ARTICLES

Legitimizing Elections Through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa

Michael P. Lowry

Abstract: Actual or apparent corruption can seriously undermine any democratic system. This Article examines two approaches to tackling this problem in South Africa. The libertarian approach, used in the United States, embodies a strong presumption against regulation of campaign financing on the basis that it is a violation of the constitutional rights to free speech and association. The weak regulations that result from this system do little to stem the influence of a powerful few on the outcomes of national elections. A better approach for South Africa is the egalitarian model, used in both the United Kingdom and Canada. This model focuses on leveling the playing field for participants. Under this model, rights are subject to greater regulation so long as the government can provide sufficient justification. South Africa’s current system, by requiring proportional national funding of political parties, but leaving private financing largely unregulated, has resulted in a virtual one-party state in which private funding dominates. To solve these problems, South Africa should embrace the egalitarian model by implementing spending caps and increasing transparency.
The Evolution of International Law

Milena Sterio

[pages 213–256]

Abstract: Globalization, characterized by the inter-connectivity of persons, states, and non-state actors on a global plane, has led to the development of binding international law across several legal fields, namely, international human rights, international criminal law, and private international law. This Article explores the proliferation of actors, norms, and organizations, as well as the expansion of international jurisdiction that has underscored the development of international law over the last half century. The Article focuses on the impact of globalized international law on state actors, as well as on individuals, by reshaping their behavior in the international realm. In particular, this Article assesses the role that globalized international law plays in specific legal fields, drawing comparisons and suggesting what the future might hold for such fields of law.

NOTES

India’s New Constitutionalism: Two Cases That Have Reshaped Indian Law

Milan Dalal

[pages 257–276]

Abstract: As a nation of over one billion people and the world’s largest democracy, India is sometimes confronted with situations in which its democratic institutions clash. Under India’s Constitution, legislation concerning land reform is placed in a special category designed to immunize it from judicial scrutiny. This scheme, known as the Ninth Schedule, has been abused by legislators seeking electoral benefit. Simultaneously, the country has been rocked by a series of public corruption scandals. As Parliament has sought to clean up its image by expelling disgraced members, its actions have been challenged as unconstitutional, leading to a constitutional showdown between the legislative and judicial branches. This Note analyzes two seminal decisions of India’s Supreme Court, handed down in January 2007, which have the potential to transform Indian law by declaring the court the ultimate arbiter of the meaning of the Indian Constitution.
Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses Before the ICT

Elizabeth M. DiPardo

[pages 277–302]

Abstract: Trial attorneys around the world face the problem of how to confront a witness whose live testimony contradicts his prior statements. U.S. prosecutors take refuge under Federal Rule of Evidence 613 and the *Harris* doctrine, which permit inadmissible hearsay and illegally obtained statements to be used to impeach a witness’s live testimony. No similar rule aids prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Recent divergent decisions regarding the use of inconsistent statements for impeachment purposes have left ICTY prosecutors struggling to prove cases against the most heinous criminals in history. This Note argues that the ICTY should adopt a new evidentiary rule akin to the United States’ Rule 613 and the *Harris* doctrine. Adoption of a new rule would more efficiently balance the prosecutor’s duty to prove the case against the accused’s right not to be convicted by otherwise inadmissible evidence.

Taxpayer Standing: Maintaining Separation of Powers While Ensuring Democratic Administrative Action

Daniel C. Garnaas-Holmes

[pages 303–326]

Abstract: In a landmark 2007 decision, the U.S. Supreme Court broadly expanded its standing doctrine. Traditionally, the U.S. standing doctrine has been narrow, relying largely on the “cases and controversies” language of Art. III of the U.S. Constitution. This doctrine has precluded third-party or tax-payer suits concerning administrative action. This Note compares the U.S. standing doctrine to that of South Africa, which has a much broader notion of who may bring suit. South Africa’s history with apartheid and distrust of government has led to a liberal standing doctrine in which any individual aggrieved by administrative action may bring suit to receive a written explanation from the offending agency. By exploring the doctrines, this Note argues that a similar type of standing in the United States would serve to democratize administrative action while still ensuring a constitutional separation of powers.
DEFINING “DEVELOPING COUNTRY” IN THE SECOND COMMITMENT PERIOD OF THE KYOTO PROTOCOL

Will Gerber

[pages 327–344]

Abstract: In 2005, negotiations began among parties to the UN Framework Convention on Climate Change to lay the groundwork for what was to become the Second Commitment Period of the Kyoto Protocol. Prominent among the issues raised at this initial meeting in Montreal and those that followed, was that of whether rapidly industrializing developing countries would take on binding commitments to reduce greenhouse gas emissions. As in the past, the G-77, the main representative body of developing countries, together with China, strongly opposed any kind of binding commitments. A closer look at the countries comprising the G-77 negotiating group reveals there are vast disparities in economic power and industrialization among them. This Note explores the wide gulf that has emerged between developing countries and suggests that developed countries may have to make difficult decisions about the structure of the Kyoto Protocol to secure commitments from industrializing countries.

THE CONTINUING CONUNDRUM OF INTERNATIONAL INTERNET JURISDICTION

Kevin A. Meehan

[pages 345–370]

Abstract: International law has long been concerned with resolving issues of international jurisdiction; however, the unique circumstances involved in Internet cases have thrown a wrench in the traditional machinery of international jurisdiction law. Domestic courts continue to struggle with the issue, and the international community has dragged its feet on developing a uniform standard for determining international Internet jurisdiction. Further complicating matters, states often have divergent substantive Internet regulations and policies. This Note discusses and analyzes the leading cases and theories on international Internet jurisdiction and concludes that none of the current proposed solutions alone provide a satisfactory solution. Nevertheless, an international resolution on internet jurisdiction that borrows elements from each of these proposals could be successfully established.
Abstract: International and domestic nongovernmental organizations (NGOs) have multiplied on the African continent as both public and private donors have shifted their funding away from ineffective governments. Many African nations, including Zimbabwe and Sudan, have responded by expelling international NGOs and enacting laws that severely limit their ability to function. In most cases, NGOs are without recourse because of their precarious position in international law. Some scholars have posited that NGOs should be granted legal personality to make them full or partial subjects in international law. This Note argues that such a solution would not promote important goals NGOs advance in Africa. It would also ignore the important role that African governments must play in health and development issues. Instead, the international community should reinforce the existing international legal framework, allow NGOs to remain independent, and create mechanisms to foster communication between NGOs and host governments.
Abstract: Actual or apparent corruption can seriously undermine any democratic system. This Article examines two approaches to tackling this problem in South Africa. The libertarian approach, used in the United States, embodies a strong presumption against regulation of campaign financing on the basis that it is a violation of the constitutional rights to free speech and association. The weak regulations that result from this system do little to stem the influence of a powerful few on the outcomes of national elections. A better approach for South Africa is the egalitarian model, used in both the United Kingdom and Canada. This model focuses on leveling the playing field for participants. Under this model, rights are subject to greater regulation so long as the government can provide sufficient justification. South Africa’s current system, by requiring proportional national funding of political parties, but leaving private financing largely unregulated, has resulted in a virtual one-party state in which private funding dominates. To solve these problems, South Africa should embrace the egalitarian model by implementing spending caps and increasing transparency.

Introduction

Elections are at the center of politics in democracies. A problem confronted by many democratic nations concerns how the activities of the candidates, interest groups, and individual participants in an election are financed. Candidates and interest groups must have the means to pay for the activities associated with a successful electoral campaign, such as advertisements. The electorate and the nation as a whole, however, are concerned with the appearance of undue influence or out-
right corruption, which if present may detract from the public’s confidence in the democratic process. The rules that govern financing must therefore strive to achieve a balance that both allows candidates and interest groups access to the funds necessary to participate in the political process, and yet does not detract from the integrity of the elected government.

Corruption and undue influence can take many forms, but this Article focuses on efforts to curtail these factors in democratic elections. In the countries discussed in this Article, finance rules revolve around constitutional provisions. In the United States, political parties and candidates must abide by contribution limitations designed to prevent corruption and that the U.S. Supreme Court has endorsed as constitutional. In Canada, both candidates and interest groups are required to abide by expenditure limitations, despite the freedom of expression provision guaranteed by the Canadian Charter. South Africa takes these systems one step further and explicitly requires non-exclusive public funding of political parties in its constitution. However, unlike Canada and the United States, South Africa currently does not require contribution disclosure and, despite its progressive constitutional provisions, has a largely unregulated political financing system.

This Article is organized in three parts. Part I reviews South Africa’s political history and the current status of its election finance regulation system in order to highlight the need for comprehensive and transparent regulation of campaign financing. Part II explores the legal framework regarding campaign financing in the United States, the United Kingdom, and Canada. This Article concludes by comparing these systems, and offering general recommendations as to how

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3 Canada Elections Act, 2000 S.C., ch. 9 (Can.).

4 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 § 2(b) (U.K.) [hereinafter Canadian Charter].


6 See Nico Steytler, The Legislative Framework Governing Party Funding in South Africa, in The Politics of State Resources: Party Funding in South Africa 59, 64 (Khabele Matlosa ed., 2004) (the limited public funding in South Africa is regulated but private contributions are not) [hereinafter The Politics of State Resources].
South Africa may implement a regulatory system consistent with its constitution that inspires confidence in elected government.

I. SOUTH AFRICA: A BRIEF HISTORY OF THE FRANCHISE

South Africa’s history and its system of apartheid are well documented and need not be discussed in detail here.\(^7\) To begin to appreciate the need for transparency in South African elections, however, it is necessary to have a basic understanding of the effect of racial politics on the franchise. The earliest Boer settlers defined the franchise as “one white man, . . . one vote.”\(^8\) As a result, race and politics were linked from the very moment European immigrants arrived and created an environment in which the right of non-Europeans to vote was routinely circumscribed.\(^9\) Even in Cape Colony (the Cape), the only colony in which non-whites could vote prior to the formation of the Union of South Africa in 1909,\(^10\) there seemed little doubt that universal suffrage for non-whites was undesirable, leading to economic qualifications that ensured only those “who, in point of intelligence, are qualified for the exercise of political power” were eligible.\(^11\) After 1909, South Africa’s history of racially-biased voting was further institutionalized and “placed the political future of all citizens other than the whites in the hands of the white voters. . . . [Furthermore] it ensured that additions of non-white voters to the voters’ list would occur only if the predominantly white electorate agreed.”\(^12\)

From 1909 through 1994, the voting rights of non-whites became increasingly restricted and the rights already in place in the Cape were undermined.\(^13\) For example, in 1930, white women twenty-one and older were unconditionally granted the right to vote,\(^14\) thus diluting the voting strength of non-whites. The Natives Representation Act of 1936

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\(^8\) Eric A. Walker, THE FRANCHISE IN SOUTHERN AFRICA, 11 CAMBRIDGE HIST. J. 93, 94 (1953).

\(^9\) See generally id. (detailing early history of South Africa and efforts to restrict vote to white citizens).


\(^11\) Walker, supra note 8, at 97.


\(^14\) See Heard, supra note 12, at 2. Similarly, the voting age for whites was reduced from twenty-one to eighteen in 1958. See id. at 3.
eliminated the single, multiracial voting roll in the Cape. In its place, the Act created two separate roles, one for whites and one for non-whites. Non-whites, however, could only elect three white representatives. Because of these separate voter rolls, a 1939 census revealed that of all registered voters, ninety-seven percent were white Europeans.

Although “native” voters had some marginal representation in Parliament, legislative enactments repeatedly undermined this representation until its elimination in 1968. Furthermore, the system of apportionment counted only the number of white voters in each province, resulting in a dramatic under-representation of regions with large non-white populations. As a result of this systematic eradication of the non-European franchise, by 1977 not only was eighty-four percent of South Africa’s adult population ineligible to vote, but these South Africans would likely have been indifferent to the results of the election: regardless of the outcome, a pro-apartheid Nationalist majority would emerge.

Universal suffrage put an end to South Africa’s minority government. Government corruption, however, persisted, which likely had significant effects on voter confidence. The corruption of apartheid governments was no secret. Even after the much-heralded 1994 elections, in 1996 forty-four percent of the public felt most officials were corrupt, and a further forty-one percent believed corruption was increasing. Even in 2007, charges of corruption reached the highest

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16 Id.
17 Id.
18 See Walker, supra note 8, at 110 (stating that 1939 census revealed 1,083,685 voters, of which 1,053,555 were classified as European and 30,130 as non-European).
19 S. Afr. Const. 1983 § 32. In 1983, the South African Constitution created houses in Parliament for non-whites (including “coloureds” and Indians); however, the President’s Council (composed primarily of whites) was authorized to pass legislation without the consent of these parliamentary bodies. Id.
20 See Heard, supra note 12, at 3 (describing variety of acts Parliament implemented that undermined non-white voting).
21 Id. at 8.
22 Id. at 5.
24 See generally Lajcakova, supra note 1; Oko, supra note 1.
26 Id. at 157.
levels of government.\textsuperscript{27} For example, former Deputy President Jacob Zuma along with his aide Schabir Shaik were charged regarding payments made to secure a 30 million rand defense contract.\textsuperscript{28} Despite these and other charges, Zuma was recently elected head of the ANC and is considered the favorite to succeed Thabo Mbeki as President of South Africa in the next election.\textsuperscript{29}

Corruption affects much more than campaign finance regulation.\textsuperscript{30} It also weakens a nation by decreasing public confidence in election results. One important step toward cleaning up the government’s image and ensuring the public’s continued confidence in election results would be to force political parties and politicians to disclose the sources of their campaign funds to public scrutiny.

II. THE CONSTITUTIONAL FOUNDATIONS, EVOLUTION, AND CURRENT STATUS OF SELECTED COUNTRIES

There are two decidedly different models by which the countries compared in this Article attempt to regulate campaign funding. These models provide a context in which the judicial decisions of each country may be considered. Comparatively speaking, the United States uses a libertarian model in which regulations will not be allowed that in any manner violate constitutional rights. Canada and the United Kingdom employ a more egalitarian model in which rights are not absolute and even the most fundamental rights may be infringed if sufficient justification exist. As will be seen, these two models provide decidedly different regulatory atmospheres.


\textsuperscript{30} See Lodge, \textit{supra} note 25, at 158 (providing various explanations of what constitutes corruption).
A. The United States

Prior to the Watergate scandal, there had been relatively little regulation of campaign contributions or expenditures.\textsuperscript{31} In the wake of abuses by the Nixon Administration, however, Congress enacted the Federal Election Campaign Act Amendments of 1974 (FECA).\textsuperscript{32} FECA created four requirements aimed at controlling the influence of money in politics and increasing the transparency of elections.\textsuperscript{33} These requirements included: (1) disclosure of contributions; (2) limits on the size of campaign contributions; (3) limits on campaign expenditures; and (4) public financing of presidential campaigns.\textsuperscript{34} Yet, as will be seen, every effort to plug the proverbial hole in the campaign financing dam seems only to have created a new hole elsewhere.\textsuperscript{35}

1. FECA and Buckley

FECA was immediately subjected to a legal challenge on the grounds that it infringed multiple constitutional rights guaranteed by the First Amendment.\textsuperscript{36} In \textit{Buckley v. Valeo}, the Supreme Court generally upheld mandatory disclosure of campaign contributors while rejecting, for the most part, an argument that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”\textsuperscript{37} The Court also rejected plaintiffs’ argument that the requirement infringed associational rights.\textsuperscript{38}

The Court in \textit{Buckley} also recognized there could be limited situations in which disclosure could be harmful,\textsuperscript{39} and stated that to qualify for an exception, a group must show a “reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them

\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{36} Buckley v. Valeo, 424 U.S. 1, 1–3 (1976).
\textsuperscript{37} Id. at 64.
\textsuperscript{38} Id. at 84 (“In summary, we find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.”).
\textsuperscript{39} Id. at 71 (“There could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act’s requirements cannot be constitutionally applied.”).
to threats, harassment, or reprisals . . .\textsuperscript{40} Brown v. Socialist Workers ‘74 Campaign Committee applied the Buckley criteria and found compelled disclosure would have a chilling effect on the Committee’s freedom of association, thereby exempting it from reporting requirements.\textsuperscript{41} The Buckley Court’s analysis of both contribution and expenditure limitations focused on “whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment.”\textsuperscript{42} In applying a strict scrutiny analysis to the contribution limitations, the Court found Congress’s interest stemmed from “the Act’s primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions . . . .”\textsuperscript{43} Upholding the contribution limitation, the Court wrote the “weighty interests served by restricting the size of financial contributions to political candidates [were] sufficient to justify the limited effect [the restriction had] on First Amendment freedoms . . . .”\textsuperscript{44} Yet, unlike the contribution limitations, the various expenditure limitations of FECA were struck down because “Congress’ interest in preventing real or apparent corruption was inadequate to justify the heavy burdens on the freedoms of expression and association that the expenditure limits imposed.”\textsuperscript{45} In considering the general limitation on campaign expenditures, the Court reasoned FECA’s disclosure requirements sufficiently addressed the government’s concerns, thus depriving the government of any justification for this further limitation.\textsuperscript{46} The Court also restricted much more specific expenditure provisions.\textsuperscript{47} For example, Congress attempted to restrict third-party spending in section 608(e)(1) of FECA, which created a $1000 spending limitation relative to a clearly identified candidate.\textsuperscript{48} The Court, however, curtailed its applicability due to constitutionality concerns\textsuperscript{49} and re-

\textsuperscript{40} Id. at 74.
\textsuperscript{41} See 459 U.S. 87, 87 (1982).
\textsuperscript{42} Buckley, 424 U.S. at 13–14.
\textsuperscript{43} Id. at 26.
\textsuperscript{44} Id. at 29.
\textsuperscript{46} See id.
\textsuperscript{47} See Buckley, 424 U.S. at 39.
\textsuperscript{48} See id. (“[N]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.”).
\textsuperscript{49} Id. at 44 (“[I]n order to preserve the provision against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that in
stricted the $1000 limitation to only those independent communications that engaged in “express words of advocacy.”50 The Court also struck down restrictions on the amount of personal funds the candidate could expend, finding serious flaws in Congress’s logic that this restriction would help effectuate “the prevention of actual and apparent corruption.”51 In summary, the Court found these expenditure limitations created “substantial and direct restrictions [on political campaigns] that the First Amendment cannot tolerate.”52

Turning to FECA’s implementation of a public financing scheme for presidential election campaigns, the Court again rejected plaintiffs’ claims of First and Fifth Amendment violations.53 It stated “the Constitution does not require Congress to treat all declared candidates the same for public financing purposes,” and upheld the provision that allowed presidential campaigns to voluntarily submit to restricted public funding.54

2. BCRA and McConnell

The Buckley framework was subject to intense criticism,55 particularly with respect to the undermining effect of loopholes.56 This led to the enactment of the Bipartisan Campaign Reform Act (BCRA).57 As with FECA, BCRA was subject to an immediate court challenge. McConnell v. Federal Election Commission focused on whether the regulation of “soft money” (a contribution restriction) and “electioneering communications” (an expenditure limitation) infringed on First Amendment rights.58

express terms advocate the election or defeat of a clearly identified candidate for federal office.”).

50 Id. at 50.
51 See id. at 52 (“The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.”).
52 See Buckley, 424 U.S. at 58–59.
53 See id. at 90.
54 See id. at 97.
55 Justice Stevens’ concurrence in Nixon v. Shrink Missouri Government PAC highlighted a fundamental criticism of the Buckley framework. See 528 U.S. 377, 398–99 (2000) (Stevens, J. concurring). He argued that “[m]oney is property, it is not speech.” Id. at 398. As such, Justice Stevens stated that “[t]he right to use one’s own money . . . certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases.” Id. at 389–99.
The first section of BCRA attempted to eliminate the well-documented problem of “soft money.”\(^59\) FECA had defined “contribution” only to include donations made for the purpose of influencing an election for federal office.\(^60\) This led to a Federal Election Commission (FEC) ruling that contributions to state parties were not only unlimited and unregulated, but could also be used for a variety of purposes in mixed state and federal elections.\(^61\) This created a loophole through which donors could make unrestricted donations to state parties.\(^62\) The Court found “[t]he solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.”\(^63\)

Plaintiffs argued BCRA’s contribution restrictions facially violated the First Amendment and other constitutional provisions.\(^64\) In rejecting this argument, the Court upheld its precedent, which had stated contribution limits were unconstitutional only where they prevented the “amassing [of] resources necessary for effective advocacy.”\(^65\) The Court also stated unequivocally that “the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits,”\(^66\) thus reaffirming the standard by which contribution limits are to be tested.\(^67\)

Plaintiffs also alleged Congress’s attempt to regulate “electioneering communications” was unconstitutional because it did not respect the delineation drawn in Buckley between express and issue advocacy.\(^68\) The Court noted, however, that this section of the Buckley opinion had been a statutory construction, not a constitutional interpretation.\(^69\) Finally, the Court stated that none of the vagueness concerns raised in Buckley that prompted the “express advocacy” restriction were in issue with the statute as drafted by BCRA, thereby rejecting plaintiffs’ argu-

\(^{59}\) See id. at 122–26, 129 (noting that Senate investigation concluded “the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system”).


\(^{61}\) See McConnell, 540 U.S. at 123–24.

\(^{62}\) See id. at 126.

\(^{63}\) See id.

\(^{64}\) See id. at 134.

\(^{65}\) Id. at 135 (citing Buckley, 424 U.S. at 21).

\(^{66}\) McConnell, 540 U.S. at 143.

\(^{67}\) See id. at 143–56.

\(^{68}\) Id. at 190.

\(^{69}\) Id. at 192.
ment. The Court did not address the constitutional issues and may have opened a door to Congressional regulation of other forms of “electioneering communications.”

BCRA and McConnell did not solve all campaign financing problems. “527s,” named after the section of the Internal Revenue Code under which they are organized, seem to have become the conduit through which wealthy donors are able to contribute unlimited amounts of money. 527s are regulated by the IRS, not the FEC, and although they must publicly report contributions exceeding $200, 527s are not required to abide by federal contribution limitations, resulting in large contributions to these groups.

After the 2004 election, the FEC rejected proposals for a rule change that would have subjected 527s to the limitations of FECA. A strong argument was made, in vain, that 527s fulfill the major purpose test of Buckley, and are therefore subject to FEC regulation. This argument was rejected despite almost $400 million in 527 spending during the 2004 election alone and the fact that the vast majority of donations originated from “wealthy” contributors. In fact, during the 2004 election, $106 million or forty-four percent of all money raised by Democratic-leaning 527s came from just fourteen donors. Republican-leaning groups raised $40.45 million, (forty-percent of their total) from just eleven donors. Despite the Supreme Court’s explicit ruling in McConnell that Congress may legislate to prevent circumvention of the rules, 527s remain beyond regulation. Thus 527s undermine the regulatory scheme because soft money that once flowed to the state parties now flows to them.

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70 Id. at 194. The Court found FECA’s definition of an “electioneering communication” to be “both easily understood and objectively determinable.” Id. at 103. FECA defined “electioneering communication as: (1) a broadcast; (2) clearly identifying a candidate for federal office; (3) aired within a specific time period; and (4) targeted to an identified audience of at least 50,000 viewers or listeners. § 304(f)(3).
75 Potter, supra note 72, at 777.
76 Id.
77 Id.
78 See McConnell, 540 U.S. at 223–24.
B. Canada

The basis of modern Canadian election regulation began with the passage of the Canada Elections Act (CEA) in 1974.\textsuperscript{79} The Act was comprehensive: it imposed spending limits on both parties and candidates; created contribution disclosure requirements; and set forth criteria for the partial reimbursement of campaign expenses incurred by candidates and parties.\textsuperscript{80} Until the passage of the Canadian Charter in 1982, however, the judiciary was restricted to interpreting the Act’s implementation and could not interpret its “constitutionality.”\textsuperscript{81} One of the most fundamental differences from the U.S. approach is the use of proportionality review, premised on the notion that rights are not absolute and the government may curtail them in a narrow manner with sufficiently serious justification.\textsuperscript{82}

1. The Alberta Cases

The development of Canadian election law after constitutional jurisdiction was established in 1982 begins with the decision of an Albertan trial court, which, although only binding in Alberta, was nonetheless applied nationally.\textsuperscript{83} In \textit{National Citizens’ Coalition v. Canada (A.G.)}, an Albertan trial court struck down the CEA provision “prohibiting anyone, other than registered parties or candidates, from incurring election expenses as defined during an election campaign . . . .”\textsuperscript{84} The court first held that the limitation was a prima facie infringement on the freedom of expression provision in section 2 of the Charter.\textsuperscript{85} It then applied the second step of the proportionality review of section 1 of the Charter, and explored whether it was reasonable and “demonstrably justified in a free and democratic society.”\textsuperscript{86} In holding the limitation was unjustified, the court found Parliament had enacted the limitation based on concerns that harm may occur under the current


\textsuperscript{83} \textit{Id.} at 89.

\textsuperscript{84} [1984] 32 Alta L.R.2d, ¶ 12 (quoting Canada Elections Act, R.S.C., ch. 14, § 70.1 (1970)).

\textsuperscript{85} \textit{Id.} ¶ 55.

\textsuperscript{86} \textit{Id.} ¶ 14 (quoting Canadian Charter, § 1).
regime and stated that an “actual demonstration of harm or a real likelihood of harm [should be shown] before a limitation can be said to be justified.”

This remained the state of the law until the 1993 passage of CEA amendments that sought to place a $1000 limit on third-party spending. In Somerville v. Canada (A.G.), the National Citizens’ Coalition once again filed suit in Alberta challenging the statute’s constitutionality. The government acknowledged the provisions were in breach of section 2’s freedom of expression protections, but argued it satisfied the proportionality clause in section 1. The government also stated the Act’s goal was to level the political playing field by ensuring “that the spending limits on parties and candidates [were] not undermined,” and to guarantee “a ‘fair’ and ‘equitable’ electoral system.”

The Alberta Court of Appeal was not persuaded and termed the limit “an effective muzzle” and “in its effect, a ban on third-party national advertising . . . .” The court held the ban was a prima facie breach of the Charter’s right to free expression and that the government failed the proportionality test of section 1. It concluded that even if the legislation had been of substantial importance sufficient to justify the infringement of certain rights, the $1000 limit was too extreme “to be [justified] as a ‘reasonable’ limit on . . . core democratic rights.” Again, the Chief Election Officer chose to apply the Alberta ruling to the entire nation, effectively deregulating any third-party spending.

2. The Canadian Supreme Court

The Supreme Court of Canada first had occasion to address this topic in Libman v. Quebec (A.G.) when a challenge was brought against a third-party spending restriction in Quebec similar to the statute struck down in Somerville. The court initially found the Act violated both the freedom of expression and the freedom of association provisions of the

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87 Id. ¶ 53.
88 Act to Amend the Canada Elections Act, 1993 S.C., ch. 19 (Can.).
89 [1996] 184 A.R. 241 (Can.).
90 Id. at 247.
91 Id.
92 Id. at 268.
93 Id. at 260.
95 Id. at 271.
96 Geddis, supra note 81, at 91–92.
97 [1997] 3 S.C.R. 569 (Can.).
Charter. It then concluded the objectives of the Act were: (1) “to promote a certain equality of access to media of expression”; and (2) to promote the goal of informed voters. The goal of equal access to political communication was found to be of “pressing and substantial importance in a democratic society,” despite the fact, as the court noted, that this conclusion was different from that of the Somerville court.

The court then applied the proportionality test of section 1 and found there was a rational connection between the goal of Quebec’s legislature and the means by which it chose to pursue that goal. The court, however, then decided the statute failed the minimal impairment requirement. It proceeded to describe the Lortie Commission’s recommendation regarding third-party expenditures as a less burdensome alternative. Ultimately, although the court invalidated the restriction, it completely reversed the logic of Somerville.

In 2000, Canada enacted amendments to the CEA. These amendments restricted third parties from advertising on polling day prior to the close of polling stations, and from spending more than a total of $150,000 per election or more than $3000 per district. The amendment further required third parties to identify themselves on all advertising materials. The CEA was also challenged, and the Canadian Supreme Court found that although the restrictions Parliament enacted infringed on the freedom of expression as guaranteed by section 2(b) of the Charter, they satisfied the proportionality requirements of section 1 and were accordingly upheld. In its analysis, the court stated that “[t]he current third party election advertising regime is Parliament’s response to this Court’s decision in Libman,” and thus “is con-

98 Id. ¶¶ 35–37.
99 Id. ¶¶ 40–41.
100 Id. ¶ 42.
101 Id. ¶¶ 55–56.
103 Id. ¶¶ 77–84. The Lortie Commission attempted to strike a balance between individual expression and party funding. Id. ¶ 77. The Commission recommended that those “not connected with a political party or candidate” be prohibited from “incurring election expenses exceeding $1000 and from pooling these amounts.” Id. The court reasoned that this provided independents with the opportunity to express themselves while simultaneously discouraging parties from Balkanizing in order to evade CEA restrictions. Id. ¶ 78.
105 Canada Elections Act, 2000 S.C., ch. 9 (Can.).
106 Id. § 323.
107 Id. § 350.
108 Id. § 352.
sistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman.*”  

Given the similarities, the court upheld the Act, concluding that although all but one of the Act’s sections infringed on the freedom of expression, all sections satisfied the proportionality test of section 1.  

C. The United Kingdom

The United Kingdom lacks a single written document detailing the structure of the government and the rights of the citizenry. Rather, Parliament is supreme and thus, by definition, statutes cannot be challenged as unconstitutional in the British judicial system. Nonetheless, under *Bowman v. United Kingdom,* British electoral law may be open to attack on human rights grounds. Britain’s status as a signatory to the Convention for the Protection of Human Rights and Fundamental Freedom (Convention on Human Rights) gave Phyllis Bowman the right to bring suit alleging a British law restricting third-party expenditures in an election violated her rights under the Convention on Human Rights.

The crux of the *Bowman* case focused on a British statute that limited third-party expenditures to five pounds. That statute defined third parties to include anyone unauthorized by a candidate to assist in an election campaign. The logic behind this restriction originated in the overall expenditure limitation imposed on British candidates. As noted with respect to other countries, spending limits can be rendered moot if third-party participants are not similarly handicapped. Thus, as with candidate restrictions, the goal of this restriction was to equalize the electoral playing field.

Bowman attacked this provision as infringing on her right of free expression as guaranteed by article 10 of the Convention on Human Rights, which provides in part:

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110 Id. ¶ 63.
111 Id. ¶ 147.
115 Id. art. 25.
116 Representation of the People Act, 1983, § 75(1) (Eng.).
118 See id. at 503.
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights or others . . . .

The European Court of Human Rights easily found “there can be no doubt that the prohibition contained in section 75 amounted to a restriction on freedom of expression, which directly affected Mrs. Bowman.” The court then proceeded to apply the proportionality test of section 2.

Although the court found the statute addressed a legitimate aim, it also found that “the restriction in question was disproportionate to the aim pursued.” It rejected the contention that because the restriction only applied during the campaign cycle, Bowman was therefore free to campaign at any other time. The court stated the obvious: the most effective time to discuss political issues and seek support is during an election campaign, not during the indeterminable amount of time beforehand. The court also rejected other methods of communication the government offered as alternatives, finding they were not sufficiently demonstrated as viable options or were not part of Bowman’s objective. As such, the five pound restriction was declared a violation of article 10 “as a total barrier to Mrs. Bowman’s publishing information with a view to influencing the voters . . . .”

The British Parliament considered several proposals in response to the Bowman decision. Many focused on greater disclosure of contributions and increasing the level of public funding for political parties.

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120 Convention on Human Rights, supra note 114, art. 10.
122 Id. ¶ 38.
123 Id. ¶ 47.
124 See id. ¶ 45.
125 Id. ¶ 46.
hundred pounds before the approval of the candidate is required. The limit was created as a compromise that would allow third parties sufficient resources to participate meaningfully without requiring a drastic increase in the spending limit enforced on candidates. It remains unclear, however, whether this increase will satisfy the demands of the Convention.

III. SOUTH AFRICA: THE FUTURE?

In the ten years since ratification of the South African Constitution, there has been only one case that has explicitly dealt with the issue of money in politics. During the same time, Parliament has only met the bare necessities of section 236 of the South African Constitution, which mandates public funding of political campaigns, by providing limited public financing to political parties. Finally, there is little to no regulation of private funding in South Africa. This begs the question: “[W]hat form should the various legal ground rules required to control a society’s election process take, so as to best guarantee that the outcome of that procedure will be regarded within that society as a legitimate means of apportioning political and legal rule making power?” As previously discussed, the U.S. and European systems (as implemented in Canada and Britain) provide opposing models.

A. Competing Models

1. The Libertarian/U.S. Model

The libertarian model focuses on the right of each citizen to participate in the electoral process with the maximum amount of freedom possible. The result is a strong presumption against regulation unless

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128 Political Parties, Elections and Referendums Act, 2000, c. 41, § 131 (Eng.).
129 See Ewing, supra note 113, at 506.
130 Id.
133 See Steytler, supra note 6, at 64.
135 See supra Part II.
136 Geddis, supra note 134, at 434.
an exacting burden of proof can be satisfied. In the United States, this is embodied by the “strict scrutiny” standard, or variants thereof, employed by the Supreme Court in its campaign financing decisions, and by the Court’s advisement that only those measures that seek to stem corruption or the appearance of corruption will meet constitutional muster. This feature is well-suited to emphasizing the rights of the individual.

There are, however, drawbacks to this system. Although the U.S. system allows limitations on contributions to parties and candidates, it does not allow for the limitation of expenditures. This permits candidates, political parties, and third parties to spend unlimited amounts of money in pursuit of electoral victory. Prior to enactment of BCRA in 2002, the most common method of circumventing the rules designed to restrict candidates and political parties was the use of “soft money.” Even with the passage of BCRA and the supposed elimination of soft money, the funding pipeline was diverted to other sources, such as 527s.

In this respect, the U.S. electoral system reflects the American culture of individualism enshrined in its constitution. The focus is on the individual and the right of that individual to participate in the electoral process in largely whatever manner he sees fit. In order to protect the right of individuals to participate, attempts to restrict the voice of an individual through expenditure limitations will be struck down as an unconstitutional abridgement of core political speech.

Yet, this principled stance undermines any attempt to regulate spiraling campaign expenditures. As the British and Canadian systems recognized, unlimited third-party spending merely serves to undermine the limits imposed on candidates and political parties. The only comparable equivalent in the United States is the system of public funding for presidential campaigns. While BCRA fundamentally revised nearly all aspects of private campaign financing, it did not modify the provisions concerning matching public funds available to presidential campaigns. Thus, despite the myriad of changes to the presidential nominating process since the system’s inception in FECA, the funding

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137 Id.
139 See Buckley, 424 U.S. at 23.
140 McConnell, 540 U.S. at 121.
The inevitable result was that candidates were increasingly able to raise more than the limits imposed by the acceptance of public funding. Increasing numbers of candidates have thus chosen to reject public financing, again increasing the cost of campaigns and undermining campaign regulation. Thus, the balance in the U.S. system is slanted toward the individual’s right to participate, generally without regard for how this may affect the perceived legitimacy of election results.

2. The Egalitarian/European Model

The model Britain and Canada employ focuses not on the rights of individuals in a vacuum, but on those rights relative to the rights of others. This system explicitly attempts to equalize opportunities for participation so as not only to limit the temptation to circumvent funding limits, but also in part to help legitimize the electoral result. To accomplish this goal, the British and Canadian systems not only limit candidates and political parties, but limit third parties as well. This levels the playing field and attempts to guarantee each participant an equal opportunity to participate rather than simply an opportunity to participate, as in the United States. The Canadian Supreme Court stated that this model prevents the wealthy “from controlling the electoral process to the detriment of others with less economic power.” It addresses the goal of equalizing the power of all participants by subsidizing certain actors and restricting others to achieve a level playing field.

The egalitarian model, however, is not without problems. Despite its thoroughly regulated campaign system, the British electoral system suffered from low public confidence in the 1990s. This skepticism

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142 See id. at 3–4.
143 See generally Malbin, supra note 140 (discussing candidates’ decisions to reject public funding). Steve Forbes was the first to opt out of public financing in 1996 and 2000, followed by George W. Bush in 2000. Democrats Howard Dean and John Kerry joined Bush in opting out in 2004. Id. at 2; see Nelson Polsby & Aaron Wildavsky, Presidential Elections 58 (12th ed. 2008).
145 Id.
146 Id. at 435.
148 Id.
149 Navraj Singh Ghaleigh, Expenditure, Donations and Public Funding Under the United Kingdom’s Political Parties, Elections and Referendums Act 2000—and Beyond?, in Party Fund-
was reinforced by a scandal involving a suspicious one million pound donation from Formula One magnate Bernie Ecclestone to Britain’s Labor Party. This demonstrated that despite going to great lengths to minimize opportunities and motivations to cheat, regulations do not absolutely guarantee the integrity of the system. Furthermore, as highlighted by the Bowman case, it can be difficult to draft a statute that strikes the appropriate balance to satisfy the proportionality test employed in Canada and Europe. Canada struggled for nearly two decades before a definitive doctrine was established in Harper.

B. South Africa’s Current System

Constitutions may provide more than just the skeletal necessities for the ordering of government or the grouping of rights such as those embodied in the U.S. document. Constitutions “may also operate as a symbol . . . of the values . . . which [a] society aspires to foster.” The South African Constitution is such a document. At the end of the long nightmare of apartheid, the country sought to redefine itself through its constitution. When reality falls short of aspirations, however, charges of hypocrisy will not be far behind, perhaps endangering the legitimacy of the entire document. For South Africa to live up to the high ideals of its organic document regarding electoral funding, it must drastically reform private party financing.

Not only is reform needed to meet the equitable goals of its constitution, South Africa’s status as a nearly one-party state creates an environment in which regulation is necessary. As noted by Ivor Sarakinsky, an expert witness for the African National Congress (ANC) in Institute for Democracy in South Africa v. African National Congress, as of 2004 the ANC enjoyed a majority in excess of sixty-five percent. As such, the proportional distribution of public campaign money further entrenches the ANC, and smaller opposition parties are left “rely[ing] on

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151 Lisa E. Klein, On the Brink of Reform: Political Party Funding in Britain, 31 Case W. Res. J. Int’l L. 1, 6–7 (1999). Prior to Ecclestone’s donation, Labor had steadfastly opposed an exception for Formula One to an EU ban on tobacco advertising. Id. After the donation and election of a Labor majority, the party changed its position. Id.
155 Id.
156 Sarakinsky, supra note 35, at 113.
private donations to fund the bulk of their expenses.”\textsuperscript{157} Sarakinsky further illustrates the perception of the one-party state, acknowledging that such private donations are difficult to obtain, as donors fear retaliation from the governing ANC.\textsuperscript{158}

The South African Constitution directly addresses electoral financing.\textsuperscript{159} Section 236 reads: “To enhance multiparty democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.”\textsuperscript{160} This provision was first used during the 1999 elections following the passage of legislation that explicitly implemented section 236.\textsuperscript{161} Under the implementing Act, a party must be represented in either the national or provincial legislature, or both, in order to qualify for public funding.\textsuperscript{162} The Act also outlines examples of both acceptable\textsuperscript{163} and unacceptable uses of public funding.\textsuperscript{164} It further requires parties to render accountings of how the money was spent,\textsuperscript{165} and to return certain amounts of unspent money\textsuperscript{166} or money that is determined to be improperly spent.\textsuperscript{167} Despite the Act, it remains unclear whether the mandate of section 236 has been satisfied. This makes future litigation more likely,\textsuperscript{168} as the case detailed below reveals.

Although public funding is seemingly well-regulated, private financing remains largely unregulated in South Africa.\textsuperscript{169} During the 1999 elections, a total of 53 million rand in public payments were made to parties, but it was estimated that 300 to 500 million rand was spent in total.\textsuperscript{170} It is impossible to formulate a more specific estimate due to the lack of regulation and disclosure. It is nonetheless obvious that parties received the majority of their funding from private sources, perhaps

\begin{itemize}
  \item \textsuperscript{157} Id. at 112–13.
  \item \textsuperscript{158} See id. at 120–21.
  \item \textsuperscript{159} S. Afr. Const. 1996 § 236.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Public Funding of Represented Political Parties Act preamble; CLARENCE TSHITEREKE, INSTITUTE FOR SECURITY STUDIES, SECURING DEMOCRACY: PARTY FINANCE AND PARTY DONATIONS—THE SOUTH AFRICAN CHALLENGE 4–5 (2002).
  \item \textsuperscript{162} Public Funding of Represented Political Parties Act s. 5(1)(a).
  \item \textsuperscript{163} Id. s. 5(b).
  \item \textsuperscript{164} Id. s. 5(3).
  \item \textsuperscript{165} Id. s. 6.
  \item \textsuperscript{166} Id. s. 9.
  \item \textsuperscript{167} Public Funding of Represented Political Parties Act s. 7.
  \item \textsuperscript{168} Steytler, supra note 6, at 59.
  \item \textsuperscript{169} JUDITH FEBRUARY & RICHARD CALLAND, INSTITUTE FOR DEMOCRACY SOUTH AFRICA, WHAT MEASURES AND ACTIONS HAVE BEEN TAKEN TO COMBAT CORRUPTION IN THE POLITICAL SPHERE AND WITH WHAT RESULTS? 3 (2005), available at http://www.idasa.org.za.
  \item \textsuperscript{170} Tshiterere, supra note 161, at 5 tbl. 2 (providing breakdown of funding by party).
\end{itemize}
undermining the intent of section 236.⁷¹ For fiscal year 2004, the situation changed little as public financing was projected to reach 74.1 million rand while election costs were still projected to be 300 to 500 million rand.⁷²

Despite the hope that mandatory disclosure of private party financing would follow the passage of the public funding law, no such system has been realized. Such a system would help shed light on the amount of money actually spent in South African elections.⁷³ In what appears to be the only reported case in which the parties litigated the issue of private financing, a South African trial court concluded political parties were not required under current law to reveal their private fundraising records.⁷⁴ This decision was not appealed, in part due to the belief that the political parties involved would begin to enact party funding regulations.⁷⁵ As of November 2006, however, more than a year after the decision, no action had been taken by any of the political parties to regulate private donations.⁷⁶


Plaintiffs brought this case under section 32(1) of the Constitution,⁷⁷ suing the four largest political parties “to establish the principle that political parties, or at least those who hold seats in the national, provincial and local government legislatures, are obliged . . . to disclose particulars of all the substantial donations they receive.”⁷⁸ They claimed disclosure was required under section 32(1) so that they might

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⁷¹ See id. During the 1999 elections, parties received between eighty-three and eighty-nine percent of their funding from private sources. See id.

⁷² February & Calland, supra note 169, at 5–6 (detailing projected payments made for fiscal year 2005–06).

⁷³ Steytler, supra note 6, at 64.

⁷⁴ IDASA v. ANC, 2005 (10) BCLR 995 (Cape of Good Hope Provincial Div.), ¶ 57 (S. Afr.).


⁷⁷ S. Afr. Const. 1996 § 32(1) (“Everyone has the right of access to: any information held by the state; and any information that is held by another person and this is required for the exercise or protection of any rights.”).

⁷⁸ IDASA, 2005 (10) BCLR, ¶ 1 (quoting Plaintiff’s founding affidavit).
exercise their rights under a multitude of constitutional provisions, including the protection of political rights in section 19, which reads:

Every citizen is free to make political choices, which includes the right—

- to form a political party;
- to participate in the activities of, or recruit members for, a political party; and
- to campaign for a political party or cause.

Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

Every adult citizen has the right—

- to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- to stand for public office and, if elected, to hold office.

The court found, however, that section 32 could not provide an independent basis for suit, and the plaintiffs could not invoke it as an independent cause of action unless the action was directed at the constitutionality of the Promotion of Access to Information Act. Because the plaintiffs had not raised any constitutionality challenges, they were unable to “seek their remedy within the four corners of [the] statute,” as the court required.

In its discussion of the constitutional aspects of the claim, the court found sections 41(1)(c), 152(1)(a), and 195(1) inapposite to the ultimate issue and dismissed them from consideration. The court also summarily dismissed the claim that the lack of access to the donation records somehow infringed on the rights contained in sections 16 and 18, stating, “[T]here is no rational connection between the respondents’ donations records and the rights derived from sections 16 and 18.”

The court did analyze the claims brought under section 19, examining “whether the applicants reasonably require the respondents’ donation records” to exercise the rights contained therein. It con-

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179 Id. ¶ 36 (claiming information was necessary for exercise of no less than seven constitutional rights under §§ 1(d), 16, 18, 19(1), 19(2), 41(1)(c), 152(a)(1), & 195(1)).
181 IDASA, 2005 (10) BCLR, ¶ 17.
182 Id. ¶ 19.
183 Id. ¶ 40.
184 Id. ¶ 41.
185 Id. ¶ 42.
cluded that the plaintiffs failed to demonstrate with sufficient specificity how the lack of access to donation records infringed on their rights under section 19. Accordingly, the court found disclosure was not a requirement for free and fair elections, and denied the requested relief. Yet, in closing, Judge Griesel offered a glimmer of hope, stating:

[This] does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means that, on my interpretation of existing legislation, the respondents are not obliged to disclose such records.

IV. The Next Step for South Africa

Of the countries surveyed, South Africa is the only one with an explicit provision in its governing document calling for public funding of political parties. Why does this provision appear there but not in the Canadian Charter, another relatively recent document? The answer may partially lie in the history of the two countries. On the one hand, Canada’s political system has been comparatively stable and descends from the British system, which has produced regulations regarding political spending since 1884. On the other hand, modern South Africa inherited a history of regulatory repression. Given this history, the framers of the South African Constitution would have been keenly aware of the need for reliable funding and the drastic effects its absence could have on the political expression of various factions.

The most glaring differences between the countries reviewed herein center on the use of proportionality review outside the United States. As discussed, this review holds that rights are not absolute and may be infringed if the government interest is sufficiently serious and legitimate, and its means minimally impair the right. Campaign restrictions in Canada were thus upheld by its Supreme Court, despite the fact they blatantly infringed on the right of free expression, because the infringement was sufficiently minimal in light of the importance of

\[186\] IDASA, 2005 (10) BCLR, ¶ 48 (S. Afr.).  
\[187\] Id. ¶ 52.  
\[188\] Id. ¶ 57.  
\[190\] Representation of the People Act, 1884, 48 & 49 Vict., c. 3 (Eng.).  
\[191\] See supra Part I.  
the government objective.\textsuperscript{193} Conversely, the United States is much more absolutist in its “strict scrutiny” jurisprudence.\textsuperscript{194} The “narrowly tailored to meet a compelling government interest” test, as applied to political speech, is perhaps the most difficult of all to pass.\textsuperscript{195} The Supreme Court rejected the implementation of expenditure limitations in Buckley as an overbroad infringement on core political speech.\textsuperscript{196} South Africa has explicitly incorporated the proportionality standard into the text of its constitution, thus providing a substantially more flexible framework within which to structure a regulatory system.\textsuperscript{197}

Given South Africa’s status as an emerging democracy, it is vitally important that citizens continue to have confidence in the electoral machinery’s capacity to produce a fair result. Corruption, or even the mere appearance of corruption, can result in severe erosion of public trust and confidence in the government.\textsuperscript{198} Since 1994, a number of corruption scandals have surfaced in South Africa.\textsuperscript{199} If left unchecked, these scandals could lead to a downward spiral in which distrust of government results in lower voter turnout. This, in turn, would only foster more discontent.

Because corruption flourishes in a lax regulatory environment,\textsuperscript{200} South Africa’s reform package needs to address several points. First, Parliament must choose between at least two models of campaign finance regulation.\textsuperscript{201} Considering South Africa’s oppressive past and the presence of the proportionality standard in its constitution, it seems reasonable to assume the egalitarian model would be the better choice. One significant advantage to this model is that it addresses the imbalance of wealth between the races—one of the surviving vestiges of apartheid.\textsuperscript{202} This means the relatively poorer black population is protected against the possibility that wealthier whites would simply drown out the voice of blacks.

\textsuperscript{193} See id.
\textsuperscript{194} See Buckley v. Valeo, 424 U.S. 1, 1, 39, 143 (1976).
\textsuperscript{195} See id.
\textsuperscript{196} See id.
\textsuperscript{197} S. Afr. Const. 1996 § 36.
\textsuperscript{198} See February & Calland, supra note 169, at 10–11.
\textsuperscript{199} See Robinson & Brümmer, supra note 28, at 3.
\textsuperscript{200} February & Calland, supra note 169, at 11. But see Sarakinsky, supra note 35, at 115–18 (arguing corruption does not flourish in lax regulatory environment).
\textsuperscript{201} See, e.g., Dirk Kotzè, Public Funding Regulatory Measures to Prevent the Abuse of State Resources, in The Politics of State Resources, supra note 6, at 91, 99–100.
\textsuperscript{202} See Robinson & Brümmer, supra note 28, at 3–4 (detailing corruption difficulties experienced in implementation of Black Economic Empowerment program).
The egalitarian model will fulfill both South Africa’s interests in protecting the integrity of its electoral process and the flexible nature of its constitution. But what does this egalitarian model mean? The Council of Europe promulgated seven general principles with respect to political financing that, if adopted in South Africa, would both define the regulatory system and make great strides toward protecting the electoral process from the taint of corruption. The following principles will each be addressed in turn:

- A balance between public and private funding;
- Fair criteria for public funding;
- Strict rules governing private donations;
- A maximum allowable amount to be spent by each actor;
- A flow of money that is transparent and available to public scrutiny;
- An independent agency with auditing authority over all actors who are required to file; and
- Meaningful sanctions for those who violate the rules.

The current “balance” between public and private funding in South Africa can best be described as skewed. The level of public funding compared to the estimated expenditures reveals that public funding accounts for only a small percentage of the parties’ overall spending. Although not discussed as comprehensively in this Article, modern Germany has encountered many of the same issues as the United States, United Kingdom, and Canada. Like these three nations, it has thoroughly litigated the issue of how to balance public and private funding under its egalitarian framework. The German system thus offers a convenient model for South Africa. In 1992, the Bundesverfassungsgericht (Federal Constitutional Court) struck down the previous balance that had reimbursed political parties for campaign costs. The new balance stated that the level of public funding to which each

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204 See Kotè, supra note 201, at 98.
205 See Tshitereke, supra note 161, at 4–5; February & Calland, supra note 169, at 6–7.
207 Id.
party was entitled was directly proportional to the amount of private funding the party was able to raise independently.\textsuperscript{209}

Under the German balance, the “marketplace of ideas” is still able to function, albeit in a much more limited manner than in the United States.\textsuperscript{210} Parties are still only as viable as their ideas and their candidates. This prevents a situation in which the State is forced to grant equal funding to a fringe party.\textsuperscript{211} Furthermore, this balance moderates the infringement on the right of free association by allowing parties to still raise private funds.\textsuperscript{212}

Regarding eligibility for public funding, South Africa’s criteria are quite clearly set forth by the Funding Act and appear to have been equitably applied.\textsuperscript{213} The Act only requires that a party receive 50,000 votes to receive a seat in Parliament, which is one of the methods to qualify for public funding.\textsuperscript{214} Parties may also qualify for funding if they are elected to seats in provincial legislatures.\textsuperscript{215}

Despite the low thresholds for public financing, there are no restraints when competing for private funding in South Africa. Parties are permitted to receive unlimited donations from both domestic and foreign sources.\textsuperscript{216} The availability of foreign donations has led to a series of occurrences involving foreign nations that may be legal, but could hardly be deemed proper.\textsuperscript{217} Domestic contributions can be equally scandalous, as evidenced by the British scandal involving a waiver on tobacco advertising for Formula One.\textsuperscript{218} If South Africa wishes to avoid corruption and pursue an egalitarian model in which the money of no South African or foreign citizen may drown out the voice of a poorer South African citizen, then limits must be imposed.

The control of private funding would be greatly enhanced by placing a spending cap on actors.\textsuperscript{219} This cap, however, must not be placed

\textsuperscript{209} Kommers, supra note 206, at 215.
\textsuperscript{210} See supra notes 206–09 and accompanying text.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} February & Calland, supra note 169, at 4–5 (listing multitude of parties that have qualified for public funding).
\textsuperscript{214} Public Funding of Represented Political Parties Act s. 5(1)(ii).
\textsuperscript{215} Id.
\textsuperscript{216} Tshitereke, supra note 161, at 4.
\textsuperscript{217} Kotzé, supra note 201, at 94–96 (detailing three examples where foreign investment may have led to favorable treatment).
\textsuperscript{218} Keith Ewing, The Disclosure of Political Donations in Britain, in Party Funding and Campaign Financing in International Perspective, supra note 150, at 57, 57–59; supra Part III.A.2.
\textsuperscript{219} See Sarakinsky, supra note 35, at 125.
solely on parties and candidates, or it will merely serve to promote circumvention of the rules through the creation of third-party entities to which the rules do not apply,220 as seen in the United States. Rather, South Africa must follow Canada’s lead in restricting the spending of third parties in addition to other political actors. This method may actually increase competition and creativity as parties seek to stretch their funding to its maximum limit. Furthermore, when combined with the public/private funding balance previously discussed, a cap would successfully end the arms race of campaign fundraising. Because all actors would be capped at a maximum amount, the pressure to continually raise the fundraising ante would be relieved.

Transparency and accountability in financing is a universal step toward reinforcing the integrity of any electoral system. Although worthy of praise, voluntary disclosure, such as seen during the 2004 South African election cycle,221 is simply not enough. When drafting the mandatory disclosure system, the Parliament must be certain the regulations are comprehensive, or it too could promote circumvention such as that which occurred with 527s in the United States.222

Yet, as recognized by the U.S. Supreme Court, transparency and disclosure can also be used as a weapon against fringe parties.223 For example, it may be possible for a pro-apartheid party in South Africa to demonstrate before the courts that the forced disclosure of their benefactors would effectively serve to muzzle their associational rights.224 Finally, as argued by IDASA, public disclosure allows voters to make an informed choice when deciding how to cast a ballot.225

The Independent Electoral Commission (IEC) is South Africa’s governing agency for public funding.226 Supervision of public funding, however, is the absolute limit of the IEC’s authority, as it has no power to promulgate rules or regulations regarding private funding. The IEC’s powers under the Funding Act, as already noted, seem to be for-
The natural solution to this problem thus seems to be the expansion of the IEC’s authority to all political funding.\textsuperscript{228} Along with this expansion of jurisdiction should come an expansion of disciplinary authority. If the agency is only able to monitor and disclose funding without effective punitive measures available, the motivation to obey is lessened. The U.S. FEC is a prime example of an ineffective agency, as a majority vote is required of its six-member board to initiate a disciplinary proceeding.\textsuperscript{229} The board, however, is divided between three Republicans and three Democrats, usually resulting in a tie vote—and thus inaction—on many matters.\textsuperscript{230}

**Conclusion**

Despite the problems inherent in overcoming decades of repressive government and international isolation, the transition to democracy and equality in South Africa has gone as well as may be realistically expected. If South Africa wishes to continue to make gains, however, it must take strides to ensure that its electoral machinery remains free from the taint of corruption. By implementing reforms now, as opposed to waiting for a national scandal to erupt, the country can make progress toward the goal of ensuring legitimate, stable governments.

\textsuperscript{227} Id.

\textsuperscript{228} Of course this suggestion is not without its detractors. Sarakinsky proposes at least two alternatives that do not involve government oversight. He first suggests internal party structural reform to create centralized fundraising, thereby limiting the opportunity for corruption on the theory that local politicians will not know who donated. The second suggestion is based on a Swedish model where each political party can examine the others audited accounts, but no information is made public. See Sarakinsky, supra note 35, at 124–25.

\textsuperscript{229} See About the FEC, http://www.fec.gov/about.shtml (last visited May 11, 2008).

\textsuperscript{230} See, e.g., Hearing Before S. Comm. on Rules & Admin., 107th Cong. (2004) (statement of Trevor Potter, Former Commissioner of the FEC), available at http://rules.senate.gov/hearings/2004/071404_potter.htm. A former FEC Commissioner testified that the FEC frequently deadlocks on the most important issues the agency confronts. Historically, these deadlocks have usually reflected a partisan, 3–3 split . . . . The cause of the agency’s deadlocks, however, is not as important as the result. What matters is that the agency charged with issuing advisory opinions, implementing regulations and enforcing the law has been unable to do so on a number of important instances, in a complete abdication of its only statutory obligation: to interpret and enforce the laws Congress makes . . . . [T]he agency’s inability to act is neither infrequent nor unimportant.

\textit{Id.}
THE EVOLUTION OF INTERNATIONAL LAW

Milena Sterio*

Abstract: Globalization, characterized by the inter-connectivity of persons, states, and non-state actors on a global plane, has led to the development of binding international law across several legal fields, namely, international human rights, international criminal law, and private international law. This Article explores the proliferation of actors, norms, and organizations, as well as the expansion of international jurisdiction that has underscored the development of international law over the last half century. The Article focuses on the impact of globalized international law on state actors, as well as on individuals, by reshaping their behavior in the international realm. In particular, this Article assesses the role that globalized international law plays in specific legal fields, drawing comparisons and suggesting what the future might hold for such fields of law.

INTRODUCTION

Globalization, a phenomenon that can be described as inter-connectivity between regions, peoples, ethnic, social, cultural, and commercial interests across the globe, has affected different legal fields, including international law.1 Reshaped by the potent forces of globaliza-

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1 Many scholars have attempted to define globalization. See, e.g., Paul Schiff Berman, From International Law to Law and Globalization, 43 Colum. J. Transatl. L. 485, 490 n.11 (2005); Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. Int’l L. & Pol. 527, 537–38 (2001); see also infra Part II (discussing “globalization” of three areas of international law). Legal scholars also refer to globalization, for example, by calling for a broader frame of analysis entitled “law and globalization.” See Berman, supra, at 490–92.

The term “globalization,” moreover, has been used in many different fields besides law, such as anthropology and sociology. For example, anthropologists have argued that we live in the “global cultural ecumene” or a “world of creolization.” See Robert J. Foster, Making National Cultures in the Global Ecumene, 20 Ann. Rev. Anthropology 235, 236 (1991); Ulf Hannerz, Notes on the Global Ecumene, Pub. Culture, Spring 1989, at 66; Ulf Hannerz, The World in Creolisation, 57 Afr. 546, 551–52 (1987). Sociologists, similarly, have shifted
tion, international law has transformed itself from a set of legal rules governing inter-state relations, to a complex web of transnational documents, providing a normative framework for all sorts of different actors on the international legal scene.\(^2\) Phenomena that used to belong to domestic realms are now examined and monitored through the international legal lens.\(^3\) Our planet is “shrinking” because issues such as the environment, nuclear weapons, disease, and terrorism have become of global concern, and are thus measured by international law parameters.\(^4\) Domestic law has lost its omnipotent, “sovereign” power and is now supplemented, corrected, and watched over by international law.\(^5\) Thus, international law has undergone an evolutionary process over recent decades, transforming itself from an instrument of inter-state conflict resolution, to a powerful global tool, present in everyday life and influential in many state actors’ and non-state entities’ decisions and policies.

This Article examines the evolution of international law brought about by the impact of globalization, as well as the role that globalized international law plays in different legal fields, and the impact that it asserts on state and non-state actors. First, this Article describes the transformation of international law by focusing on four different phenomena: the proliferation of actors, norms, and organizations in international law; and the expansion of jurisdiction in international law. This Article then assesses the role that globalized international law plays in different legal fields, namely, international human rights, international criminal law, and private international law. Finally, this Article focuses on the impact of globalized international law on state actors, as well as on the individual, by reshaping their behavior in the international realm.

I. Transformation of International Law

International law, as studied through a traditional framework, included two types of normative systems: one promulgated by states themselves for their domestic relations, and the other promulgated among states for inter-state relations.\(^6\) Throughout the twentieth cen-

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\(^2\) See infra Part II.

\(^3\) See id.


\(^5\) See id. at 936, 941.

\(^6\) See Berman, supra note 1, at 487.
tury, such a formal view of international law became inadequate. For one, the creation of individually enforceable norms in the field of international human rights transformed individuals into international law players. Moreover, nongovernmental organizations (NGOs) came to play a prominent role on the international legal scene, as did various regional organizations, institutions, and judicial bodies. The proliferation of actors in international law contributed to a proliferation of international legal norms. Moreover, even classic legal actors, such as courts, changed their role in light of this modernization of international law. For example, judges today seem more willing to “apply international norms transnationally, to engage in a transnational judicial dialogue, and even to adopt conceptions of universal jurisdiction.”

Thus, as scholars have already noted, international law has transformed itself, changed by the powerful forces of globalization. Globalization refers to a “stretching process” in which “connections have been made between different social contexts or regions and become networked across the earth as a whole.” For the purposes of international law, globalization means that, in a globalized world, international law recognizes different state interests and finds ways to give effect to them, with the specific consequence that what one state does on a particular matter may be of specific interest to another state. Thus, activities that were treated as local under the traditional conception of international law are now internationalized.

Moreover, to add to this globalization puzzle, international legal norms seem no longer to be created mainly by state actors. Rather, today we deal with a world of “transnational law-making [and] cross-border interaction,” where state and non-state actors together “dissemi-
nate alternative normative systems across a diffuse and constantly shifting global landscape.”

Four phenomena caused by the globalization of international law include the proliferation of actors, norms, and organizations in international law, as well as the expansion of traditional international jurisdictional concepts.

A. New Actors in International Law

Traditionally, international law involved state actors and inter-state relations. Individuals, organizations, regional bodies, non-governmental institutions, and the like were left outside the reach of international law. The United Nations (U.N.) was a forum open exclusively to state parties. The International Court of Justice (ICJ), as well as its predecessor, the Permanent Court of International Justice (PCIJ), were reserved for state grievances. It was inconceivable that an individual would come before such tribunals, or that international law would govern anything but relations among state parties.

Today, the converse is true. International law, in its transformed or globalized version, governs all sorts of relations, including those implicating states, regional bodies, NGOs, trade organizations, commercial actors, and private individuals. It spreads into legal fields such as environmental law, labor law, trade regulations, antitrust, health, and insurance law. Non-state actors play increasingly important roles in

17 Id.
18 Id. (observing that traditional international law scholars “located international law in the acts of official governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations . . . or other affiliated bodies, and the rulings of international courts and tribunals”) (citing Barry E. Carter & Philip R. Trimble, International Law 2 (3d ed. 1999)).
19 See Barry E. Carter et al., International Law 14 (5th ed. 2007) (noting that traditional concept of international law “was generally one of law between nation states”).
20 See id. at 298 (stating that main function of ICJ “is to decide legal disputes between states”) (emphasis added).
21 See Berman, supra note 1, at 487 (noting that “[i]n an earlier generation,” the study of international law focused only on norms “promulgated by nation-states and . . . among nation-states”).
23 See id. (concluding that we need “a more fine-grained, nuanced understanding of the way legal norms are passed on” from such different groups, to begin to study law and globalization).
24 See id.
such fields, including regional organizations, specialized bodies such as trade organizations, NGOs, and private individuals.\textsuperscript{25}

Regional organizations play dominant roles within their “jurisdictions.” The North American Free Trade Agreement (NAFTA) is such a prominent regional power that it acts as a sovereign in matters of trade within the continent.\textsuperscript{26} In Europe, the European Union (EU) undertakes a sovereign role in matters such as labor law, consumer regulations, antitrust, and environmental law.\textsuperscript{27} Moreover, NGOs play a hugely important role on the international scene. They challenge traditional models of state sovereignty with regard to different areas of law, and in particular human rights norms; they formulate global standards of corporate behavior; and they generally claim to represent some sort of a global interest.\textsuperscript{28} Another example, the World Trade Organization (WTO), dictates the terms of global trade by creating norms, establishing an entirely new jurisdiction to handle disputes, and tying state and non-state interest in a global web of trade relationships embodied in the organization’s structure and processes.\textsuperscript{29} Finally, private individuals exercise increasing influence in the international legal field.\textsuperscript{30} Private par-

\textsuperscript{25} See id. (noting the “wide variety of non-state actors engaged in the establishment of norms that operate internationally and transnationally”); see also id. at 321 (observing that states themselves are “increasingly delegating power to private actors who exist in a shadowy world of quasi-public/quasi-private authority”).

\textsuperscript{26} See Berman, supra note 1, at 535 (discussing authority of NAFTA’s ad hoc tribunals over national courts as an example of NAFTA’s power to articulate jurisdictional norms).

\textsuperscript{27} See Cohan, supra note 4, at 940 (considering EU role in modern world and noting both its active participation in many substantive conferences and membership in several international organizations).


\textsuperscript{29} Many commentators have noted the increasing role of the WTO in developing a global common law of international trade. See, e.g., Berman, supra note 1, at 521; Raj Bhala, The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), 14 Am. U. Int’l L. Rev. 845, 850 (1999).

\textsuperscript{30} See Ralph G. Steinhardt, The Privatization of Public International Law, 25 Geo. Wash. J. Int’l L. & Econ. 523, 544 (1991) (“[T]he concerns, the actors, and the processes of ‘public’ international law have been expanded—’privatized’—in this century.”); see also Berman, supra note 1, at 520 (“[C]onflicts law and international business transactions have
ties can now enter into investment treaties with state parties; moreover, they can sue state parties in specific tribunals for breaches of such investment relations. Private parties can also rely on international law to obtain certain guarantees, particularly in the field of human rights, and they can sue state parties for violations of such international standards.

Thus, it is no longer true that international law represents a body of law that solely governs relations among states; on the contrary, it is a complex web of treaties, regulations, customary norms, and codes of conduct that shapes relationships among state as well as non-state actors along horizontal and vertical axes of power.

B. Proliferation of Norms in International Law

International law today encompasses many different norms. These include: multiple conventions and treaties in several areas of law; a significant number of customary norms ranging from fields such as human rights to foreign direct investment, a vast number of international legal decisions stemming from various international tribunals; numerous international legal doctrines emanating from scholars and publicists writing in a broad range of fields; and soft law instruments become a staple of state-to-state relations, and non-state or private actors have taken an increasingly important role in the articulation and enforcement of international standards.


32 See, e.g., Claudio Grossman, The Velasquez Rodriguez Case: The Development of the Inter-American Human Rights System, in International Law Stories 77, 82 (John E. Noyes et al. eds., 2007) (stating that individuals can bring complaints against state parties in Inter-American Court of Human Rights); Sands, supra note 1, at 546–47 (describing how individuals can bring claims against state parties in European Court of Human Rights); see also Berman, supra note 1, at 521 (noting a “proliferation of international tribunals” in human rights area); infra Part III.A.

33 See Berman, supra note 22, at 311–12 (challenging the “top-down” conception of international law and calling for the need “to approach the multifaceted ways in which legal norms develop”).

34 See Sands, supra note 1, at 548 (noting a great increase in norms of international law).
such as codes of conduct, gentlemen’s agreements, and governmental statements.35

Such a proliferation of international legal norms stems from several factors. First, the latter half of the twentieth century has witnessed an increase in the number of international legal bodies—organizations, institutions, conferences, and tribunals—which all, as one of their roles, draft and issue international law instruments.36 Second, also over the course of the last century, international law has expanded into a variety of fields that were traditionally left to state sovereign reign.37 There are now more international laws and regulations in health law, consumer law, labor law, and antitrust law.38 Third, and most important, international law now plays a different role in today’s globalized world. While a century ago, international law was only meant to govern relations among states, this is no longer true.39 International law aims to influence a variety of state and non-state actors in many different legal fields and along different normative axes.40 It influences national legislative bodies,41 supreme judicial organs,42 individual expectations,43 diplo-

36 See Sands, supra note 1, at 553 (noting that today there are over twenty-five permanent international courts and tribunals); see also Carter et al., supra note 19, at 11–13 (describing different international norm-creating institutions that have developed since World War II); Harold Hongju Koh, Is There a “New” New Haven School of International Law, 32 Yale J. Int’l L. 559, 564 (2007) (remarking that today we live in a world where “non-state actors are capable of serving as transnational decisionmakers”).
37 Sands, supra note 1, at 548 (“International laws now address a broad and growing range of economic, political, and social matters.”); id. at 548–49 (explaining that same proliferation of international law erodes state sovereignty).
38 Dunoff et al., supra note 35, at 29 (noting that both breadth and depth of international law have increased “as the law regulates more areas than ever before”).
39 See Ian Brownlie, Principles of Public International Law 287 (3d ed. 1979); Sands, supra note 1, at 527 (stating that international law traditionally was seen as a “set of rules with the object of preserving the peace and harmony of nations”).
40 See id. (noting that international law today “serves a broader range of societal interests, and that it now connects with a wider range of actors and subjects”).
41 See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting) (stating, in his infamous dissent, that one of the outstanding canons of statutory interpretation is the presumption that Congress, when it passes a law, acts in accordance with the law of nations).
43 See infra Part III.B.
matic concerns, foreign policy issues, and a vast number of domestic legal areas on a substantive level.

It may be true that the proliferation of legal norms itself contributed to the perception that international law is inherently present across such different legal spheres. It may conversely be said that it is actually the higher level of interaction among state and non-state parties in recent decades has caused this very same proliferation of international legal rules. In other words, the more states and non-state actors interact, the more friction they create and the more law they need to resolve their differences. Similarly, global interaction also induces parties to negotiate to prevent friction and future disputes, thereby contributing to the proliferation of international legal norms.

C. Proliferation of Organizations in International Law

International law has not only witnessed a proliferation of legal norms, but also an expansion in the number of international legal organizations. At the end of World War I, the victorious states created the League of Nations, a body charged with preventing another bloody war and the U.N.'s predecessor organization. At the same time, states realized that an international arbitrator may be needed in other substantive areas, such as health, labor, or communications law. In other words, states seemed to realize that if they achieved coordination in substantive areas of law, they would then be less likely to engage in violent conflict in general. Thus, the League of Nations was outfitted with special offices, such as the International Telecommunication Union and the International Labour Office, charged with the task of studying and promoting international cooperation on various issues of international interest. Along the same lines, the PCIJ was created, leading at least some to believe that the peaceful settlement of disputes through international law was possible. Although these developments

44 See Dunoff et al., supra note 35, at 27 (“[T]he institutionalization of international law that began in significant part with the League of Nations accelerated in the post-war era.”).
45 Id. at 16 (noting that League of Nations was created to address questions of war and peace).
46 Id.
47 See id.
48 Id. (“The result was a shift in the way much international law was made, as the League took the lead in preparing multilateral treaties on many subjects, encouraged states to reach bilateral agreements, and drafted many nontreaty instruments that came to be influential among states.”).
49 Dunoff et al., supra note 35, at 16.
proved inefficient in preventing World War II, they at least geared states toward joint organizational efforts as a method of preventing conflict.\textsuperscript{50} The end of World War II saw the creation of the U.N.—the supreme international organization. The U.N. was charged with many tasks but most importantly, was conceived as a global peacekeeper that would replace any unilateral use of force with joint decision-making and acting on the international legal scene.\textsuperscript{51} In the wake of the establishment of the U.N., other regional bodies, assuming the roles of regional peacekeepers, were born. In Europe, the North Atlantic Treaty Organization (NATO) was established. With mostly Western European nations and the United States as its members, NATO countered the threatening power of the former Union of Soviet Socialist Republics during the Cold War.\textsuperscript{52} In Africa, the Economic Community of West African States (ECOWAS) was created as a mixed organization: its mission was economic, but it encompassed mercenary forces charged with keeping peace in West Africa.\textsuperscript{53} Embracing the post-World War I notions of preventing conflict by transferring substantive decision-making in different areas to international bodies, international actors engaged in negotiation to create international monetary, trade, economic, insurance, investment, and other types of organizations.\textsuperscript{54} Thus, a multitude of international organizations were created in the latter half of the twentieth century, including the International Monetary Fund, the WTO, the World Bank, the International Center for the Settlement of Insurance Disputes (ICSID), and the World Intellectual Property Organization (WIPO).\textsuperscript{55} Similarly, states within the same regions acted to create regional organizations charged with similar objectives.\textsuperscript{56} The Organization for Security and Cooperation in Europe, the Association of Southeast Asian
Nations, the Organization of American States, and the Organization of African Unity are examples of such regional bodies.\textsuperscript{57}

The higher level of interaction among international law actors in the twentieth century seems to have produced a myriad of international and regional bodies charged with resolving state, and non-state actors’ differences on substantive levels as well as providing an institutional forum where such actors can assert their grievances.\textsuperscript{58}

D. Expansion of Jurisdiction in International Law

It seems logical that the recent higher level of international interaction would produce more friction. To resolve disputes and allocate international responsibility, international law has developed and expanded its traditional notion of jurisdiction.\textsuperscript{59} Historically, jurisdiction was conceived as the sovereign’s power within a defined territory to impose and enforce its laws on its subjects and in its judicial organs.\textsuperscript{60} Today, however, jurisdiction in international law is mostly extra-territorial.\textsuperscript{61}

First, the development of human rights norms has contributed to the idea that some crimes are so heinous that any nation in the world, acting on behalf of the entire international community, can punish an offender.\textsuperscript{62} The concept of universal jurisdiction was thus born, defined as the power of any state to punish offenders of universal crimes, such as piracy, war crimes, slave trade, or genocide, without requiring any

\textsuperscript{57} Id.
\textsuperscript{58} See supra Part I.C.
\textsuperscript{59} Berman, supra note 1, at 530–31 (discussing how traditional concepts of jurisdiction “have had difficulty adapting” with challenges caused by globalization).
\textsuperscript{60} Id. at 530 (noting that traditionally, questions of jurisdiction were analyzed by reference to physical location).
\textsuperscript{61} Id. at 531 (noting existence of extra-territorial regulation in field of trademark rules, tort law, criminal investigations, internet transactions, and human rights violations).
\textsuperscript{62} See Restatement (Third) of Foreign Relations Law § 404 (1987). The development of the human rights movement implied, first, that what a state did to its own citizens was of international concern and that government officials could be held responsible and prosecuted for abuses against their own population. See Carter et al., supra note 19, at 779 (noting that Nuremberg trials after World War II were “important precedents in establishing the responsibility of government officials for human rights abuses, even abuses committed against their own population”). The development of human rights norms then came to encompass the idea that some crimes are so horrific that any state can punish offenders in the name of the world community. See Restatement (Third) of Foreign Relations Law § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern.”) (emphasis added).
territorial or substantive links to the prosecuting forum. 63 Adolf Eichmann, for example, a German citizen living in Argentina, was tried in Israel, under the theory of universal jurisdiction, for crimes against humanity that he committed during World War II in Germany, before Israel even became a state. 64 General Augusto Pinochet was indicted in Spain on charges of crimes against humanity for acts committed against Spanish victims during his dictatorship of Chile. 65 Hissein Habré, who ruled Chad in the 1980s, was recently subject to an international arrest warrant in Belgium, under Belgium’s universal jurisdiction law. 66

Moreover, states have been willing to grant access to their domestic courts to victims of human rights violations, even where such victims are foreign, or when such violations occurred in foreign countries, or were committed by foreign defendants. The U.S. Supreme Court has interpreted the Alien Tort Statute 67 to provide jurisdiction—and possibly a cause of action—to foreign plaintiffs suing foreign defendants for violations of the laws of nations. 68 Similarly, U.S. federal courts have entertained judicial challenges to the system of military commissions President Bush established to try al Qaeda detainees. 69 This exemplifies

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63 Dunoff et al., supra note 35, at 380 (“The traditional rationale for universal jurisdiction is that the prohibited acts are of an international character and are of serious concern to the international community as a whole.”).


66 Dunoff et al., supra note 35, at 383.


68 Sosa v. Alvarez-Machain, 542 U.S. 692, 712–18 (2004). The Court held that the Alien Tort Statute is a jurisdictional statute and that it was not intended to create a new cause of action for torts in violation of international law. Id. at 712–15. The first Congress, instead, understood that the Alien Tort Statute would provide a cause of action for a limited number of violations of the law of nations, such as violation of safe conduct, infringement of the rights of ambassadors, and piracy. Id. at 724. Today, “[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth] century paradigms we have recognized.” Id. at 725; see also Filartiga v. Pena Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that Alien Tort Statute provides jurisdiction to a foreign plaintiff for a violation of law of nations).

69 In Hamdan v. Rumsfeld, a five-justice majority of the Court held that the military commission system set up by the Bush Administration to try al Qaeda detainees did not satisfy the requirements of Common Article 3 of the 1949 Geneva Conventions. See 126 S. Ct. 2749 (2006). Although the Court did not decide whether these Conventions gave rise to judicially enforceable private rights in domestic courts, the majority struck down the military commissions because the Uniform Code of Military Justice, the statutory authority
once more the expanded role of domestic courts in litigation centering on human rights abuses and implying violations of international legal obligations.

Finally, because state and non-state actors interact frequently on the international commercial scene, states have been willing to assert extra-territorial jurisdiction to regulate commercial conduct occurring abroad but having an effect on domestic markets.\(^{70}\) For example, the United States relies on the so-called “effects doctrine” to establish the extra-territorial reach of the Sherman Act, which U.S. courts have held to regulate conduct occurring abroad.\(^{71}\) Similarly, U.S. courts rely on a variation of the “effects doctrine” to regulate securities markets and to reach fraudulent conduct that took place abroad.\(^{72}\) European market authorities, although initially critical of the U.S. approach, seem to have adopted similar jurisdictional tests that strive for the imposition of extra-territorial regulation of foreign conduct having effects on the European market.\(^{73}\)

Related issues have arisen in connection with the regulation of Internet activities.\(^{74}\) Recently, a French court ordered Yahoo! to block

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\(^{70}\) Berman, supra note 1, at 531 (noting problems caused by cross-border activity and desire by local communities to apply their norms to extra-territorial activities). Such extra-territorial regulation has already occurred in fields such as antitrust, securities, tax, and trademark protection. See Milena Sterio, Clash of the Titans: Collisions of Economic Regulations and the Need to Harmonize Prescriptive Jurisdiction Rules, 13 U.C. DAVIS J. INT’L L. & POL’Y 95, 100–04 (2007).

\(^{71}\) See generally LaRoche v. Empagran, 542 U.S. 155 (2004) (recognizing extra-territorial reach of Sherman Act, but holding that exercise of such jurisdiction would not be reasonable where a foreign plaintiff’s claim is based wholly on foreign harm because it “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs”); Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). But see Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (tempering extra-territorial application of Sherman Act with considerations of “international comity”).

\(^{72}\) Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968); DUNOFF ET AL., supra note 35, at 373; see also Consol. Gold Fields v. Minorco, 871 F.2d 252, 261–62 (2d Cir. 1989).

\(^{73}\) See Case 89/95, Ahlstrom v. Comm’n. (Wood Pulp Cartel), 1988 E.C.R. 5193 (upholding extra-territorial assertion of European Community competition law where conduct occurred abroad but was “implemented” within European market). Note that the European Court of Justice never adopted the infamous “effects” test, but that in practice, its “implementation” test operates very similarly to the effects test. See DUNOFF ET AL., supra note 35, at 375.

\(^{74}\) Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, Ordonnance de référé (Fr.), available at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm. For a discussion of the case, see Joel R. Reidenberg, Yahoo
access in France to a Yahoo! auction site selling Nazi memorabilia, as the sale of such items was illegal under French law.\textsuperscript{75} Yahoo! immediately moved for a U.S. court order declaring the French court order unenforceable, provoking a judicial battle.\textsuperscript{76} Ultimately, Yahoo! capitulated by deciding to comply with the French order,\textsuperscript{77} but this judicial controversy highlights particularly well a type of extraterritorial problem linked to the assertion of jurisdiction in today’s globalized world.\textsuperscript{78}

Thus, jurisdiction in modern globalized international law recognizes interaction among all sorts of international state and non-state actors and provides not only access to more tribunals, but also a basis for imposing substantive laws in an extra-territorial manner.\textsuperscript{79}

\section*{II. The Role of International Law in Different Fields}

The globalization and evolution of international law has impacted different legal fields. Three areas where the effects of globalization are most striking include human rights law, international criminal law, and private international law.
A. International Human Rights

International law in its proliferated, or globalized version has played an important role in human rights law, where the evolutionary trend on the international scene has had a major impact.

1. Creation of International Norms

The evolution of international law has created many new human rights norms. Throughout the twentieth century, several human rights conventions have been negotiated, and many customary human rights norms have emerged. These new human rights norms are significant not only because of their expanded number, but also because of their evolutionary nature. Because international law is no longer limited to governing purely state relations, but also encompasses the relationship of non-state actors vis-à-vis states, a different set of norms has emerged to cover these new relations.

For example, the prohibition on torture arising out of the 1984 Torture Convention and other treaties and international customary norms necessarily implies several things. Parties to the Torture Con-

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80 See Dunoff et al., supra note 35, at 17 (“[T]he human tragedy of World War II led governments . . . to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments.”).


82 See supra Part I.B.

83 See generally Torture Convention, supra note 81, art. 2 (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

vention may not institute torture as an official governmental policy in their international relations with other states.\textsuperscript{85} Moreover, states may not treat individuals in ways that amount to torture, even when such individuals are their own citizens.\textsuperscript{86} Officials of one state may even attempt to prosecute officials of another state for acts that constitute torture.\textsuperscript{87}

As the Torture Convention illustrates, these new types of international human rights norms differ from other, more traditional types of international norms.\textsuperscript{88} Under traditional international law norms, State A may not do certain things to State B, State C, or any other State. Conversely, States B, C, or any other state may not do the same thing to State A. States A, B, and C, however, may do whatever they wish within their own borders. New human rights norms vary strikingly from this traditional model. For one, they are not limited to the regulation of the behavior of State A \textit{vis-à-vis} other states; rather, they are able to regulate what State A does to its own citizens and residents within its borders, as well as requiring State A to justify its behavior before States B and C, at


\textsuperscript{85} \textit{See} Torture Convention, \textit{supra} note 81, art. 1. The Torture Convention specifically defines “torture” in its main article as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” \textit{Id.} (emphasis added). The Torture Convention specifically prohibits state-sponsored torture. \textit{See id.} For a discussion of the workings of the Torture Convention, see Edwin Odhiambo-Abuya, \textit{Reinforcing Refugee Protection in the Wake of the War on Terror}, 30 B.C. Int’l & Comp. L. Rev. 227, 281–94 (2007).

\textsuperscript{86} \textit{See} Torture Convention, \textit{supra} note 81, art. 2. The Torture Convention strengthens existing norms against torture in many ways: it requires state parties to present reports focused explicitly on torture; it creates an expert committee to review those reports; and it provides for an optional individual complaints procedure. \textit{Dunoff et al., supra} note 35, at 450. Israel, for example, has been criticized by the Committee Against Torture, a special committee of experts established by the Torture Convention, because of its controversial interrogation techniques. \textit{See Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Israel, U.N. Doc. A/49/44} (1994). This criticism exemplifies the notion that under modern international law, states may no longer do whatever they wish within their jurisdiction. \textit{See id.} Similarly, the United States has faced significant international criticism in light of its own more aggressive interrogation techniques in the “Global War on Terror.” \textit{See Dunoff et al., supra} note 35, at 465–66.

\textsuperscript{87} The concept of universal jurisdiction allows a forum to prosecute an individual when that individual’s alleged crimes have absolutely no territorial nexus with the prosecuting state. \textit{See Dunoff et al., supra} note 35, at 380. The leader of State A, who tortured people within State A, could theoretically be subject to criminal prosecution in State B, if State B has an expansive universal jurisdiction statute, even though State B has no other connection to the acts of torture that took place within State A. \textit{See id.}

\textsuperscript{88} \textit{See supra} notes 85–87 and accompanying text.
the risk of seeing its leaders indicted for violations of such human rights norms in States B and C.\(^89\)

These new types of human rights norms are coupled with other changes in international law in a manner that strengthens their role in state behavior.\(^90\) As mentioned above, states traditionally exercised their jurisdictional powers territorially.\(^91\) The evolutionary trend of international law has led states to rely more and more on extra-territorial jurisdiction.\(^92\) Such a powerful application of state judicial powers has been particularly important in the human rights field. New human rights norms are often accompanied by the notion of universal jurisdiction, meaning they can be enforced by any state, anywhere in the world, against any offenders. The Torture Convention has a provision providing for universal jurisdiction for possible prosecutions of offenders.\(^93\) New human rights norms sometimes go beyond simply prohibiting states from doing something; some impose certain duties on states, such as the duty to either prosecute or extradite offenders.\(^94\)

Finally, modern human rights norms are more potent in light of the globalization of international law. In other words, because of the proliferation of actors in modern international law, states, as well as various non-state actors, are now charged with the creation, implementation, and monitoring of human rights norms. Thus,

\[\text{[I]}\]ndividual states, the United Nations, and various regional organizations, including the Council of Europe, the Organization of American States, and the Organization of African Unity, working with countless non-governmental human rights organizations, scholars, and lawyers, have developed an extensive body of human rights treaties, declarations, and related in-

\(^89\) States today are, therefore, obligated to cede sovereignty to the international community, which “imposes standards of good governance and human rights norms” on all states. Cohan, supra note 4, at 941.

\(^90\) See supra Part I (discussing overall transformation of international law).

\(^91\) See Berman, supra note 1, at 530.

\(^92\) For a discussion of extra-territorial jurisdiction, see supra Part II.D.

\(^93\) Torture Convention, supra note 81, art. 5. Article 5 of the Torture Convention provides for different bases of jurisdiction, including territorial jurisdiction, passive personality, and nationality principles. Id. art. 5(1)–(3). Article 5 goes on to specify that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction.” Id. art. 5(2).

\(^94\) See id., art. 7 (containing an “extradite or prosecute” provision); Genocide Convention, supra note 81, art. 5 (containing a provision requiring member states to “give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”).
Instruments in an effort to develop and clarify international human rights norms. These same actors have also developed a complex system of institutions designed to monitor and to some extent to implement existing norms. These institutions include regional human rights courts, treaty bodies, groups of experts, and more.95

State and non-state actors thus work together to promote, implement, and monitor the myriad of human rights norms, creating a powerful regime of human rights protection and regulations.

2. Limitations on State Sovereignty

Because of their powerful reach and impact on state behavior, new human rights norms impose severe limitations on state sovereignty.96 They dictate that State A may no longer act however it wishes within its own borders—contrary to centuries of customary international law. Precisely because the globalized version of international law takes into account individual interests, it affords individuals more protection from state intrusion into their affairs by limiting state sovereign powers.

It had long been the role of domestic law to define what a sovereign may do to its subjects.97 For example, nobody would dispute that the U.S. Constitution grants the President numerous powers: to enter into agreements with other nations; to nominate judges to the Supreme Court; and to approve the congressional budget.98 Nor would anyone dispute that Congress has the power to draft laws that criminalize certain individual behaviors, or require citizens to pay taxes, or mandate

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95 Dunoff et al., supra note 35, at 443.

96 In fact, many scholars have noted that the traditional nineteenth century model of state sovereignty became outdated in the twentieth century. See, e.g., Kenichi Ohmae, The End of the Nation State, at viii (1995); Matthew Horsman & Andrew Marshall, After the Nation-State: Citizens, Tribalism and the New World Disorder, at ix (1994) (“The traditional nation-state, the fruit of centuries of political, social and economic evolution, is under threat.”); George J. Demko & William B. Wood, Introduction: International Relations Through the Prism of Geography, in Reordering The World: Geopolitical Perspectives on the Twenty-First Century 3, 10 (George J. Demko & William B. Wood eds., 1994) (“Once sacrosanct, the concept of a state’s sovereignty—the immutability of its international boundaries—is now under serious threat.”); see also Berman, supra note 1, at 523.

97 See, e.g., Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”) (citing Joseph Story, Commentaries on the Conflict of Laws, ch. 2 (1869)).

98 U.S. Const. art. II, § 2 (giving President power to “make treaties”); id. art. I, § 7 (describing checks and balances procedure under which President may veto a bill originating in Congress, thereby giving President power to override proposed congressional budget).
licenses to engage in certain professional activities.\textsuperscript{99} We accept the notion that our sovereign, domestically, can require us to do certain things or to refrain from doing certain things. We also respect the idea that if another individual, or our sovereign, does something that offends our rights, we can seek redress through judicial institutions.

The evolutionary version of international law attempts to play a similar role by creating important human rights norms that function somewhat like domestic law. New human rights norms require sovereigns, as well as individuals, to refrain from engaging in certain types of behavior, and as a corollary, to perform certain actions.\textsuperscript{100} For example, a sovereign may not condone torture as an official state practice; if it finds out that someone in its territory has engaged in torture, it must punish such groups or individuals accordingly.\textsuperscript{101} Because new human rights norms sometimes create judicially enforceable private rights,\textsuperscript{102} individuals can seek redress from domestic or international judicial bodies for violations thereof, either by other individuals or by their own sovereign.\textsuperscript{103} The latter idea—that one may sue their own sovereign for violations of supra-national norms that transcend and limit the sover-

\textsuperscript{99} Id. art. I (giving Congress general power to legislate).

\textsuperscript{100} Dunoff et al., supra note 35, at 17 (“[T]he growth of the human rights movement fundamentally challenged the notion that states were free to do what they wanted within their own border.”).

\textsuperscript{101} Torture Convention, supra note 81, arts. 1 & 7. Other international conventions, moreover, impose affirmative duties on states to punish violators of norms that such conventions seek to protect. See, e.g., Convention (No. 4) Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. 4]; Convention (No. 3) Relative to the Treatment of Prisoners of War art. 130, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. 3]; Convention (No. 2) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention No. 2]; Convention (No. 1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 311 [hereinafter Geneva Convention No. 1]; Genocide Convention, supra note 81, art. 4.

\textsuperscript{102} In the United States, for example, there has been significant debate over whether certain provisions of the Vienna Convention on Consular Relations grant individuals private judicially enforceable rights in U.S. courts. See Bruno Simma & Carsten Hoppe, The \textit{LaGrand Case: A Story of Many Miscommunications}, in \textit{International Law Stories}, supra note 32, at 371, 371–405. The debate centers on whether an international treaty creates individual rights that may be enforced in a domestic court of law against a domestic sovereign. \textit{Id}.

\textsuperscript{103} See Dunoff et al., supra note 35, at 443. As noted above, individuals today are provided with numerous complaint procedures through international and regional organizations, committees, tribunals, and other judicial bodies. See \textit{id}.
eign’s powers—is particularly revolutionary and had no place in traditional international law.104

The field of human rights law, in itself, represents a stark departure from traditional international law models. In its modern, evolutionary version, human rights law places limits on state sovereignty and establishes norms that govern inter-state and intra-state behavior.105 Thus, the “new” state sovereignty actually requires states to participate in a complex web of transnational regimes, institutions, and networks to accomplish what they could once do on their own, within their specific jurisdiction.106

Globalized international law has imposed so-called “vertical constraints” on states, whereby external human rights norms are imposed on states “by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention.”107 A direct result of this phenomenon is that a sovereign state must now answer not only to its own nationals, but also to the international community as a whole.108 A state may no longer reject a norm based on a claim of exclusive sovereignty, as such a notion no longer exists.109 Sovereignty will no longer operate as an excuse for violations of human rights norms against slavery, genocide, torture, or arbitrary confiscation of property. Moreover, human rights norms have evolved to encompass claims of indigenous populations, special needs of the disabled, health care, and education.110

The most fundamental point about human rights law is that it establishes a set of rules for all states and all peoples. It thus seeks to increase world unity and to counteract national separateness. . . . In this sense, the international law of human rights is revolutionary because it contradicts the notion of national

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104 EU citizens may sue their own states in the European Court of Human Rights for particular human rights violations. Sands, supra note 1, at 546–47. Similarly, citizens of Central and South American countries may bring complaints against their states in the Inter-American Court of Human Rights. Grossman, supra note 32, 81–83; see infra Part II.A (discussing individual expectations under globalized international law).

105 Berman, supra note 1, at 527 (“While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.”).


107 Cohan, supra note 4, at 941.

108 See id. at 942.

109 See DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 6, 7 (1983).

110 See Cohan, supra note 4, at 943.
sovereignty—that is, that a state can do as it pleases in its own jurisdiction.\textsuperscript{111}

An influential report issued in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS) supports this revolutionary view of human rights norms that operate as a vertical constraint on state sovereignty.\textsuperscript{112} The ICISS report, entitled “The Responsibility to Protect,” highlighted the need to update the U.N. Charter to incorporate this new understanding of state sovereignty.\textsuperscript{113} The report noted a shift from the traditional concept of “sovereignty as control” toward “sovereignty as responsibility in both internal functions and external duties.”\textsuperscript{114} According to the ICISS Report, if a population is suffering and its state is unwilling or unable to halt the suffering, then the principle of non-intervention yields to the international responsibility to protect.\textsuperscript{115} The revolutionary version of human rights law, imposed on states through the general evolutionary trend in international law, has imposed additional restrictions on states, thereby eroding the traditional notion of exclusive state sovereignty.\textsuperscript{116}

B. \textit{International Criminal Law}

The evolutionary movement in the international legal field has exercised tremendous influence in the area of international criminal law. The field itself is less revolutionary than international human rights law, as the idea of individual international responsibility for criminal acts was accepted several centuries ago.\textsuperscript{117} Early on, states recognized piracy as the first international crime, and sought to punish individuals who engaged in piracy, irrespective of such individuals’ state affiliation.\textsuperscript{118} Moreover, states held trials for war crimes as early as the fifteenth century, and enacted various legal codes prohibiting war

\textsuperscript{111} Forsythe, \textit{supra} note 109, at 6, 7 (emphasis added).


\textsuperscript{113} See ICISS Report, \textit{supra} note 112 §§ 2.16–.27.

\textsuperscript{114} \textit{Id.} § 2.14.

\textsuperscript{115} \textit{Id.} §§ 2.14–.15.

\textsuperscript{116} See \textit{id.}.

\textsuperscript{117} Dunoff et al., \textit{supra} note 35, at 607.

\textsuperscript{118} \textit{Id.}
crimes in subsequent years. During the nineteenth century, states negotiated several treaties criminalizing trading in slaves, an act committed by individuals, not states.

With the rise of human rights norms, the field of international criminal law came to encompass additional international violations having to do with attacks on human dignity. Atrocities committed in civil wars became criminalized on an international level. To this end, throughout the 1990s, the linkage of human rights protection with international criminal responsibility contributed to the creation of several international criminal courts charged with prosecuting individuals accused of specific crimes. Moreover, specific criminal offenses have been affirmatively recognized as contrary to international law, and as providing substantive jurisdiction for prosecution in one of the newly created international criminal tribunals. The globalization forces behind the transformation of international law exercised an expansive influence on the field of international criminal law by broadening its horizons and enlarging the idea of global accountability for heinous individual crimes.

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119 Id.
120 Id.
121 Id. (noting that state and non-state actors have accepted, over last several centuries, that individuals may be responsible under international law for acts against human dignity).
124 Dunoff et al., supra note 35, at 653. The ICTY, for example, specifically recognized that states had accepted that certain violations of customary international humanitarian law created individual responsibility. See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–134 (Oct. 2, 1995).
125 The globalization movement also influenced the idea of international criminal responsibility by providing more alternatives to domestic criminal prosecution of human rights offenders. In today’s globalized world, actors outside the relevant state may provide support to the offender’s home state; foreign states may consider prosecuting the offender themselves under various extra-territorial jurisdictional principles; and states may act to set up international tribunals to try such offenders. Dunoff et al., supra note 35, at 608.
1. Creation of New International Courts

Although the idea of international criminal prosecutions gained popularity in the wake of World War II and the Nuremberg Tribunal, a very limited number of such trials actually took place during the second half of the twentieth century. The 1990s, however, witnessed a rebirth of the idea, beginning with the creation of several new international tribunals.

Following the bloody civil wars in the former Yugoslavia and Rwanda, the U.N. utilized its Chapter VII powers to create the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals were charged with a specific mandate: to prosecute individuals accused of specific heinous offenses, such as genocide, war crimes, and crimes against humanity, that took place in the territory of the former Yugoslavia and Rwanda during a specific time period. The creation of the International Criminal Court (ICC) in 1998 followed the same evolutionary trend of prosecuting individuals accused of extraordinarily heinous crimes in an international forum.

Although the jurisdictional mandates of these tribunals were strictly limited temporally, territorially, and substantively, they nonetheless represent a giant step toward solidifying the idea of individual international criminal responsibility, born in Nuremberg but put aside during the second half of the twentieth century.

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126 The Nuremberg trials took place as part of the International Military Tribunal, established through the London Charter. Id. at 609.
127 Bassiouni, supra note 123, at 38–39 (noting that because of Cold War, very few international prosecutions took place despite existence of many conflicts because “[j]ustice was the Cold War’s casualty”).
129 Dunoff et al., supra note 35, at 653.
131 The ICTY and ICTR can prosecute individuals accused of genocide, crimes against humanity, and war crimes. The ICTY can consider any crimes committed in the former Yugoslavia after 1991, up to the present; whereas, the ICTR is confined to crimes in Rwanda in 1994. Both tribunals are to “wind down” and complete their work by 2010. Dunoff et al., supra note 35, at 653, 656.
132 See Bassiouni, supra note 123, at 112 (“[S]ince 1948, there have been few criminal investigations or prosecutions.”).
tional notion of international law, most types of individual criminal responsibility would be handled domestically under domestic law. For example, suppose a Canadian was murdered by a Swedish killer. Historically, the only recourse for the family of the Canadian victim was to ask the Canadian government to issue a diplomatic protest to the Swedish government. Moreover, if a military dictator from a given country decided to exterminate a minority group, such acts would be seen as matters of purely domestic jurisdiction. In other words, the concerned state could, if it chose to do so, prosecute the military leader domestically. Practically speaking, such prosecutions never took place while the offending leader was still in power, and very rarely took place even after a change of regimes for a variety of reasons, including: fears of regional instability; lack of democracy in the new regime; need for national reconciliation; and lack of recognition of international criminal norms.

The evolutionary movement that began transforming international law played a dominant role in transforming the international criminal law field. With the notion that international law encompasses much more than purely inter-state relations, international criminal law gained freedom to explore the idea of criminalizing individual offenses—typically handled in domestic fora—on an international level. The creation of international tribunals was a logical step in that direc-

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133 See Dunoff et al., supra note 35, at 607 (describing phenomena of recognition of criminal responsibility under international law, which began as early as fifteenth century). As noted above, certain crimes had been internationalized early on, such as piracy and trading in slaves. See id. Nevertheless, most other crimes would be prosecuted within a domestic criminal system.


135 See id.

136 Austen L. Parrish, 31 Am. Indian L. Rev. 291, 294–96 (2006) (discussing traditional notion of state sovereignty as asserting that “[s]o long as a state did not cause harm outside its territory, international law had little to say about what a state did internally”). Under traditional notions of sovereignty, any domestic policy choices, even those as flagrant as the decision to exterminate a minority group, would be free from external or internal constraints. See Cohan, supra note 4, at 914–15 (discussing “Westphalian sovereignty,” or the right of a sovereign state to be left alone from external interference, and “domestic sovereignty,” or the right of a sovereign state to be free of internal interference).

tion, as it provided specific jurisdictions to handle criminal prosecutions of individuals accused of international offenses.\textsuperscript{138}

More recently, the field of international criminal law has transformed itself once more by encompassing the idea of hybrid tribunals—jurisdictions created by international agreement between the U.N. and the host country. These agreements mix local law in their otherwise internationally-oriented statutes and employ a mix of domestic and international personnel. Examples of such tribunals include East Timor,\textsuperscript{139} the Special Court for Sierra Leone,\textsuperscript{140} the Iraqi High Tribunal,\textsuperscript{141} and the Extra-Ordinary Chambers in the Courts of Cambodia Tribunal.\textsuperscript{142} These hybrid courts solidify the idea of international criminal responsibility while recognizing the need to involve aggressors’ home countries in the prosecution process, for substantive as well as practical reasons.\textsuperscript{143} Moreover, they exemplify globalization—the interconnectivity between local and global domains as well as the linkage between domestic and international matters.\textsuperscript{144}

2. Creation of New Offenses

With the rebirth of international criminal tribunals and their quick creation in the 1990s, it became crucial to define specific offenses that would merit such high-profile prosecution in the interna-

\textsuperscript{138} Dunoff et al., supra note 35, at 18 (describing establishment of new international tribunals in 1990s).


\textsuperscript{140} See Sterio, supra note 130, at 895–99; see also Ellis, supra note 128, at 136–39 (discussing Special Court for Sierra Leone in context of an accountability policy in Liberia).

\textsuperscript{141} For a discussion of the Iraqi High Tribunal, see generally Michael P. Scharf & Gregory S. McNeal, Saddam on Trial: Understanding the Iraqi High Tribunal (2006); Tarin, supra note 139. The Iraqi High Tribunal is not a truly hybrid court because its seat is in Baghdad, its prosecutor is Iraqi, and its judges are all Iraqi. Thus, the Iraqi High Tribunal has been characterized as an “internationalized” domestic court because its statute and rules of procedure are modeled on the ICTR, ICTY, and the Special Court for Sierra Leone. See Scharf & McNeal, supra, at 57–59.

\textsuperscript{142} For a discussion of the Cambodian court, see Dunoff et al., supra note 35, at 656–57; Ellis, supra note 128, at 125–28.

\textsuperscript{143} Avril McDonald, Sierra Leone’s Shoestring Special Court, Int’l Rev. of the Red Cross, Mar. 2002, at 121, 121–124 (discussing distinct features of Special Court).

\textsuperscript{144} See supra note 128 and accompanying text (providing a definition of globalization); see also Berman, supra note 1, at 540 (discussing use of hybrid courts in context of a discussion on plural sources of legal authority, a phenomenon linked to globalization).
International law, even in its most traditional form, encompassed the idea that individuals should be treated fairly during wartime. This notion logically follows the main premise of traditional international law: states, at peacetime, have unlimited sovereignty within their territory. At wartime, however, states transcend their borders and encroach on other states’ sovereignty. Thus, special rules are needed to address situations in which jurisdictional lines become blurred and territory no longer equals sovereignty.

The multiple Hague Conventions stemming from the beginning of the twentieth century, the four Geneva Conventions negotiated in the wake of World War II, and the Conventions’ two Additional Protocols, represent the bulk of international legal norms specifying codes of behavior during wartime, as they relate to both soldiers and civilians. These norms, crafted to handle traditional warfare where states and their armies fought in clearly delineated battlefields, proved insufficient in the face of modern wars—often brutal civil conflicts, involving para-military groups, guerrillas, civilians, and interference from neighboring states. Recognizing this problem, drafters of the above-mentioned international court statutes sought to criminalize offenses in a manner that would encompass specific conduct taking place in the


146 International law has long embraced the notion of jus in bello, commonly referred to as the law of war or international humanitarian law, which attempts to shield individuals from certain types of wartime harm, and which regulates the conduct of armed conflict. See DUNOFF ET AL., supra note 35, at 527.

147 Parrish, supra note 136, at 294–96.

148 DUNOFF ET AL., supra note 35, at 527 (describing development of law of war).

149 “Hague law” refers to a series of conferences held in the Hague, producing a set of declarations and conventions, most notably in 1899 and 1907. Id.

150 The Geneva Conventions of 1949 place numerous obligations on states to protect people in international armed conflict who are not actively engaged in hostilities. These people include the sick and the wounded (Convention No. 1), the sick and the wounded at sea (Convention No. 2), prisoners of war (Convention No. 3), and civilians (Convention No. 4). See generally Geneva Convention No. 4, supra note 101; Geneva Convention No. 3, supra note 101; Geneva Convention No. 2, supra note 101; Geneva Convention No. 1, supra note 101. In addition, Protocol I to the Geneva Conventions of 1977 includes additional rules covering international conflicts, and Protocol II to the same conventions includes rules covering internal armed conflict. Protocol Additional (No. 1) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol II, supra note 122; see also DUNOFF ET AL., supra note 35, at 628, 638 (discussing subject matter of four Geneva Conventions).

151 Protocol II supra note 122; Protocol I, supra note 150.

152 DUNOFF ET AL., supra note 35, at 537–38.
new type of warfare. The ICC, ICTY, and ICTR statutes relied on the Nuremberg Charter to criminalize genocide and war crimes. These statutes, however, expanded the Nuremberg idea of crimes against humanity that criminalized this offense purely during wartime, into the notion of crimes against humanity applied equally to peace and wartime and to the new types of warfare.

Moreover, in the context of specific conflicts, statutes of some of the above tribunals adopted rules borrowed from domestic laws to criminalize conduct that was unique to the given war. Thus, the Special Court for Sierra Leone statute gives the prosecutor the ability to indict individuals accused not only of the most heinous offenses, such as genocide, war crimes and crimes against humanity, but also of offenses specific to the civil war in Sierra Leone. These include offenses related to the abuse of girls, those related to the destruction of property, and those related to the use of child soldiers. Similarly, the Extraordinary Chambers in the Courts of Cambodia criminalizes offenses such as the destruction of cultural property, crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, as well as crimes of homicide, torture, and religious persecution as defined in the Cambodian domestic penal code.

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153 Charter of the International Military Tribunal at Nuremberg art. 6, 82 U.N.T.S. 279 (1945).
154 Id. Under the Nuremberg Charter, the offense of crimes against humanity merely extended the offense of war crimes to the same category of protected person-civilian, so that crimes against humanity were reflections of an extension of war crimes. Thus, crimes committed before 1939 were excluded from prosecution under this offense.
156 Scharf & McNeal, supra note 141, at 3 (noting that Iraqi High Tribunal’s jurisdiction is comprised of a mix of international law crimes and domestic law crimes).
The field of international criminal law, under the evolutionary influence of general international law, has thus transformed itself over the last two decades. The notion of inter-state relations as the governing mode of dialogue in international criminal law is no longer prevalent, and this field now governs individual criminal responsibility and extends to spheres traditionally left to purely domestic powers.

C. Private International Law

The globalization movement has played a particularly dominant role in the world of commerce. Large and even mid-size commercial operators no longer deal with local or regional partners; today, they frequently engage in cross-border business, dealing with foreign entities.\textsuperscript{159} Laws governing such cross-border transactions have changed correspondingly.\textsuperscript{160} We no longer deal with purely national commercial laws, but instead have to look for supra-national legal authority that has the power to regulate cross-border transactions.\textsuperscript{161} We have witnessed a rise of cross-border regulations, aiming to provide a legal framework for the globalized commercial world. At the same time, we have also witnessed a proliferation of actors. Traditionally, only states could conclude treaties, in which they could choose to protect their national business interests.\textsuperscript{162} Nowadays, commercial treaties are being concluded between states and foreign investors directly.\textsuperscript{163} This public/private merger in the field of cross-border commercial law epitomizes the entire shift of international law from a body of law governing inter-state relations, to a complex web of regulations concluded between state and non-state actors and governing private entity-state relations.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{159} See Sterio, \textit{supra} note 70, at 97.
\item \textsuperscript{160} See id.
\item \textsuperscript{161} Hannah L. Buxbaum, \textit{Conflict of Economic Laws: From Sovereignty to Substance}, 42 Va. J. Int’l L. 931, 942–54 (2002) (discussing ways in which “regulatory power traditionally enjoyed by sovereign states has shifted” to supranational level, to private actors, and to “informal networks constituted among sub state-level agencies in different countries”).
\item \textsuperscript{162} See Vienna Convention on the Law of Treaties art. 2(1)(a), 1155 U.N.T.S. 331 (1969) (defining treaty as “an international agreement concluded between states . . . governed by international law”).
\item \textsuperscript{163} See Dunoff et al., \textit{supra} note 35, at 216–17 (discussing corporations and businesses as international actors).
\item \textsuperscript{164} See Berman, \textit{supra} note 1, at 550 (noting that private parties today exercise forms of governmentally authorized power).
\end{itemize}
1. Creation of New Cross-Border Regulations

Over the past few decades, several cross-border regulations have been concluded to provide a legal regime for international transactions involving commercial entities coming from two or more different states.\textsuperscript{165} In other words, in today’s inter-connected world, globalization has dictated a harmonization of substantive rules in specific fields. This harmonization supersedes national rules and undermines the traditional concept of state sovereignty. It also illustrates the complexity of modern international law in its transformed or globalized version.

In the law of sales, the U.N. Convention on the International Sale of Goods (CISG) was negotiated, representing a set of default rules that contracting parties refer to if their international sale contract are silent on certain issues.\textsuperscript{166} Under the CISG, transacting parties may opt out of any nation-state law and instead choose a sort of \textit{lex mercatoria} to govern their interactions, dispensing altogether with the need to consult any state laws.\textsuperscript{167}

In the field of international trade, the WTO already plays a hugely significant role, providing not only a body of substantive rules, but a dispute settlement mechanism as well, which encompasses state commercial interests.\textsuperscript{168} Under this mechanism, states act against each other like private commercial entities would in a typical private arbitration.\textsuperscript{169} Moreover, the WTO appellate tribunals seem to be creating an international common law of trade and amassing a body of legal rules that challenge traditional conceptions of state sovereignty and override domestic court decisions.\textsuperscript{170} Finally, NGOs and international civil soci-

\textsuperscript{165} See id. at 520–23 (discussing undermining of public/private law distinction in field of private international law).


\textsuperscript{168} Dunoff et al., supra note 35, at 834; Berman, supra note 1, at 521–22.


\textsuperscript{170} See Bhala, supra note 29, at 850 (“In brief, there is a body of international common law on trade emerging as a result of adjudication by the WTO’s Appellate Body.”); Lori M. Wallach, \textit{Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards}, 50 U. Kan. L. Rev. 823, 825 (2002) (“Expansive international rules strongly enforced through international dispute resolution bodies have significant implications for the laws and policies domestic governments may establish, as well as for the processes domestic governments use to make policy.”).
ety groups have become active in the WTO process, attempting to use the appellate panels to further their specific goals, particularly in environmental and labor law.  

Also in the field of transnational trade, NAFTA plays a dominant role in the North American continent. Under NAFTA, private investors can challenge a NAFTA government’s regulatory decision directly within the NAFTA dispute resolution system, thereby again challenging the notion of state sovereignty. In the field of intellectual property, WIPO functions similarly to the WTO. Moreover, numerous cross-border regulations exist in the securities and tax fields, which are particularly impacted by the globalization movement. Finally, international trade association groups and their standard-setting organs wield tremendous influence in creating voluntary guidelines that become industry norms and often have strong public policy ramifications.

All of the above involve cross-border regulatory rules in the form of treaties. All of the above were negotiated by state parties, but were heavily influenced by private commercial interests, epitomizing again the private/public merger and the complexity of today’s globalized international law. According to Michael Reisman, the term “private” in “private international law” is a “misnomer, for what is transpiring is

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173 See id.

174 See Jeffrey K. Walker, *The Demise of the Nation-State, the Dawn of New Paradigm Welfare, a Future for the Profession of Arms*, 51 A.F. L. Rev. 323, 327 (2001) (discussing how organizations such as WTO and WIPO have encroached on state sovereignty and that latter sets and enforces international trademark and patent policy).


176 Berman, *supra* note 1, at 522–23. In the chemical industry, for example, the Canadian Chemical Manufacturers Association and the International Counsel of Chemical Associations have set industry standards in conjunction with other NGOs and environmental organizations. See Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 Vand. J. Transnat’l L. 487, 508–09 (2002). As another example, the Fair Labor Association has created standards now accepted as the norm in the apparel industry. See Fair Labor Ass’n, Workplace Code of Conduct and Principles of Monitoring, available at http://www.fair labor.org/conduct.
a fundamental interstate competition for power that falls squarely within the province of public international law.”

Private international law has thus transformed itself from a set of transnational rules governing non-state, commercial entities, to a body of supra-national laws and regulations, which govern relations among many different state and non-state entities.

2. Expanded Role of Non-State Commercial Actors

Following the rise of cross-border regulations, typically negotiated and concluded among states, private actors became more involved in international commerce, attempting to exercise a direct influence on states and to obtain favorable treatment in their business endeavors. Private investors started lobbying their own governments to conclude so-called bilateral investment treaties (BITs) with developing countries. Although BITs represent a traditional form of international lawmaking—treaties negotiated among states—they signal a shift in the type of actors present on the international scene. BITs truly are about investors’ interests and their power to lobby and persuade their governments to conclude favorable treaties with foreign nations. They demonstrate that powerful private interests can act and influence the international treaty process, and that non-state actors have gained an important seat in the world of international relations.

Following the proliferation of BITs, private investors began working directly with foreign nations on various financing projects, typically

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178 Dunoff et al., *supra* note 35, at 860 (noting most of growth in international production over past decade has come from cross-border mergers and acquisitions).

179 Id. at 861 (noting that several European states are entering into BITs with developing world, and that United States launched its own BIT program in 1977 and began to enter into BITs with developing states in 1980s).

180 As noted above, traditionally only states could be subject to international law—whoever wronged a person indirectly harmed his state. The harmed individual had to persuade his state to adopt his grievance on the international level against the offending state. The pursuit of such claims by states in the commercial world is problematic for political, diplomatic, and foreign policy reasons. Thus, with the rise of foreign investment, pressures built for alternative mechanisms, and BITs, which provide strong investor protection as well as a dispute settlement procedure, are one of the responses. Id. at 869.

181 Private investors also have important protection, besides BITs, under the ICSID Convention. Under this Convention, private parties have direct access to an international arbitral forum to pursue claims against host states—namely, the ICSID, an institution closely associated with the World Bank. Id. at 870.
linked to building infrastructure in developing countries.  

Private investors started concluding commercial contracts directly with foreign governments that specify the investors’ role in the particular building project.  

This phenomenon, typically referred to as “project finance,” demonstrates that everything about traditional commercial law has changed. For one, commercial agreements are no longer negotiated simply by states, but they also involve private entities as direct contracting partners.  

Additionally, the subject matter of treaties has shifted from detailing particular state interests and trade-offs, to focusing on investment relations and the rights and liabilities of private investors.  

Finally, these project finance agreements signal that states are willing to relinquish a tremendous amount of their sovereign power to private entities.  

For example, states will allow private operators to run their roads, dams, factories, and plants.  

Globalization, in this context, has impacted state behavior in a powerful way, by transferring sovereign-type powers to non-state actors and by involving the latter heavily in the commercial negotiation process.

III. The Impact of Globalized International Law

As described above, international law has transformed itself over the past few decades and now represents a complex body of global rules and regulations that apply to a vast field of state and non-state actors. Although the latter phenomenon is relatively non-controversial and has already received significant scholarly attention, the relevant question for the purposes of this Article is whether such globalized international law has had a significant impact on international legal ac-

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184 See Brealey, supra note 183, at 25 (noting that in recent years, private funding of large infrastructure investments has increasingly taken form of project finance, and describing main characteristics of such financings).

185 Banani, supra note 182, at 357 (noting that infrastructure development has been increasingly funded by private capital).

186 Id. at 356 (describing need for investor protection in project finance agreements).

187 Id. at 373–74 (describing risks to state sovereignty that private finances causes).

188 See Berman, supra note 1, at 550 (noting that states are increasing delegating authority to private actors).

189 See supra Part I.

190 See generally Berman, supra note 22; Sands, supra note 1.
tors. First, to what extent, if any, has globalized international law affected state behavior; and, second, to what extent, if any, has it affected individual behavior?

A. State Behavior

International law now displays a globalized shape: it covers a wide variety of legal fields, it encompasses a myriad of different rules and regulations, and it governs state as well as non-state behavior. In light of such a radical transformation, the relevant inquiry focuses on understanding how such transformation has affected state actors, and whether their behavior on the international scene has changed in considerable ways. Thus, this Article examines two different phenomena in this Part: (1) whether states comply with globalized international law more willingly than they did decades ago, when international law exhibited a more traditional form; and (2) whether states are more prone to incorporating globalized international law into their own domestic laws or to relying on globalized international law in their international relations. All these observations can be simplistically explained by the fact that lines between international and domestic legal domains have become so blurred that states no longer view international law as the "enemy."

1. Willing Compliance Phenomenon

Because international law is omni-present in state life, it seems that it no longer meets the same resentment it did in some legal cultures throughout the past century. Moreover, it seems that Louis Henkin’s famed observation, that most states obey their international legal obligations most of the time, is becoming truer by the day. Particularly

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191 See Cohan, supra note 4, at 954 (“Today there is a veritable panoply of treaties, regional agreements, U.N. Declarations, and other protocols that globalization is pushing toward a[n] orderless world so that domestic actions in one state can have rippling effects that impact other states.”).

192 See id.

193 The United States, for example, was overtly hostile to international law at the beginning of the twentieth century, as exemplified in its isolationist doctrine, which dominated U.S. foreign policy between the two world wars, and resulted in U.S. refusal to join the League of Nations. See, e.g., Bassiouni, supra note 123, at 20 (“By then, the United States was in the throes of isolationism, with its rejection of President Woodrow Wilson’s internationalist views, evidenced by Congress’ refusal to have the United States become part of the League of Nations.”); WBUR, U.S. Foreign Policy, 1776–2001, http://www.wbur.org/special/special-coverage/feature_isolation.asp (last visited May 10, 2008).

relevant, however, is the reason behind such state compliance. This Article argues that the evolution of international law into a globalized force majeure has instilled a legal sense of obligation in states toward this new globalized international law. Because international law no longer entails mainly state relations, any state behavior on the international scene today necessarily affects a wide range of actors. Thus, states, when they (mis)behave, have to account for a variety of consequences that their (mis)behavior will produce: they have to envision the impacted state, as well as non-state actors; they have to calculate whether any of their international legal obligations under the myriad of international treaties they may be party to will be triggered; and they have to fear any grievances that may be asserted against them in a variety of possible jurisdictions. When such a complicated calculus must be performed before any state action, this Article argues that states are likely more willing to take international law into account, or to at least try not to disrespect it in a blatant manner.

It may be difficult to call such state compliance with international law “willing” when any noncompliance may result in serious sanctions, and when the “willingness” may in fact stem from fear of sanctions and consequences. This Article argues, however, that the repetition of compliance with international law, although caused at first by a threat of sanctions, may ultimately result in a new norm or custom of state behavior, whereby states would truly obey international law from a sense of legal obligation and from a tradition of long-standing and uniform practice of doing so.

For example, after the terrorist attacks on the United States on September 11, 2001, the Bush administration chose to detain so-called enemy combatants at the Guantanamo military base in Cuba. Under

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195 There are many theories of compliance with international law, the major ones being institutionalism, constructivism, the New Haven School, a Kantian model, and a managerial model. See Dunoff et al., supra note 35, at 30–31; see also Koh, supra note 36, at 566–70 (discussing emergence of transnational law as a reason for compliance with international law). See generally Berman, supra note 22 (arguing that approach to international law should be a mixture of Robert Cover’s legal pluralism and insights of the New Haven School); Harold Hongju Koh, Filartiga v. Pena-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture, in INTERNATIONAL LAW STORIES, supra note 32, at 45, 67–73 (using Filartiga to illustrate a key claim of the “New New Haven School of International Law” about application of international law by individual countries).

196 See Oona A. Hathaway, Hamdan v. Rumsfeld: Domestic Enforcement of International Law, in INTERNATIONAL LAW STORIES, supra note 32, at 229, 234 (describing establishment of U.S. military detention center at Guantanamo Bay); see also Dunoff et al., supra note 35, at 999 (discussing establishment of Guantanamo detainee program).
a traditional version of international law, the United States would be concerned only about the impact this detention had on the parent state of the detainees.\textsuperscript{197} Other than those states, the United States would evidently be free to treat the detainees as it wished, within the purview of its domestic law.\textsuperscript{198} The globalization movement that has transformed international law brings a major change in the above analysis.

First, the United States must now consider not only relevant state actors, but also a number of non-state and supra-state actors. In addition to concerns raised by the home states of detained individuals, the United States has received a vast number of complaints about the Guantanamo detention facility from a variety of NGOs, regional state organizations, and human rights protection bodies.\textsuperscript{199} Moreover, the United States can no longer consider only whether the detention program is legal under its domestic law; it must also consider all relevant international conventions to which it is a member.\textsuperscript{200} Thus, the United States could very well interpret the detention program as legal under its Constitution and Bill of Rights, but the same conclusion may not hold true under the four Geneva Conventions, the Hague Conventions, or the Torture Convention. To complicate things further, the evolutionary process of international law has elevated certain legal principles to the status of customary norms, which bind all states in a conclusory manner without room for derogations or reservations, even if states are not parties to specific treaties codifying the legal norms.\textsuperscript{201} Thus, if U.S. treatment of Guantanamo detainees were to violate a customary norm

\textsuperscript{197} For a general discussion of the difference between the traditional version of international law, and the globalized or evolutionary version of international law, see supra Part II.

\textsuperscript{198} See Cohan, supra note 4, at 914–15 (discussing “Westphalian sovereignty,” or the right of a sovereign state to be left alone from external interference).

\textsuperscript{199} See Hathaway, supra note 196, at 235–36 (describing criticism Bush Administration received because of alleged abuse of Guantanamo detainees).

\textsuperscript{200} See id. at 235. The Bush Administration effectively claimed that the Geneva Conventions did not apply to the conflict with al Qaeda. This shows that the Bush Administration, although adamant about its desire to continue the Guantanamo detention program, saw the need to justify its actions internationally, and to prove that they were in compliance with U.S. international legal obligations. See id. It is also worth noting that the U.S. Supreme Court—possibly because of domestic and international criticism of the Bush Administration—ultimately held that the military commissions designed to try al Qaeda detainees violated Common Article 3 of the 1949 Geneva Conventions. See Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

\textsuperscript{201} See Dunoff et al., supra note 35, at 78–81 (providing general discussion of international custom). States can choose to “opt out” of an emerging customary norm by objecting to the rule as it develops. Id. at 78. Once a norm reaches the status of international custom, however, all states are bound by it. Id.
of international law, such treatment would be a violation of international law, although legal under domestic law.

Finally, the United States must both consider the effect of its actions on the proliferating number of relevant actors impacted by its behavior and the implicated legal norms, as well as account for a number of jurisdictions that may choose to challenge the United States as a country, or some of its leaders, if U.S. behavior becomes so offensive as to warrant judicial proceedings. States may assert grievances against the United States in the ICJ, a traditional form of state-to-state complaint procedure. Additionally, state and non-state actors may complain about the United States to committees or judicial bodies set up under various international conventions, regional organizations, or other human rights protection mechanisms. Such state and non-state actors may directly target top U.S. political leaders through criminal complaints brought in foreign domestic courts, or even international courts, under their expansive jurisdiction statutes. Thus, in light of all the legal challenges such a program may face on the international level, this Article argues that a country like the United States should at least think twice before instituting such a program as Guantanamo.

In the specific case of the United States, international law has not necessarily changed the Guantanamo policy at stake. International law has however, certainly provoked a vigorous public debate at both the international and national levels concerning the legality of the policy. The existence of such a debate signals the erosion of state sover-

202 See Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993. ICJ jurisdiction is based on state consent, so that any exercise of jurisdiction by the tribunal would have to be based on a treaty or on ad hoc consent. See id.


204 See Dunoff et al., supra note 35, at 383. For example, a complaint was filed with the German Federal Prosecutor’s Office against U.S. Secretary of Defense Donald Rumsfeld and other government officials by a U.S.-based NGO and several Iraqi citizens alleging that the officials were responsible for unlawful acts committed against detainees at the Abu Ghraib prison and elsewhere. Id. The complaint was brought under the German universal jurisdiction statute. Id. Although this complaint was ultimately dismissed by the German Prosecuting Attorney, it nonetheless signals the possibility that U.S. leaders may face prosecution in a foreign domestic court. See id.

205 For a discussion of universal jurisdiction statutes, see supra Part I.D.

206 Cohan, supra note 4, at 942 (“Subsequently, human rights and civil liberties organizations, politicians, and newspapers brought further pressure upon the Bush Administra-
eignty brought about by the evolutionary process that has been transforming international law. This erosion of state sovereignty translates itself into a heightened level of compliance with international law. Although compliance might be a direct product of a pragmatic calculus, whereby states realize it may be strategically advantageous for them to obey an international rule, this Article argues that it nonetheless signals a phenomenon of willing legal obedience. Continuous repetition of willing state compliance with international law may instill a profound sense of legal obligation in states’ behavior in the years to come.

2. State Reliance on International Law Domestically and in International Relations

Willing compliance with international law has already shaped state behavior in two ways. First, states seem willing to comply with international law on a new level—by relying on it directly in domestic legal arenas. Second, states seem eager to rely on international law to justify specific actions in international relations with other states or entities.

Traditionally, only a monist system encompasses international law as part of domestic law. In a dualist system, a particular international legal norm must first be incorporated into domestic law by a specific statute. Similarly, in a traditional system, national jurisdictions are independent of the ICJ, and the ICJ is not supposed to function as a supra-national entity. Yet, the globalization of international law has blurred these lines as well. Because international law touches on so many aspects of everyday life, and now pertains to issues that had been traditionally left to the realm of domestic law, when asked to resolve such issues, domestic courts are increasingly faced with international norms or rulings by the ICJ or other supra-national courts. This is particularly true in the human rights legal field.

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207 See supra Part III.A.1.
208 Dunoff et al., supra note 35, at 267–68.
209 Statute of the International Court of Justice, supra note 203, art. 36. Under the ICJ Statute, the tribunal’s jurisdiction is based solely on state consent. Id.
210 See, e.g., Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) 486–99 (1989). In Soering, the European Court of Human Rights held that extradition of a German national accused of murder from the United Kingdom to the United States breached article 3 of the European Convention on Human Rights. Extradition would violate this article, which bans torture or inhuman or degrading treatment or punishment, because the defendant would be subject to the death penalty and “death row phenomenon” (the psychological degradation caused by living on death row). See id.
For example, litigation under the Alien Tort Statute in the United States, revived in the *Filartiga* case,\(^{211}\) centers around violations of the law of nations. Thus, U.S. domestic courts are called on to decide when there has been a violation of international law that would warrant damages in the domestic legal system.\(^{212}\) General Augusto Pinochet’s extradition proceedings between the United Kingdom and Spain required domestic courts, particularly in the United Kingdom, to interpret the multilateral Torture Convention and how its diplomatic immunity provision would affect Great Britain’s legal obligations *vis-à-vis* the relevant parties.\(^{213}\) More recently, an Oklahoma criminal court specifically relied on an ICJ ruling\(^{214}\) in a case involving the claim that the United States had violated the Vienna Convention on Consular Relations (Vienna Convention).\(^{215}\) The Oklahoma court gave specific deference to the ICJ’s interpretation of the Vienna Convention and held the United States was bound by the Vienna Convention, and more importantly, by the ICJ interpretation thereof.\(^{216}\) Thus, on a judicial level, states, and in particular their judges, seem more willing to rely on international law in reaching everyday decisions because international law now governs and influences a growing variety of legal areas.\(^{217}\)

\(^{211}\) See *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).

\(^{212}\) See *Koh*, *supra* note 36, at 65–66 (describing an era of “transnational public law litigation,” a novel and expanding effort by state and individual plaintiffs to fuse international legal rights with domestic legal remedies”).


\(^{214}\) Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 1 (Mar. 31). The ICJ held that the United States breached its obligation under article 36(1)(a) of the Vienna Convention on Consular Relations to ensure that Mexican consular officials can communicate with their nationals and, under article 36(1)(c), have the right to visit their nationals in detention. *Id.* ¶ 153. The ICJ held that “the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the [U.S.] courts . . . with a view to ascertaining whether in each case the violation of Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice.” *Id.* ¶ 121.


\(^{216}\) See *Torres v. State*, No. PCD-04–442, 2004 WL 3711623, (Okla. Crim. App. May 13, 2004). Judge Chapel stated that his court was, without any doubt, bound by the Vienna Convention, and thus also bound to give full faith and credit to the ICJ’s *Avena* decision. *Id.* at ¶1–5.

\(^{217}\) *Dunoff et al.*, *supra* note 35, at 29 (alleging that both “breadth” and “depth” of international law have increased). The U.S. Supreme Court has shown a particular willingness to consider international law. In *Thompson v. Oklahoma*, the Court determined that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibited the execution of any offender under the age of sixteen at the time the crime was committed. The Court stated that this view was consistent with views expressed by “other nations that share our
Additionally, states seem more willing to rely on international law on a diplomatic level. In their international relations, states like to have the international law “crutch” and be able to pronounce the legality of their actions under international law. Because international law now touches on so many legal areas, states seem to rely on it in many more aspects of their diplomacy. International law experts have taken up predominant positions in governments, and virtually every foreign policy or diplomacy decision is scrutinized for its coherence under international law.218

For example, when NATO countries decided to launch air strikes on the territory of the former Yugoslavia because of then-President Milosevic’s oppressive rule of the province of Kosovo, they sought U.N. Security Council approval for their use of force.219 Even when the U.N. fell short of approving such use of force, NATO countries still sought to justify their actions on the ground of international necessity,220 al-

Anglo-American heritage, and by the leading members of the Western European community.” 487 U.S. 815, 830 (1988). In Roper v. Simmons, another case interpreting the Eighth Amendment in connection with a juvenile offender, the Court wrote that it was appropriate to refer “to the laws of other countries and to international authorities.” 543 U.S. 551, 575 (2005). The Court specifically considered the U.N. Convention on the Rights of the Child, which the United States has not ratified, and which bans capital punishment for crimes committed by juveniles under eighteen. See id. at 576. The Court further stated, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” Id. at 578. Even Justice O’Connor, in her dissent, acknowledged that “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” Id. at 604 (O’Connor, J., dissenting).

Note, however, that the U.S. Supreme Court has recently shown skepticism regarding the enforceability of international law in domestic courts, holding that the Vienna Convention was not self-executing and that the U.S. President could not order states to abide by ICJ rulings. See Medellin v. Texas, 128 S. Ct. 1346, 1351 (2008). This decision does not imply that international law will be entirely displaced from our judicial dialogue; rather, this decision may simply reflect the notion that, in most cases, congressional action must be taken in order to ratify international law and implement it domestically.


220 See Press Release, Javier Solana, Secretary-General of NATO, NATO Press Release 040 (March 23, 1999). NATO Secretary-General Javier Solana, in his statement announcing the start of air strikes on the territory of the Federal Republic of Yugoslavia, referred to “military action . . . intended to support the political aims of the international commu-
though, arguably, NATO members were acting within their jurisdiction and had at least regional authority to act.\textsuperscript{221} This signifies that international law truly matters, and that powerful organizations like NATO would rather comply with international law, taking action that is not authorized internationally only when deemed truly necessary. For example, the U.S. government sought U.N. Security Council approval for both Gulf Wars, even though the United States had the military capacity to act unilaterally and had invoked self-defense grounds, which would have justified the use of force without Security Council approval.\textsuperscript{222} It can be argued that the United States sought U.N. affirmation for strategic or diplomatic reasons, but it can be equally argued that part of the affirmation process included a belief in the necessity of compliance with international law.

**B. Individual Behavior**

The above-described calculus that states now perform when faced with assessing the validity of their behavior in light of globalized international law also pertains to individuals.\textsuperscript{223} In other words, in the same manner that states’ behavior seems curtailed by the evolving and expanding forces of international law, individual rights appear to be gaining greater protection from state intrusion. Thus, the evolution and globalization of international law that has eroded state sovereignty has provided a sphere of protection to the individual—a sort of a buffer zone between individual rights and states’ prerogatives to regulate individual behavior. Individuals, in this new spectrum of protection stem-

\textsuperscript{221} North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. NATO has jurisdiction in Europe and is charged with maintaining peace and security on that continent by enabling member countries to exercise collective self-defense if one or more of such member countries are under an armed attack. See id.; see also Carter et al., supra note 19, at 549 (describing role of NATO).

\textsuperscript{222} Dunoff et al., supra note 35, at 891 (noting that United States sought U.N. Security Council authorization to use force in First Gulf War); id. at 894–95 (discussing issue of whether United States could have legally used force in First Gulf War in absence of Security Council authorization, on ground of self-defense); id. at 905–08 (describing U.S. efforts to obtain Security Council authorization to use force in second Gulf War, and, once efforts failed, its ultimate decision to use force without Security Council approval). Note also that the United States, as well as its allies in the second Gulf War, attempted to justify legally their decision to use force in various Security Council resolutions. Id. at 908–09. This exemplifies the importance of international legal justification for controversial actions on the international level, even for powerful countries like the United States. See id.

\textsuperscript{223} See supra Part III.A.1 (discussing “willing compliance” phenomenon whereby states comply with their international legal obligations more willingly today).
ming from globalized international law, now have different expectations about what states can do to them, as well as newly created rights enforceable in various courts of law.\footnote{See infra Part III.B.1.}

1. Expanded Individual Expectations in the Face of Globalized International Law

Individuals today expect more protection from international law. Because international law has become omni-present in everyday life, individuals can find a protectionist international legal norm in almost every aspect of their lives. For example, international human rights norms protect the individual from undue state interference with basic rights, such as the rights to be free of torture, to have one’s human dignity respected, to have counsel appointed, to vote, and to receive a general education.\footnote{See generally ICCPR, supra note 81; ICESCR, supra note 81; Universal Declaration of Human Rights, supra note 81. Many of these basic human rights stem from the so-called International Bill of Rights, consisting of the Universal Declaration, the ICCPR, and the ICESCR. See generally ICCPR, supra note 81; ICESCR, supra note 81; Universal Declaration of Human Rights, supra note 81.} International labor laws protect individual workers and place limits on the rights of their employers.\footnote{David M. Trubek, Emergence of Transnational Labor Law, 100 Am. J. Int’l L. 725, 727 (2006) (discussing “transnational labor law” or a regime of protection of workers’ rights). The International Labour Organization has maintained and developed international labor standards. For a complete database of conventions and recommendations setting forth international labor standards, see ILOLEX: Database of International Labour Standards, http://www.ilo.org/ilolex/english/convdispl.htm (last visited May 10, 2008).} International environmental laws provide the individual with a healthy living environment.\footnote{See, e.g., Rio Declaration on Environment and Development, June 14, 1992, U.N. Conference on Environment and Development, Doc. A/CONF.151/5/Rev. 1, reprinted in 31 I.L.M. 874 (1992); Declaration of the U.N. Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14, reprinted in 11 I.L.M. 1416 (1972).} International tax laws ensure that individuals do not have to pay their taxes multiple times if they are involved in international transactions.\footnote{See generally Internal Revenue Serv., U.S. Tax Treaties (2007) (describing tax exemptions provided by U.S. treaties), available at www.irs.gov/pb/irs-pdf/p901.pdf; HM Revenue & Customs, Digest of Double Taxation Treaties (2007) (describing double taxation treaties to which United Kingdom is party), available at www.hmrc.gov.uk/cnr/dddigest.pdf. Numerous countries have concluded bilateral taxation treaties exempting their citizens or residents from being subject of double taxation, which occurs when two or more taxes may need to be paid for the same asset, financial transaction and/or income, arising from an overlap between different countries’ tax laws and jurisdictions. EU member states have concluded a multilateral agreement on information exchange. This means that they will each report (to their counterparts in each other jurisdiction) a list of those
Such a protectionist structure directly affects individuals by providing a shield, a web of rules and regulations that ensure individuals are not unnecessarily burdened by the state. Unsurprisingly, individual expectations have changed. Individuals no longer believe in absolute state sovereignty. Individuals today can easily consult international law on many different aspects of their lives. When faced with a question of state powers—e.g., can my state do this to me?—individuals are likely to look to international law as a shield and to invoke international legal norms to curb state behavior. Most importantly, individuals are likely to invoke specific international legal norms as bestowing certain rights on them, and as taking away such rights from their home states.

2. Newly Created Individual Rights in Light of Globalized International Law

The globalization forces that have transformed international law and confined state behavior as well as expanded individual expectations, have also affected specific individual rights. Individual rights are typically created by domestic legal systems. These are known as private, judicially enforceable rights. In a dualist legal system, international law needs to be specifically incorporated into domestic law.

SAVERS who have claimed exemption from local taxation on grounds of not being a resident of the state where the income arises. These savers should have declared that foreign income in their own country of residence, so any difference suggests tax evasion. See European Commission, Taxation and Customs Union, http://ec.europa.eu/taxation_customs/taxation/gen_info/tax_policy/index_en.htm (last visited May 15, 2008) (providing overview of EU tax policies).


230 See, e.g., id. As a corollary to this protectionist nature of globalized international law, it is important to note that the evolution of certain international legal fields, such as international criminal law, has expanded individual liability, thus imposing additional limitations on individual behavior. For example, the concept of international criminal responsibility evolved over the latter half of the twentieth century, and was implemented particularly in the 1990s in the judicial proceedings that have taken place in the ICTY and ICTR. See supra Part III.B; see also Askar, supra note 145, at 84–112 (discussing different types of individual criminal responsibility as they exist in ICTY, ICTR, and ICC statutes). For literature on the work of the ICTY and ICTR and their role in implementing the notion of individual criminal responsibility, see Dapo Akande, International Law Immunities and the International Criminal Court, 98 A.J.I.L. 407 (2004); Dermot Groome, Book Review, International Crimes and the Ad Hoc Tribunals, 100 A.J.I.L. 993 (2006); Theodor Meron, Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals, 100 A.J.I.L. 551 (2006).

231 See supra Parts III.A & B.1.

by the passage of specific statutes; thus, an international legal norm
may only protect private, individual rights to the extent that the in-
corporating domestic statute allows.233 This result, however, seems to
have been somewhat undermined by recent litigation challenging this
traditionalist conception and seeking to establish that individuals can
sometimes rely on international law directly to have their individual
rights protected in a domestic court of law.234

Several examples of such litigation occurred in the United States, a
dualist legal system. There had been significant judicial debate over the
issue of whether article 36 of the Vienna Convention creates a private,
judicially enforceable right.235 Litigation in the United States centered
around the question of whether private plaintiffs could directly rely on
this international convention to have their private rights enforced and
protected by U.S. courts.236 Although the majority of the Court chose
not to answer this question directly in the latest case it heard on the
issue,237 the dissent strongly pointed out that the Vienna Convention is
a self-executing treaty, and that its provisions are such that “they are
intended to set forth standards that are judicially enforceable.”238 Al-
though the majority left the issue unanswered, the dissent suggested it
would be prudent to let the individual rely on this international treaty
directly, indicating a desire to recognize the importance of interna-
tional protectionist norms on the rights of the individual.239

In Europe, such a shift already occurred in the second half on the
twentieth century. There, individual rights are specifically protected
under the European Convention on Human Rights, and individuals
can bring specific grievances against their home countries in the Euro-

233 Dunoff et al., supra note 35, at 268.
234See, e.g., Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006); Medellin v. Dretke, 544
235 See, e.g., Sanchez-Llamas, 126 S. Ct. 2669; Medellin, 544 U.S. 660; Breard, 523 U.S. 371.
Article 36 of the Vienna Convention states that “if he so requests, the competent authorities
of the receiving State shall, without delay, inform the consular post of the sending
State if, within its consular district, a national of that State is arrested or committed to
prison or to custody pending trial or is detained in any other manner. . . . The said au-
thorities shall inform the person concerned without delay of his rights under this subpara-
graph.” Vienna Convention, supra note 166, art. 36(1)(b).
236 Several foreign plaintiffs have raised this argument unsuccessfully in U.S. courts.
See, e.g., Medellin, 544 U.S. 660; Breard, 523 U.S. 371.
237 Sanchez-Llamas, 126 S. Ct. 2669.
238 Id. at 2695 (Breyer J., dissenting).
239 Id. at 2698. The dissent noted that “the language, the nature of the right, and the
ICJ’s interpretation of the treaty taken separately or together so strongly point to an intent
to confer enforceable rights.” Id.
pean Court of Human Rights.\textsuperscript{240} Thus, individuals in Europe can rely on this multilateral treaty to have their rights protected and enforced in an international tribunal, and subsequently, in domestic tribunals that follow the European Court’s directive.\textsuperscript{241}

Furthermore, European individuals and corporate non-state actors have other newly created rights stemming from a variety of EU Regulations and Directives, which offer protection on many levels, including antitrust, labor, insurance, and health.\textsuperscript{242} Thus, the globalization trend in international law that has been transforming the world seems to have particularly embedded itself in Europe. In the United States, the trend seems weaker; nonetheless, U.S. courts appear at least more willing to consider international protectionist norms and their impact on individual rights.\textsuperscript{243}

Individual expectations and behavior have changed across the globe in light of the powerful influence of globalized international law, which has eroded state sovereignty in significant ways and granted the individual certain quasi-absolute rights and protections.\textsuperscript{244} The degree of protection afforded to the individual by modern-day international law may vary from region to region and country to country, but a core group of individual rights seem to have been firmly embedded in almost every nation’s legal culture, a phenomenon brought about by the potent forces of globalized international law.

Conclusion

The powerful forces of globalization have transformed international law through a process of evolution, which has had significant consequences on this legal field. Besides the proliferation of actors, processes, and sources in international law, this evolution has heavily impacted several legal fields, in particular human rights law, international criminal law, and private international law. The evolutionary

\textsuperscript{240} See Bowman v. United Kingdom, 26 Eur. Ct. H.R. 1 (1998); Sands, \textit{supra} note 1, at 546–47.

\textsuperscript{241} Seymour & Tooze, \textit{supra} note 203, at 119 (noting that judgments of European Court of Human Rights are binding on states as a matter of international law).

\textsuperscript{242} For a general discussion on the vast EU regulatory powers, see Peter L. Strauss, \textit{Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice Versa}, 12 \textit{Columbia J. Eur. L.} 645 (2006); see also \textit{Carter et al.}, \textit{supra} note 19, at 520–49 (discussing different kinds of legislative acts that can be adopted by European Community, including regulations and directives); Cohan, \textit{supra} note 4, at 940 (describing expansive EU role and fact that it has gained “legal supremacy over Member States”).

\textsuperscript{243} See, e.g., Sanchez-Llamas, 126 S. Ct. 266; \textit{Medellin}, 544 U.S. 660; \textit{Breard}, 523 U.S. 371.

\textsuperscript{244} See \textit{supra} Parts III.A & B.
process has also magnified the impact of international law, in its globalized shape and form, on state behavior and individual expectations. Although state powers and sovereignty seem to have been curtailed by this evolutionary process, by the same token, individual powers have been reinforced and reinvented through new transnational judicial norms and processes. How far the evolution of international law will take us remains uncertain, but it seems likely that international law will play a crucial role in the future life of both state and non-state entities, and that its study will require a truly elaborate approach.245

245 Scholars of the so-called “New” New Haven School of International Law have already started exploring the problem of finding the proper approach to the study of such a complex field as modern international law, and recommend the use of a pluralist approach, an inter-disciplinary focus, and as a commitment to the study of transnational law. See generally Berman, supra note 23; Laura A. Dickinson, Toward a “New” New Haven School of International Law?, 32 Yale J. Int’l L. 547 (2007); Koh, supra note 36. This Article focuses on the evolution of international law in light of globalization, and will leave the question of how to study such globalized international law to future endeavors.
INDIA’S NEW CONSTITUTIONALISM: TWO CASES THAT HAVE RESHAPED INDIAN LAW

Milan Dalal*

Abstract: As a nation of over one billion people and the world’s largest democracy, India is sometimes confronted with situations in which its democratic institutions clash. Under the Indian Constitution, legislation concerning land reform is placed in a special category designed to immunize it from judicial scrutiny. This scheme, known as the Ninth Schedule, has been abused by legislators seeking electoral benefit. Simultaneously, the country has been rocked by a series of public corruption scandals. As Parliament has sought to clean up its image by expelling disgraced members, its actions have been challenged as unconstitutional, leading to a constitutional showdown between the legislative and judicial branches. This Note analyzes two seminal decisions of the Indian Supreme Court, handed down in January 2007, which have the potential to transform Indian law by declaring the court the ultimate arbiter of the meaning of the Indian Constitution.

Introduction

India is often hailed as the world’s largest democracy.¹ At the core of that democracy is a thriving, independent judicial system that has been an important engine of social change and development.² Yet, despite possessing a well-developed system of law inherited from British colonial rule,³ for the first fifty years following independence

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² Justices of the Indian Supreme Court are chosen on the basis of seniority and free of political considerations at the behest of the President with consultation from the Chief Justice. The Chief Justice is appointed by the President.

from Britain, the nation’s supreme court vacillated in exerting the full checks on the legislative branch requisite in modern democracies.\textsuperscript{4} Two recent cases involving the power of courts to review Parliament’s legislative and non-legislative functions—the \textit{Coelho}\textsuperscript{5} and \textit{Raja Ram Pal}\textsuperscript{6} cases—demonstrate the Indian Supreme Court is embarking on a new era of judicial review, asserting itself as a co-equal branch of government and a body dedicated to upholding principles of democratic government.\textsuperscript{7}

Part I of this Note examines the background of India’s Constitution with respect to judicial review, the Ninth Schedule laws, the 1973 ruling of the Indian Supreme Court on which type of laws could be challenged, political corruption, and the power of Parliament to expel members. Part II describes recent jurisprudence of the court, including detailed discussion of the \textit{Coelho} and \textit{Raja Ram Pal} cases. Part III critiques these cases in terms of their positive and negative implications.

\textbf{I. Background}

\textbf{A. Background to Ninth Schedule Leading up to Coelho}

India achieved independence from Great Britain in 1947.\textsuperscript{8} Shortly afterwards, India’s leaders crafted the Constitution of India (constitution), which came into effect on January 26, 1950.\textsuperscript{9} Authored by Dr. B.R. Ambedkar, it is the longest written constitution in the world.\textsuperscript{10} As with most constitutions, all laws passed by the legislative branch must conform to its provisions.\textsuperscript{11}


\textsuperscript{5} I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Others, (2007) 2 S.C.C. 1 [hereinafter Coelho].

\textsuperscript{6} Raja Ram Pal v. Hon’ble Speaker, Lok Sabha & Others, (2007) 3 S.C.C. 184 (India) [hereinafter Raja Ram Pal].


\textsuperscript{8} Cambridge Illustrated History: British Empire 386 (P.J. Marshall ed., 2006).


\textsuperscript{11} See Supreme Court of India, Constitution of Supreme Court of India, http://supreme courtofindia.nic.in/new_s/constitution.htm (last visited May 5, 2008).
Not long after the enactment of the constitution, Parliament found reason to amend it.\textsuperscript{12} India’s first prime minister, Jawaharlal Nehru, a self-described “democrat and socialist,”\textsuperscript{13} had campaigned for decades against British imperialism and, after independence, vowed to free India from the stranglehold of elites.\textsuperscript{14} Nehru was a staunch supporter of nationalization and expropriation of land from the elite for redistribution to the poor.\textsuperscript{15} Yet, India’s new constitution had guaranteed a right of property to its citizens, and therefore Nehru’s grand plans for equitable redistribution of \textit{zamin} (land) were soon confronted by the \textit{zamindars} (landowners) in the courts.\textsuperscript{16} Early court rulings held the land reform laws “transgressed the fundamental right to property guaranteed by the constitution.”\textsuperscript{17}

As a result, Prime Minister Nehru introduced the First Amendment to the constitution of India on May 29, 1951, creating a famous scheme known as the “Ninth Schedule.”\textsuperscript{18} The First Amendment created article 31B,\textsuperscript{19} which described the Ninth Schedule and was inserted into part III of the constitution.\textsuperscript{20} Originally consisting of thirteen laws, the Ninth Schedule was narrowly crafted to immunize land reform laws from judicial review.\textsuperscript{21}

\textsuperscript{13} \textit{Anchor for Asia}, \textit{Time}, Oct. 17, 1949, \textit{available at} http://www.time.com/time/magazine/article/0,9171,853939,00.html.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} See Noorani, \textit{supra} note 12, at 731.
\textsuperscript{18} See Constitution (First Amendment) Act, 1951; Noorani, \textit{supra} note 12, at 731.
\textsuperscript{19} Article 31B reads: “Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force.” \textit{INDIA Const.} art. 31B.
\textsuperscript{20} See Constitution (First Amendment) Act, 1951.
\textsuperscript{21} Noorani, \textit{supra} note 12, at 731. Nehru himself commented on the narrow scope of laws belonging to the Ninth Schedule, stating, “It is not with any great satisfaction or pleasure that we have produced this long schedule. We do not wish to add to it for two reasons. One is that the schedule consists of a particular type of legislation [land reform laws], generally speaking, and another type should not come in. Secondly, every single measure included in this schedule was carefully considered by our president and certified by him.” \textit{Id.}
From the moment of the First Amendment and the introduction of land reform laws under the Ninth Schedule, a long saga ensued in the courts.\textsuperscript{22} Between 1951 and 1967, property owners challenged the laws and constitutional amendments that placed land reform laws within the Ninth Schedule.\textsuperscript{23} Initially, the laws were challenged as violations of article 13(2) of the constitution, which provides against derogation of fundamental rights.\textsuperscript{24} Analogizing the constitutional amendments to laws, plaintiffs creatively argued in \textit{Sankari Prasad Singh Deo v. Union of India}\textsuperscript{25} and \textit{Sajjan Singh v. Rajasthan}\textsuperscript{26} that the amendments were abridging the fundamental right to property and therefore were invalid under article 13(2).\textsuperscript{27} Nevertheless, in both decisions, the Indian Supreme Court rejected the arguments and “upheld the constitutional validity” of article 31B.\textsuperscript{28}

In 1967, however, the supreme court reversed itself and held, by a slim six-to-five majority, that the amendments were “laws” within the meaning of article 13.\textsuperscript{29} This was a significant decision, for the court ruled for the first time that there were implied limitations on Parliament’s power to amend the constitution.\textsuperscript{30} The court held that “Parliament would have no power from the date of the decision (February 27, 1967) to amend any of the provisions of part III so as to take away or abridge fundamental rights.”\textsuperscript{31} The court further noted that, if Parliament wished to amend fundamental rights, it would have to convene a Constituent Assembly (constitutional convention).\textsuperscript{32}

Following this significant decision, the Government continued its “radical measures” on the social front, destined once again to clash with the courts.\textsuperscript{33} One goal of the new prime minister, Indira Gandhi, Jawaharlal Nehru’s daughter, was to eliminate payments the Government was required to make to princes.\textsuperscript{34} In consideration for the

\begin{itemize}
\item \textsuperscript{22} \textit{See id.} at 731–33.
\item \textsuperscript{23} \textit{See id.}
\item \textsuperscript{24} \textit{India Const.} art. 13, § 2. Article 13(2) reads: “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” \textit{Id.}
\item \textsuperscript{25} \textit{Sankari Prasad Singh Deo v. Union of India}, A.I.R. SC 458 (1951) (India).
\item \textsuperscript{26} \textit{Sajjan Singh v. Rajasthan}, A.I.R. SC 845 (1965) (India).
\item \textsuperscript{27} \textit{Nayak, supra} note 17, at 2.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} I C Golak Nath & Ors v. State of Punjab & Anr, 2 S.C.R. 762 (1967) (India).
\item \textsuperscript{30} \textit{Nayak, supra} note 17, at 3.
\item \textsuperscript{31} Noorani, \textit{supra} note 12, at 732.
\item \textsuperscript{32} \textit{Nayak, supra} note 17, at 3.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Katherine Frank, Indira} 323 (2001).
\end{itemize}
peaceful accession of their territories to the Union of India at the time of independence from Great Britain, the constitution mandated annual payments, known as “privy purses,” to the displaced princes.\textsuperscript{35} These payments, however, were unpopular with the populace, and Mrs. Gandhi was determined to save to the treasury $6 million per annum through the elimination of the privileges. Hence, in September 1970, Gandhi muscled an amendment through the lower house of Parliament aimed at “rescind[ing] the privy purses.”\textsuperscript{36} Although the vote passed with significant margins in the lower house, it was defeated by one vote in the upper house.\textsuperscript{37} Following this parliamentary defeat of her amendment, Gandhi simply instructed her ally, President V.V. Giri, to “derecognize” the princes through a presidential proclamation, unconstitutionally stripping the royalty of their payments and titles.\textsuperscript{38}

The supreme court invalidated the derecognition of the princes as unconstitutional (along with a contemporaneously enacted measure nationalizing banks) in early December 1970.\textsuperscript{39} As one commentator described it, “[B]y now, it was clear that the Supreme Court and Parliament were at loggerheads over the relative position of the fundamental rights.”\textsuperscript{40}

In response to this blow from the supreme court, Mrs. Gandhi dissolved Parliament and called for new elections to take place in February 1971.\textsuperscript{41} Campaigning on the popularity of her socialist and populist legislation, Mrs. Gandhi’s Congress Party was returned to power with a two-thirds majority, making her “the most powerful Indian prime minister since independence.”\textsuperscript{42} With this newfound power, the prime minister once again eagerly set to amending the constitution.\textsuperscript{43} Between 1971 and 1972, Parliament passed a number of important constitutional amendments, including, significantly, the Twenty-fourth Amendment (Parliament has the “absolute power to amend any part of the constitut-

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. The vote in the lower house was 339-154. Id.
\textsuperscript{38} Id.
\textsuperscript{39} Frank, supra note 34, at 323; Nayak, supra note 17, at 3.
\textsuperscript{40} Nayak, supra note 17, at 3.
\textsuperscript{41} Frank, supra note 34 at 323–24.
\textsuperscript{42} Id. at 327. The new majority in the lower house of Parliament gave the Congress Party 325 seats—seventy more seats than in the previous Parliament. Id.
\textsuperscript{43} Id. at 328.
tion, including Part III dealing with fundamental rights”), the Twenty-sixth Amendment (elimination of the princes’ privy purses), and the Twenty-ninth Amendment (inserting certain land reform laws from the state of Kerala into the Ninth Schedule, thereby placing the laws beyond judicial review).

Once again, legislation involving amendment of the constitution and land reform laws was challenged in the courts. In what became known as the Kesavananda Bharati case, a thirteen-judge panel of the supreme court issued a seminal opinion spanning nearly 800 pages and an entire volume of the Supreme Court Cases Reporter. The court adeptly issued a series of instrumental decisions.

First, the court overturned the Golak Nath case, which had held that Parliament lacked the power to amend fundamental rights in the constitution without a constitutional convention. Second, by a margin of thirteen-to-zero, the court upheld the Twenty-fourth Amendment, which stipulated that the “Parliament had the power to amend any or all provisions of the Constitution.” Ruling seven-to-six, however, the court included one caveat: although no part of the constitution was beyond amendment, Parliament could not abrogate the “basic structure” of the constitution through simple amendments. Additionally, the court upheld the Twenty-ninth Amendment, holding the Kerala land reform laws were beyond judicial review, as they were contained in the Ninth Schedule.

Hence, the court, while upholding the amendments passed by Parliament, inserted the power of judicial review for itself by ruling that amendments, altering the “basic structure” of the constitution could not withstand judicial scrutiny. The court also reserved to it-

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44 Constitution (Twenty-fourth Amendment) Act, 1971; Frank, supra note 34, at 328; Nayak, supra note 17, at 4.
46 See Constitution (Twenty-ninth Amendment) Act, 1972; Nayak, supra note 17, at 4; Noorani, supra note 12, at 732.
50 See id.
51 Noorani, supra note 12, at 732.
52 Nayak, supra note 17, at 4.
53 Noorani, supra note 12, at 732.
54 Id.
55 Id.
self the task of determining what exactly constitutes the “basic structure” of the constitution.\(^56\)

Although the government questioned the basic structure doctrine articulated in *Kesavananda Bharati*, the ruling was re-affirmed in subsequent decisions.\(^57\) Thus, for over thirty years, Parliament was able to operate by amending the constitution so long as it did not erode the basic structure of the constitution.\(^58\)

**B. Background to the Raja Ram Pal Case**

Indian politicians have long been plagued by allegations of corruption.\(^59\) In 1989, Prime Minister Rajiv Gandhi’s squeaky-clean image was tarnished by allegations that he and a number of government officials had received kickbacks from a Swedish company named Bofors AB to provide India with howitzer guns.\(^60\) The “Bofors scandal” led to Mr. Gandhi’s defeat in the 1989 elections.\(^61\) One of Mr. Gandhi’s successors as prime minister, P.V. Narasimha Rao, also faced extensive accusations of impropriety.\(^62\) Most significantly, in 1993 Mr. Rao survived a no-confidence vote in Parliament only after he allegedly bribed several members of Parliament (MPs) to support him.\(^63\) And more recently, India’s foreign minister, Natwar Singh, resigned after being implicated in Paul Volker’s United Nations investigation of the oil-for-food scandal in Iraq.\(^64\)

\(^{56}\) Id.

\(^{57}\) See Smt. Indira Nehru Gandhi v. Raj Narain, 1975 Supp (1) S.C.C. 1 (India) (invalidating clauses of Thirty-ninth Amendment as inconsistent with basic structure of constitution); see also Minerva Mills Ltd. v. Union of India, 3 S.C.C. 625 (1980) (India) (striking down clauses 4 and 5 inserted into article 368 of the constitution by the Forty-second Amendment as inconsistent with basic structure doctrine).

\(^{58}\) See id.

\(^{59}\) See infra notes 60–67.


A news team sting operation on December 12, 2005, uncovered an even deeper morass of corruption.\textsuperscript{65} In what came to be known as a “cash-for-query” scandal, ten members of the lower house and one member of the upper house of Parliament were captured on videotape taking bribes in exchange for asking questions in Parliament.\textsuperscript{66} The bribes ranged from $325 to $2400.\textsuperscript{67} Although politicians had been embroiled in corruption scandals before, such blatant dishonesty forced the government’s hand, culminating in the expulsion of MPs in December of 2005.\textsuperscript{68} With some of the MPs challenging the expulsion as unconstitutional, and claiming they had been entrapped, the scandal foreshadowed a constitutional showdown in the supreme court.\textsuperscript{69}

Article 105(3) of the Indian Constitution states: “In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the constitution [Forty-fourth Amendment] Act 1978.”\textsuperscript{70} This section is similar to Article I, Section 5, clause 2 of the U.S. Constitution, which states, “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”\textsuperscript{71} Although the U.S. Constitution expressly outlines a procedure for the House and Senate to expel members, the Indian Constitution does not explicitly mention expulsion.\textsuperscript{72} Instead, it could be interpreted as saying Parliament has the power to make laws to regulate itself.\textsuperscript{73} This ambiguity came to light in the \textit{Raja Ram Pal} case.\textsuperscript{74}


\textsuperscript{66} \textit{Id}.

\textsuperscript{67} \textit{Id}.

\textsuperscript{68} \textit{Id}. The ten Lok Sabha (lower house) members expelled were from a variety of political parties, including five members of the BJP, three members of BSP, one from Congress, and one from RJD. The Rajya Sabha (upper house) member expelled belonged to BJP. \textit{Parliament Gets Supreme Stamp}, \textit{Hindustan Times}, Jan. 11, 2007, available at http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=6fae6738-e4cf-4e5b-9c08-ebbbc0ea1503.

\textsuperscript{69} See \textit{MPs Expelled}, supra note 65.

\textsuperscript{70} \textit{India Const.} art. 105, § 3.

\textsuperscript{71} \textit{U.S. Const.} art. I, § 5, cl. 2.

\textsuperscript{72} See \textit{India Const.} art. 105, § 3.

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} \textit{Raja Ram Pal}, (2007) 3 S.C.C. 184.
Expulsion from Parliament is not unprecedented. The first person to be expelled from Parliament was H.G. Mudgal, in a situation remarkably similar to the recent cash-for-query scandal. While Mr. Mudgal complained he was denied due process, the Speaker of the Lower House, G.V. Mavlankar, stated, “The procedure of forming a special committee is a proper one and the House can expel any of its members,” and the issue was not pursued further.

In the period following the end of the dark days of the Emergency Period, even the legendary Indira Gandhi was herself expelled from the Lok Sabha (Lower House of Parliament). In December 1978, Mrs. Gandhi, having recently returned from a well-received trip to London, was found guilty by the Privileges Committee of Parliament for “obstructing four officials who were investigating Maruti Limited” and “intimidating officials of the Lok Sabha.”

What differentiates the 2005 expulsion of eleven members of Parliament from the prior expulsion cases of Mr. Mudgal and Mrs. Gandhi is that neither parliamentarian decided to fight their grievances through the courts. Hence, when the eleven expelled MPs pursued their cases through the judicial process, a case of first impression came before the Indian Supreme Court.

II. Discussion

Two seminal cases came before the Indian Supreme Court in 2006. One, the Coelho case, would decide whether the court could review acts of Parliament within the Ninth Schedule, while the other, the Raja Ram Pal case, would pass judgment on whether Parliament’s internal procedures were justiciable.
A. Justiciability of the Ninth Schedule

The power to put laws out of the reach of the judiciary under article 31B led Parliament to enact several laws and place them within the Ninth Schedule, which had originally been created by Prime Minister Nehru to help protect progressive land reform laws from judicial scrutiny. The scheme, which originally comprised of thirteen laws in 1951, had mushroomed to include 284 laws by 2006, many unrelated to land reform or ending feudalism. The proliferation of laws included within the Ninth Schedule led to much public consternation, and in 2006, the constitutional bench of the Indian Supreme Court finally agreed to take up a case challenging laws under the grounds that they “could not have been validly inserted in the Ninth Schedule.”

On January 11, 2007, Chief Justice Y.K. Sabharwal handed down the case of *I.R. Coelho (Dead) By Lrs v. State of Tamil Nadu & Others*. The Chief Justice began by stating the broad question to be considered by the court: “[W]hether on and after [April 24, 1973] when [the] basic structures doctrine was propounded, it is permissible for the Parliament under Article 31B to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court?”

The Chief Justice first traced the development of the law, citing the major cases that had been decided by the court with respect to interpretation of some articles of the constitution and challenges to the Ninth Schedule. Thus the court found occasion to focus on the *Golak Nath* case, which had “held that [a] constitutional amendment is ‘law’ within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void,” and *Kesavananda Bharati*, which had overruled *Golak Nath* and held that “Article 368 [the amendment clause of the Constitution] did not enable the Parliament to alter the basic structure or framework of the Constitution.”

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85 Noorani, supra note 12, at 731.
88 *Id.* at 1.
89 *Id.* at 70.
90 See *id.* at 69–75.
91 *Id.* at 73.
Next, the court dove into a discussion on the importance of fundamental rights.\(^{93}\) Quoting the Nobel laureate and economist, Dr. Amartya Sen, the court noted “the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.”\(^{94}\) Furthermore, the court noted that “fundamental rights occupy a unique place in the lives of civilized societies and have been described . . . as ‘transcendental,’ ‘inalienable’ and ‘primordial.’”\(^{95}\) Moreover, noting the importance of fundamental rights in providing checks and balances, the court stated:

[T]he jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.\(^{96}\)

Noting the nature of fundamental rights in providing a check against actions of Parliament, the court then stated that “separation of powers is part of the basic structure of the Constitution.”\(^{97}\) This led the court to examine the central question of “whether the basic structure test would include judicial review of Ninth Schedule laws on the touchstone of fundamental rights.”\(^{98}\)

The court disposed of the question of its ability to conduct judicial review of legislation under the Ninth Schedule by stating that it would be contrary to the check that article 32\(^{99}\) confers: “It cannot be said that

\(^{93}\) Id. at 79–80.

\(^{94}\) Id. at 79.

\(^{95}\) Id. at 80.

\(^{96}\) Id. at 82.

\(^{97}\) Coelho, (2007) 2 S.C.C. 1, at 87.

\(^{98}\) Id. at 88.

\(^{99}\) Article 32 provides:

Remedies for enforcement of rights conferred by this Part—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to
the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution.”

Additionally, the court again looked to its previous jurisprudence in the Kesavananda Bharati case and pointed out that although “Parliament has [the] power to amend the provisions of Part III so as to abridge or take away fundamental rights . . . that power is subject to the limitation of basic structure doctrine,” and “at least some fundamental rights do form part of basic structure of the Constitution.” The supreme court thus held it could strike down any law inserted into the Ninth Schedule if it were contrary to the basic structure of the constitution and passed after the Kesavananda Bharati case was decided.

B. The Power to Review Non-legislative Procedure

The case of the expelled MPs, Raja Ram Pal v Hon’ble Speaker, Lok Sabha & Others, rapidly made its way to the supreme court. The case was heard by a constitutional bench of five justices of the supreme court, including Chief Justice Y.K. Sabharwal.

Petitioners asserted five significant contentions with respect to the unconstitutionality of their expulsions. First, petitioners argued that India’s Parliament could not expel the MPs because it did not inherit such “power and privilege of expulsion” from the British House of Commons through the constitution. Petitioners argued that

expulsion is necessarily punitive in nature rather than remedial and such power vested in [the] House of Commons as a result of its power to punish for contempt in its capacity as a High Court of Parliament and since this Status was not accorded to [the] Indian Legislature, the power to expel could

exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

India Const. art. 32.

101 Id. at 100.
102 Id.
104 Id. at 184.
105 Id. at 242–43.
106 Id. at 242.
not be claimed by the Houses of Parliament under Article 105(3).\textsuperscript{107}

Second, they stated article 105(3) could not be the basis for expulsion, as it “would come in conflict with other constitutional provisions,” namely articles 101 and 102, which deal with disqualification of members of Parliament.\textsuperscript{108} Third, they argued there was a “denial of principles of natural justice in the [Parliamentary] inquiry proceedings,” which cannot be exempt from judicial review.\textsuperscript{109}

The petitioners’ final two arguments involved the scope of judicial review.\textsuperscript{110} They argued that the supreme court “is the final arbiter on the constitutional issues and the existence of judicial power” and “that the constitutional and legal protection accorded to the citizens would become illusory if it were left to the organ in question to determine the legality of its own action.”\textsuperscript{111} Furthermore, the expelled MPs claimed it is the function of the judiciary to review the “the exercise of power by the executive or any other authority” to ensure its compliance with the constitution.\textsuperscript{112}

Representatives from the two Houses of Parliament did not appear before the court, viewing the matter as a political question and therefore not justiciable.\textsuperscript{113} Their positions, however, were represented by the Union of India, which argued “[t]he actions of expulsions are matters within the inherent power and privileges of the Houses of Parliament.”\textsuperscript{114}

In what can be regarded as a seminal opinion in the annals of Indian constitutional law, the supreme court deftly disposed of the petitioners’ arguments regarding the unconstitutionality of their expulsion from Parliament while simultaneously upholding the principles of judicial review.\textsuperscript{115} The court began by stating that the constitution was in fact the “supreme lex in this country” and cited the famous Kesavananda Bharati case as support for this principle.\textsuperscript{116}

\begin{itemize}
  \item \textsuperscript{107} Id.
  \item \textsuperscript{109} Id. at 242–43.
  \item \textsuperscript{110} Id. at 243.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Mishra, supra note 75, at 1. In fact, the Speaker of the Lok Sabha refused to respond to summons by the court. Id.
  \item \textsuperscript{114} Raja Ram Pal, (2007) 3 S.C.C. 184, at 245.
  \item \textsuperscript{116} Raja Ram Pal, (2007) 3 S.C.C. 184, at 246.
\end{itemize}
First, the court addressed the petitioners’ claim that because Parliament did not inherit the power of expulsion from Britain’s House of Commons, it lacked the power to expel them. The court began examining this issue by citing its decision in the 1964 UP Assembly case, where it noted that although “[i]n England, Parliament is sovereign,” India had a federalist system whereby “the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other,” and therefore the characteristics of the (unwritten) British Constitution could not be compared to that of the Indian Constitution.

To establish whether other constitutional provisions dealing with the disqualification of MPs clashed with a power to expel alleged in article 105(3), the court looked to the specific meaning of the words “vacancy,” “disqualification,” and “expulsion.” Article 101 specifically deals with vacancies; article 102 with disqualification for membership. The court held these provisions all served different purposes: “While disqualification operates to prevent a candidate from re-election, expulsion occurs after the election of the member and there is no bar on re-election. As far as the term ‘vacancy’ is concerned, it is a consequence of the fact that a member cannot continue to hold membership.” Hence, the court ruled the power of expulsion did not conflict with any other constitutional provisions.

Based on this analysis, the majority stated it was unable to find any reasons why Parliament “should be denied the claim to the power of expulsion arising out of remedial power of contempt.” Furthermore, in his concurring opinion, Justice Thakker cited an Australian case for support of the principle that Parliament also possessed the power to expel a member because “the need for removal and replacement of a dishonest member may be . . . imperative as a matter of self-preservation.”

In tackling the petitioners’ final three contentions, the court made certain to address the relationship between the co-equal branches of government and, simultaneously, discussed how it had

117 Id. at 249–51.
118 Id. at 246–47.
119 Id. at 284.
120 Id.
122 Id.
123 Id. at 323.
124 Id. at 403 (Thakker, J., concurring) (citing Armstrong v. Budd, (1969) 71 S.R. 386 (NSW) (Austl.)).
jurisdiction in this case.\textsuperscript{125} To this extent it stated, “Parliament is a co-
ordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny . . . mere co-ordinate constitutional status . . . does not disentitle this Court from exercising its jurisdiction of judicial review.”\textsuperscript{126}

Having dispatched the question of whether it had jurisdiction, the court then examined the scope of its jurisdiction.\textsuperscript{127} Significantly, the court departed with the established jurisprudence of English courts. In particular, the court held that although the British House of Commons had a “broad doctrine of exclusive cognizance” of its internal proceedings,\textsuperscript{128} this principle was displaced in India by articles 122(1) and 212(1) of the constitution.\textsuperscript{129} Furthermore, the court acknowledged that although it may not question the “truth or cor-
rectness of the material . . . [nor] substitute its opinion for that of the legislature,” proceedings of Parliament “which may be tainted on ac-
count of substantive or gross illegality or unconstitutionality” could still be reviewed by the judiciary.\textsuperscript{130}

III. Analysis

The two recent decisions of the Indian Supreme Court, in \textit{Coelho} and \textit{Raja Ram Pal}, can be heralded as significant victories for Indian constitutional law and democratic government.\textsuperscript{131} The court’s decisions were seminal because they re-evaluated the conduct of Parliament and the scope of judicial review in which the court could engage with re-
spect to Parliament’s legislative and non-legislative functions.\textsuperscript{132}

The \textit{Coelho} case held that laws and constitutional amendments that altered the basic structure of the constitution, by violating fundamental rights, could be invalidated.\textsuperscript{133} This decision is significant for a variety of reasons.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 371.
\item \textsuperscript{126} \textit{Raja Ram Pal}, (2007) 3 S.C.C. 184, at 371.
\item \textsuperscript{127} \textit{Id.} at 372.
\item \textsuperscript{128} \textit{See Bradlaugh v. Gossett, 1884 (12) Q.B.D. 271 (U.K.).}
\item \textsuperscript{129} \textit{Raja Ram Pal}, (2007) 3 S.C.C. 184, at 372.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{See Tipping the Scales, supra note 115.}
\item \textsuperscript{132} \textit{See id.; India Court Opens, supra note 86.}
\item \textsuperscript{134} \textit{See id.}
\end{itemize}
First, the unanimous opinion in Coelho can be viewed as a victory for fundamental rights.\textsuperscript{135} Given the prior action of Parliament in dumping hundreds of laws into the Ninth Schedule, it was unclear whether the fundamental rights advanced by the constitution would be subject to simple amendment or dissolution by Parliament.\textsuperscript{136} In light of the court’s decision, however, it is now clear that rights such as “equality,” “freedom,” and “life” are considered “fundamental” and therefore “are not bamboos that will bend to accommodate passing political winds.”\textsuperscript{137}

Related to the first point is the concept of political accountability.\textsuperscript{138} In the past, politicians have been tempted to abuse the structure of article 31B and the Ninth Schedule to include laws unrelated to land reform or ending feudalism as a means of scoring political points with constituents; they will now no longer be able to evade the scrutiny of a watchful judiciary.\textsuperscript{139}

Third, this decision restores a balance of power between the legislative and judicial branches.\textsuperscript{140} At the core of any democracy is an independent, thriving judiciary.\textsuperscript{141} Part-and-parcel of such a system is the ability of courts to engage in judicial review and strike down laws that do not conform with the basic charter of governmental power.\textsuperscript{142} By ruling that the court could strike down any law that altered the basic structure of the constitution, the court defended the constitution and placed an essential check on Parliament.\textsuperscript{143}

At the same time, the Coelho opinion cannot be viewed as only having a positive impact.\textsuperscript{144} It has opened the court to considerable avenues of criticism.\textsuperscript{145} For example, one could argue the decision gives the judiciary an inordinate amount of power, countering the “restoring balance” argument offered above.\textsuperscript{146} The case could be

\textsuperscript{136} See id.
\textsuperscript{137} Id.
\textsuperscript{139} See id.
\textsuperscript{140} See India Court Opens, supra note 86.
\textsuperscript{141} See id.
\textsuperscript{142} See id.
\textsuperscript{143} See id.
\textsuperscript{145} See id.
\textsuperscript{146} See Jaising, supra note 133.
made that the supreme court has gone too far and established itself as the most powerful branch of government, as it has essentially given itself the power to be the “final arbiter of what is in the public interest.”\textsuperscript{147} In fact, one commentator stated that \textit{Coelho} makes the “Supreme Court one of the most powerful courts in the world.”\textsuperscript{148}

In a sense, the decision could also be criticized as allowing an unelected judiciary to usurp and negate the power of the people instilled in their elected representatives.\textsuperscript{149} Although this argument about judicial activism is nothing new to India, this decision is likely to feed more pronounced attacks on the court, perhaps jeopardizing its credibility.\textsuperscript{150}

Additionally, the claim could be made that, given this newfound power the judiciary could enact its own agenda.\textsuperscript{151} Indira Jaising, a practicing attorney before the supreme court, has already warned that “[w]e live in times when the Supreme Court believes that liberalisation, privatisation and globalisation are good for the country and any law that hinders these will violate fundamental rights and hence, the basic features of the Constitution.”\textsuperscript{152}

As explained in Part I, the power to expel MPs had never before been challenged in a court.\textsuperscript{153} Therefore, in accepting and settling the \textit{Raja Ram Pal} case, the Indian Supreme Court issued a seminal opinion reinforcing the power of Parliament to expel its members under its “privileges and immunities” power as set forth by article 105(3) of the constitution.\textsuperscript{154} Thus, similar to the decision in \textit{Coelho}, the decision in \textit{Raja Ram Pal} is also controversial for its implications.\textsuperscript{155}

First, it can be argued the decision was necessary to clarify a contentious point of law.\textsuperscript{156} Similar to the manner in which the U.S. Supreme Court resolves disputes between circuit courts of appeal, here, the Indian Supreme Court cleared up confusion between divided

\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{See Back to the Drawing Board, supra} note 144.
\textsuperscript{150} \textit{See id.}
\textsuperscript{151} \textit{See Jaising, supra} note 133.
\textsuperscript{152} \textit{Id.} Jaising provides a hypothetical example of such policy, posing that a pharmaceutical company, faced with “compulsory licensing of life saving drugs,” could challenge such a law placed in the Ninth Schedule as violating “freedom of trade.” \textit{Id.}
\textsuperscript{153} \textit{See Mishra, supra} note 75.
\textsuperscript{154} \textbf{INDIA CONST.} art. 105, § 3.
\textsuperscript{155} \textit{See Parliament Gets Supreme Stamp, supra} note 68.
\textsuperscript{156} \textit{See id.}
high courts.\textsuperscript{157} Regardless of the outcome of the case, there is now an element of finality to a previously open question of law.\textsuperscript{158}

A second argument in favor of \textit{Raja Ram Pal} follows the argument from proponents of the \textit{Coelho} decision, which is that the opinion holds politicians accountable for their actions.\textsuperscript{159} No longer can they exercise decisions regarding membership and hope to hide behind the cloak of parliamentary immunity.\textsuperscript{160} And furthermore, it is clear the public is behind the judiciary, which is viewed by many as the “last post of hope” in a very corrupt country.\textsuperscript{161}

Of course, this interpretation is subject to challenge by the view that the decision has negative implications in terms of strengthening both the power of Parliament and the judiciary.\textsuperscript{162} Parliament’s powers have been vastly expanded (or “clarified”) such that it may expel members at will, as it has the power to determine its own procedures according to the court’s interpretation of article 105(3).\textsuperscript{163} The court limited this power by noting that “proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny.”\textsuperscript{164} In other words, the court granted itself expanded power of judicial review over parliamentary expulsion.\textsuperscript{165} One could, however, still imagine politically motivated ejections.\textsuperscript{166} As one commentator wrote, “[A] majoritarian government could well use brute strength and terminate memberships” of the political opposition.\textsuperscript{167}

The strongest implication of the \textit{Raja Ram Pal} case is that the court will now be able to exercise scrutiny over non-legislative proceedings, not just those proceedings dealing with parliamentary expulsion.\textsuperscript{168} Because the court did not limit its language to proceedings dealing with expulsions, but rather noted it could review proceedings tainted with “substantive or gross illegality,” it leaves open the floodgates to challenges of parliamentary procedure.\textsuperscript{169} This, no doubt, will be a

\textsuperscript{157} See id.
\textsuperscript{158} See id.
\textsuperscript{159} Mishra, \textit{supra} note 75, at 4.
\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} See \textit{Tipping the Scales}, \textit{supra} note 115.
\textsuperscript{163} See id.
\textsuperscript{164} See id.
\textsuperscript{165} See id.
\textsuperscript{166} See Mishra, \textit{supra} note 75, at 2–3.
\textsuperscript{167} Id.
\textsuperscript{168} See \textit{Tipping the Scales}, \textit{supra} note 115.
\textsuperscript{169} Id.
source of contention between Parliament and the court in the future.170

Conclusion

The Supreme Court of India is clearly more assertive today than it was just thirty years ago, when it held in the Kesavananda Bharati case that it had limited ability to conduct judicial review of laws placed in the infamous Ninth Schedule, thus shielding them from review. Recent decisions in the Coelho and Raja Ram Pal cases show the court is more willing to undertake judicial review, by permitting examination of both Parliament’s legislative and non-legislative roles. Such action has allowed the court to tackle issues ranging from invalidating laws that have nothing to do with land reform, to stemming political corruption. The court’s decisions are not without controversy, as various sides see them as expanding accountability, and others see them as usurping the role of the legislature. Given the seminal nature of these Indian Supreme Court decisions, however, the cases are likely to have a lasting impact on not only Indian constitutional law, but also the way Parliament crafts laws and constitutional amendments in the future.

170 See id.
CAUGHT IN A WEB OF LIES: USE OF PRIOR INCONSISTENT STATEMENTS TO IMPEACH WITNESSES BEFORE THE ICTY

ELIZABETH M. DIPARDO*

Abstract: Trial attorneys around the world face the problem of how to confront a witness whose live testimony contradicts his prior statements. U.S. prosecutors take refuge under Federal Rule of Evidence 613 and the Harris doctrine, which permit inadmissible hearsay and illegally obtained statements to be used to impeach a witness’s live testimony. No similar rule aids prosecutors at the International Criminal Tribunal for the Former Yugoslavia (ICTY). Recent divergent decisions regarding the use of inconsistent statements for impeachment purposes have left ICTY prosecutors struggling to prove cases against the most heinous criminals in history. This Note argues that the ICTY should adopt a new evidentiary rule akin to the United States’ Rule 613 and the Harris doctrine. Adoption of a new rule would more efficiently balance the prosecutor’s duty to prove the case against the accused’s right not to be convicted by otherwise inadmissible evidence.

The question is whether you were lying then or are you lying now . . . or whether in fact you are a habitual and compulsive liar!

—Agatha Christie’s Witness for the Prosecution

Introduction

With the dramatic flair that only movies can muster, Agatha Christie’s character Sir Wilfrid Robarts highlights a classic problem facing trial attorneys: how does an attorney confront a witness whose live testimony contradicts his prior statements?1

U.S. prosecutors take for granted the evidentiary proposition that inadmissible hearsay and illegally obtained statements are always available to impeach a witness’s live testimony should he weave a web of lies

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1 Witness for the Prosecution (MGM 1957).
on the stand. In stark contrast, the use of prior inconsistent statements for impeachment purposes before the International Criminal Tribunal for the Former Yugoslavia (ICTY) varies from case to case. In an international criminal system, where there are few evidentiary rules and little precedent to draw on, these divergent decisions leave ICTY prosecutors struggling to prove cases against the most heinous criminals in history.

Part I of this Note focuses on both the development of the ICTY’s Rules of Procedure and Evidence and the particular rules governing the admission of evidence at trial. Part II examines particular examples of the admission of prior inconsistent statements before the ICTY, common law courts, and civil law courts. Part III argues that the ICTY should adopt the logic of U.S. courts and codify a rule allowing otherwise inadmissible evidence to be used for impeachment purposes.

I. Background

A. Establishment of the ICTY’s Rules of Evidence and Procedure

The ICTY opened its doors in 1993 as an ad-hoc court and body of the United Nations (U.N.) designed to try crimes committed in the territory of the former Yugoslavia. The ICTY exercises jurisdiction over

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2 See generally Fed. R. Evid. 613 (authorizing impeachment by prior inconsistent statements, even if statement is otherwise inadmissible hearsay); Harris v. New York, 401 U.S. 222 (1971) (allowing impeachment by prior inconsistent statements, even if statement was obtained in violation of witness’s constitutional rights).

3 Compare Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing use of prior inconsistent statements for impeachment), with Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to admit prior inconsistent statements for impeachment).


There is an echo in this Chamber today, . . . We have preserved the long-neglected compact made by the community of civilized nations [forty-eight] years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor’s tribunal. The only victor that will prevail in this endeavor is the truth.
individuals responsible for violations of the 1949 Geneva Conventions, violations of the law of war or genocide, and other crimes against humanity. To achieve this task, the U.N. Security Council left the arrangement of all practical details to the U.N. Secretary-General.

Recognizing that little precedent existed regarding the day-to-day operation of an international criminal tribunal, the Secretary-General concluded that “the judges of the International Tribunal as a whole should draft and adopt rules of procedure and evidence.” Two months of drafting gave rise to the *Rules of Procedure and Evidence* (*Rules*). This document, in just 125 rules, outlined the procedural framework including investigatory procedures; pre-trial, trial, and appellate proceedings; sentencing; and all rules of evidence.

The simplicity of the *Rules* is rooted in the historical purpose and development of the ICTY. The ICTY embraces the straightforward goal of “ensur[ing] that a trial is fair and expeditious . . . with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” Flexible procedures give the Trial Chamber discretion to decide what is in the best interest of the accused on a case-by-case basis. The ICTY also represents an attempt to integrate the civil

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12 ICTY Statute, *supra* note 6, art. 20(1).

13 *See* Prosecutor v. Tadic, Case No. IT-94-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ¶ 23 (Aug. 10, 1995) (“A final indication of the uniqueness of the International Tribunal is that, as an ad hoc institution, the International Tribunal was able to mold its Rules and procedures to fit the task at hand.”).
and common law heritages of all U.N. members.\textsuperscript{14} The \textit{Rules}, therefore, embody only those principles espoused by all member states.\textsuperscript{15}

The judges drafting the \textit{Rules} cleverly left the power to amend any and all procedural rules in their own hands.\textsuperscript{16} The drafters were aware that, because the \textit{Rules} were the first international code of criminal procedure, they would need to be adjusted to meet the practical needs of international criminal prosecution.\textsuperscript{17} Amendment of a rule occurs when a judge, prosecutor, or registrar proposes a change, which garners support from ten of the sixteen permanent judges at the annual plenary meeting or obtains unanimous support of the permanent judges at any time.\textsuperscript{18} The judges of the ICTY have embraced this power wholeheartedly as the \textit{Rules} have been amended, on average, twice per year since their adoption in 1994.\textsuperscript{19} Recent studies of the \textit{Rules} note

\begin{itemize}
  \item[\textsuperscript{14}] See Prosecutor v. Delalić, Case No. IT-96–21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, ¶ 15 (May 1, 1997) (“[I]n formulating the rules, elements of both the civil and the common law systems capable of promoting justice were considered and adopted. . . . A Rule may have a common law or civilian origin but the final product may be an amalgam of both common law and civilian elements, so as to render it sui generis.”).
  \item[\textsuperscript{19}] See Boas, \textit{supra} note 16, at 5 (explaining the remarkable number of amendments that have been made to \textit{Rules} since their initial adoption).
\end{itemize}
that, between 2000 and 2001, ninety-one rules were amended, seven new rules were adopted, and one rule was deleted.\(^{20}\)

### B. Admission of Evidence Under the ICTY’s Rules

Only two broad principles guide a judge’s hand when admitting evidence before the ICTY: (1) Trial Chambers “may admit any relevant evidence which it deems to have probative value,”\(^ {21}\) and (2) “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”\(^ {22}\) The simplicity of these provisions reflects that the common law’s restrictive evidentiary rules stem from the need to control information presented to a lay jury.\(^ {23}\) As ICTY judges serve as the factfinder at trial, these skilled jurists can weigh the probative value of evidence without being “shielded from irrelevancies or given guidance as to the weight of the evidence they have heard.”\(^ {24}\) The admission of evidence before the ICTY thus mirrors the inquisitorial model of civil law nations.\(^ {25}\)

Inherent in the determination of whether evidence is probative is the reliability of the evidence.\(^ {26}\) Although the Trial Chambers have refused to read an absolute requirement of reliability as a condition for admissibility, reliability is “the golden thread which runs through all components of admissibility.”\(^ {27}\)

\(^{20}\) Id.

\(^{21}\) R. P. & EVID., supra note 16, at 89(C) (General Provisions).

\(^{22}\) Id. at 89(D) (General Provisions).

\(^{23}\) See First Annual Report, supra note 15, ¶ 72 (remarking that there are no technical evidentiary rules because “[t]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system”).

\(^{24}\) See id.; see also Fed. Judicial Ctr., Manual For Complex Litigation (Fourth) § 11.431 (2004) (stating that judges are “accustomed to reviewing matters that may not be admissible”).

\(^{25}\) See Boas, supra note 4, at 48 (comparing ICTY’s flexible approach to admission of evidence to principle of la liberté de la prevue present in French criminal law system, which allows a court to rule any form of evidence admissible).

\(^{26}\) See, e.g., Prosecutor v. Kordic, Case No. IT-95–14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, ¶¶ 23, 24, & 29 (July 21, 2000) (concluding that decedent’s unsworn statement that had not been taken subject to cross-examination was unreliable and, therefore, inadmissible); Prosecutor v. Alexsovski, Case No. IT-95–14/1-AR73, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, ¶ 15 (Feb. 16, 1999) (“Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose in the sense of being voluntary, truthful and trustworthy.”).

\(^{27}\) Prosecutor v. Delalić, Case No. IT-98–21-T, Decision on the Prosecution’s Oral Request for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, ¶ 32 (Jan. 19, 1998); see Wil-
1. Admission of Hearsay Evidence

The ICTY defines hearsay as “the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says.”

Hearsay statements are admissible against both parties if the statements are relevant and have probative value. The Rules not only allow for the admission of hearsay evidence, but specifically call for the use of written statements in lieu of live testimony to expedite trials.

Only when the need to ensure a fair trial outweighs the probative value will Rule 89(D) filter out hearsay statements. The “golden thread” of reliability, therefore, weaves into this analysis because determinations regarding probative value require Trial Chambers to pay particular attention to the reliability of a statement including whether it was voluntary, truthful, and trustworthy.

The adoption of this flexible approach to hearsay evidence reflects that, in legal systems around the world, “[t]he exclusion . . . of hearsay evidence is not grounded upon its intrinsic lack of probative value. It is ordinarily excluded because of the possible infirmities with respect to the observation, memory, narration, and veracity of him who utters the offered words.”

2. Admission of Evidence Obtained in Violation of the Rules

Evidence obtained in violation of the Rules’ procedural safeguards is not automatically excluded because of the ICTY’s flexible approach to the admission of evidence. In Prosecutor v. Brdjanin, the Trial


28 Alexsovski, Case No. IT-95–14/1-AR73, Decision on the Prosecutor’s Appeal on Admissibility of Evidence, ¶ 14.
29 See id. ¶ 15.
31 Boas, supra note 16, at 29 (explaining reasons why hearsay evidence will be excluded in trials before ICTY).
34 See R. P. & Evid., supra note 16, at 5(A) (Non-compliance with the Rules) (“When an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance has caused material prejudice to that party.”); Prosecutor v.
Chamber noted that “drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained.”

Instead, relevant and probative evidence is generally admissible unless it was “obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

The defense successfully invoked this exclusionary principle in Prosecutor v. Delalić. There, the Trial Chamber excluded a confession that Austrian police obtained after hours of continuous interrogation, by five different officers, and repeated assertions that the accused’s confession would mitigate the severity of the charges. In making its determination, the Trial Chamber noted that any statements obtained by oppressive conduct undermined the integrity of the proceedings. In Prosecutor v. Kordić, however, evidence obtained by eavesdropping on an enemy’s telephone calls in a time of war did not damage the integrity of the proceedings and was thus admissible at trial.

3. Cross-Examination of Witnesses

The Rules expressly guarantee litigants the right to cross-examine witnesses. The sequence of witness examinations in ICTY proceedings parallels the system used in common law courts: the prosecution presents its witnesses and engages in direct examination, after which the defense counsel may cross-examine the witnesses. Notably, the subject matter on cross-examination is limited to the evidence-in-chief and matters substantially affecting the credibility of witnesses.
The right to cross-examination is traditionally linked to preserving the right of an accused to confront witnesses testifying against him.\textsuperscript{44} Recent decisions by the Trial Chambers, however, note that both the prosecution and the defense must have the right to engage in effective cross-examination to ensure a fair trial.\textsuperscript{45} For example, in \textit{Prosecutor v. Blaskic}, the defense provided the prosecution with only pseudonyms representing two key witnesses and refused to provide any additional information until the moment the witnesses appeared to testify.\textsuperscript{46} The defense counsel sought to insulate these witnesses from outside pressure.\textsuperscript{47} In finding for the prosecution, the Trial Chamber concluded that this withholding of information interfered with the prosecution’s right to effective cross-examination of defense witnesses.\textsuperscript{48} The Trial Chamber, therefore, ordered defense counsel to provide the prosecution with the witnesses’ full names and summaries of the facts to which each would testify two days before the scheduled testimony.\textsuperscript{49}

\textbf{II. Discussion}

The right to cross-examine a witness regarding his or her credibility must include the right to present prior inconsistent statements to a witness if, during live testimony, the witness changes his or her story.\textsuperscript{50} The prosecutor’s ability to introduce this form of impeachment evidence, however, is not explicitly guaranteed in the \textit{Rules} and, therefore, is left entirely to the discretion of each Trial Chamber.\textsuperscript{51}

\textsuperscript{44} See generally Stefano Maffei, \textit{The European Right to Confrontation in Criminal Proceedings} (2006) (concluding that confrontation of adverse witnesses is a fundamental right of accused after tracing development of right in English, Italian, and French criminal procedure).

\textsuperscript{45} Prosecutor v. Blaskic, Case No. IT-95–14, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, ¶ 10 (Sept. 25, 1998) (“CONSIDERING that, in view of establishing the truth, this principle requires that there be no excessive infringement on the rights of the Prosecution, \textit{inter alia} the right to conduct an effective cross-examination of the Defence witnesses.”).

\textsuperscript{46} Id. ¶ 8.

\textsuperscript{47} Id.

\textsuperscript{48} See id. ¶¶ 10, 14.

\textsuperscript{49} Id. ¶ 14.

\textsuperscript{50} See R. P. & Evid., \textit{supra} note 16, at 90(H)(i) (Testimony of Witnesses) (granting litigants the right to cross-examine on matters affecting the credibility of witnesses).

\textsuperscript{51} Compare Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (Oct. 9, 2006) (allowing impeachment by prior inconsistent statements), with Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (refusing to allow impeachment by prior inconsistent statements).
A. Use of Impeachment Evidence Before the ICTY

1. Impeachment Evidence in Prosecutor v. Simiće

For more than three years, Blagoje Simiće, Miroslav Tadić, and Simo Zarić, together with the Serbian military, wreaked havoc on the municipality of Bosanski Samac. Under their “campaign of terror,” Bosnian Muslims and Croats were required to work at forced labor projects; expelled, through force and intimidation, from their homes; or sent to detention camps where prisoners were killed, beaten, and sexually assaulted. By the end of the conflict, the Muslim and Croat populations had dwindled from 17,000 in 1991 to less than 300 in 1995. These actions constituted crimes against humanity and contravened the 1949 Geneva Conventions, leading the ICTY Office of the Prosecutor to indict all three men in 1995.

At trial, a novel issue of international evidentiary law emerged regarding the use of a witness’s prior inconsistent statements to impeach his testimony. The prosecutor had conducted three telephone interviews with Tadić in 1996. When Tadić’s live testimony conflicted with his interview statements, the prosecution sought to cross-examine him regarding these inconsistencies. To prevent the admission of these statements, the defense argued that, at the time of the interviews, the accused was not fully aware of the nature and cause of the charges against him. These statements were therefore obtained in violation of the accused’s rights under the Rules. The prosecution urged the Trial Chamber to adopt the logic of Harris v. New York, a seminal U.S. deci-

52 See Prosecutor v. Simiće, Case No. IT-95–9, Fifth Amended Indictment, ¶¶ 11–33 (May 30, 2002) [hereinafter SimićeFifth Amended Indictment].
54 Id. ¶ 1.
55 Id. ¶ 34.
56 See Simiće, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2.
57 Id.
58 Id.
59 Id.
60 See R. P. & EVID., supra note 16, at 42 (Rights of Suspect During Investigation) (“(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands: (i) the right to be assisted by counsel of the suspect’s choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.”).
sion, which allows evidence obtained in violation of a defendant’s constitutional rights to be used for impeachment purposes.\textsuperscript{61}

Trial Chamber II refused to admit these statements because admission would impede the ICTY’s mission to afford the accused a fair trial.\textsuperscript{62} First, the Trial Chamber feared that impeaching the accused’s credibility would affect issues of criminal responsibility. Second, the Rules’ procedural safeguards were designed to preserve the accused’s privilege against self-incrimination.\textsuperscript{64} When Tadić consented to these telephone interviews, the prosecutor had not yet served the indictment against him and, therefore, he was not aware of his privilege against self-incrimination.\textsuperscript{65} The Trial Chamber also feared that the use of these statements—even for impeachment purposes—would condone the prosecutor’s misconduct.\textsuperscript{66} The Rules also confer the right to appear as a witness in one’s own defense.\textsuperscript{67} The Trial Chamber reasoned that, if these statements undermined the accused’s credibility at trial, the accused could no longer assist in his own defense.\textsuperscript{68}

The Trial Chamber refused to adopt the U.S. approach to impeachment evidence because of a factual difference between Harris and Simić.\textsuperscript{69} To the Trial Chamber, a crucial difference was that the defendant in Harris gave his statement before being indicted, whereas Tadić made a statement without fully being informed of the charges against him.\textsuperscript{70}

\textsuperscript{61} Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 1.

\textsuperscript{62} See id. ¶ 8 (concluding that “it is improper to allow the use of such evidence even for the purposes of impeaching the credibility of the accused, doing so would not be in accordance with principles of fundamental justice”); see also ICTY Statute, supra note 6, art. 20(1) (ensuring defendants the right to fair and expeditious trial).

\textsuperscript{63} Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8.

\textsuperscript{64} Id. ¶ 6; see also ICTY Statute, supra note 6, art. 21(4)(g) (stating that accused shall “not to be compelled to testify against himself or to confess guilt”).

\textsuperscript{65} See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8.

\textsuperscript{66} See id.

\textsuperscript{67} R. P. & Evid., supra note 16, at 85(C) (Presentation of Evidence).

\textsuperscript{68} Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 7.

\textsuperscript{69} Id. ¶ 4.

\textsuperscript{70} Id.
2. Impeachment Evidence in *Prosecutor v. Mrkšić*

Mile Mrkšić, a former Colonel in the Yugoslav People’s Army (JNA), along with his subordinates Miroslav Radić and Veselin Šljijančanin, were indicted for orchestrating the Vukovar massacre. On November 19, 1991, JNA soldiers transferred approximately 400 non-Serbs from the Vukovar Hospital to a farm in Ovcara. These ill patients were beaten for several hours before being led to a field to be executed and buried in a mass grave.

Just as in *Simić*, Trial Chamber II faced the question as to whether the prosecution, during cross-examination, should be allowed to introduce the accuseds’ prior inconsistent statements in order to challenge their credibility and the credibility of other defense witnesses. Mrkšić and the other defendants had been questioned by the authorities of the former Yugoslavia in Belgrade in 1998. Defense counsel passionately argued that these statements were inadmissible because this questioning was done in violation of the procedural safeguards laid out in Rule 37(B). Under the *Rules*, investigatory power may be wielded only by the Office of the Prosecutor and those acting under its discretion. The statements at issue were taken by the Serbian military security organ or the Military Investigating Judge at the instigation of the Military Prosecutor in Belgrade—an entity distinct from the ICTY.

Over the defense’s objections, the Trial Chamber admitted the defendants’ 1998 statements solely for the purpose of cross-examination and testing the credibility of the witnesses’ testimony. This decision rested on several considerations including: the statements were obtained in accordance with Serbian domestic law; there was no

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72 *Id.* ¶ 22.
74 *Prosecutor v. Mrkšić*, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 30 (Oct. 9, 2006).
75 *Id.* ¶ 15.
76 *Id.* ¶¶ 11–13.
77 *See* R. P. & Evid., *supra* note 16, at 37(B) (Functions of the Prosecutor) (“The Prosecutor’s powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor’s discretion.”).
78 *Mrkšić*, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 15.
79 *Id.* ¶ 33.
80 *Id.* ¶ 17.
suggestion that the accused’s wills were overborne or influenced by coercion, inducement, or other impropriety; and the 1998 statements were obtained much closer in time to the actual events than the statements given at trial in 2006. Judge Parker, moreover, concluded that the integrity of the proceedings could be open to greater threat if an Accused was not tested in cross-examination about an earlier account he had given which was materially inconsistent with his evidence given in the trial. That is so whether, for example, the inconsistency is explicable by confusion or lapse of memory given the years since the events, or to deliberate falsity of the evidence given at trial. . . . In the latter case, the Trial Chamber may be misled by perjury concerning a material matter.

Judge Parker also noted that allowing impeachment of a witness would unearth evidence of substantial probative value regarding the credibility of all evidence given by the witness. Discovery of additional probative information furthers the ICTY’s mission to ensure a fair trial.

Although the Trial Chamber admitted these 1998 statements to impeach the declarant, the Trial Chamber refused to admit these statements to challenge the testimony of other defense witnesses. To impeach a witness with another’s prior statements would not yield evidence of significant probative value because no one, except the declarant, would be in a position to explain the inconsistencies.

B. Use of Impeachment Evidence in the United States

In U.S. courts, a defendant’s credibility may be challenged by prior inconsistent statements, even when the statements are inadmissible as evidence in the prosecution’s case-in-chief because of a procedural or

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81 Id. ¶ 28.
82 Id.
83 Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31.
84 Id.
85 See ICTY Statute, supra note 6, art. 20(1).
86 Mrkić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 37.
87 Id.
constitutional defect. 88 The Federal Rules of Evidence govern when the original statement is considered hearsay. 89 The impeachment exception to the exclusionary rule applies when the original statements were obtained in violation of constitutional rights. 90

1. Impeachment by Hearsay Evidence

Hearsay, including prior inconsistent statements, is generally inadmissible for substantive use in U.S. courts. 91 Rule 801(d)(1)(A) allows for prior inconsistent statements to be used as substantive evidence only when the original statement was given under oath at a prior proceeding or deposition. 92

The overriding importance of assessing a witness’s credibility, however, allows for impeachment by prior inconsistent statements even when the original statement is hearsay. 93 When live testimony contradicts a witness’s prior statements, counsel on cross-examination has two options: (1) directly question the testifying witness as to the prior inconsistent statement; 94 or (2) introduce extrinsic evidence, such as written records or another witness, to prove that the testifying witness is lying on the stand. 95 As impeachment evidence may only be used by the factfinder to assess the credibility of a witness, these prior inconsistent statements are admitted with a limiting instruction directing the jury as to the acceptable uses of these statements. 96

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89 See Fed. R. Evid. 613 & 801(d)(1)(A); see also id. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).
91 See Fed. R. Evid. 802.
92 Id. 801(d)(1)(A).
93 Id. 613.
94 Id. 613(a).
95 Id. 613(b).
96 See United States v. Michelson, 335 U.S. 469, 484–85 (1948). For example, the Third Circuit’s model jury instruction states:

You have heard the testimony of certain witnesses (if only one witness was impeached with a prior inconsistent statement, include name of witness). You have also heard that before this trial (they)(he)(she) made (statements)(a statement) that may be different from (their)(his)(her) testimony in this trial. It is up to you to determine whether (these statements were)(this statement was) made and whether (they were)(it was) different from the witness(es)’ testimony in this trial. (These earlier statements were)(This earlier statement was) brought to your attention only
In a seminal impeachment case, *United States v. Barrett*, the defendant was tried for the theft of a valuable stamp collection from the Cardinal Spellman Museum. At trial, Buzzy Adams, a prosecution witness, testified that the defendant had previously admitted to the theft. Concerned that Adams was lying to cover his own involvement in the robbery, the defense sought to introduce a second witness, a waitress, who overheard Adams state that the defendant had nothing to do with the theft. The trial judge excluded these inconsistent statements, reasoning that the waitress’s testimony was nothing more than a hearsay opinion that the defendant was innocent. The First Circuit reversed the conviction for failure to admit these inconsistent statements. As the jury is the “principal judge of the credibility of witnesses,” the purpose of prior inconsistent statements is to highlight the “clear incompatibility” between the statements to the factfinder; thus, it is irrelevant whether the testimony is a hearsay opinion.

2. Impeachment by Illegally Obtained Evidence

At the center of U.S. criminal procedure lies the exclusionary rule, which requires the suppression of evidence obtained in violation of a defendant’s constitutional rights. Despite the importance of the exclusionary rule, it is a well-established exception—the *Harris* exception—that illegally obtained evidence may still be used to impeach a defendant’s live testimony. This exception reflects a balancing of the

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97 539 F.2d 244, 245 (1st Cir. 1976).
98 Id. at 254 n.9.
99 Id. at 253–54.
100 Id. at 247.
101 Id. at 254.
102 Barrett, 539 F.2d at 254.
103 See Weeks v. United States, 232 U.S. 883, 889 (1914) (finding that a warrantless confiscation of Week’s private letters violated his constitutional rights under Fourth Amendment and, therefore, letters were inadmissible at trial).
104 See Harris v. New York, 401 U.S. 222, 224–26 (1971) (“The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent statements.”); Walder v. United States, 347 U.S. 62, 65 (1954) (proclaiming, for the first time, that it would be a perversion of *Weeks* doctrine to allow defendant to “turn the illegal method by which evidence in the Govern-
need to deter unlawful police conduct with both the law’s interest in preventing perjury and the jury’s need to accurately assess a defendant’s credibility.\(^{105}\)

*Harris v. New York* held that statements obtained in violation of *Miranda*, although inadmissible in the prosecution’s case-in-chief, were admissible to impeach the defendant’s live testimony.\(^{106}\) Viven Harris was tried for twice selling narcotics to an undercover agent.\(^{107}\) Before being read his *Miranda* rights, Harris admitted to police that he made both sales and that the second transaction involved heroin.\(^{108}\) At trial, Harris changed his story, denying that he made the first sale and stating that the second sale was only baking powder.\(^{109}\) The trial court allowed the prosecutor to cross-examine Harris by presenting these otherwise inadmissible statements.\(^{110}\)

The Court implicitly reasoned that the “speculative possibility” that police misconduct would continue if evidence is used for impeachment purposes was vastly outweighed by both the need to prevent perjury and the jury’s need to properly assess the defendant’s credibility.\(^{111}\) Police would continue to avoid blatant violations of constitutional rights because this evidence would be banned from the prosecution’s case-in-chief.\(^{112}\) For these reasons, the Court noted that “there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility.”\(^{113}\) In *United States v. Haven*, the Court slightly expanded the *Harris* exception to allow illegally obtained evidence to impeach a defendant’s answers to the prosecutor’s questions during cross-examination.\(^{114}\)

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\(^{106}\) *See* 401 U.S. at 226.

\(^{107}\) *Id.* at 222–23.

\(^{108}\) *See* White, *supra* note 105, at 1481–82 n.43.

\(^{109}\) *Id.*


\(^{111}\) *See id.* at 225.

\(^{112}\) *Id.*

\(^{113}\) *Id.* (quoting Walder v. United States, 347 U.S. 62, 65 (1954)); *see also* United States v. Haven, 446 U.S. 620, 627 (1980) (“The incremental furthering of those ends [deterrence of illegal police conduct] by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial.”).

\(^{114}\) *See Haven*, 446 U.S. at 627–28.
Although the *Harris* exception allows defendants to be impeached by illegally obtained evidence, *James v. Illinois* held that this evidence could not be used to impeach the testimony of all defense witnesses.\(^\text{115}\) In *James*, the prosecution needed to connect the defendant to eyewitness descriptions of a red-headed shooter who left a young boy dead and another seriously injured.\(^\text{116}\) Darryl James, once arrested, admitted to dying his hair black and wearing it in its “natural” style, but previously had red hair worn in a slicked-back “butter” style.\(^\text{117}\) At trial, a friend of the defendant’s family testified that on the day of the shooting the defendant’s hair was black and curly.\(^\text{118}\) The prosecutor unsuccessfully sought to use James’s statement to impeach this friend.\(^\text{119}\)

The balance, in this case, tipped against the expansion of the *Harris* exception because allowing the impeachment of all witnesses with illegally obtained evidence would encourage the illicit collection of evidence and decrease the accuracy of the factfinding process.\(^\text{120}\) As witnesses are not substantially invested in a trial, a defendant’s fate should not be jeopardized due to a witness’s inattentiveness.\(^\text{121}\) This extension could lead to defense counsel not calling witnesses—who potentially may offer probative evidence—for fear that their inattentiveness would open the door to illegally obtained evidence.\(^\text{122}\)

### C. Use of Impeachment Evidence in Civil Law Systems

In civil law systems, the admissibility of evidence is determined by the trial judge, thus obviating the need to codify many rules of evidence.\(^\text{123}\) Yet the importance of using prior inconsistent statements for impeachment purposes has crept into the codes of criminal procedure in several nations, including Germany and Poland.\(^\text{124}\)

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\(^{116}\) Id. at 309–10.

\(^{117}\) See id. (noting that James’s original statements were suppressed as fruit of an unlawful arrest because police lacked probable cause for a warrantless arrest).

\(^{118}\) Id. at 310.

\(^{119}\) Id. at 320.


\(^{121}\) *James*, 493 U.S. at 315.

\(^{122}\) Id. at 315–16.

\(^{123}\) See Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 36 (Oct. 9, 2006).

German evidentiary law allows for judicial records of the accused’s previous statements to be read to the court if the accused’s live testimony is contradictory.\textsuperscript{125} Furthermore, it is the practice of German courts to allow a witness’s prior depositions to be read to the court in order to highlight inconsistencies.\textsuperscript{126}

The Polish Code of Criminal Procedure permits the accused’s prior statements given during an investigation or other proceeding to be read in court if, at trial, the accused refuses to testify, states that he does not remember certain facts, or offers contradictory testimony.\textsuperscript{127} Once read to the court, the presiding judge will request that the accused explain these inconsistencies.\textsuperscript{128}

III. Analysis

To resolve the contradictory results of Mrkšić and Simić, this Note argues that the ICTY should adopt an international equivalent of the United States’ Rule 613 and the \textit{Harris} exception to the exclusionary rule.\textsuperscript{129} The U.S. approach is clearly compatible with the civil law approach to admission of evidence, as Germany and Poland already possess rules allowing impeachment by prior inconsistent statements.\textsuperscript{130} Adoption of the U.S. approach would also allow the ICTY to adhere to its fundamental evidentiary rules.\textsuperscript{131}

According to the \textit{Rules}, evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial.\textsuperscript{132} Impeachment by prior inconsistent statements unearths evidence of substantial probative value regarding the credibility of a witness’s live testimony.

\textsuperscript{125} See StPO § 254(2).
\textsuperscript{126} See \textit{Comparative Criminal Procedure} 132 (John Hatchard et al. eds., 1996).
\textsuperscript{127} Code of Criminal Procedure art. 389, § 1.
\textsuperscript{128} Id. § 2.
\textsuperscript{129} See Prosecutor v. Tadic, Case No. IT-91–1, Decision on the Defence Motion on Hearsay, ¶¶ 15–19 (Aug. 7, 1996), \textit{quoted in} Boas, \textit{supra} note 4, at 52. (recognizing that although ICTY is not bound by any particular national code of evidence or criminal procedure, the Tribunal may seek guidance in rules recognized in other prominent legal systems).
\textsuperscript{130} See StPO § 254; Code of Criminal Procedure art. 389, §§ 1–2.
\textsuperscript{131} See R. P. & Evid., \textit{supra} note 16, at 89(C)–(D) (General Provisions); see also Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 25 (Oct. 9, 2006) (recognizing that while Rules deal with \textit{admission} of evidence, underlying policies “provide a useful and appropriate guide to the determination of the procedure to be followed as to the use of a statement solely for the purposes of cross-examination”).
\textsuperscript{132} See R. P. & Evid., \textit{supra} note 16, at 89(C)–(D) (General Provisions).
allowing impeachment would also further the ICTY’s commitment to conducting fair trials because fair trials occur only when a balance is struck between the need to find the truth and the need to preserve the rights of the accused.\textsuperscript{134}

A. Uncovering the Truth Through the U.S. Approach

Impeachment of a witness’s credibility by presentation of prior inconsistent statements is a vital tool for the factfinder in evaluating the evidence presented at trial.\textsuperscript{135} The value of testimonial evidence depends on a witness’s “opportunity to observe and his capacity to observe accurately, to remember, and to communicate in such a way that triers of fact may know what actually happened.”\textsuperscript{136} If factfinders are to base life-altering decisions on the information communicated by witnesses, it is imperative that they discover whether a witness is worthy of their trust.\textsuperscript{137}

By presenting the prior inconsistent statements to a witness, the prosecutor successfully highlights the “clear incompatibility” between the statements to the factfinder.\textsuperscript{138} Questioning during cross-examination also affords a witness an opportunity to explain the inconsistencies, proving that the live testimony is truthful and reliable.\textsuperscript{139} With both sides of the story, the factfinder may choose to trust a witness, discredit a witness who is so unreliable as to contradict himself,\textsuperscript{140} or infer that if a witness is mistaken as to one fact, perhaps he is mistaken as to other crucial facts.\textsuperscript{141}

\textsuperscript{133} See Prosecutor v. Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 31 (Oct. 9, 2006).

\textsuperscript{134} See id., ¶ 26 (noting that question is whether probative value of impeachment evidence substantially outweighs need to ensure fair trial); see also Harris v. New York, 401 U.S. 222, 225 (1971) (concluding that the need to prevent perjury and allow jurors to assess credibility outweighed any threat of police misconduct).


\textsuperscript{137} See Fed. R. Evid. 613 advisory committee’s note; Ladd, supra note 136, at 240.

\textsuperscript{138} See United States v. Barrett, 539 F.2d 244, 254 (1st Cir. 1976).

\textsuperscript{139} See Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 32.

\textsuperscript{140} Weinstein & Berger, supra note 88, § 12.01[5].

\textsuperscript{141} Id. § 12.01[4]. The maxim falsus in uno, falsus in omnibus, meaning false in one thing, false in everything, is a notion deeply rooted in common law jurisprudence. See United States
The Simić Trial Chamber failed in its role as the principal judge of a witness’s credibility when it refused to allow the prosecution to present Tadić’s telephone interviews.\footnote{See Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003); see also Barrett, 539 F.2d at 254 (finding trial court erred in excluding impeachment evidence because of importance of assessing witness’s credibility).} In retrospect, no one will ever know whether Tadić’s telephone interviews or live testimony recounted an accurate version of the atrocities that occurred in Bosanski Samac.\footnote{See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2.} Denying the prosecution the ability to present his prior inconsistent statements, however, withheld valuable information regarding Tadić’s character and veracity from the Trial Chamber.\footnote{See id., ¶ 8.} In Mrkšić, on the other hand, the admission of the 1998 statements gave the Trial Chamber the opportunity to evaluate the accused’s credibility and independently decide whether to credit the live testimony.\footnote{See Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.} 

B. Preserving the Rights of the Accused Through the U.S. Approach

Experience under the U.S. approach demonstrates that using prior inconsistent statements for impeachment purposes does not tread on the rights of the accused.\footnote{Id. ¶ 34.} First, restricting the use of prior inconsistent statements to impeachment purposes ensures that an accused will never be convicted based solely on hearsay or illegally obtained evidence.\footnote{See Walder v. United States, 347 U.S. 62, 65 (1954) ("[T]he Government cannot make an affirmative use of evidence unlawfully obtained."); Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29 ("[T]he Chamber would not have allowed the admission of any of these Statements as substantive evidence, had the prosecution sought to rely on it.").} Courts fear that questionable evidence will affect determinations of criminal responsibility by being used to meet the prosecution’s burden of proof.\footnote{See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8; Kainen, supra note 120, at 1352.} For example, the Harris Court cautioned that a defendant cannot be convicted based on statements obtained without Miranda warnings because the defendant would be unaware of his right...
to counsel or privilege against self-incrimination. The Mrkšić Trial Chamber similarly warned that the accused should not risk conviction based on questioning that failed to observe the procedural requirements of the Rules.

This proposed international evidence rule leaves the Rules’ procedural safeguards intact while simultaneously allowing prosecutors to draw the accused’s inconsistencies to the attention of the Trial Chamber. The Harris exception was originally “fashioned to prevent defendants from using unfair trial tactics—lying for their own benefit while the Government stood by helplessly, unable to use constitutionally obtained probative evidence that could expose the lies.” Under U.S. law, the Constitution cannot shield a defendant from his own prior statements; similarly, the Rules should no longer be allowed to shield the accused as in Simić.

ICTY judges, through careful drafting, could form a rule that incorporates the James limitation, thus adhering to the Rules’ exclusion of evidence when its probative value is outweighed by the need to ensure a fair trial. Rule 613 concludes that any witness may be impeached by their own prior statements. The James limitation recognizes that a defendant’s statements can only impeach the declarant defendant, not other witnesses. The normative basis of these two propositions is that a witness should always be aware of his or her own prior statements. As recognized by the James Court, cross-examination of a witness by ref-

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149 See Harris v. New York, 401 U.S. 222, 224 (1971) (“Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes.”).

150 See Mrkšić, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 29.

151 See Mrkšić Brief for the Prosecution, supra note 34, ¶ 10.

152 White, supra note 105, at 1497.

153 See Harris, 401 U.S. at 226.

154 See James v. Illinois, 493 U.S. 307, 315–16 (1990); see also R. P. & Evid., supra note 16, at 89(D) (General Provisions) (guiding Trial Chambers to exclude evidence if necessary to hold fair trial).

155 Fed. R. Evid. 613.

156 493 U.S. at 315–16.

157 See Fed. R. Evid. 613 advisory committee’s note. The common law rule regarding impeachment by prior inconsistent statements, derived from The Queen’s Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), required a witness to be shown a written account of the alleged prior inconsistent statement before counsel could cross-examine regarding the inconsistencies. In Rule 613, the drafters did away with this requirement, implicitly reasoning that witnesses should be aware of their own prior statements and need not be shown the statement in advance. See id.
ference to another person’s statements is unlikely to reveal information of significant probative value.\textsuperscript{158} This type of cross-examination, therefore, would be excluded not just under James, but under the ICTY’s current Rules.\textsuperscript{159}

Additionally, trial before a professional factfinder ensures that the accused will not be convicted due to overvaluation of impeachment evidence.\textsuperscript{160} Because of the overriding importance of discovering the truth, U.S. courts allow for impeachment by prior inconsistent statements despite the potential overvaluing of this information by lay juries.\textsuperscript{161} Jurors’ ability to confine evidence to its proper scope, even with a limiting instruction, has been called an “unmitigated fiction”\textsuperscript{162} and an impossible feat of “mental gymnastics.”\textsuperscript{163} Empirical studies confirm that jurors are often unable to follow instructions limiting the use of evidence to a particular purpose.\textsuperscript{164}

The ICTY has a stronger incentive to adopt a rule permitting impeachment of witnesses by prior inconsistent statements because professional judges possess the requisite knowledge to afford only the proper weight to hearsay or illegally obtained evidence.\textsuperscript{165} Scholars

\textsuperscript{158} See James, 493 U.S. at 320.
\textsuperscript{159} See R. P. & Evid., supra note 16, at 89(C)–(D) (General Provisions).
\textsuperscript{160} See Boas, supra note 4, at 55.
\textsuperscript{161} See White, supra note 105, at 1476–77.
\textsuperscript{162} Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).
\textsuperscript{163} Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); see also Kainen, supra note 120, at 1352 (noting that courts expect jurors not to “consider any of the affirmative inferences from the perjury that would relieve the prosecution from establishing its burden of proving guilt with lawful evidence”).
\textsuperscript{164} See Jonakait, supra note 135, at 202–05. A preeminent study looked at whether jurors obeyed instructions limiting the use of prior conviction evidence to impeachment purposes as required by Rule 609. When jurors did not receive information regarding prior convictions, 42.5% voted to convict. Jurors were then presented with evidence of prior convictions for similar offenses, prior convictions for dissimilar offenses, and prior perjury convictions. Even though jurors were given a limiting instruction, conviction rates skyrocketed to 75.0%, 52.5%, and 60.0% respectively. Researchers concluded that presentation of prior convictions “increase[s] the likelihood of conviction, and that the judge’s limiting instructions do not appear to correct that error.” See Roselle L. Wissler & Michael Saks, On the Inefficacy of Limiting Instruction: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 L. & Hum. Behav. 37, 43, & 47 (1985).
\textsuperscript{165} See Andrew J. Wistrich et al., Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U. Pa. L. Rev. 1251, 1319–21 (2005). One study found that judges in bench trials were able to disregard coerced confessions obtained in violation of Miranda's guarantee of a right to counsel. When judges were not told about the defendant’s coerced confession, 17.7% convicted the defendant. When judges were told about the defendant's coerced confession, just 20.7% chose to convict the defendant. Researchers concluded that “judges were able to uphold the policies underlying the Miranda doctrine and ignore incriminating but inadmissible evidence.” Id.
have noted that the presence of professional factfinders is precisely the reason why hearsay and other troublesome evidence are admissible before the ICTY. Quite simply, ICTY trials are “unencumbered by the usual concern of unduly prejudicing non-judicial minds in the trying of criminal cases.” Admission of impeachment evidence, therefore, is warranted at the ICTY because it would give the judge a better understanding of the witness’s credibility without the risk of the evidence being used substantively.

Third, the explicit exclusion of illegally obtained statements from the prosecution’s case-in-chief ensures that prosecutors respect the procedural guidelines of the Rules. The Simić Trial Chamber’s fear that admission of prior statements would “condone” violation of the rules was allayed by the U.S. Supreme Court in Harris. There, the Court noted sufficient deterrence of police misconduct stems from the exclusion of these illegally obtained statements from substantive use. Essentially, there is no incentive to violate procedural and constitutional guidelines if the evidence cannot be used at trial. Even less incentive exists in ICTY cases because investigations are directed entirely by prosecutors because the ICTY has no law enforcement branch. Prosecutors, therefore, will have an even greater appreciation for the risks of violating the Rules because of the detrimental effect on their own cases.

Finally, potential impeachment by prior inconsistent statements does not interfere with the free exercise of the accused’s right to testify in his own defense—a fear of the Simić Trial Chamber. This right is guaranteed under both the Rules and U.S. law. Impeachment simply

166 See Boas, supra note 4, at 55; see also May & Wierda, supra note 17, at 747 (explaining that ICTY judges are able to hear hearsay and other controversial evidence in context in which it was obtained and afford it proper weight).
167 Boas, supra note 4, at 55.
168 See id.
170 See id.; Prosecutor v. Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003).
171 See Harris, 401 U.S. at 225.
172 See id. (explicitly reasoning that “sufficient deterrence follows when the evidence in question is made unavailable to the prosecution in its case in chief”).
174 See Harris, 401 U.S. at 225.
175 See Simić, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 7.
176 R. P. & Evid., supra note 16, at 85(C) (General Provisions); In re Oliver, 333 U.S. 257, 273 (1948) (expounding that “[a] person’s right to reasonable notice of a charge
ensures that when the accused elects to testify, he or she speaks truthfully.\textsuperscript{177} Essentially, this right to testify “cannot be construed to include the right to commit perjury.”\textsuperscript{178}

\section*{C. Practical Benefits of the U.S. Approach}

In ICTY trials, the lack of contemporaneous evidence presents a tactical problem for prosecutors.\textsuperscript{179} Contemporaneous evidence carries more weight at trial because it was obtained or recorded while the criminal events were transpiring.\textsuperscript{180} Adoption of the U.S. approach to prior inconsistent statements would take prosecutors one step closer to overcoming this evidentiary hurdle.\textsuperscript{181}

Most crimes being tried before the ICTY occurred before the ICTY was even established; therefore, prosecutors are faced with piecing together evidence years after the crimes occurred.\textsuperscript{182} Wiretapping and surveillance—which are two of the most common investigatory tools—are unavailable to ICTY prosecutors.\textsuperscript{183} Documentary evidence is also scarce because, as one former ICTY prosecutor noted, “Senior leaders orchestrating large-scale crimes rarely document the overall criminal purpose or detail each criminal step of its implementation.”\textsuperscript{184}

In the absence of these fact-gathering tools, live testimony is the primary tool for presenting facts to the Trial Chamber.\textsuperscript{185} As the value of testimonial evidence depends on a witness’s ability to remember and relate certain events, the prosecutor should be able to check the accu-
racy of trial testimony against statements given closer in time to the underly-
ing event.\textsuperscript{186} For example, the \textit{Simi\v{c}} case involved alleged crimes occurring between September 1991 and December 1993.\textsuperscript{187} The telephone interviews at issue were conducted in 1996.\textsuperscript{188} Tadi\v{c}i\'s trial testimony, however, did not take place until 2003.\textsuperscript{189} Because of the frailty of human memory, statements given two years after an event are more credible than statements given ten years after an event.\textsuperscript{190} Even though prior statements may not be used substantively, assessment of a witness’s credibility is crucial in the factfinder’s evaluation of testimonial evidence.\textsuperscript{191}

The absence of detailed evidentiary rules, moreover, leaves prosecutors guessing as to which pieces of their limited evidentiary arsenal can be used at trial.\textsuperscript{192} Each Trial Chamber is allowed to independently “apply the procedure according to its own understanding of the purpose and underlying principles of the procedure.”\textsuperscript{193} As previously discussed, the U.S. approach is consistent with the ICTY’s principles governing the admissibility of evidence, namely that evidence is admissible so long as its probative value is not outweighed by the need to ensure a fair trial.\textsuperscript{194} Codification of a clear rule regarding prior inconsistent statements would prevent conflicting interpretations of policy and provide concrete guidelines for prosecutors.\textsuperscript{195}

As the ICTY seeks to provide expeditious trials, adoption of the U.S. approach would obviate the need for case-by-case evidentiary deci-

\textsuperscript{186} See Ladd, \textit{supra} note 136, at 240; see also Prosecutor v. Mrk\v{s}i\v{c}, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 28 (Oct. 9, 2006) (noting extensive time delay between challenged statements and trial testimony of accused can extend up to fifteen years).

\textsuperscript{187} \textit{Simi\v{c}} Fifth Amended Indictment, \textit{supra} note 52, ¶ 11.

\textsuperscript{188} Prosecutor v. Simi\v{c}, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 2 (Mar. 11, 2003).

\textsuperscript{189} Id.

\textsuperscript{190} See generally Yaacov Trope & Nira Liberman, \textit{Temporal Construal}, 110 PSYCHOL. R. 403, 418 (2003) (finding that memories of events change over time and, as time passes, individuals will likely perceive events in abstract features, not concrete details).

\textsuperscript{191} Mrk\v{s}i\v{c}, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.


\textsuperscript{193} Id. at 1057.

\textsuperscript{194} See \textit{supra} notes 132–34 and accompanying text.

\textsuperscript{195} Compare Mrk\v{s}i\v{c}, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33 (allowing prior inconsistent statements to be used for impeachment), with Prosecutor v. Simi\v{c}, Case No. IT-95–9-T, Reasons for Decision on Prosecution’s Motion to Use Telephone Interviews, ¶ 8 (Mar. 11, 2003) (disallowing prior inconsistent statements to be used for impeachment).
sions and speed up the pace of war crimes trials. In Mrksić, for example, the trial was delayed for a month because the Trial Chamber needed to decide whether the 1998 statements were admissible.

**Conclusion**

International criminal tribunals are bound to play an increasingly important role in the future. The need to establish clear functional rules of evidence is paramount to ensuring that these criminal trials remain fair proceedings for both the prosecution and defense. Currently, the ICTY’s *Rules*, with all their virtues and flaws, have been virtually duplicated by the International Criminal Tribunal for Rwanda and the International Criminal Court. As a result, the debate regarding the use of prior inconsistent statements for impeachment purposes will remain part of the international legal landscape until one tribunal ends the debate by establishing a clear evidentiary rule allowing the admission of these statements.

The ICTY, as the original international criminal tribunal, stands in a position to remedy this problem, once and for all, by adopting an international equivalent to Rule 613 and the *Harris* exception. The Trial Chambers have already accepted the logic underlying the U.S. evidentiary rule. Now it is time for the ICTY to explicitly adopt a similar rule and prevent future witnesses from weaving a web of lies on the stand.

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196 See, e.g., *Mrksić*, Case No. IT-95–13/1-T, Decision Concerning the Use of Statements Given by the Accused, ¶ 33.

197 *Id.* The defense filed a motion requesting the exclusion of the 1998 statements on September 7, 2006. The Trial Chamber did not resolve the issue until October 9, 2006. *Id.*
TAXPAYER STANDING: MAINTAINING SEPARATION OF POWERS WHILE ENSURING DEMOCRATIC ADMINISTRATIVE ACTION

DANIEL GARNAAS-HOLMES*

Abstract: In a landmark 2007 decision, the U.S. Supreme Court expanded its standing doctrine. Traditionally, the U.S. standing doctrine has been narrow, relying largely on the “cases and controversies” language of Article III of the U.S. Constitution. This doctrine has precluded third-party or taxpayer suits concerning administrative action. This Note compares the U.S. standing doctrine to that of South Africa, which has a much broader notion of who may bring suit. South Africa’s history with apartheid and distrust of government has led to a liberal standing doctrine in which any individual aggrieved by administrative action may bring suit to receive a written explanation from the offending agency. By exploring the doctrines, this Note argues that a similar type of standing in the United States would serve to democratize administrative action while still ensuring a constitutional separation of powers.

Introduction

On November 29, 2006, the U.S. Supreme Court heard oral arguments in Massachusetts v. Environmental Protection Agency (EPA).¹ The issue was whether the Administrator of the EPA had authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clear Air Act.² Despite the lack of attention given to the issue of standing in the parties’ briefs, much of oral arguments were devoted to discussion of whether states, local governments, and private organizations have standing to sue the EPA over policies with which

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¹ No. 05–1120 (U.S. Nov. 29, 2006).
they disagree. When the Court released its decision in April 2007, it devoted nearly half of the written opinion to the standing issue. Indeed, the Chief Justice’s dissent addressed only the standing issue and never reached the merits. To the surprise of many, the court held that Massachusetts had standing to bring suit against the EPA. The ability of states and taxpayers to bring suit against the federal government to express grievances with national policy decisions is hardly a new issue, especially in the realm of environmental policy. Although Massachusetts v. EPA concerned environmental regulation, its attention to standing refocused the debate on an old question: whether administrative action can accord with public wishes while avoiding the separation of powers problems inherent in judicial review of executive action.

Although much attention has been given to the issue of taxpayer standing in a purely domestic context, there has been less attention in a

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4 See Massachusetts v. Envtl. Prot. Agency (EPA), 127 S. Ct. 1438, 1452–59 (2007). The Court, however, only addressed standing for the state of Massachusetts, and did not comment on the standing of local governments and private organizations. See id. The Court omitted discussion of the latter because only one party needs standing for the suit to go forward. See id. at 1441 (citing Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006)).

5 See id. at 1463–71 (Roberts, C.J., dissenting).


comparative context. By comparing the standing doctrine of South Africa—the product of a recently created judicial system drawing on the vast experiences of other nations—with that of the United States, this Note explores ways of making administrative action and subsequent judicial review more democratic. In particular, this Note looks at the process of petitioning for reasons. This process allows citizens adversely affected by administrative decisions to ask administrative agencies to justify and explain their decisions in writing without actually suing the agencies.

Part I of this Note explains the historical background for the current standing doctrines of the United States and South Africa, paying particular attention to the political context in which the South African doctrine emerged. Part II sets forth the standing doctrines employed in each country, and draws attention to significant differences. Part III explains the doctrinal differences and suggests ways in which the United States can take examples from foreign systems in order to liberalize access to courts without undermining its separation of powers doctrine.

I. Background

A. United States

Standing in the United States is grounded in the “cases and controversies” language of Article III of the U.S. Constitution. The meaning of this phrase and its interpretation have evolved drastically since the time of the Framers. In early U.S. jurisprudence, the Court

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13 See Winter, supra note 12, at 1395.
adopted the English and colonial notion that standing was a matter of bringing an action in a recognized form.\textsuperscript{14} Chief Justice Marshall adopted this view when he wrote: “[Judicial power] is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case.”\textsuperscript{15} One scholar explains this formulation as an adoption and reflection of the common law forms of action used in England and its colonies.\textsuperscript{16} Although commentators often focus on standing as a matter of separation of powers, in the early years of the United States, the doctrine more accurately reflected the English common law principal that “where there is a legal right there is also a legal remedy . . . whenever that right is invaded.”\textsuperscript{17}

Modern U.S. standing doctrine requires an injury in fact, yet prior to the American Revolution, English practice allowed “standingless” suits against illegal government action through writs of mandamus, prohibition, and certiorari issued by the King’s Bench.\textsuperscript{18} The King’s Bench was “acting on behalf of the King to superintend lower organs” to redress “refusal or neglect of justice” and “encroachment upon jurisdiction.”\textsuperscript{19} In those instances, the injury involved was purely “metaphoric” and encompassed “any infringements of rights of another.”\textsuperscript{20} As U.S. law diverged in general from English tradition, so too did its standing doctrine.\textsuperscript{21} The term standing lost its original substantive meaning describing the relationship between the parties and became a mere procedural term.\textsuperscript{22} Modern U.S. standing doctrine has done away with the notion of “standingless” cases that had been recognized in English common law and has adopted a litigant-specific definition.\textsuperscript{23} The doctrine abandons the writ system employed by the King’s Bench, thus decreasing the executive’s control over the functions of lower state organs.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{14} Osborn v. Bank of United States, 22 U.S. (9 Wheat) 738, 819 (1824).
\item \textsuperscript{15} Osborn, supra note 12, at 1395.
\item \textsuperscript{16} Winter, supra note 12, at 1396.
\item \textsuperscript{17} Id. at 1396 (quoting William Blackstone, 2 Commentaries *23).
\item \textsuperscript{18} See id.
\item \textsuperscript{19} See id. at 1397–98.
\item \textsuperscript{20} See id. at 1397.
\item \textsuperscript{21} See Winter, supra note 12, at 1417.
\item \textsuperscript{22} See id. at 1422–23.
\item \textsuperscript{23} See infra Part II.A (discussing U.S. standing doctrine and requirement of injury to litigant in order to bring suit).
\item \textsuperscript{24} See Winter, supra note 12, at 1397–98; infra Part II.A.
\end{itemize}
B. South Africa

Whereas the United States has been developing its standing jurisprudence for the past two hundred years, South Africa has had just over ten years to develop a body of law on the subject. Although South Africa gained its independence in 1961, it was not until the passage of the interim constitution in 1994 that it began to develop its modern jurisprudence. In 1993, then President F. W. De Klerk, Nelson Mandela, and the leaders of eighteen other parties endorsed an interim constitution to become effective after the first national election. The interim constitution was the result of tedious two-year negotiations between apartheid leaders and representatives of the African National Congress. Following Nelson Mandela’s election in April 1994, the interim constitution entered into force as planned.

Because of past political instability and abuses, the interim constitution provided liberal standing to ensure the just administration of the laws and guarantees under the Bill of Rights. The interim constitution was an “eclectic and somewhat confused document” borrowing ideas from America, Canada, Germany, India, Namibia, and international law. As a result of the apartheid rule’s exclusion of blacks from the political process and its extensive record of human rights abuses, the interim constitution went to great length to protect human rights and ensure full political participation. Both the interim and permanent constitution (South African Constitution, or constitution) embody a broad range of first, second, and third generation rights.


26 See Berat, supra note 10, at 43.

27 See id.


29 Berat, supra note 10, at 43.

30 See Jack Greenberg, A Tale of Two Countries, United States and South Africa, 41 ST. LOUIS U. L.J. 1291, 1291–92 (1997) (discussing dramatic reforms in new constitution); Owens, supra note 9, at 368.

31 See Greenberg, supra note 30, at 1291–92; Owens, supra note 9, at 368; Sachs, supra note 28, at 1253.


33 S. Afr. CONST. ch. 2; S. Afr. (Interim) CONST. ch. 3. First generation rights are those “guaranteeing civil and political freedoms”; whereas, second and third generation rights
Leading up to the adoption of the South African Constitution in 1996, Parliament instituted a program of public participation designed to legitimize the process and ensure that the final draft embodied citizens’ hopes and desires.\textsuperscript{34} Although the commission received over two million submissions, few of them were reflected in the final draft.\textsuperscript{35} Like the interim constitution, this version drew heavily from the experiences of other nations and international law, often leading to internal contradictions.\textsuperscript{36} Nonetheless, it was an important step toward ensuring the peaceful future of the nation as well as spurring South Africa’s modern jurisprudence.\textsuperscript{37} Its passage marked the end “of a six year long battle . . . where competing visions of the new South Africa, formed during the decades of struggle, clashed through paragraph after paragraph.”\textsuperscript{38} Yet with its passage, the “honeymoon” period was over—as was the willingness of the populace to defer their demands on the government.\textsuperscript{39} Justice Albie Sachs of the South African Constitutional Court described the process as one of “transition from a country where law was used to express untrammeled power to one where all power was subjected to law.”\textsuperscript{40} Although the transformations have been rapid, commentators note that South Africa has developed an efficient judicial system.\textsuperscript{41}

Unlike the U.S. judicial system, which vests supreme authority in a single Supreme Court, the South African Constitution divides supreme judicial authority between the Supreme Court of Appeal (SCA) and the Constitutional Court.\textsuperscript{42} The former is the highest court in non-constitutional matters while the latter is the supreme authority on all constitutional matters.\textsuperscript{43} Since its formation under the interim constitution, the Constitutional Court has struggled to define the procedure for invoking its jurisdiction.\textsuperscript{44} Although the line of rulings on access to the court are complex, the Constitutional Court has affirmed that par-

\textsuperscript{34} See Berat, \textit{supra} note 10, at 57.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{See id.} at 59.
\textsuperscript{38} Siri Gloppen, \textit{South Africa: The Battle over the Constitution} 3 (1997).
\textsuperscript{39} Berat, \textit{supra} note 10, at 59.
\textsuperscript{40} Sachs, \textit{supra} note 28, at 1249.
\textsuperscript{41} See Berat, \textit{supra} note 10, at 46, 48–53.
ties may invoke its jurisdiction either by referral from an appellate court or by direct application.\footnote{Id. at 53.} As a result of the complex rules, the Constitutional Court has a relatively sparse docket, and thus does not face the same concerns of docket overload that the U.S. Supreme Court experiences.\footnote{See id. at 50.} At first glance, therefore, South African courts avoid at least one pragmatic concern stemming from a liberalized standing doctrine.\footnote{See id.}

II. Discussion

A. U.S. Standing Doctrine

The U.S. standing doctrine is rooted in Article III, Section 2 of the U.S. Constitution, which states that “the judicial Power shall extend to all Cases . . . [and] Controversies.”\footnote{See U.S. Const. art III, § 2. Treatment of U.S. standing in this Note is relatively brief in light of the vast amount of literature available. See generally Raoul Berger, \textit{Standing to Sue in Public Actions: Is It a Constitutional Requirement?}, 78 YALE L.J. 816 (1969); Louis L. Jaffe, \textit{Standing to Secure Judicial Review: Public Actions}, 74 HARV. L. REV. 1265 (1961); Owens, \textit{supra} note 9; Winter, \textit{supra} note 12. See also Erwin Chemerinsky, \textit{Constitutional Law} 60–101 (2d ed. 2002) (describing U.S. standing doctrine).} The Court has interpreted Article III standing to require that (1) the plaintiff have suffered an injury in fact, or at least an imminent harm,\footnote{See, \textit{e.g.}, FEC v. Akins, 524 U.S. 11, 25 (1998) (denial of information after Congress created right to such information was sufficient injury); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 887–88 (1990) (two people using lands in vicinity of those adversely affected by federal environmental policy was too general of a harm to establish injury); United States v. SCRAP, 412 U.S. 669, 685 (1973) (students claiming injury to forest recreation area from increased pollution caused by government regulatory scheme deemed sufficient injury).} (2) caused by the defendant,\footnote{The harm must at least be “fairly traceable” to the defendant. \textit{See} Duke Power v. Car. Envtl. Study Grp., 438 U.S. 59, 74–78 (1978) (causation requirement satisfied because, but for the Price-Anderson-Act, nuclear reactor would not be built and plaintiffs would suffer no harm); Simon v. E. Ky. Welfare Rights Org. 426 U.S. 29, 45–46 (1976) (purely speculative whether new IRS revision, limiting amount of free medical care hospitals were required to provide, was responsible for denial of medical services to plaintiffs; thus no standing).} and (3) that a favorable court ruling would redress.\footnote{The harm must at least be “fairly traceable” to the defendant. \textit{See} Duke Power v. Car. Envtl. Study Grp., 438 U.S. 59, 74–78 (1978) (causation requirement satisfied because, but for the Price-Anderson-Act, nuclear reactor would not be built and plaintiffs would suffer no harm); Simon v. E. Ky. Welfare Rights Org. 426 U.S. 29, 45–46 (1976) (purely speculative whether new IRS revision, limiting amount of free medical care hospitals were required to provide, was responsible for denial of medical services to plaintiffs; thus no standing).} The Court and commentators suggest such a restrictive standing doctrine ensures the separation of powers, promotes judicial efficiency by maintaining a workable caseload, and improves judicial decision making by providing specific
controversies that parties will litigate actively. Chief Justice Marshall, in the first opinion to contemplate the scope of the judiciary’s power, wrote: “The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.”

In addition to the constitutional bar requiring injury and redressability, the U.S. standing doctrine also contains a number of prudential bars to litigation. Most important to this Note are the bars to general taxpayer and third-party standing. In delineating these and other prudential bars to standing, the Court has relied heavily on the case and controversy requirements of Article III, Section 2. The Court addressed the issue in *Frothingham v. Mellon*, in which the plaintiff asserted that the Federal Maternity Act of 1921, providing financial grants to states to reduce maternal and infant mortality, violated the Tenth Amendment’s reservation of powers to state governments. The Court held that a taxpayer’s grievance concerning spending of federal funds is too “attenuated” because it is “shared with millions of others [and] is comparatively minute and indeterminate.” Because of such an attenuated link, the Court developed a two-part test to determine the existence of taxpayer standing. First, “the taxpayer must establish a logical link between the status and the type of legislative enactment attacked.” Second, “the taxpayer must establish a nexus between the status and the precise nature of the constitutional infringement alleged.”


53 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1804). It is this notion of separation of powers that Justice Scalia has adopted as the correct interpretation, and to which he urges the Court return. *See* Scalia, *supra* note 8, at 887–99.

54 *See* Massachusetts (Frothingham) v. Mellon, 262 U.S. 447, 486–89 (1923); Braxton County Ct. v. West Virginia, 208 U.S. 192, 197 (1892).

55 *See* Frothingham, 262 U.S. at 486–89; Braxton, 208 U.S. at 197.

56 *See* Frothingham, 262 U.S. at 486–89; Braxton, 208 U.S. at 197.

Frothingham, 262 U.S. 447.

58 *Id.* at 488; *see also* Ex parte Levitt, 302 U.S. 633, 634 (1934) (general interest common to all members of public not sufficient for standing).


60 *Id.*

61 *Id.* This means plaintiff must show that Congress is violating a specific constitutional provision rather than simply exceeding the scope of its powers. *See* Chemerinsky, *supra* note 48, at 92.
The Court went further in *Lujan v. Defenders of Wildlife*, holding that Congress cannot authorize standing for general grievances by simply inserting a grant into a particular statute. The Court struck down such a provision in the Endangered Species Act because it would allow Congress to transfer from the President to the courts the most important duty of the Chief Executive—ensuring “the Laws be faithfully executed.” In *Association of Data Processing Service Organizations, Inc. v. Camp*, however, the Court found acceptable congressional authorization of standing for certain people within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” In *Camp*, the Court held that data processors were within the zone of interests protected by the Bank Service Corporation Act of 1962, which prohibited bank service corporations from “[engaging] in any activity other than the performance of bank services for banks.” Through its treatment of general grievances, the Court has demonstrated an unwillingness to let Congress appoint every citizen as a sort of private attorney general.

Finally, the Court has recognized standing for associations or organizations only when their members would be injured by the challenged action, or if it has been injured as an entity. An association cannot, however, seek redress because a government policy is contrary to its views. As discussed below, this differs from the practice of other countries, such as England, which allow associational standing for watchdog organizations.

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63  *Id.* at 576; *see also* U.S. Const. art. II, § 3.
64  *Camp*, 397 U.S. at 153; *see also* Barlow v. Collins, 397 U.S. 159, 164 (1970) (finding farmers within zone of interests of statute regulating tenant farmers and assignment of payments under Upland Cotton Program).
66  *See* Owens, *supra* note 9, at 331 n.38.
67  Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (holding organization has standing to challenge conduct impeding its ability to attract members, raise revenues, or fulfill its purposes); Sierra Club v. Morton, 405 U.S. 727, 735 (1972) (finding national environmental protection organization lacked standing because its members were not injured by construction of ski resort in national park).
B. South Africa

1. General Standing Doctrine

Prior to the 1994 interim constitution, South African courts adopted a restrictive interpretation of standing. In fact, the doctrine was markedly similar to the current U.S. doctrine in that litigants could not bring suits on behalf of the general welfare, but rather were required “to have a personal interest in the matter and to have been adversely affected by the wrong alleged.” Current South African standing doctrine, however, is quite broad. The constitution grants standing to:

(a) anyone acting in their own interests;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interests of its members.

South African courts have accepted such liberal standing as necessary to enforce the fundamental rights enumerated in chapter 2 of the constitution.

Although the broad standing conveyed by chapter 2, section 33(d) would suggest that the Constitutional Court receives a litany of cases concerning issues of public interest, rarely has the court reached its decision based on the provision. Ferreira v. Levin NO & Others is one of the few cases to discuss the issue, and even then only Justice O'Regan

70 Cheryl Loots, Standing, Ripeness and Mootness, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA 7-2 (2d ed. 2002).
72 See S. Afr. Const. ch. 2 § 38; Greenberg, supra note 30, at 1292; Owens, supra note 9, at 368.
73 S. Afr. Const. ch. 2 § 38 (emphasis added).
74 Coetzee v. Comitis & Others 2001 (1) SA 1254 (CC) ¶¶ 17.5–.7 (S. Afr.); Ferreira v. Levin NO & Others, 1996 (1) SA 984 (CC) ¶ 165 (S. Afr.); see also S. Afr. Const. ch. 2 (much broader enumerated rights than U.S. Constitution, including privacy (§ 14), labor relations (§ 23), environmental (§ 24), and housing rights (§ 26)).
75 See Loots, supra note 70, at 7-11 to -12 (discussing the few Constitutional Court cases giving treatment to the issue).
reached the issue of *locus standi* to claim relief in the public interest.\(^{76}\)
She described the requirements of the provision as follows:

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.\(^{77}\)

Despite the broad standing of section 33(d), courts often find alternative grounds for standing, thus avoiding any decisions based on section 33(d).\(^{78}\)

2. Just Administrative Action

The South African Constitution also grants broad standing in cases concerning administrative action.\(^{79}\) The constitution embodies a “right to just administrative action that is lawful, reasonable and procedurally fair.”\(^{80}\) The provision entitles anyone whose rights have been adversely affected by administrative action to be given written reasons for the action.\(^{81}\) The provision serves the purpose of guarding against “parliamentary ouster,” so that an Act of Parliament “can no longer oust a court’s constitutional jurisdiction and deprive the courts of their review function.”\(^{82}\) The Constitutional Court has characterized the principle as establishing the notion that the executive “may exercise no power and perform no function beyond that conferred upon them by law.”\(^{83}\)

\(^{76}\) 1996 (1) SA 984 (CC) ¶ 233 (O’Regan, J.) (S. Afr.).

\(^{77}\) Id. ¶ 234, *quoted in Loots, supra* note 70, at 7-11.

\(^{78}\) Ferreira, (1) SA 984, ¶ 233 (noting important factor is whether there is another reasonable and effective manner in which challenge can be brought); *see also* Loots, *supra* note 70, at 7-11 (discussing similarities between South African and Canadian cases).

\(^{79}\) *See* S. Afr. Const. ch. 2 § 33; S. Afr. (Interim) Const. § 24(a).

\(^{80}\) S. Afr. Const. ch. 2 § 33(1).

\(^{81}\) Id. § 33(2).


Prior to the interim constitution, South African administrative law was governed by common law. Based largely on the principles of rule of law and sovereignty of Parliament, common law allowed actions of a decision-maker to be overturned “if he abused his discretion, failed to properly apply his mind or failed to follow the rules of natural justice.” This essentially gave free reign to Parliament and the executive during apartheid rule, particularly for laws governing segregation and national security. The inclusion of the right to just administrative action in the interim and permanent constitutions embodied a “radical sea-change” in administrative law, setting the stage for constitutional supremacy. Current jurisprudence requires all public power to flow from the Constitution and conform thereto.

The Constitutional Court has addressed each of the separate rights embodied in section 33(a) of the constitution, namely the right to administrative action that is (1) lawful, (2) reasonable, and (3) procedurally fair. Procedural fairness is a flexible concept embodying two fundamental principles—the right to be heard and the rule against bias. Although courts have broad latitude to determine procedural fairness, the Constitutional Court has warned that “court[s] should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively.”

The concept of reasonable administrative action, as it is now interpreted, did not exist under common law. The Constitution abrogated the common law doctrines of symptomatic unreasonableness and gross unreasonableness, creating in their stead a doctrine of unreasonableness per se. Two approaches exist. Under the first, an ac-

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84 Id. at 63-1.
85 Id. (citing Fedsure Life Assurance, 1999 (1) SA 374 (CC) ¶¶ 23 & 28; Johannesburg Stock Exch. & another v. Witwatersrand Nigel Ltd. & another, 1988 (3) SA 132 (A) at 152 (S. Afr.)).
86 See id. at 63-1 to -2.
87 Klaaren & Penfold, supra note 82, at 63-2.
88 See Pharm. Mfr. Ass’n of S. Afr. & another: In re Ex parte President of RSA & Others, 2000 (2) SA 674 (CC) ¶ 45 (S. Afr.).
89 See Klaaren & Penfold, supra note 82, at 63-25 to -36. Because the issue is given such broad treatment in Klaaren & Penfold, this Note only briefly summarizes the jurisprudence.
90 See id. at 63-26; see also Premier, Mpumalanga, & another v. Executive Comm., Ass’n of State-Aided Schs., E. Transvaal, 1999 (2) SA 91 (CC) ¶ 41 (S. Afr.) (discussing what constitutes procedural fairness).
91 Premier, Mpumalanga, 1999 (2) SA, ¶ 41.
92 Klaaren & Penfold, supra note 82, at 63-32.
93 See id. at 63-32 to -33. Symptomatic unreasonableness did not allow review of unreasonableness itself, but allowed review to the extent that the unreasonableness pointed to the existence of another ground of review. Id. at 63-32. Gross unreasonableness is that
tion is reasonable “if there is a rational connection between a legitimate state objective and the means used.” 94 Under the second, in contrast, an action is reasonable if it is “supported by the evidence before the decision-maker and the reasons given for it, and is ‘rationally connected to its purpose, or objectively capable of furthering that purpose.’” 95

Parliament provided a tool for enforcement of this right in the Promotion of Administrative Justice Act (AJA). 96 The AJA was passed “to give effect” to the right to just administrative action by “providing a detailed elaboration of both the scope and content of the rights, as well as providing an institutional framework for their implementation and enforcement.” 97

a. Defining Administrative Action

Before the rights under chapter 2 section 33 and the AJA can be applied, it must first be determined whether a case involves administrative action. 98 In discerning whether the rights apply, one must look to both the constitution and the AJA. 99

Under the constitution, administrative action compromises “all action taken by persons and bodies exercising public power.” 100 The SCA interpreted this description to include only those actions in which the body or person is acting in its public capacity, as opposed to acting simply as a private party. 101 In Cape Metropolitan Council, the court characterized a local authority’s cancellation of an agency agreement as private action because the power to terminate was derived not from its power as an agency, but rather from the tenets of contract law. 102 Thus a state organ must be using its inherent state power for its actions to qualify as administrative. 103 The concept includes not only administra-

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94 Klaaren & Penfold, supra note 82, at 63-33.
96 AJA, Act 3 of 2000.
97 Klaaren & Penfold, supra note 82, at 63-5 to -6.
98 Id. at 63-8.
99 Id.
100 Id. at 63-9.
102 Id.
103 See id.; Klaaren & Penfold, supra note 82, at 63-9 n.1. Examples of such actions include: the withdrawal of education bursaries by organs of the provisional executive; a deci-
tive adjudications, but also administrative rule-making and subordinate legislation.\textsuperscript{104}

The Constitutional Court has held that three categories of government action do not constitute administrative action under the constitution: legislative action;\textsuperscript{105} executive policy decisions;\textsuperscript{106} and judicial action.\textsuperscript{107} The appropriate inquiry in such cases “is whether the task itself is administrative,” not simply whether it was conducted by the executive branch.\textsuperscript{108} Thus, “[W]hat matters is not so much the functionary as the function.”\textsuperscript{109} These categories are excluded because they are already regulated by the Constitution and through political participation; it would therefore be inappropriate to characterize them as administrative action.\textsuperscript{110}

While the Constitutional Court has defined administrative action primarily in terms of what it does not encompass, drafters of the AJA directly addressed its entire scope.\textsuperscript{111} To a large extent, the AJA codifies
the Constitutional Court’s delineation of administrative action, but in positive terms.\textsuperscript{112} The AJA breaks administrative action into two groups: (1) that affecting individuals, and (2) that affecting the public.\textsuperscript{113} Acts affecting private individuals involve situations

where a person enjoys an expectation of a privilege or benefit of which it would not be fair to deprive him or her without a fair hearing; and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed.\textsuperscript{114}

Administrative action affecting the public, however, is concerned more with the “general rule-making procedures which must be followed.”\textsuperscript{115} The AJA states that procedural fairness “depends on the circumstances of each case,” and in instances affecting either individuals or the public, it sets forth detailed provisions on how agencies must comply with procedural fairness.\textsuperscript{116} Both sections of the AJA require, among other factors, notice of actions as well as public hearings and an opportunity to comment on actions taken by administrative agencies.\textsuperscript{117}

b. The Right to Petition for Reasons

The right to written reasons did not exist under common law, but is embodied in both the constitution and the AJA.\textsuperscript{118} Drafters of the constitution included the provision because they felt it would promote administrative justice and good decision-making without instigating unnecessary judicial review of the executive branch.\textsuperscript{119} The underlying theory is that decision-makers who know they may be required to justify their actions in the future will be more likely to consider alternatives

\textit{Id.} The statute goes on to explain in detail what does not constitute administrative action, including executive acts of the President or Provincial Executive, the legislative functions of Parliament, and the judicial functions of courts. \textit{Id.} ss. 1(b)(aa)–(ii).

\textsuperscript{112} See \textit{id.}

\textsuperscript{113} \textit{Id.} ss. 3 & 4.


\textsuperscript{115} See Klaaren \& Penfold, \textit{supra} note 82, at 63-28.

\textsuperscript{116} AJA, Act 3 of 2000 ss. 3(2), 3(3)–(5), \& 4.

\textsuperscript{117} \textit{Id.} s. 3(2)(i) (requiring notice of nature and purpose of proposed administrative action; \textit{id.} s. 3(2)(ii) (mandating reasonable opportunity to make representations; \textit{id.} s. 4(a) (providing much the same for administrative action affecting the public).

\textsuperscript{118} Klaaren \& Penfold, \textit{supra} note 82, at 63-35; see also S. Afr. Const. ch. 2 § 33(2) (granting right to petition for reasons); AJA, Act 3 of 2000 s. 5(1) (same).

\textsuperscript{119} Klaaren \& Penfold, \textit{supra} note 82, at 63-35.
while making decisions, and strive to act in accordance with the principles of just administrative action.\textsuperscript{120} Once a citizen has petitioned for reasons, however, it must be determined what constitutes “adequate reasons” under both the constitution and the AJA.\textsuperscript{121}

Neither the constitution nor the AJA define “adequate reasons”; therefore, South African commentators have looked to U.K. cases, which construe the term to mean “the reasons set out must be reasons which will not only be intelligible but which deal with the substantive points that have been raised.”\textsuperscript{122} South African courts have held the term to require that more drastic action demands more detailed reasons.\textsuperscript{123} Thus “the degree of seriousness of the administrative act should . . . determine the particularity of the reasons furnished.”\textsuperscript{124} The reason giving provision “serves a satisfactory function, explaining to the affected parties and to the public at large why a particular decision has been made.”\textsuperscript{125} Finally, although the procedure is request-driven in that agencies will not provide reasons until asked, recent legislative trends require that reasons be automatically given in relation to certain decisions.\textsuperscript{126}

Article 253 of the EC Treaty provides for a similar procedure in the European Union.\textsuperscript{127} Analyzing EU treatment of the provision provides a more complete understanding of the process. The scope of article 253 is much broader than that embodied in South African law because it applies not only to administrative decisions, but also to legislative acts.\textsuperscript{128} The policy reasons justifying the duty include increasing the transparency of decision-making, helping facilitate judicial review by the European Court of Justice (ECJ), and creating “participation rights.”\textsuperscript{129} The reasons given should include the factual background of

\begin{itemize}
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{See id.} at 63-36.
  \item \textsuperscript{122} \textit{Id.} (quoting \textit{In re Poyser and Mills’ Arbitration, [1964] 2 QB 467 at 487 (U.K.)}).
  \item \textsuperscript{123} \textit{Id.} at 63-37 (citing \textit{Moletsane v. Premier of Free State & another, 1996 (2) SA 95 (O) at 98G-H (S. Afr.)}).
  \item \textsuperscript{124} KlaAREN & Penfold, \textit{supra} note 82, at 63-37.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} EC Treaty, \textit{supra} note 11, art. 253 (“Regulations, directives and decision adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reason on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty.”).
  \item \textsuperscript{128} \textit{See Paul Craig & Gráinne de Búrca, EU Law: Text, Cases, and Materials} 117 (3d ed. 2003).
  \item \textsuperscript{129} \textit{See id.} at 118, 120.
\end{itemize}
the measure and the purposes behind it. In *Germany v. Commission*, the ECJ held it was sufficient to set out in a concise, clear, and relevant manner the principal issues of law and fact on which the action was based so the reasoning that led the Commission to its decision could be understood. Furthermore, the reasons given “must be sufficient to enable the court to exercise its judicial review function,” and the court “will scrutinize the . . . reasoning, annulling the decision if it does not withstand examination.”

c. *Standing to Sue in Administrative Cases and Substantive Remedies*

Standing to sue administrative agencies is controlled by chapter 2 section 38 of the constitution, as are all suits concerning infringements on constitutional rights. South African courts have adopted a broad approach to standing in these instances, largely because the nature of administrative cases allows a suit to be brought under any of the five grounds for standing in section 38. Unlike other actions giving rise to suits, administrative actions are specifically intended to have public effect. Further, they affect classes of citizens in a similar manner, often classes that are too poor or disenfranchised to bring the action on their own behalf.

In *Ngxuza & Others v. Secretary of Department of Welfare, Easter Cape Provincial Government & another*, Judge Froneman adopted a liberal approach to standing in administrative cases because:

The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of

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131 Id.
132 Id. at 120.
133 See *Ngxuza & Others v. Sec’y, Dep’t of Welfare, E. Cape Provincial Gov’t & another*, 2000 (12) BCLR 1322 (E) at 1331 (S. Afr.).
134 See id. at 1328.
135 See Klaaren & Penfold, *supra* note 82, at 63-38.
public power is in accordance with the principle of legality. All this speaks against a narrow interpretation of the rules of standing.\textsuperscript{136}

Although Judge Froneman was willing to uphold the plaintiffs’ standing in \textit{Ngxuza} on almost any of the grounds in section 38, plaintiffs ultimately elected to proceed under section 38(3) as a class action suit.\textsuperscript{137} The SCA upheld the applicants’ standing on that basis.\textsuperscript{138}

Although the liberal standing doctrine allows more judicial intrusion into administrative action, South African courts have been hesitant to impose substantive remedies that substitute the court’s judgment for that of the administrative agency.\textsuperscript{139} This reluctance has carried over from the pre-constitution common law period and resembles the separation of powers concerns embodied in U.S. jurisprudence.\textsuperscript{140} The Constitutional Court has held that courts should be cautious in providing substantive relief, especially when the relevant decision is of a political nature.\textsuperscript{141} In \textit{Premier, Mpumalanga, & another v. Executive Committee, Association of State-Aided Schools, Eastern Transvaal}, Justice O’Regan wrote that “a court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government.”\textsuperscript{142}

The AJA also stipulates that substantive remedies should only be available in limited cases.\textsuperscript{143} Although section 8 of the AJA states that remedies may include the setting aside of the administrative action, in most circumstances the court will remit the matter for reconsideration by the administrator.\textsuperscript{144} Only in “exceptional cases” will the court substitute or vary the administrative action or direct the administrator to pay compensation.\textsuperscript{145} Thus, the likely remedies open to citizens are either to petition for reasons, or, if inadequate reasons are given, hope the

\begin{thebibliography}{99}
\item[136] 2000 (12) BCLR 1322 (E) at 1327 (S. Afr.), quoted in Klaaren & Penfold, \textit{supra} note 82, at 63-38.
\item[137]  See \textit{id.} at 63-38.
\item[138]  Permanent Sec’y, Dep’t of Welfare, E. Cape, & Others v. Ngxuza & Others, 2001 (4) SA 1184 (SCA) ¶ 11 (S. Afr.).
\item[139]  Klaaren & Penfold, \textit{supra} note 82, at 63-39.
\item[140]  See \textit{id.}
\item[141]  Id.
\item[142]  1999 (2) SA 91 (CC) ¶ 51 (S. Afr.).
\item[143]  AJA, Act 3 of 2000 s. 8(1)(c)(ii).
\item[144]  Id. s. 8(1)(c)(i).
\item[145]  Id. ss. 8(1)(c)(ii)(aa) & (bb).
\end{thebibliography}
court will give the administrative agency sufficient instructions on remittance of the matter.\textsuperscript{146}

\textbf{III. Analysis}

As noted above, the prime concerns underlying a conservative U.S. standing doctrine are: promoting judicial efficiency by maintaining a workable caseload; improving judicial decision-making by providing specific controversies that parties will actively litigate; and the separation of powers doctrine.\textsuperscript{147} These concerns can be alleviated, however, without depriving citizens of just administrative action.\textsuperscript{148} Before turning to those issues, it is first necessary to discuss some of the practical reasons for the differences between U.S. and South African standing doctrines.

South Africa is neither the only country, nor the only common law tradition, which provides for liberal standing.\textsuperscript{149} Australia, the United Kingdom, Canada, India, Pakistan and the Philippines—many of which have common law traditions—provide liberal access to courts.\textsuperscript{150} One must take account of two important differences between these countries and the United States: first, almost all except the United States are parliamentary systems; and second, South Africa,\textsuperscript{151} Pakistan,\textsuperscript{152} and the Philippines\textsuperscript{153} have weathered much more political unrest than the United States.\textsuperscript{154} The former is important insofar as notions of parliamentary supremacy make it easier for legislatures to alter the legal framework.\textsuperscript{155} The latter is particularly critical in the comparison between South African and U.S. standing doctrines because countries facing political instability and corruption are more willing to liberalize

\textsuperscript{146} See S. Afr. Const. ch. 2 § 33(2); AJA, Act 3 of 2000 s. 8.
\textsuperscript{147} See Chemerinsky, \textit{supra} note 48, 60–61; Scalia, \textit{supra} note 8, at 894 (discussing separation of powers).
\textsuperscript{148} See Owens, \textit{supra} note 9, at 373–74 (discussing concerns over separation of powers).
\textsuperscript{150} See Owens, \textit{supra} note 9, at 343–54.
\textsuperscript{154} See Owens, \textit{supra} note 9, at 360–70.
\textsuperscript{155} O’Connor, \textit{supra} note 9, at 644 (noting, however, that parliamentary supremacy has done little for legislative efforts to curb judicial review of administrative action).
judicial review to curb political injustice. The liberal standing doctrines of Pakistan and the Philippines, for instance, are directly attributable to difficulties in maintaining faith in the public administration of laws.

These practical explanations aside, even in the highly political system of U.S. Government and its litigious society, a liberalized standing doctrine can operate within the confines of a restrictive approach to judicial review. Although U.S. Supreme Court decisions abound with fears of opening the “floodgates of litigation,” adopting a system similar to that embodied in the AJA can be done in a manner sufficient to protect efficient judicial review. For example, one of the most limiting features of South African standing in administrative cases lies in the definition of administrative action.

Because administrative actions include only those actions taken pursuant to the agency’s public authority, it precludes actions by administrators that, if done by any other individual or organization, would constitute private actions. For example, individuals who are upset because their contract with the government has been terminated would not be allowed to proceed under liberalized standing rules for administrative cases. Rather, the party would already have standing under the common law of contracts. In Cape Metropolitan Council & another v. Metro Inspection Services Western Cape CC & Others, for example, the court held that cancellation of an agency agreement was not an administrative action and the proper remedy could be pursued under common law. By additionally excluding political decisions of the legislature and executive, South African standing law further restricts access to courts, which should assuage the worries of the U.S. Supreme Court.

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156 See Owens, supra note 9, at 360.
157 See id. at 360–70.
158 See id. at 371–74 (discussing ramifications of liberal standing for sufficient adversity and separation of powers).
160 See supra Part III.B.2.a.
162 See id.
163 See id.
164 Id. The court distinguished a public administration acting as an administrative authority exercising public power on the one hand, from a public administration acting as a contracting party on the other. Id.
165 See Klaaren & Penfold, supra note 82, at 63-9.
U.S. policy-makers could further promote just administrative action while ensuring well-litigated cases and controversies by adopting and modifying a standing doctrine similar to that of chapter 2 section 38 of the South African Constitution. The bar to general organizational standing in the United States exists because the Court desires plaintiffs with a personal stake in the outcome of cases, hence the bar to advisory opinions. Whereas South African law allows standing by any litigant in the public interest, the United Kingdom provides a more limited standing for watchdog organizations. The guiding principle in U.K. courts when analyzing cases of general grievances is to keep “busy-bodies, cranks, or mischief-makers” out of the court room. So long as the parties are devoted to the litigation, courts see less reason to bar their standing. U.K. courts have thus realized that some organizations are sufficiently dedicated to their mission so as to passionately litigate cases to which they are a party.

Justice Scalia has responded to such suggestions not by attacking the ability of organizations to effectively litigate cases, but rather by arguing that the hearing of such cases violates the separation of powers doctrine. Indeed, he agrees that “often the best adversaries are national organizations . . . that have a keen interest in the abstract question at issue in the case.” Scalia is not as concerned with the ability of the Court to do its job, so much as with the Court “keep[ing] out of affairs better left to the other branches.” Scalia would require that a litigant be able to establish a particularized harm to a minority of which

166 See Owens, supra note 9, at 347.
169 See World Dev. Mov’t, 1 W.L.R. at 393.
170 See id.
171 See id. But see Dobbs v. Train, 409 F. Supp. 432, 434–35 (N.D. Ga. 1975), aff’d, 559 F.2d 946 (5th Cir. 1977) (finding administrative agencies are not permanently immune from judicial review just because citizens missed narrow window for public comment). Another possibility, mentioned only briefly as it is outside the purview of this Note, is that governments can institute a public ombudsman to handle disputes involving citizens and administrative agencies. See Mary Seneviratne, OMBUDSMEN IN THE PUBLIC SECTOR 1 (1994); Robert F. Utter & David C. Lundsgaard, Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective, 54 OHIO ST. L.J. 559, 587 (1993). Such individuals exist in the United Kingdom, Scandinavian states, New Zealand, and Poland. See Seneviratne, supra, at 1; Utter & Lundsgaard, supra, at 587.
172 See Scalia, supra note 8, at 891.
173 Id.
174 Id.
he is a part.\textsuperscript{175} Such an injury sets the litigant apart from the majority, thus making it difficult for him to pursue a remedy through the political branches.\textsuperscript{176} Scalia, however, offers the precise reason why such a formulation is ineffective in modern politics—reality.\textsuperscript{177} The political process does not always work, and under certain circumstances it is necessary to allow organizations that may or may not be able to identify a specific injury to themselves to force government actors to do their jobs.\textsuperscript{178}

There are, however, reforms less intrusive into the realm of executive power, namely that of requesting written reasons.\textsuperscript{179} U.S. administrative agencies often do produce reasons for their actions; however, there is no process requiring them to do so.\textsuperscript{180} The South African procedure for requesting written reasons affords agencies an opportunity to explain themselves in a satisfactory manner before the judiciary intervenes.\textsuperscript{181} U.S. policy-makers, in creating such a provision, should go beyond the approach taken by South Africa and delineate exactly what constitutes adequate reasons.\textsuperscript{182} Whereas South African courts have gone on to interpret the provision, U.S. policy-makers should give more direction from the start.\textsuperscript{183} Adequate reasons should set out in a concise, clear, and relevant manner the principal issues of law and fact on which the action was based, as required in the European Union.\textsuperscript{184} Such reforms would promote both greater transparency and broader access to courts when reasons are insufficient without unduly encroaching on the political branches of government.\textsuperscript{185}

\textsuperscript{175} See id. at 895.
\textsuperscript{176} See id. at 894.
\textsuperscript{177} See Scalia, supra note 8, at 884.
\textsuperscript{178} See Owens, supra note 9, at 373.
\textsuperscript{179} See S. Afr. Const. ch. 2 § 33(2); AJA, Act 3 of 2000 s. 5(1); EC Treaty, supra note 11, art. 253.
\textsuperscript{180} See 68 Fed.Reg. 52,925–31 (2003) (giving reasons for EPA’s denial of rule-making petition submitted by petitioners in Massachusetts v. EPA). The reasons the EPA gave in that particular instance were: (1) that the Clean Air Act does not authorize the EPA to issue mandatory regulations to address global climate change; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time. See Massachusetts v. EPA, 127 S. Ct. 1438, 1450 (2007) (citing 68 Fed.Reg. 52,925–31).
\textsuperscript{181} See S. Afr. Const. ch. 2 § 33(2); AJA, Act 3 of 2000 (5) (1); Klaaren & Penfold, supra note 82, at 63-35.
\textsuperscript{182} See Klaaren & Penfold, supra note 82, at 63-36.
\textsuperscript{183} See id. at 63-37.
\textsuperscript{184} See Craig & de Búrca, supra note 128, at 118.
\textsuperscript{185} See id.
Conclusion

This Note does not suggest an all-out liberalization of the U.S. standing doctrine. There is no denying that separation of powers is a central and laudable tenet of U.S. constitutional jurisprudence. But it should not stand as a rigid bar to otherwise meritorious claims. Rather, the most vital concern in the realm of taxpayer suits should be promoting democratic and just administrative action. South African law confronts the same obstacles as U.S. law, yet provides liberal grounds for standing. South Africa ameliorates separation of powers concerns, not by restricting access to courts in the first instance, but rather by restricting the remedies available to litigants. Only in rare circumstances will South African courts replace administrative judgments with their own; rather, courts will require agencies to better justify their actions to injured individuals and to the public in general. The true effect of such a policy is to force agencies to analyze thoroughly the options available to them. If requiring administrative agencies to justify actions that adversely affect citizens gives them pause before enacting questionable regulations, such a policy only serves to make administrative agencies more responsive to citizens. Scalia and the Court’s injury-specific formulation of standing focuses on what would happen if courts heard cases lacking a particularized injury—encroachment on the political branches. The real concern, however, should be what would happen if courts refuse to hear cases. In many instances, there would be no remedy; the political system often does not work as well as we wish nor as well as the founders intended.

Should the EPA be required to justify all of its policy decisions in writing? Of course not. But it also should not be allowed to shirk its responsibilities, as the Court held it had in Massachusetts v. EPA. Only those actions “materially” affecting citizens’ rights would be subject to review under a revised standing doctrine. Thus the EPA should be expected to explain to citizens and local governments why it has taken actions inconsistent with its purpose and mission—an explanation beyond that of “it would be inappropriate at this time.” If current U.S. standing jurisprudence precludes citizens from receiving this information, it needs to be modified.
DEFINING “DEVELOPING COUNTRY” IN THE SECOND COMMITMENT PERIOD OF THE KYOTO PROTOCOL

Will Gerber*

Abstract: In 2005, negotiations began among parties to the U.N. Framework Convention on Climate Change to lay the groundwork for what was to become the Second Commitment Period of the Kyoto Protocol. Prominent among the issues raised at this initial meeting in Montreal and those that followed, was that of whether rapidly industrializing developing countries would take on binding commitments to reduce greenhouse gas emissions. As in the past, the G-77, the main representative body of developing countries, together with China, strongly opposed any kind of binding commitments. A closer look at the countries comprising the G-77 negotiating group reveals there are vast disparities in economic power and industrialization among them. This Note explores the wide gulf that has emerged between developing countries and suggests that developed countries may have to make difficult decisions about the structure of the Kyoto Protocol to secure commitments from industrializing countries.

Introduction

On November 6, 2006, the Twelfth Session of the Conference of the Parties to the United Nations (U.N.) Framework Convention on Climate Change (COP 12) opened in Nairobi, Kenya.1 The purpose of

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1 Pew Ctr. Global Climate Change, Twelfth Session of the Conference of the Parties to the U.N. Framework Convention on Climate Change, COP 12 Report, http://pewclimate.com/what_s_being_done/in_the_world/cop12/summary.cfm (last visited May 14, 2008) [hereinafter COP 12 Report]. Between writing and publication of this Note the Thirteenth Session of the Conference of the Parties (COP 13) took place in Bali, Indonesia on December 3–15, 2007. The primary accomplishment of this session was the Bali Action Plan, which provides a roadmap for negotiations over the next two years. This session did not, however, address the primary substantive issues raised by this Note, including negotiation structure and binding commitments for the Second Commitment Period, and is thus not discussed in detail in this Note. See Int’l Inst. for Sustainable Dev., Summary of the Thirteenth Conference of Parties to the UN Framework Convention on Climate Change and Third Meeting of the Parties to the Kyoto Protocol: Dec. 3–15, 2007, 12 Earth Negotiations Bull. 354 (Dec. 18, 2007), available at http://www.iisd.ca/vol12/enb12354e.html [hereinafter Earth Negotiations Bulletin Summary].
this meeting was to continue the work begun in Montreal the previous year to secure binding obligations for the Kyoto Protocol’s second commitment period beginning in 2012. The negotiations leading up to this new period have focused largely on establishing new commitments for developed countries and on the development of mechanisms that encourage greater involvement by developing countries in the climate regime.

As in previous rounds of negotiations, parties to the convention have arranged themselves into negotiating groups, each of which represents distinct interests. Not surprisingly, there is a clear divide between developed and developing nations in these negotiating groups. The most powerful group for developing nations is the Group of 77 (G-77), which, despite its name, has now expanded to 130 members, including major players such as India. It has become increasingly clear that emission reduction commitments by members of the G-77 will be necessary for the Kyoto Protocol to have a meaningful impact on climate change. The necessity of commitments by the G-77 becomes even more apparent when one considers the fact that China, though not an official member, has closely allied itself with the G-77 and will be bound by the same obligations as members of the group. Commitments by these countries, however, will be undoubtedly accompanied by a demand for a greater role in Kyoto Protocol policy-making.

To maintain the Protocol’s effectiveness and coherence, member nations will have to form a new model for governance that rewards developing countries for taking on binding commitments with sacrifices of power by more developed nations.

The negotiations of the Eleventh Conference of the Parties to the Convention (COP 11) in Montreal and the Twelfth Conference of the Parties (COP 12) in Nairobi, both looking toward the Kyoto Protocol’s second commitment period, are indicators of what this new power bal-

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2 See Earth Negotiations Bulletin Summary, supra note 1.
3 See id.
5 See id.
6 The Group of 77 at the United Nations, About the Group of 77, http://g77.org/doc (last visited May 14, 2007) [hereinafter About the Group of 77].
7 See, e.g., COP 12 Report, supra note 1.
8 See Wirth, supra note 4, at 649.
9 See Building on the Kyoto Protocol: Options for Protecting the Climate 54 (Kevin A. Baumert ed., 2002).
10 Id.
ance could look like. These meetings and the rounds of negotiations to follow will show whether the nations that have traditionally played the largest role in shaping the Protocol will acquiesce to the implementation of measures that effect power-sharing, or if they will fight to retain control.

To put these negotiations in context, Part I of this Note briefly examines the history of the Kyoto Protocol, focusing particularly on its approach to the participation of underdeveloped countries. Part II considers issues that have arisen under the Protocol’s original provisions since its ratification. It goes on to gives a brief description of the first and second meetings of the parties to discuss obligations for the second commitment period, including a more in-depth look at innovative suggestions for greater commitments for developing (non-Annex I) parties. Part III discusses the potential objections to each of the proposed new mechanisms and assesses the chances for their success in holding developing countries to greater obligations if implemented.

I. BACKGROUND

The Kyoto Protocol is likely the most popularly recognized name in the field of climate change control. In the United States, the government’s official position on the Protocol typically evokes either outrage or indifference, neither of which leads to a true assessment of the potential for the program that is currently in place.

The Kyoto Protocol is an outgrowth of the U.N. Framework Convention on Climate Change (UNFCCC or Convention), a convention that entered into force on March 21, 1994, under which the ratifying parties were to

gather and share information on greenhouse gas emissions, national policies and best practices; launch national strategies for addressing greenhouse gas emissions and adapting to expected impacts, including the provision of financial and tech-

11 See COP 12 Report, supra note 1.
nological support to developing countries; and cooperate in preparing for adaptation to the impacts of climate change.\textsuperscript{15}

The 1997 Kyoto Protocol was intended to effect a binding implementation of the principles set forth in the UNFCCC.\textsuperscript{16} The basic structure of the climate control regime is fairly simple.\textsuperscript{17} Of the 168 countries that ratified the Protocol, thirty-five developed countries (Annex I parties) committed themselves to reduce their greenhouse gas emissions by specified percentages ranging up to eight percent between the years 2008 and 2012.\textsuperscript{18} The overall goal was a minimum five percent reduction in global greenhouse gas emissions from 1990 levels.\textsuperscript{19}

Although the Annex I parties were to bear the greatest responsibility for emissions reductions, the remaining parties were also given a role under the Protocol.\textsuperscript{20} These countries, largely referred to as “developing nations,” were to be involved in the climate regime through programs such as the Clean Development Mechanism (CDM), which involved allowing developed countries to offset their own emissions with emission-reduction programs in developing countries, as well as technology sharing.\textsuperscript{21} Both of these programs are voluntary for developing countries that are not otherwise burdened by any real binding commitments.\textsuperscript{22} The original rationale for this exemption for developing countries was that developed countries introduce a disproportionate amount of greenhouse gas into the environment and should therefore be required to address their emissions before developing countries will be required to make their own commitments.\textsuperscript{23} This calculus is rapidly changing, though, and some studies have shown that greenhouse gas emissions by developing nations will surpass those of developed countries as early as 2020.\textsuperscript{24} A prime example of this trend is China,

\textsuperscript{15} UNFCCC, Essential Background, http://unfccc.int/essential_background/items/2877.php (last visited May 14, 2007) [hereinafter UNFCCC, Essential Background].
\textsuperscript{17} See id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Weisslitz, supra note 20, at 483–84.
\textsuperscript{24} Michael Stavins, Forging a More Effective Global Climate Treaty, Env’t, Dec. 2004, at 23, 25.
which is still pegged as a “developing” nation even though it is projected to pass the United States as the number one emitter of carbon dioxide by the year 2025.  

Given that the first commitment period was planned to last only until 2012, provisions were included in the Protocol establishing negotiation meetings to assess climate developments during the previous period and to discuss means to address evolving environmental needs. Article 3, paragraph 9 provides that commitments for subsequent periods are to be determined through meetings called Conferences of the Parties (COPs) commencing at least seven years before the end of each commitment period.

In November 2005, COP 11 convened to consider the climate regime’s second period in light of lessons learned from implementation of the Protocol up to that time. Two major steps bearing on the future of the Kyoto Protocol were taken at this meeting. First, the parties established a new working group to discuss future commitments of the developed countries that are parties to the Kyoto Protocol. Second, the parties instituted a dialogue on “strategic approaches for long-term global cooperative action to address climate change.” This dialogue will primarily take the form of several scheduled workshops intended to examine the evolving environmental situation. The parties’ decision establishing these workshops provides that each will be moderated by two facilitators, one chosen by Annex I parties from among their ranks, and the other chosen by the non-Annex I parties out of their own group.

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27 Id.


29 Id.

30 Id.

31 Id.


The parties took further steps toward the next commitment period at COP 12 in Nairobi, Kenya in early November 2006. Although the first dialogue session had taken place in Bonn in May 2006, the results of that meeting were not the main focus of COP 12. Center stage was instead taken by U.N. Secretary-General Kofi Annan’s introduction of what has been dubbed the Nairobi Framework (the Framework). This program’s explicit purpose is to encourage developing countries to participate in the Kyoto Protocol. The Framework draws together several different U.N. agencies including the U.N. Development Programme, the U.N. Environment Programme, the World Bank Group, the African Development Bank, and the UNFCCC, all of which will work to find means to involve primarily African countries in the CDMs.

II. Discussion

Since the Protocol was ratified, concerns about its implementation have haunted parties to the convention. The issues raised throughout the life of the Protocol often reflect a sharp divide between the developed and developing world. The two groups have frequently disagreed on their respective roles in the future implementation of the Protocol and the commitments that should be made by each, as illustrated by the latest round of negotiations.

Japan’s concerns about the Protocol’s implementation are representative of those of many developed countries. Japan argues that its domestic system of pollution reduction is already much more efficient and effective than those of most other countries. For this reason it will be much more difficult for Japan to reduce its greenhouse gas emissions by the same percentage as other countries whose pollution reduction processes are much less efficient. While these less efficient countries may take basic and inexpensive steps to meet their reduction goal, Japan

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34 See COP 12 Report, supra note 1.
35 Id.
36 Id.
37 Id.
38 Id.
39 See Weisslitz, supra note 20, at 484–85.
40 Id.
41 See COP 12 Report, supra note 1.
42 See What 2nd Commitment Period of the Kyoto Protocol?, supra note 12.
43 Id.
will be forced to spend far more for complex research and implementation to reach a similar target for greenhouse gas reductions.\textsuperscript{44}

Other developed countries have also recognized that their emission reduction efforts will result in similar diminishing returns and that nations in the process of industrialization are in a better position to have a substantial impact on reducing greenhouse gas pollution.\textsuperscript{45} For instance, during the second round of dialogue, held in Nairobi in November 2006, Elliot Diringer, from the Pew Center on Global Climate Change, gave a presentation pointing out that some “developing” countries that are affiliated with the G-77, such as China, India, Brazil, and Indonesia, are among the top twenty-five nations for both GDP and total emissions.\textsuperscript{46} Some commentators believe, given these facts, it is time for larger developing countries to make meaningful commitments, especially because some projections show that developing countries will be responsible for half the world’s emissions by 2020 or earlier.\textsuperscript{47}

A. What Are “Developed” and “Developing” Nations?

A large share of the tension between “developed” and “developing” nations arises from the uncomfortable clustering of nations in their negotiating blocs.\textsuperscript{48} These odd arrangements of countries are partly due to the fact that the Convention on Climate Change does not precisely define the terms “developed” and “developing” that have come to drive much of the debate concerning the Kyoto Protocol.\textsuperscript{49} The Convention also contains no provision whereby a nation must take on responsibilities similar to those of its equals in terms of economic capabilities or greenhouse gas emissions.\textsuperscript{50} Thus, some developing parties that have developed rapidly since ratification have become equals or surpassed some developed nations in terms of economic prowess or emissions, and yet remain aligned with much smaller and less devel-

\textsuperscript{44} Id.
\textsuperscript{45} See Stavins, supra note 24, at 25.
\textsuperscript{47} See Stavins, supra note 24, at 25.
\textsuperscript{48} See Wirth, supra note 4, at 649.
\textsuperscript{49} See Baumert, supra note 21, at 382.
oped countries that bear lesser burdens under the Protocol.\textsuperscript{51} This is particularly true in the G-77, where seriously under-industrialized nations, many of them in Africa, are lumped together with rapidly industrializing countries like China and India.\textsuperscript{52} One explanation for this curious grouping is that less industrialized countries believe they lack the economic clout to negotiate effectively.\textsuperscript{53} It is thus useful to have powerful countries like China on one’s side jockeying for position with the larger European countries.\textsuperscript{54}

Some commentators point to significant incongruities between the arguments made on behalf of developing nations and the realities of the modern global economy.\textsuperscript{55} One argument developing countries advanced against binding commitments is that such commitments would impose unduly burdensome costs, putting them at a significant economic disadvantage and hindering their further economic development.\textsuperscript{56} Some see this as difficult to reconcile with the facts discussed above, namely that several of the G-77 members are among the nations with the greatest GDP.\textsuperscript{57} These countries are already major players in the global economy, and some believe they should be treated as such under the Kyoto Protocol’s climate control regime.\textsuperscript{58}

Nonetheless, some major economies in the G-77 are starting to recognize their changing role under the Protocol and are attempting to establish domestic programs that reflect their responsibility for worldwide emissions, which they hope will spare them global disapprobation.\textsuperscript{59} For instance, in the second round of dialogue leading up to the Protocol’s second commitment period, China presented a comprehensive plan for resource conservation that involves several advanced technologies such as nuclear and bio-energy projects.\textsuperscript{60} These programs alone distinguish China from a large number of its fellow G-77 nations,

\textsuperscript{51} See Wirth, supra note 4, at 649.
\textsuperscript{53} See id.
\textsuperscript{54} See id.
\textsuperscript{55} See Weisslitz, supra note 20, at 484–85.
\textsuperscript{56} Id.
\textsuperscript{57} See Diringer, supra note 46.
\textsuperscript{58} See COP 12 REPORT, supra note 1.
\textsuperscript{60} See id.
many of which are decades away from considering these types of advanced energy resources.\textsuperscript{61}

The disparity in advanced resource options among G-77 countries arises in part from vast wealth differentials within the group of nations.\textsuperscript{62} For example, Burundi, a party to the Kyoto Protocol and a member of the G-77, has a GDP of $5.78 billion, which pales in comparison to China’s GDP of $10.17 trillion.\textsuperscript{63} Another indicator of wealth, per capita GDP, shows that China is more than eleven times as wealthy as Burundi and nearly eight times as wealthy as Ethiopia, another G-77 member.\textsuperscript{64} South Africa, which held the G-77 Chairmanship in 2006, has a per capita GDP that is nineteen times that of Burundi and thirteen times that of Ethiopia.\textsuperscript{65}

Despite the economic heterogeneity of the G-77, the group remains intact and maintains a unified front against any type of binding commitment.\textsuperscript{66} In China’s presentation discussed above, its spokesman stressed the country’s status as a developing nation and its dependence on industrialized nations for technology and financing.\textsuperscript{67} Conspicuously absent from China’s proposals was any mention of any type of binding commitment for itself or any other members of the G-77.\textsuperscript{68} China continues to argue that climate control needs should be met through binding commitments by Annex I parties to make further emissions reductions while these countries at the same time promise to provide greater aid to developing nations in implementing voluntary programs.\textsuperscript{69} This was made very clear in China’s written submission to the first meeting of the Ad Hoc Working Group Further Commitments

\textsuperscript{61} See About the Group of 77, supra note 6.
\textsuperscript{62} See id.
\textsuperscript{66} See COP 12 REPORT, supra note 1.
\textsuperscript{67} See Guansheng, supra note 59.
\textsuperscript{68} See id.
\textsuperscript{69} See COP 12 REPORT, supra note 1.
for Annex I Parties under the Kyoto Protocol (AWG). This paper stated that “no new commitment . . . shall be introduced for Parties not included in Annex I to the Convention.” Presumably, this prohibition would encompass voluntary as well as mandatory commitments by developing nations.

B. Potential Methods of Differentiation Among Developing Countries

Several mechanisms have been suggested that would allow some differentiation among the G-77 countries according to their respective economic strength and technological capacities. For instance, Robert Stavins, director of the Harvard Environmental Economics Program, has suggested there should be a trigger mechanism whereby binding commitments would be required of parties to the Kyoto Protocol once their per capita GDP reaches a certain level. He does not suggest an exact threshold amount, but one could expect that wealthier non-Annex I countries like South Africa and Brazil would fall under this provision. This system might require some refinement since per capita GDP is not a perfect measurement of economic resources available to improve industrial processes in all countries. In China, for example, a large portion of the population is engaged in low-profit agriculture in outlying areas, bringing the overall per capita GDP (combining agriculture, industry, and services) down significantly. The industrial sector alone, however, generates about five times as much value as the agricultural sector, most of which will be put back into industry rather than distributed to the outlying areas. This parsing of the data shows that there may be far greater resources for technological improvements than overall per capita GDP indicates. Although imperfect, Stavins’ theory is at least a starting point, and if put into place, could force sev-

71 See id.
72 See id.
73 See Stavins, supra note 24, at 25.
74 See id.
75 See id.
76 See World Factbook: China, supra note 63.
77 See id.
78 See id.
79 See id.
eral countries to take a more active role in reducing the effects of greenhouse gas emissions.\textsuperscript{80}

Another mechanism to distinguish more industrially advanced countries from less developed nations would be to allow countries to voluntarily impose binding commitments on themselves.\textsuperscript{81} Under the Protocol’s provisions there are two ways in which a developing, non-Annex I party may add itself to Annex I.\textsuperscript{82} The first pathway is found in article 4.2(g) of the Convention, which allows developing countries to become Annex I parties by notifying the U.N. Secretary-General, who also serves as the Depositary to the Convention.\textsuperscript{83} Second, the developing nation may submit its name to the COP for addition to Annex I through an amendment to the Annex.\textsuperscript{84} This is far more demanding because a formal amendment requires a three-fourths majority vote by all parties to the Convention.\textsuperscript{85} As discussed below, the difficulty in obtaining such a vote is due not to opposition from Annex I parties, but from other developing nations who believe that voluntary binding commitments taken on by other developing countries will put pressure on non-committing countries to follow suit.\textsuperscript{86}

Even after a developing nation has become an Annex I party, they still do not have the privileges of many of the developed nations—such as emissions trading—until their names are added to Annex B, which contains the emission-reduction commitments for each industrialized country.\textsuperscript{87} Only a formal amendment will add the party’s name to this Annex so that it may actually be bound by its stated commitment, and the written consent of each party affected by the amendment must be obtained.\textsuperscript{88} Once again, other developing nations are reluctant to give their written consent, fearing that by doing so they open themselves to pressure to make their own voluntary commitments.\textsuperscript{89}

This voluntary route to binding obligations may not appear to have any real potential at first blush, given the procedural complications described above, and because it would seem that it is not in the interest of non-Annex I parties to submit themselves to additional scrutiny when

\textsuperscript{80} See Stavins, supra note 24, at 25.
\textsuperscript{81} See Baumert, supra note 21, at 392.
\textsuperscript{82} See Building on the Kyoto Protocol, supra note 9, at 42–43.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} See COP 12 Report, supra note 1.
\textsuperscript{87} See Building on the Kyoto Protocol, supra note 9, at 43.
\textsuperscript{88} Id.
\textsuperscript{89} See COP 12 Report, supra note 1.
they already enjoy the benefits of Kyoto without any binding commitments. This approach, however, has already been attempted by Kazakhstan, most likely spurred by the possibility of economic advantage to be gained from emissions trading. Kazakhstan’s attempt to add itself to the list of Annex I parties, however, was met with stiff opposition from major developing countries that, reportedly, feared setting an unfavorable precedent. In theory, permitting these countries to add themselves to the list of Annex I parties would place other developing nations with similar or better capabilities under pressure to make similar commitments. Despite this obstacle, the issue of voluntary commitments continues to be the subject of active debate at the meetings of the parties. The possibility was raised again at COP 12 in Nairobi, where the issue was deferred to an AWG workshop scheduled for May 2007.

III. Analysis

According to the Pew Climate Center’s official report on the COP 12 proceedings, developed countries advocated for a firm date for a second review of the Protocol, which they hoped would show that Annex I commitments alone would be inadequate to effect significant protection of the environment. This movement, along with the introduction of the Nairobi Framework during COP 12, exhibits the parties’ understanding that developing countries must take a bigger role in the climate regime.

A. Obstacles to Expansion of Annex I

As discussed above, some commentators believe the most effective means to ensure consistent participation would be to convince developing countries to join Annex I and thus make binding commitments to reduce their emissions. Without these commitments, there are too few consequences for delay or noncompliance. Given the current structure of the Protocol, however, there are few incentives for develop-

90 See Building on the Kyoto Protocol, supra note 9, at 42–43.
91 Id. at 44.
92 Id.
93 Id.
94 See COP 12 Report, supra note 1.
95 Id.
96 Id.
97 Id.
98 See Weisslitz, supra note 20, at 489–90.
99 Id.
ing countries to take on greater responsibilities.\textsuperscript{100} If developed countries attempted to impose commitments on the non-Annex I parties, they would run the risk of upsetting the delicate balance, which has been struck that allows over 160 countries with vastly diverse needs to agree to a single convention.\textsuperscript{101} There is the possibility that developing countries would view this type of action as heavy-handed and would be less likely to cooperate even in Kyoto’s voluntary programs, such as the CDM, for fear it would trap them into unforeseen responsibilities.\textsuperscript{102}

If developing countries are to give up their freedom under the Protocol, they will require meaningful incentives and strong assurances from developed nations.\textsuperscript{103} For instance, developing countries are wary of accepting commitments under the climate regime because they are afraid it will hinder their efforts to compete with major Western economies.\textsuperscript{104} Furthermore, many of the least developed parties to the Protocol are concerned that binding obligations could inhibit their ability to fight the war on poverty by impeding their modernization efforts.\textsuperscript{105} Given these concerns, it is likely developing nations would require a safety-valve arrangement by which obligations could be relaxed if compliance with Kyoto commitments were having too severe an economic impact on a developing country’s economy.\textsuperscript{106}

Some observers believe that taking on concrete commitments will have exactly the opposite effect on smaller countries’ economies.\textsuperscript{107} Commentators often take the long-term view, asserting that establishing more environmentally-sound practices now will serve developing nations better in the future because they will be prepared for the environmental crises that are sure to come.\textsuperscript{108} This idea is appealing for developed nations whose place in the world market is assured and who have the additional resources to focus their efforts on curbing climate change.\textsuperscript{109} The situation is somewhat different, however, for those countries trying to find a place for themselves in the global economy or

\begin{thebibliography}{99}
\bibitem{100} Id.
\bibitem{101} Id. at 488.
\bibitem{102} Id.
\bibitem{103} \textit{See} What 2nd Commitment Period of the Kyoto Protocol?, \textit{supra} note 12.
\bibitem{104} \textit{See} Weisslitz, \textit{supra} note 20, at 489.
\bibitem{105} \textit{See} Mumma, \textit{supra} note 52, at 203 (arguing that allotment of emissions units under Kyoto Protocol must take into consideration a country’s need to develop economically).
\bibitem{106} \textit{See} What 2nd Commitment Period of the Kyoto Protocol?, \textit{supra} note 12.
\bibitem{107} \textit{See} Weisslitz, \textit{supra} note 20, at 489–90.
\bibitem{108} Id.
\bibitem{109} Id.
\end{thebibliography}
trying to fend off widespread poverty. Their needs are more immediate and they would likely have more difficulty accepting economic disadvantage in the short-term, even if it meant having a head-start on preparing for eventual environmental crises. The initial attraction to the Kyoto Protocol for these countries may have been the opportunity to act on the international stage or to acquire technologies from developed countries that would aid their economic development, not necessarily the high ideals of curbing climate change.

Likewise, developing countries might attempt to limit the consequences of non-compliance with their Kyoto obligations so that economic sanctions could not be used against these less powerful countries. It is crucial for nations seeking an equal footing with the world’s large economies that their markets not be compromised by major players’ refusal to do business with them. Currently, developing nations can escape this risk and remain parties to the Protocol because they have no binding commitments, and therefore risk no consequences for noncompliance. This is understandable because the penalties envisaged in the Marrakesh Accords could have a significant impact on a struggling nation. The Accords, a series of agreements passed at COP 7 that were intended to resolve ongoing implementation debates among UNFCCC parties, established a compliance regime for the Kyoto Protocol under which parties who do not meet their emissions commitments may have penalties imposed on them such as restrictions against involvement in CDM projects and a thirty percent reduction in a country’s permitted annual emissions. Softening these stiffer consequences of noncompliance could be a difficult point for developed nations to concede because international disapprobation may not always be sufficient to bring a country into compliance.

It is quite possible that developed countries would be willing to make allowances for less developed countries that genuinely have diffi-

110 See Mumma, supra note 51, at 203.
111 Id.
112 See id. at 185 (noting that Kyoto Protocol provides for developed countries to aid developing countries both through CDM and direct contribution of funds).
113 See Baumert & Figueres, supra note 50, at 5 (stating that Compliance Committee has authority to deprive a non-compliant country of many of economic advantages of participating in Kyoto Protocol).
114 See Weislitz, supra note 20, at 484–85.
115 Id. at 492–93.
116 See Baumert & Figueres, supra note 50, at 5.
117 Ronald B. Mitchell, Flexibility, Compliance and Norm Development in the Climate Regime, in Implementing the Climate Regime 65, 68 (Olav Stokke et al. eds., 2005).
118 See id.
culties meeting their Kyoto obligations, possibly through some form of sliding scale arrangement. In most of these cases the stakes would be relatively low because many developing countries contribute little to the world’s greenhouse gas problem. Countries like China and India, however, contribute significantly to the world’s greenhouse gas emissions, and missing the opportunity to hold them accountable for emissions reductions would be a much greater blow to the objectives of the Kyoto framework because they would be able to release harmful amounts of greenhouse gases into the atmosphere without any significant consequences.

B. Reclassification of Parties to Reinvigorate Dialogue

There is a very real possibility that a separation between developing countries that are large and small greenhouse gas contributors would produce a more effective climate agreement by holding large contributors more accountable. One must consider, however, how this change might be implemented without threatening the developing nations’ sovereignty by forcing change on them. Achieving this goal may require a seismic shift in the structure of the agreement. For instance, to make the debate around the second commitment period more productive, the parties’ rhetoric would need to be recast in terms other than “developed” and “developing.” These labels have exhausted their usefulness and should be replaced with designations that recognize finer distinctions among nations. The criteria for this new structure should focus more on factors such as technological capacity and greenhouse gas emissions rather than historical solidarity. The original designations also conjure up the old distinctions between the Western and non-Western world with the West taking the lead and aiding the non-Western countries. This type of distinction should be eradicated as quickly as possible because developing nations fear the

119 Id.
120 See Mumma, supra note 52, at 199. Africa’s contribution to greenhouse gas emissions is estimated at only three percent. Id.
121 See Stavins, supra note 24, at 25.
122 See Wirth, supra note 4, at 649.
123 See Weisslitz, supra note 20, at 488.
124 See What 2nd Commitment Period of the Kyoto Protocol, supra note 12.
125 See Baumert, supra note 21, at 382 (arguing that indefiniteness of terms “developed” and “developing” under Protocol has caused confusion among parties).
126 See id.
127 See Building on the Kyoto Protocol, supra note 9, at 36.
128 See Weisslitz, supra note 20, at 488.
Kyoto Protocol’s environmental policies are a new type of colonization. In other words, less industrialized parties to the Kyoto Protocol believe that subjecting themselves to an enforcement regime under the Protocol would sacrifice too much of their sovereignty to developed nations who control the Protocol. The painful memory of living under Western rule causes them to cling to their independence and be distrustful of a program like the Kyoto Protocol, which originates in the West and would give Western powers control over less powerful, developing countries.

C. Are Sweeping Changes Really Necessary?

Given the obstacles that must be overcome, one might ask whether it is necessary for developed nations to persuade high-emission developing countries to take on more binding commitments. One must consider whether the effects of global climate change may be addressed sufficiently through greater emission-reduction requirements for Annex I countries and through national programs voluntarily developed by high-polluting developing countries. Some observers point to China’s domestic environmental programs as proof that once developing member countries reach a certain level of industrialization, they will impose standards on themselves without outside enforcement. As discussed above, China presented some impressive programs for resource conservation at the second AWG meeting. Reliance on this type of national initiative has its shortcomings. As Kevin Baumert observes, there is no real accountability for the implementation of these programs. Developing countries are given significant leeway under the Kyoto Protocol to determine how fully they will carry out their plans. Even the national communications required of developing nations need not contain exact descriptions of the nation’s environmental programs. These reports, which are the primary reporting obligation of developing nations, are designed to provide an opportunity for these countries to describe the

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129 Id.
130 Id.
131 Id.
132 See Baumert, supra note 21, at 376–78.
133 See id.
134 See Guansheng, supra note 59.
135 Id.
136 See Baumert, supra note 21, at 381–82.
137 Id.
138 Id.
139 Id.
steps they are taking to curb their greenhouse gas emissions.\textsuperscript{140} In practice, however, they often contain only claims of existing programs without any real detail.\textsuperscript{141} Consequently, it is possible that a country’s impressive rhetoric will become hollow promises because there can be no meaningful enforcement by other parties to the Protocol.\textsuperscript{142} Reports have shown that this may be the case in China, where the halting of construction on several high-polluting power plants elicited praise from the international community even though work on the plants quietly began again shortly thereafter.\textsuperscript{143} 

Even assuming that China is upholding its promises to carry out its national programs, there is no guarantee that other developing nations would be as cooperative when they reach a certain level of industrialization.\textsuperscript{144} There is reason to believe that China’s motives for cooperating with the Kyoto Protocol may not be as effective for other developing countries or even for China in the future.\textsuperscript{145} First, China has been under international scrutiny from the beginning of the Protocol.\textsuperscript{146} China has been one of the major question marks in the structure of Kyoto.\textsuperscript{147} Observers in practically every Western country have been waiting to see what conservation steps China is willing to take, placing substantial pressure on the country to march in step for fear of its economic ties being harmed if it does not.\textsuperscript{148} A related point is that China’s initiatives come at a time when the Western world is still very dominant industrially and thus in a position to place this kind of economic pressure on countries like China.\textsuperscript{149} This will not always be the case, however, and the incentive for nations without binding obligations to create national programs for environmental protection may be diminished in the future.\textsuperscript{150} Finally, China does not have the shadow of colonialism hanging

\begin{thebibliography}{99}
\bibitem{140} Id.
\bibitem{141} See Baumert, \textit{supra} note 21, at 381.
\bibitem{142} Id.
\bibitem{144} See Weisslitz, \textit{supra} note 20, at 488.
\bibitem{146} Id.
\bibitem{147} See Cooper, \textit{supra} note 145, at 401 (arguing that allowing China to continue to develop unchecked could frustrate all other Kyoto Protocol efforts).
\bibitem{148} Id.
\bibitem{149} See Weisslitz, \textit{supra} note 20, at 484–85.
\bibitem{150} Id.
\end{thebibliography}
over it as do many developing nations. It remains to be seen what effect the history of Western domination will have on African parties to the UNFCCC, if and when they achieve significant industrial development. One does not know whether they will take the initiative, like China, to create their own national programs for greenhouse gas emissions reductions, or whether they will resist change because of their fear that greater involvement in the climate regime will hand over too much power to more developed Western nations.

Conclusion

Some commentators believe that nothing short of a complete overhaul of the Kyoto provisions will create a working agreement between developed and developing countries on the future of the Protocol. This will be very difficult for the Kyoto Protocol’s founding members to swallow because they fear that too many concessions will rob the Protocol of any real teeth. The outcome of negotiations leading up to the second commitment period will largely depend on whether more industrialized developing countries will accept the similarities between themselves and the Annex I parties instead of perpetuating the myth that they come to the table in the same position as impoverished African nations. The negotiations will require humility and flexibility by Annex I parties, who may be required to sacrifice some of their expectations for the climate regime to ensure its continued existence. International conventions always face the challenge of meeting widely diverse needs, but hopefully, as with other international agreements, the justice of Kyoto’s cause will prevail and the Protocol will remain intact. Countries like China give some reason for hope that developing nations will truly embrace the ideals of the agreement as they develop into major industrial players, and that even though Kyoto may evolve, it will prove to be an effective international tool for combating global climate change.

151 Id. at 488.
152 Id.
153 Id.
154 See What 2nd Commitment Period of the Kyoto Protocol, supra note 12.
155 See Mitchell, supra note 117, at 68.
156 See Guansheng, supra note 59.
157 See What 2nd Commitment Period of the Kyoto Protocol, supra note 12.
158 See UNFCCC Essential Background, supra note 15.
159 See Guansheng, supra note 59.
THE CONTINUING CONUNDRUM OF INTERNATIONAL INTERNET JURISDICTION

KEVIN A. MEEHAN*

Abstract: International law has long been concerned with resolving issues of international jurisdiction; however, the unique circumstances involved in Internet cases have thrown a wrench in the traditional machinery of international jurisdiction law. Domestic courts continue to struggle with the issue, and the international community has dragged its feet on developing a uniform standard for determining international Internet jurisdiction. Further complicating matters, states often have divergent substantive Internet regulations and policies. This Note discusses and analyzes the leading cases and theories on international Internet jurisdiction and concludes that none of the current proposed solutions alone provide a satisfactory solution. Nevertheless, an international resolution on internet jurisdiction that borrows elements from each of these proposals could be successfully established.

Introduction

Over the last decade, the Internet has exploded, making our world smaller.1 The touch of a few keystrokes enables people to communicate, engage in commerce, and interact with others around the world.2 This ability to cross international borders without leaving one’s living room has created a jurisdictional void that has yet to be filled.3 When an international Internet conflict arises, several difficult questions must be answered: Where can the plaintiff sue? Which country’s laws apply?4 Although these questions are not unique to Internet cases, the circumstances typically involved in such cases have made answers and consen-

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1 See Tim Gerlach, Note, Using Internet Content Filters to Create E-Borders to Aid International Choice of Law and Jurisdiction, 26 Whittier L. Rev. 899, 899 (2005).

2 See id.

3 See id.

4 See id. at 900.
sus opinion far more difficult than in traditional international jurisdiction cases.\(^5\)

Courts and commentators have long recognized these problems, yet little progress has been made toward finding a solution to the Internet jurisdiction dilemma.\(^6\) The failure of the legal community to develop jurisdictional standards has created significant concerns in the Internet community.\(^7\) Many Internet content providers are faced with the uncertainty of being sued in unanticipated jurisdictions for violating unknown laws with untold consequences.\(^8\) Their fear is grounded in a reality demonstrated by a Brazilian court order entered against Google subsidiary YouTube, which resulted in at least one Brazilian telecom company blocking the site from its Internet users.\(^9\) Although the judge vacated his order shortly after the ban went into effect, this libel case demonstrates the enormous impact Internet jurisdiction can have on e-commerce.\(^10\)

Although the Internet is still relatively young, the legal principles of international jurisdiction are not. This Note begins with a brief explanation of traditional (non-Internet related) international jurisdiction law. Next, this Note summarizes the leading case involving international Internet jurisdiction and the leading theories for resolving its open issues. Finally, this Note suggests that, although alone they are each insufficient, aspects from each of these theories should be combined for a practical and comprehensive approach to international Internet jurisdiction.

I. Background

A. Introduction to International Jurisdiction

The right of a sovereign state to create and enforce laws concerning activities within its borders is a fundamental principle of interna-

\(^6\) See Gerlach, supra note 1, at 902–03.
\(^8\) See id. at 268.
tional law,\textsuperscript{11} yet there is often ambiguity as to whether such sovereign powers may extend beyond a state’s borders.\textsuperscript{12} As a result, the corpus juris concerning international jurisdiction is among the most voluminous in all of international law and acknowledges several bases of jurisdiction.\textsuperscript{13}

The strongest basis for a state’s jurisdiction is territoriality.\textsuperscript{14} Under this principle, a sovereign state necessarily has jurisdiction over all persons, objects, and activities within its borders.\textsuperscript{15}

Although inherently weaker, several bases of extraterritorial jurisdiction are also acknowledged by the international community, such as nationality, passive personality, effects, protection, and universality principles.\textsuperscript{16} The nationality principle permits states to assert jurisdiction over their own nationals, wherever they are located.\textsuperscript{17} This principle is grounded in the relationship existing between states and their nationals in which citizens are subject to their state’s laws because they enjoy the benefits of citizenship and have notice of the laws of their home state.\textsuperscript{18}

Similarly, jurisdiction has been based on the nationality of the victim; however, such “passive personality” jurisdiction is not favored.\textsuperscript{19} Another common basis of extraterritorial jurisdiction is effects jurisdiction.\textsuperscript{20} Under this principle, a state may assert jurisdiction over conduct that has an effect, but does not actually occur, within its border.\textsuperscript{21} In addition, jurisdiction has been upheld under the protection principle where extraterritorial conduct directly threatened crucial state interests, such as national security.\textsuperscript{22} Lastly, under the universality principle,
certain activities are by their very nature *jus cogens*, and any nation may have jurisdiction over them.

In many cases, a number of states may have concurrent jurisdiction under any of the various forms of extraterritorial jurisdiction, resulting in a conflict of laws. Forum selection clauses in international business contracts have become an increasingly important and accepted method of resolving international conflict of laws issues in the world of global commerce. Outside of this arena, however, there are two doctrines commonly used by courts to resolve international conflicts of laws: international comity, and *forum non conveniens*. International comity is the recognition that a nation grants to the legislative, executive, or judicial acts of another nation within its own territory. Under this doctrine, a court may recognize and enforce a judgment of a foreign court, apply the laws of another state, or decline to assert its otherwise valid jurisdiction and dismiss the complaint in favor of a foreign forum. Under the *forum non conveniens* doctrine, a court can dismiss a case if it finds that it would not be a sufficiently convenient forum for adjudication.

**B. International Internet Jurisdiction**

1. The Internet Problem

Although the above legal framework worked relatively well in traditional contexts, the advent of the Internet introduced novel challenges
for determining international jurisdiction. In the traditional analog world, it is relatively easy for courts to determine the geographical locations of the persons, objects, and activities relevant to a particular case. The geography of the digital world of the Internet, however, is not as easily charted. Content providers may physically reside, conduct their business, and locate their servers in a particular location, yet their content is readily accessible from anywhere in the world. Furthermore, attempts to identify the location of a particular user over the Internet have proven extremely difficult, and many Internet users compound this problem by intentionally hiding their location. Traditional principles of international jurisdiction, particularly territoriality, are poorly suited for this sort of environment of geographic anonymity. Courts have struggled to develop a satisfactory solution, yet no progress has been made toward a uniform global standard of Internet jurisdiction.

2. Jurisdiction in Yahoo! v. La Ligue le Racisme et L’Antisemitisme

Perhaps the most highly publicized example of jurisdictional difficulties involving the Internet is Yahoo! Inc. v. La Ligue le Racisme et L’Antisemitisme (LICRA), a case that started in 2000. Two French citizens, LICRA, and L’Union Des Estudiants Juifs De France (UEJF), filed suit in France against Yahoo!, alleging that the website violated a French law prohibiting the display of Nazi paraphernalia by permitting users of its Internet auction service to display and sell such artifacts.

The two Paris based anti-racism groups demanded that Yahoo!’s French subsidiary (Yahoo.fr) remove all hyperlinks to the parent website (Yahoo.com) containing the offending content, and warn French

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34 See Rice, supra note 5, at 429.
35 See id.
37 See Rice, supra note 5, at 458–59 (explaining geo-location technologies).
38 See id. at 429.
39 See id.
40 See Gerlach, supra note 1, at 902–03.
41 See Hestermeyer, supra note 7, at 268.
surfers of the offending content accessible on Yahoo.com. In defense, Yahoo! argued that the French court lacked jurisdiction over the matter because its servers were located in the United States, its principle business was located there, and it had no intention of violating the French law prohibiting the display of Nazi paraphernalia by linking Yahoo.com to Yahoo.fr.

In a preliminary order, dated May 22, 2000 (the May Order), the Tribunal De Grande Instance De Paris rejected Yahoo!’s arguments. The court held that it could properly assert jurisdiction because “the damage was suffered in France.” The May Order required Yahoo!: (1) to “dissuade and render impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects, as well as to render impossible any other site or service which makes apologies of Nazism”; (2) to warn all surfers on Yahoo.fr that the display or sale of Nazi objects as well as the “banalization” of Nazism is strictly forbidden in France and exposure to such illegal material is possible by using the hyperlink to Yahoo.com or by conducting certain searches; (3) to submit to the court at a later hearing their proposed measures for implementing the previous two orders; and (4) to pay each plaintiff 10,000 francs.

During the subsequent hearing, Yahoo! again challenged the French Tribunal’s jurisdiction to consider the matter. Yahoo! also argued that compliance with the May Order would violate its First Amendment rights to freedom of expression, and, therefore, it could not be enforced in the United States. Yahoo! further claimed that compliance with the order would be technologically impossible. Finally, it argued that, even if it could comply with the May Order, implementing it “would entail unduly high costs for the company . . . and would to a degree compromise the existence of the Internet, being a

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44 See id.
46 Id.
47 Id. At the time the judgment was awarded, 10,000 francs would exchange for $13,460. See Daily French Franc Rate Against the Dollar, http://www.jeico.co.kr/cnc57frc.html (lasted visited May 14, 2007).
49 See id.
50 See id.
space of liberty and scarcely receptive to attempts to control and restrict access.”

In November, the court again rejected Yahoo!’s jurisdiction arguments on the same grounds as in the May Order. Relying heavily on a report of Internet experts, it also rejected Yahoo!’s technological impossibility argument, and devoted much of its opinion to explaining how compliance with the May Order could be achieved. In rejecting the First Amendment argument, the court stated that “it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies.” The court then ordered Yahoo! to comply with the May Order within three months of receiving notice of the November Order.

In response to the November Order, Yahoo! initiated suit in California against LICRA and UEJF, seeking a declaratory judgment that the French orders were constitutionally unenforceable in the United States as contrary to the First Amendment. In an initial opinion, the district court denied the defendants’ motion to dismiss for lack of jurisdiction. The district court first determined that the case was ripe for adjudication, and then turned to the International Shoe personal jurisdiction analysis.

The court held that the defendants purposefully availed themselves of the forum state because they sent a “cease and desist” letter to Yahoo!’s California headquarters, requested the French court to require Yahoo! to take specific actions in California that would violate Yahoo!’s First Amendment rights, and engaged U.S. Marshals to serve process on Yahoo!. The court then determined that it would not be unreasonable to maintain Yahoo!’s suit, noting that the United States

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51 Id.
52 See id.
54 Id.
55 See id.
57 Id. at 1171.
58 See id. at 1172 n.2.
59 See id. at 1172–73. The Due Process Clause permits courts to assert jurisdiction over a non-resident defendant only if that defendant has “minimum contacts” with the forum state such that adjudication there “does not offend traditional notions of fair play and substantial justice.” Int’l Shoe v. Washington, 326 U.S. 310, 316 (1945).
60 See Yahoo! I, 145 F.3d at 1174.
was a superior forum to France for determining the limited question of whether it “should recognize and enforce the French Order that required Yahoo! to censor its U.S.-based service to conform to French penal law.”

In a subsequent opinion, the district court granted Yahoo!’s motion for summary judgment and declared the French Orders unenforceable. Addressing the issue of international comity, the court reasoned that, although U.S. courts will generally recognize and enforce a foreign judgment, it could not do so in this case because enforcement of the French orders would violate Yahoo!’s constitutional rights “by chilling protected speech that occurs simultaneously within our borders.”

LICRA and UEJF appealed and a divided panel of the Ninth Circuit reversed. The majority held the district court lacked jurisdiction over LICRA and UEJF because they had not engaged in wrongful conduct targeted at the forum state. The majority further noted that Yahoo! cannot expect to have both the commercial benefits of having its content viewed worldwide as well as the benefit of using the First Amendment as a shield against foreign litigants seeking to enforce judgments based on foreign speech laws. In an en banc rehearing, an 8-3 majority of the court upheld the district court’s exercise of jurisdiction over LICRA and UEJF; however, the district court’s judgment was ultimately reversed on the ripeness issue.

II. Discussion

A. Theories of Internet Regulation

As the last century drew to a close, the Internet was becoming a global phenomenon, yet the swelling scale of online commerce and

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61 Id. at 1178, 1179–80.
63 Id. at 1192.
64 See Yahoo! Inc. v. La Ligue le Racisme et L’Antisemitisme (Yahoo! III), 379 F.3d 1120, 1126 (9th Cir. 2004).
65 See id.
66 See id.
67 Yahoo! Inc. v. La Ligue le Racisme et L’Antisemitisme (Yahoo! IV), 433 F.3d 1199, 1201 (9th Cir. 2006).
content caused increased concerns over regulating Cyberspace.\textsuperscript{69} Attempts at regulating the Internet, however, have proven problematic because of the decentralized nature of the Web and fears of inhibiting a rapidly growing engine of global commerce and communication.\textsuperscript{70} Nevertheless, at least four prominent theoretical models of Internet regulation have emerged: (1) the self-regulation model; (2) the neo-mercantilist model; (3) the culturalist model; and (4) the globalism model.\textsuperscript{71}

The self-regulation model insists that the Internet community is capable of regulating itself and promulgation of domestic or international laws would be both unnecessary and undesirable.\textsuperscript{72} Self-regulation is likely rooted in the ideals of the “Free Software Movement” starting in the 1980s within the Internet/Hi-tech industry, which was characterized by the free exchange of proprietary information for the purpose of advancing the art through public collaboration.\textsuperscript{73} The Internet has become the primary conduit for such free communication, and attempts at regulating it have traditionally faced sharp criticism from the online community.\textsuperscript{74} One Internet commentator illustrated the views of many in the online community stating:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

. . . Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.\textsuperscript{75}

\textsuperscript{70} See \textit{id}.
\textsuperscript{71} See Love, \textit{supra} note 36, at 271.
\textsuperscript{74} See generally Elec. Frontier Found. (EEF), About EFF, http://www.eff.org/about/ (last visited May 14, 2007) (advocating various online freedoms from privacy to use of copyrighted materials).
As the Internet began to grow in the late 1990s, the self-regulation model appeared to receive acceptance from certain governments, particularly the United States. In fact, the Clinton-Gore administration called for governments to “refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities that take place via the Internet.” The self-regulation model, however, is not universally accepted, and “[m]ost countries regulate the Internet within the framework of their political, legal, moral and cultural values.”

Neo-mercantilism, the second theoretical model of Internet regulation, “combines several libertarian principles—the marketplace of ideas, laissez-faire economics, free trade and the free flow of information, goods and services—and applies them to the Internet, thereby making them global concepts.” The underlying premise of the model is that the Internet is essentially a vehicle of commerce. The role of government, therefore, is to ensure the free flow of commerce along the information superhighway and to remove any impediments. This model is considered to be the American approach to Internet regulation.

In contrast, the culturalist model views cultural protection as the primary objective of Internet regulation. Governments adhering to this model tend to “enact Internet laws and policies rooted in the specific intellectual, aesthetic and moral values of their national or regional civilizations or cultures, with little consideration of their extraterritorial or global impact.” Culturalist governments often perceive Internet content not as neutral, but serving the interest of its country of origin, which in most cases is the United States. The cultural homogeneity of the Internet is thus believed to be a potential cause of global cultural impoverishment.

76 See Eko, supra note 72, at 450.
78 See Love, supra note 36, at 271.
79 Eko, supra note 72, at 461.
80 Id. at 463–64.
81 See id. at 464.
82 See id.
83 See id.
84 Eko, supra note 72, at 465.
85 Id. at 466.
86 See id. at 467.
87 See id.
The French orders in the Yahoo! case illustrate a culturalist perspective.\(^88\) That court was primarily concerned with protecting French surfers from viewing websites that “violated French law by ‘offending the collective memory of the country.’”\(^89\) The court seemed to dismiss the compliance costs imposed on Yahoo! and failed to address the implications of the extraterritorial effects of its orders.\(^90\)

Lastly, the globalism model requires multinational political, economic, technological, and cultural cooperation in regulating the Internet.\(^91\) This model relies on treaties and international conventions to achieve that goal.\(^92\) Although international regulation of intellectual property and child pornography on the Internet has made some progress,\(^93\) there are no international agreements resolving Internet jurisdiction.\(^94\)

B. Proposed Solutions to the Internet Jurisdiction Problem

1. A *Res Communes* Solution

One solution to the Internet jurisdiction problem is to declare cyberspace a new global space or Common Heritage of Mankind (CHM).\(^95\) This solution reflects many of the underlying policies of the self-regulation model; however, the international community, instead of the Internet community, would resolve the jurisdictional issues by regulating the Internet through treaties and norms rather than applying traditional jurisdiction doctrines.\(^96\)

CHM is grounded in the *res communes* doctrine that “all nations should benefit from the resources that are recovered from areas in which all nations have an interest.”\(^97\) The High Seas, Antarctica, and Outer Space are all regulated by treaties and international conventions as CHM.\(^98\) A CHM cannot be appropriated; rather, all states share the

\(^{88}\) See *id.* at 471.

\(^{89}\) *Eko,* *supra* note 72, at 471.

\(^{90}\) See *Tribunal de grande instance* [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, *available at* http://www.cdt.org/speech/international/20001120 yahoofrance. pdf (Fr.).

\(^{91}\) See *Eko,* *supra* note 72, at 463.

\(^{92}\) See *id.*

\(^{93}\) See *id.*

\(^{94}\) See *Gerlach,* *supra* note 1, at 901–02.

\(^{95}\) See *Love,* *supra* note 36, at 273; *Heaven,* *supra* note 33, at 400.

\(^{96}\) See *Love,* *supra* note 36, at 273.

\(^{97}\) *Heaven,* *supra* note 33, at 390.

\(^{98}\) See *id.* at 391.
burden of managing a CHM’s resources and the benefits of its exploitation. Those resources must also be preserved for future generations, and a CHM can only be utilized for peaceful purposes.

Advocates of a res communes solution to the Internet jurisdiction problem envision a comprehensive international regulatory scheme. An international convention would lead to a treaty setting forth “universal standards” and declaring the Internet CHM. The treaty would also create an international body that would promulgate civil and criminal Internet regulations and jurisdictional rules. Advocates argue that regulations drafted pursuant to the treaty must be adopted by all nations without reservations or modifications, and individual nations would be required to insert these regulations into their domestic legal codes.

The clear advantage of international Internet regulation is uniformity. Courts would no longer have the discretion of deciding whether their laws or the laws of another nation apply in a given case. Moreover, the enforcement of foreign judgments would not violate domestic laws because the laws regulating the Internet would be the same in all countries. Users and providers of Internet services and content would be afforded the certainty of knowing that their conduct is regulated by a single set of globally applicable laws. In addition, proponents argue that a user or provider who violates a universal Internet regulation would simply be prosecuted in their home jurisdiction because, at least in theory, the outcome would be the same in all jurisdictions and the defendant’s home jurisdiction would be the most convenient forum.

99 See id.
100 See id.
101 See id. at 400.
102 See Heaven, supra note 33, at 390.
103 See id. at 400.
104 See id.; Love, supra note 36, at 273–74.
105 See Love, supra note 36, at 274.
106 See id.
107 See id.
108 See id.
109 See Heaven, supra note 33, at 401. Although Heaven argues uniform laws would make jurisdictional issues easier in the context of criminal violations, she acknowledges that the question of civil jurisdiction is not as readily resolved. See id. Even in the criminal context, however, there would likely be significant debate over whether sovereign rights of the defendant’s nation to protect its citizens should trump the sovereign right of the victim’s nation to protect its citizens and to prosecute crimes occurring or having substantial effects within its borders. It is unclear whether declaring the Internet res communes would remove from consideration these deeply engrained principles of sovereignty.
A universal regulatory scheme may have great appeal, but even supporters of a *res communes* solution to Internet regulation admit that it will be a “daunting task . . . coaxing sovereign nations into giving up territorial rights” over the commercial and intellectual resources of the Internet.\(^{110}\) Proponents, however, contend that the challenges of establishing an Internet CHM are both necessary and doable.\(^{111}\)

2. A Global Standard for Determining Jurisdiction

Another proposal involves establishing a global standard for determining jurisdiction in Internet cases.\(^{112}\) Similar to the *res communes* solution, the global standardization approach to Internet jurisdiction requires an international convention or treaty.\(^{113}\) It would, however stop short of declaring the Internet CHM and formulating substantive Internet regulations.\(^{114}\) Specifically, proponents of global standardization desire the international adoption of a single test for determining Internet jurisdiction.\(^{115}\) Several tests have been proposed to resolve the Internet jurisdiction problem including: (1) the accessibility test;\(^{116}\) (2) the Zippo test;\(^{117}\) (3) the effects test;\(^{118}\) and (4) the targeting test.\(^{119}\)

The Zippo test determines whether jurisdiction may be properly asserted based on “the nature and quality of the commercial activity” conducted over the Internet.\(^{120}\) This test involves evaluating the relevant Internet activity and placing it into one of three categories falling along a sliding scale.\(^{121}\) “At one end of the spectrum are situations where a defendant clearly does business over the Internet.”\(^ {122}\) Jurisdiction in these cases would be proper.\(^ {123}\) “At the opposite end are situa-

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110 Id. at 402.
111 See id.
112 See Gerlach, supra note 1, at 905.
113 See Hestermeyer, supra note 7, at 287 (advocating targeting test provision for Hague Convention).
114 See id.
115 See id.
116 See id. at 276. The accessibility test broadly holds jurisdiction properly asserted if defendant’s site was accessible in the forum state. See id.
118 See Rice, supra note 5, at 477 (discussing Panavision Int’l, L.P. v. Toeppen, 144 F.3d 1316 (9th Cir. 1998)).
119 See Hestermeyer, supra note 7, at 279.
120 Zippo Mfg., 952 F. Supp. at 1124.
121 See id.
122 Id.
123 See id.
tions where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions.”

Asserting jurisdiction over these “passive Web sites” would be improper. “The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” While many U.S. courts have applied the Zippo test, it appears to be fading in popularity.

Rather than focusing on the interactivity of the defendant’s website, some courts determine Internet jurisdiction based on whether the conduct “has an effect in the forum state.” A simplified example of this test is demonstrated in the Tribunal De Grande Instance De Paris’ holding in the Yahoo! case: “Whereas the damage was suffered in France, our jurisdiction is therefore competent.” In the United States, the effects test is grounded in the Supreme Court’s ruling in *Calder v. Jones* that jurisdiction is proper where the defendant’s intentional conduct was calculated to cause injury in the forum state. Courts may invoke the effects test to assert jurisdiction in cases where the facts would be insufficient under the Zippo test. Applying an effects test, by itself, however, has been criticized as potentially exposing websites to liability anywhere in the world.

The targeting test offers a narrower and more flexible standard. Under this test, courts determine whether the defendant website targeted the jurisdiction by considering the steps taken by the defendant to enter or avoid the particular forum state. The question of whether the defendant targeted the jurisdiction is itself a vague standard.

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124 *Id.*
125 *Zippo Mfg.*, 952 F. Supp. at 1124.
126 *Id.*
128 *See* Hestermeyer, *supra* note 7, at 278.
129 *Panavision Int’l*, L.P. v. Toeppen, 144 F.3d 1316, 1321 (9th Cir. 1998).
132 *See* Rice, *supra* note 5, at 477–78.
133 *See* Hestermeyer, *supra* note 7, at 286.
134 *See id.*
135 *See id.* at 279.
136 *See id.*
Commentators, however, suggest that courts, in applying the targeting test, should consider the totality of the circumstances or develop a non-exhaustive list of factors. The suggested factors include the languages used, the currencies accepted, disclaimers, the use of geo-location technologies, the top-level domain used, pictorial suggestions, advertising, and market participation. The targeting test has been applied in the United States and elsewhere.

3. Content Filtering & E-Borders

Many commentators view the Internet jurisdiction problem as one of weakened national borders. Some have argued that the Internet has created a borderless society because the Internet lacks a physical location. This argument, however, is largely inaccurate. “Internet communication begins ‘from a fixed location and ends at a fixed location.’” Proponents of content filtering argue that filtering technologies can be placed within this infrastructure to create e-borders.

The Internet jurisdiction problem, from the content filtering perspective, results from the large volume of unmonitored Internet traffic crossing international borders. Governments would regain control of their borders by placing blocking and tracking technologies at interna-

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137 See id.; Rice, supra note 5, at 512.
138 The top level domain refers to the last part of a domain name, thus the top level domain of www.website.com would be .com. Some top level domains, such as country codes, tie the website to a geographic location. ICANN, Top Level Domain Names, http://www.icann.org/tlds (last visited May 19, 2008).
139 See Hestermeyer, supra note 7 at 286–87; Rice, supra note 5, at 512–15.
140 See Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446, 454 (3d Cir. 2003) (holding that purposeful availment element of personal jurisdiction in Internet cases requires evidence showing defendant directly targeted its site to forum state).
141 See Hestermeyer, supra note 7, at 286 (noting German courts routinely apply targeting test in certain cases).
143 See, e.g., Dawson, supra note 142, at 638; Heaven, supra note 33, at 374.
144 Although it might be easy to view the Internet as lacking a physical location, the effective operation of the Internet requires a tremendous amount of hardware. An article discussing Google’s construction of a new computing center described it as “sprawling like an information age factory” and noted that it would be “hard to keep [it] a secret when it is a computing center as big as two football fields, with twin cooling plants protruding four stories into the sky.” John Markoff & Saul Hansell, Hiding in Plain Sight, Google Seeks More Power, N.Y. Times, June 14, 2006, at A1.
146 See Gerlach, supra note 1, at 912.
147 See Dawson, supra note 142, at 638.
tional access points or at the Internet Service Provider’s (ISP) servers to act as centurions. Many governments have already implemented such technologies to monitor and regulate Internet activities of their citizens. In an ironic twist on the Yahoo! case, Yahoo!, Google, and Microsoft have been criticized for filtering their search results in China for terms such as “democracy” and “human rights.”

There are four basic forms of content filtering: Host Name Blocking; IP Address Blocking; Keyword Blocking; and Content-Based Image Blocking. The first two, Host Name Blocking and IP Address Blocking, are the simplest filtering methods because they only check the web address and not the entire site. Host Name Blocking restricts access to web addresses containing banned terms. IP Address Blocking restricts access to sites based on a list of banned IP addresses compiled by the filter manager, or it can restrict user access to a pre-approved list of websites, called Whitelist Filters. Keyword Blocking is similar to Host Name Blocking; however, its scope is much greater because Keyword Blocking searches the entire site for banned terms. Content-Based Image Filtering scans images displayed on websites.

Proponents of content filtering view it as a more realistic solution to the Internet jurisdiction problem than attempting to get the world to agree on a single set of universal regulations and jurisdictional standards. Moreover, Internet filtering allows states to erect e-borders and regulate the Internet activity of its citizens without having an impact on foreign users or content providers. Critics, however, argue that the filtering approach unduly restricts the free flow of information.

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148 See Gerlach, supra note 1, at 912.
149 See Rice, supra note 5, at 455.
151 See Gerlach, supra note 1, at 916. IP address blocking is also known as packet filtering. See id.
152 See id.
153 See id.
154 See id.
155 See id.
156 See Gerlach, supra note 1, at 916–17.
157 See id. at 917.
158 See id. at 912–13.
159 See id.
for which the Internet was created.\textsuperscript{160} In addition, many have echoed Yahoo!’s argument that filtering technology is easily circumvented or in itself largely ineffective.\textsuperscript{161} Nevertheless, at least twenty countries currently impose significant filtering restrictions on Internet access.\textsuperscript{162}


Another solution to the Internet jurisdiction problem is to allow content providers and users to agree to resolve disputes in a particular forum via choice of law provisions in terms of service contracts.\textsuperscript{163} For example, the content provider could require users to consent to a terms of service agreement containing a forum selection clause as a condition for entering the site.\textsuperscript{164} These provisions would be valid if: (1) “the chosen law and forum are clearly disclosed to the consumer”; (2) “the chosen forum is reasonably accessible and neutral”; and (3) “the chosen law provides reasonable, baseline consumer protections.”\textsuperscript{165} The choice of law approach could also result in the development of new forms of alternative dispute resolution (ADR) specifically tailored for the unique contours of the Internet.\textsuperscript{166}

The choice of law solution draws heavily from the self-regulation and neo-mercantilist models in that it relies primarily on private ordering rather than governmental or international regulation.\textsuperscript{167} The only external regulation appears to be the establishment of an international consensus regarding the validity of such agreements; however, given the European Union’s reluctance to allow forum selection clauses, such a consensus does not seem likely.\textsuperscript{168}


\textsuperscript{161} See Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, available at http://www.cdt.org/speech/international/20001120yahoo france.pdf (Fr.); see also Gerlach, supra note 1 at 926–27 (acknowledging current limitations in filtering technology, but noting that such technologies continue to improve).

\textsuperscript{162} See Rice, supra note 5, at 457.

\textsuperscript{163} See Lester, supra note 145, at 441–42.


\textsuperscript{166} See id.

\textsuperscript{167} See id.

\textsuperscript{168} See Rice, supra note 5, at 492–94 (discussing Brussels Convention and Hague Convention proposals that would hold choice of forum contracts null and void).
III. Analysis

A. The Global Internet Commons: Unfounded and Impractical

The solution of declaring the Internet CHM is certainly appealing. It would attempt to create a utopian global common in which persons from around the world could exchange information, ideas, goods, and services. Unfortunately, the *res communes* solution suffers from a host of failures, both practical and theoretical. First, the theoretical support for declaring the Internet CHM, such as the Moon Treaty and the Outer Space Treaty, is very weak. Second, drafting a single set of Internet regulations is likely too ambitious, and might even prove more problematic than helpful. Third, the solution would take an incredible amount of time to implement and modify because it would necessarily require the participation and ratification of every nation on earth. Lastly, it would require states to relinquish their sovereign authority over Internet activities that are entirely domestic and have no international effects or implications.

The Outer Space Treaty and Moon Treaty are extremely weak authority to support declaring the Internet CHM. International participation in CHM treaties falls well short of the global ratification required for an Internet CHM to be successful. In addition, these treaties tend to promulgate aspirational goals concerning the use of resources that are extremely difficult or expensive to exploit, whereas proponents of an Internet CHM envision a comprehensive regulatory scheme. Furthermore, the aspiration of peaceful and environmentally friendly space exploration has hardly been successful. In sum,

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169 *Contra* Heaven, *supra* note 33, at 398.
171 *See id.*
172 *Contra* Heaven, *supra* note 33, at 398.
174 *See* Heaven, *supra* note 33, at 402.
existing CHM treaties have not demonstrated the feasibility of creating a universal set of concrete, binding Internet regulations.\textsuperscript{176}

Additionally, the international regulatory regime envisioned by CHM proponents attempts too much. As previous CHM treaties have shown, it is an extremely daunting task to get all nations to ratify such a treaty.\textsuperscript{177} Even proponents admit that certain legal issues (e.g., issues over which countries are in sharp disagreement) would have to remain unaddressed by the initial treaty in order to gain universal support.\textsuperscript{178} Many hotly debated jurisdictional issues, however, are those that are in the most critical need of resolution, such as freedom of expression\textsuperscript{179} and validity of forum selection clauses.\textsuperscript{180} Further complicating matters, the CHM solution would also attempt to promulgate substantive regulations.\textsuperscript{181} CHM proponents fail to see that nearly all Internet activities have real world analogs, such as libel,\textsuperscript{182} breach of contract,\textsuperscript{183} intellectual property infringement,\textsuperscript{184} identity theft, fraud,\textsuperscript{185} pedophilia, drugs,\textsuperscript{186} and product liability.\textsuperscript{187} International Internet regulators would thus need to create an international rule for nearly every criminal and civil action available anywhere in the world.\textsuperscript{188}

Even if the CHM regulators were successful in getting every nation to adopt universal Internet rules, two significant concerns would likely arise. First, there would be conflicts between these universal Internet regulations and the domestic laws regulating the same activities. For example, if domestic libel laws differed from Internet libel regulation,

\begin{itemize}
\item \textsuperscript{176} Contra Heaven, supra note 33, at 398.
\item \textsuperscript{177} See id. at 402.
\item \textsuperscript{178} See id. at 400.
\item \textsuperscript{179} Compare Dawson, supra note 142, at 662 (favoring expression), with Gerlach, supra note 1, at 912–13 (arguing sovereignty permits states to limit individual rights on Internet).
\item \textsuperscript{180} See Rice, supra note 5, at 492–93.
\item \textsuperscript{181} See Heaven, supra note 33, at 400.
\item \textsuperscript{182} See Clendenning, supra note 10.
\item \textsuperscript{183} See Lester, supra note 143, at 433–34 (discussing e-commerce contracts).
\item \textsuperscript{184} See MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 918–19 (2005) (holding file-sharing website could be liable for copyright infringement by third-party users).
\item \textsuperscript{185} See United States v. Jackson, 346 F.3d 22, 23 (2d Cir. 2003) (discussing defendant’s commission of identity theft and fraud over Internet).
\item \textsuperscript{186} See Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, available at http://www.cdt.org/speech/international/20001120yahoo france.pdf (Fr.) (noting that Yahoo! filters content pertaining to pedophilia and drugs).
\item \textsuperscript{187} If a jurisdiction recognizes product liability actions against traditional retailers, see Vandermark v. Ford Motor Co., 61 Cal.2d 256, 262 (Cal. 1964), then, presumably, online retailers could also face liability.
\item \textsuperscript{188} See supra notes 183–87 and accompanying text.
\end{itemize}
then a newspaper publisher and an Internet blogger might receive different treatments in the same court. Second, because states themselves have struggled with Internet issues, there is no reason to believe the international community would fare much better.\textsuperscript{189} The Internet is a relatively new and constantly evolving medium, further decreasing the odds that an international convention could formulate a satisfactory set of standards.\textsuperscript{190}

Timing is another factor that works against a CHM solution.\textsuperscript{191} By the time the convention is able to draft regulations on which all nations can agree, Internet use may have evolved to the point where the regulations are obsolete before they are even ratified.\textsuperscript{192} If, for whatever reason, the CHM regulations turn out to be faulty, the international community would be essentially locked into those poor standards.\textsuperscript{193} In short, a CHM solution is too stodgy for the rapid pace of Internet activity.\textsuperscript{194}

Lastly, the CHM solution would require courts to follow international standards in cases that in no way concern the international community. For example, there seems to be little reason for international standards of jurisdiction to apply in a case where an American plaintiff sues an American defendant for libel over the Internet. Sovereign nations have the right to create their own laws and enforce them within their borders and amongst their citizens.\textsuperscript{195}

\textbf{B. Targeting an International Standard for Internet Jurisdiction}

As discussed above, courts have applied several Internet jurisdiction tests; however, many commentators view the targeting test as the best.\textsuperscript{196} An international convention solution might, therefore, adopt the targeting test as a global standard for determining international Internet jurisdiction or, at least, use it as a starting point for developing a new standard.\textsuperscript{197} In addition, an international convention solution

\textsuperscript{189} See Spataro, \textit{supra} note 168, part II(1).
\textsuperscript{190} See \textit{id.}
\textsuperscript{191} See \textit{id.}
\textsuperscript{192} See \textit{id.}
\textsuperscript{193} See \textit{id.}
\textsuperscript{194} See Spataro, \textit{supra} note 168, part II(1).
\textsuperscript{195} See Gerlach, \textit{supra} note 1, at 912.
\textsuperscript{197} See Hestermeyer, \textit{supra} note 7, at 286.
might incorporate the targeting test with other provisions, such as filtering.\textsuperscript{198}

Of course, the adoption of a single standard for determining jurisdiction in Internet cases suffers from many of the same failings as the \textit{res communes} solution; however, an international convention that is limited to jurisdictional issues is far less ambitious and time consuming than declaring the Internet CHM.\textsuperscript{199} Adopting a targeting standard, or something similar, alleviates concerns about being locked\textsuperscript{200} into an inadequate universal standard because such a test would consider the totality of the circumstances under a list of non-exhaustive factors, thereby providing flexibility to adapt to changes in Internet uses.\textsuperscript{201}

\textbf{C. Content Filtering: Inadequacies and Other Concerns}

The question to ask is not whether governments and private entities are going to use filtering and monitoring technologies—that has already been answered in the affirmative.\textsuperscript{202} Countries such as Saudi Arabia, Singapore, and China, have already implemented filtering and monitoring technologies in their Internet infrastructures.\textsuperscript{203} Other countries, such as Britain, Russia, and the United States, have taken steps to monitor Internet activities.\textsuperscript{204} These examples demonstrate the increasing desire of states to regulate Internet activities within their borders and suggest that filtering and monitoring technologies will continue to play a role in such regulation.\textsuperscript{205} The more difficult ques-

\textsuperscript{198} See Lester, \textit{supra} note 145, at 468.
\textsuperscript{199} See Heaven, \textit{supra} note 33, at 400–01 (acknowledging that incremental promulgation of regulations may be slow, but would avoid delays of regulating most controversial issues).
\textsuperscript{200} See Spataro, \textit{supra} note 170, part II(1).
\textsuperscript{201} See Hestermeyer, \textit{supra} note 7, at 287.
\textsuperscript{202} See Rice, \textit{supra} note 5, at 455.
\textsuperscript{203} Id. Saudi Arabia links all thirty of the country’s ISPs to a single Internet entrance-way to support its State-run telephony monopoly and ban content deemed subversive, contrary to the State, or damaging to its leaders’ reputations. See id. at 455–56. Singapore requires its ISPs to install filters that remove content it considers to undermine public security, racial and religious harmony, or public morals. Id. at 457. Although China decentralized its Internet, it requires ISPs to filter out specific government banned sites. See id.
\textsuperscript{204} Id. Britain enacted a law extending phone tapping privileges to the Internet and private firms and individuals are required to help authorities decode data. Russian law requires telephone providers and ISPs to reroute data traffic to local law enforcement to permit monitoring of phone calls and emails. See id. at 458. The U.S. Department of Justice recently subpoenaed Google, Yahoo!, Microsoft, and AOL demanding the firms provide them with web search data of private users. See Arshad Mohammed, \textit{Google Refuses Demand for Search Information}, Wash. Post, Jan. 20, 2006, at A01.
\textsuperscript{205} See Rice, \textit{supra} note 5, at 455.
tions concerning these technologies are whether they are effective\textsuperscript{206} and whether they are appropriate.\textsuperscript{207}

The efficacy of filtering technologies suffers from two significant problems. First, the technologies themselves currently lack the accuracy to create a completely effective e-border; however, proponents argue that advancements in technology will resolve these issues.\textsuperscript{208} Second, filtering and monitoring technologies are currently engaged in “a battle at the level of the architecture” with privacy technologies that circumvent filters and cloak their users’ identities and locations.\textsuperscript{209} Although governments using filtering and monitoring technologies have targeted privacy-protection sites, those sites have, so far, been able to develop new strategies to stay ahead of blocking technologies.\textsuperscript{210}

The technology war between governments and privacy-protection companies reflects the theoretical battle over whether Internet regulation is a good idea in general.\textsuperscript{211} Those in favor of filtering contend that the Internet is a lawless medium, and these technologies are necessary to protect national security, intellectual property rights, and cultural and religious values.\textsuperscript{212} Opponents argue that filtering technologies infringe on civil liberties and stifle global communication.\textsuperscript{213} Critics point to restrictive regimes, such as China and Saudi Arabia, as evidence of filtering’s negative impact on human rights.\textsuperscript{214} They fail, however, to explain why online speech deserves unique protections that would not be afforded to similar speech in newspapers, television, or radio.\textsuperscript{215} Although the human rights and economic issues regarding filtering and monitoring technologies should concern the international community, keeping these issues separate from Internet jurisdiction would better facilitate the resolution of the latter.

\textsuperscript{206} See Gerlach, \textit{supra} note 1, at 926–27.
\textsuperscript{207} See OpenNet Initiative, \textit{supra} note 160.
\textsuperscript{208} See Gerlach, \textit{supra} note 1, at 926–27; Rice, \textit{supra} note 5, at 461.
\textsuperscript{209} Rice, \textit{supra} note 5, at 459.
\textsuperscript{210} See id. at 460–61.
\textsuperscript{211} Compare Gerlach, \textit{supra} note 1, at 912–13 (arguing governments have right to impose speech inhibiting Internet regulations), \textit{with} OpenNet Initiative, \textit{supra} note 160 (arguing against uses of filtering for restricting speech).
\textsuperscript{212} See OpenNet Initiative, \textit{supra} note 160.
\textsuperscript{213} See id.
\textsuperscript{214} See Rice, \textit{supra} note 5, at 455–59.
\textsuperscript{215} See Gerlach, \textit{supra} note 1, at 912–13.
D. Online Forum Shopping

The validity of choice of forum contracts has long been a hotly debated issue.\(^{216}\) The European Union has taken the stance that forum selection clauses are null and void in business-to-consumer contracts.\(^{217}\) In the United States, however, courts acknowledge that “agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”\(^{218}\) Because of this disagreement, it is unlikely that a solution to the Internet jurisdiction problem would include a provision permitting forum selection clauses in terms of service or online purchase agreements, at least in the context of a business-to-consumer contracts.\(^{219}\) Forum selection clauses contained in high value business-to-business contracts, however, should be presumed valid because, at some point, the value of goods or services exchanged in the transaction indicates a level of sophistication sufficient to contract away such rights.\(^{220}\) Furthermore, the international Internet community should not be deterred from utilizing other common forms of ADR, such as credit card chargebacks.\(^{221}\) In addition, the private sector should try and develop other informal, quick, and inexpensive forms of ADR to handle Internet disputes that would be more appealing to Internet users than traditional litigation.\(^{222}\)

E. A Proposal for an International Internet Convention

Despite the variety of solutions currently available, questions concerning international Internet jurisdiction remain unresolved\(^{223}\) and continue to be a concern, particularly to content providers.\(^{224}\) The reason for the deadlock concerning Internet jurisdiction could reflect the fact that, as noted above, each of the most common solutions have significant drawbacks.\(^{225}\) Moreover, common ground is difficult to find because each of the common solutions are founded in starkly different

\(^{216}\) See Lester, \textit{supra} note 145, at 454.
\(^{217}\) See Rice, \textit{supra} note 5, at 492.
\(^{219}\) See Lester, \textit{supra} note 143, at 454–55.
\(^{220}\) See id. at 455, 469.
\(^{221}\) See id. at 469. When a consumer challenges a charge on their account, the card issuer can reverse the charge by issuing a chargeback to the merchant’s account. Chargebacks are fast, convenient, informal, and very common in both the United States and the European Union. See id. at 462–64.
\(^{222}\) See id. at 463.
\(^{223}\) See Gerlach, \textit{supra} note 1, at 902–03.
\(^{224}\) See Hestermeyer, \textit{supra} note 7, at 267–68.
\(^{225}\) See Gerlach, \textit{supra} note 1, at 905.
principles of Internet regulation.\textsuperscript{226} Nevertheless, the Internet’s global scope makes it necessary for the international community to formulate universal standards for determining jurisdiction in Internet disputes.\textsuperscript{227}

A convention on international Internet jurisdiction could achieve a global consensus on Internet jurisdiction with participation and ratification by every country.\textsuperscript{228} Although universal ratification will no doubt be very difficult, a convention limited to jurisdictional issues would be an easier sell than an attempt to completely carve out and regulate a new international space.\textsuperscript{229} Furthermore, over time a convention ratified by a majority of states could still become binding customary law.\textsuperscript{230} The convention should strongly consider adopting some version of the targeting test because it is flexible and has been successfully applied in several jurisdictions.\textsuperscript{231} A targeting test considers steps taken by content providers to avoid the jurisdiction, thus reducing the likelihood that content providers will be forced to litigate in unforeseen jurisdictions.\textsuperscript{232} In formulating its targeting test, the convention should identify a number of factors it considers of high probative value, such as the use of disclaimers, filtering technology, and the accepted forms of currency.\textsuperscript{233} The convention might consider whether forum selection clauses should be presumed valid in the context of high value transactions between sophisticated businesses.\textsuperscript{234} The convention should avoid highly contentious issues, such as business-consumer choice of forum agreements, substantive Internet regulations, and the appropriateness of nation-level content filtering and Internet monitoring.\textsuperscript{235}

**Conclusion**

The lack of clear standards for determining jurisdiction in Internet cases is an international problem requiring an international solution. Although achieving full participation and ratification by every nation will likely be an extremely difficult task, no other viable solutions are available. A convention on international Internet jurisdiction is nec-

\textsuperscript{226} See Eko, \textit{supra} note 72, at 482.
\textsuperscript{227} See Heaven, \textit{supra} note 33, at 400.
\textsuperscript{228} See \textit{id.} at 402.
\textsuperscript{229} See \textit{id.}
\textsuperscript{230} See The Paquete Habana, 175 U.S. 677, 708 (1900) (holding capture of civilian fishing vessel contrary to customary law independent of any treaty).
\textsuperscript{231} See Hestermeyer, \textit{supra} note 7, at 286.
\textsuperscript{232} See \textit{id.} at 286–87.
\textsuperscript{233} See \textit{id.}
\textsuperscript{234} See Lester, \textit{supra} note 143, at 469.
\textsuperscript{235} See Heaven, \textit{supra} note 33, at 400.
necessary to clarify the expectations of the Internet community. Currently, content providers could be sued anywhere and everywhere for unintentionally violating domestic laws they never knew existed. Similarly, Internet users must surf the web without any certainty that redress is available for harms they might suffer in cyberspace. The international community should not allow this jurisdictional void to continue, and a universal standard for determining international Internet jurisdiction based on the targeting test should be adopted.
NONGOVERNMENTAL ORGANIZATIONS AND AFRICAN GOVERNMENTS: SEEKING AN EFFECTIVE INTERNATIONAL LEGAL FRAMEWORK IN A NEW ERA OF HEALTH AND DEVELOPMENT AID

CHANDLER H. UDO*

Abstract: International and domestic nongovernmental organizations (NGOs) have multiplied on the African continent as both public and private donors have shifted their funding away from ineffective governments. Many African nations, including Zimbabwe and Sudan, have responded by expelling international NGOs and enacting laws that severely limit their ability to function. In most cases, NGOs are without recourse because of their precarious position in international law. Some scholars have posited that NGOs should be granted legal personality to make them full or partial subjects in international law. This Note argues that such a solution would not promote the important goals NGOs advance in Africa. It would also ignore the important role that African governments must play in health and development issues. Instead, the international community should reinforce the existing international legal framework, allow NGOs to remain independent, and create mechanisms to foster communication between NGOs and host governments.

Introduction

In 2005, the Government of Sudan took a number of steps to remove international nongovernmental organizations (NGOs) that were operating within its borders.¹ These official acts included sending a letter of warning to the charity Oxfam and arresting two Médicins Sans Frontières (Doctors Without Borders) workers who had recently re-

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¹ See Cris Chinaka, NGOs Tiptoe Through Africa’s Political Minefields, Global Pol’y F., Oct. 11, 2005, http://globalpolicy.org/ngos/state/2005/1011tiptoe.htm. Other African nations have taken similar steps to remove international NGOs, which are seen as agents of Western Governments. Eritrea, for example, recently told the U.S. Agency for International Development to cease their operations within that country. See id.
ported a rape in the Darfur region of Sudan. Such acts of expulsion, in addition to similar incidents that occur throughout the African continent, highlight the precarious position of international NGOs relative to the power of the nation state. According to a proponent of NGOs in Zimbabwe, “Although NGOs are very important in advancing economic and social development and in alleviating poverty and hunger, some governments regard them as part and parcel of Western powers they have problems with.”

The problem of uncooperative host states in Africa is not a new phenomenon, as many donor governments across the globe, and organizations such as the International Monetary Fund (IMF) and World Bank, have argued that misrule has kept Africa from attaining significant economic and political development. In the 1980s and 1990s, wealthy nations primarily channeled development assistance through the IMF and World Bank, who would recommended disastrous structural adjustment policies for the continent. As a result of these policies, many African nations accumulated enormous amounts of debt. The failure of these policies left many Western leaders skeptical of the efficacy of African governments, and thus official development assistance (ODA) has diminished over time.

An important change has occurred in recent years in the fundamental approach to assisting the plight of needy Africans. Donor governments have been electing to channel foreign aid to NGOs rather than to governments or multilateral organizations.

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3 See Chinaka, supra note 1.
4 Id.
6 See id. at 189.
9 See id.
than African governments they largely view to be corrupt.\textsuperscript{10} Simultaneously, individuals, corporations, and foundations have increased their giving by astronomical proportions.\textsuperscript{11} For example, the Bill & Melinda Gates Foundation (Gates Foundation) alone has given over $6.6 billion to global health and development programs.\textsuperscript{12} The coffers of the Gates Foundation were more than doubled in the past year when Warren Buffet pledged thirty-seven billion dollars to the charity.\textsuperscript{13}

Thousands of NGOs and humanitarian organizations have quickly responded to the influx of available funds and are looking to spend the money.\textsuperscript{14} Similarly, donors are seeking ways to distribute their aid efficiently and effectively.\textsuperscript{15} The Gates Foundation is looking for projects that “collaborate with government, philanthropic, private-sector, and not-for-profit employers.”\textsuperscript{16}

A substantial amount of scholarly literature has been devoted to the issue of NGOs in international law.\textsuperscript{17} This inquiry is of particular importance now that international and local NGOs serve as the primary conduit for foreign aid in Africa.\textsuperscript{18} This Note seeks to add to this discussion by assessing the ways international legal rules can respond to the new reality of African aid-delivery, which involves partnerships involving many different actors.

Part I of this Note outlines the evolving role of NGOs in Africa, the emergence of local NGOs, and the reasons why African governments have problems with foreign assistance in general. Part II explores vari-

\textsuperscript{10} See id. In fact, the World Bank reported that NGOs in Africa were handling $3.5 billion in foreign aid in 1999, compared to less than $1 billion in 1990. See id.


\textsuperscript{12} Id.


\textsuperscript{14} See Garrett, supra note 11.

\textsuperscript{15} See The Bill & Melinda Gates Foundation, For Grant Seekers, http://www.gatesfoundation.org/ForGrantSeekers (last visited May 19, 2008) [hereinafter For Grant Seekers].

\textsuperscript{16} Id.

\textsuperscript{17} See, e.g., Gregory W. MacKenzie, Note, ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States, 19 SYRACUSE J. INT’L L. & COM. 197 (1993) (arguing that the International Center for the Settlement of Investment Disputes (ICSID) would be a desirable option for the settlement of disputes between states and international NGOs); Karsten Nowrot, Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law, 6 IND. J. GLOBAL LEGAL Stud. 579 (1999) (arguing that legal status of NGOs should reflect their actual participation in international affairs).

\textsuperscript{18} See generally Chege, supra note 8.
ous legal doctrines within international law as they pertain to international organizations and international NGOs, as well as presenting a sample of African laws addressing NGOs. Part III argues that popular theories of NGOs in international law would not be conducive to fostering more effective aid delivery in Africa. Rather, what is needed is for NGOs to remain independent, rely on their moral legitimacy, and engage in more effective communication.

I. BACKGROUND

Although NGOs are numerous and influential today, many scholars contend they did not become an integral part of the international system until the creation of the United Nations (U.N.). One commentator has defined international NGOs as “groups of persons or of societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking.” NGOs that operate in Africa serve a variety of goals, including offering relief services during times of natural disaster, promoting environmental conservation, fostering development, and promoting human rights. International NGOs have experienced considerable growth in recent years as countries have elected to funnel their money directly to international NGOs as opposed to going through state governments. The international community considered NGOs to be more accountable and better able to address local development conditions. Major financial institutions, including the World Bank, have backed the rise of NGOs.

The increasing prominence of international NGOs does not mean that intergovernmental organizations (IOs) are no longer major players in African aid-delivery. For example, the World Health Organiza-

19 See Nowrot, supra note 17, at 581.
22 See MacKenzie, supra note 17, at 205.
24 Id.
tion (WHO) and the Food and Agriculture Organization (FAO) are still considerable actors in Africa.\textsuperscript{26} The WHO spends nearly thirty percent of its operating budget in Africa for programs such as health care improvement, AIDS prevention, malaria prevention, child death reduction, and maternal health promotion.\textsuperscript{27} Furthermore, many U.N. agencies frequently collaborate with NGOs to achieve shared objectives.\textsuperscript{28} The WHO recently joined forces with the Malaria Consortium, Doctors Without Borders, and Medical Emergency Relief International to combat the pervasive problem of malaria in Africa.\textsuperscript{29} A representative of the group stated, “Institutions are prone to slowness. We need NGOs to generate speed and action.”\textsuperscript{30} Similarly, the FAO asserted that, “Working with [civil society organizations] enables the FAO to increase the effectiveness and quality of its work in agriculture and in the fight against hunger.”\textsuperscript{31} These examples highlight the changing nature of development assistance in Africa, which involves collaboration between multiple types of actors.\textsuperscript{32}

### A. From Official Development Assistance to Multi-Faceted Partnerships

Statistics show that, although aid has increased overall, there has been a shift from ODA given to governments toward direct funding of
international NGOs. This phenomenon resulted from concern that many governments were seen to be untrustworthy and ineffective at distributing aid. In fact, the U.N. has called for a “new humanitarian order” that incorporates efforts by states, NGOs, and IOs to cooperate in the humanitarian field. The amount of money devoted to NGOs has reached astronomical levels over the past several years. This reality can be partially attributed to more funding provided by states, but it is primarily the result of the emergence of new donors in the private sector that have committed to expending large sums of money in support of health and development. It is important to consider these actors, including the largest of them all, the Gates Foundation, because they will be key components of future African development.

1. The Bill & Melinda Gates Foundation: A New Donor

The Gates Foundation was formed in 2001 by the richest man in the world, Bill Gates, and his wife, Melinda. The current endowment of the organization is thirty-three billion dollars with approximately thirty-seven billion more being provided by a donation by Warren Buffet. The Gates Foundation focuses on global development, global health, and the U.S. educational system. This enormous stockpile of

33 See Chege, supra note 8; OECD, More Effort Needed to Reach Foreign Aid Targets, Says OECD Report, http://www.oecd.org/document/38/0,2340,en_2649_201185_38144422_1_1_1_1,00.html (last visited May 19, 2008).
34 See Offenheiser, supra note 23, at 12. A reflection of the frustration over wasted foreign aid was expressed by former U.S. Secretary of the Treasury Paul O’Neill, who said, “We’ve spent trillions of dollars on these problems and we have damn near nothing to show for it.” See Sachs, supra note 5, at 310.
35 MacKenzie, supra note 17, at 206.
36 See David Brown, Gates Foundation Giving $500 Million to Fight Disease, Wash. Post, Aug. 10, 2006, at A15. On August 9, 2006, The Gates Foundation announced that it would give $500 million dollars to the Global Fund to Fight AIDS, Tuberculosis, and Malaria, an international NGO that provides financial support for developing countries to fight those three diseases. See id.
37 See id.; OECD, supra note 33. The Organization for Economic Cooperation and Development (OECD) reports that donors have increased their funding for aid programs faster than any other public expenditure to fulfill their commitments to double aid to Africa by 2010. The report also notes, however, that funding levels will have to be increased significantly to meet the stated targets. See id.
38 See Brown, supra note 36.
40 See id.; Buffet Donates $37 Billion to Charity, supra note 13.
41 See Bill & Melinda Gates Foundation, supra note 39. According to the Foundation’s website, the organization focuses on “improving health, reducing extreme poverty, and
financial resources, in addition to the organization’s past grants, has ensured the Gates Foundation will play a leading role in the future of aid-delivery in Africa. The Gates have publicly committed to spending all of their assets within fifty years of their death so they can focus on making substantial progress in the twenty-first century.

The organization works with partners consisting of local and international NGOs. For example, past grants made by the Gates Foundation include: $500 million to The Global Fund to Fight Aids; $1.5 billion to the GAVI Alliance, an organization providing vaccinations for hepatitis and yellow fever; and $110 Million to Save the Children’s Saving Newborn Lives. As previously mentioned, the Gates Foundation is looking for causes and grantees that focus on forging meaningful alliances among various types of donees.

2. International NGO Sampler

Oxfam International and Doctors Without Borders are two examples of major international NGOs playing a significant role in development- and health-related issues in Africa. Oxfam pursues a three-pronged approach to alleviating poverty around the world by: providing support during emergencies; developing solutions for people to work their way out of poverty; and campaigning to achieve lasting change. To achieve these objectives, Oxfam works in numerous areas including: debt and aid; natural disasters; health; and improving people’s livelihoods. Oxfam’s enormous impact in Africa is illustrated by increasing access to technology in public libraries. In the United States, the foundation seeks to ensure that all people have access to a great education . . . .”

42 See id.
43 See Sally Beatty, Gates Foundation Sets Time Frame to Spend Assets, WALL ST. J., Dec. 1, 2006, at A10. The foundation said the move was a decision by its three trustees to do “as much as possible, as soon as possible” to further its work. Id.
46 See For Grant Seekers, supra note 15.
the £213 million of funds available to that organization, much of which comes from government and private donors.50

Similarly, Doctors Without Borders describes itself as “an independent international medical humanitarian organization that delivers emergency aid to people affected by armed conflict, epidemics, natural or man-made disasters, or exclusion from health care in more than [seventy] countries.”51 The medical and non-medical experts that make up that organization engage in approximately 4700 field assignments annually.52 In addition to offering medical care during times of disaster, Doctors Without Borders also provides long-term medical care for diseases such as HIV/AIDS, sleeping sickness, and tuberculosis.53 Like Oxfam, a vast majority of its funding comes from individuals, corporations, and foundations.54

B. African NGOs: The Local Solution

Recent years have witnessed the incredible proliferation of local NGOs in Africa that serve to fill the vacuum for services left by local and national governments.55 For instance, the tiny African nation of Ghana has recently reported as many as 3000 NGOs operating within that country.56 The major growth of local African NGOs can be partially explained by the increased willingness of international and bilateral aid agencies to contract with local groups to do their groundwork.57 It might also be partially explained by the sheer volume of funds available from donor countries and private organizations.58 Thus, “The promotion of NGOs as leaders in humanitarianism has created a land rush

52 Id.
53 See id.
56 Id. The prolific nature of NGOs in Africa is illustrated by South Africa, where some 50,000 NGOs currently operate. Chege, supra note 8.
57 See Adam, supra note 55. The President of Oxfam claimed, “Many large international NGOs have become the equivalent of bilateral NGO subcontracting agencies.” Offenheiser, supra note 23, at 7.
58 See Garrett, supra note 11.
atmosphere and prompted the launching of many new humanitarian groups competing for the humanitarian donor dollar.”

African governments have become frustrated by their lack of control over both local and international NGOs operating within their borders. Ministries of health in African countries are concerned with their ability to track operations of foreign organizations, avoid duplication of resources, and ensure that the services provided match their own priorities. International NGOs have been criticized for their failure to evaluate and monitor, and African NGOs are viewed as lacking “competencies, professionalism, legitimacy, and [as being prone to] cronyism.” Finally, African governments are particularly concerned that Western-backed international NGOs are “trojan horses,” there to diminish their sovereign authority and promote a Western agenda.

II. Discussion

In international law, different actors possess express rights and obligations depending on their fundamental characteristics. These differences are crucial in the context of aid and development assistance in Africa because they dictate how such actors behave toward one another. First, a state, as sovereign, is allowed to make, enforce, and adjudicate domestic laws within its territory. In other words, “[S]overeignty could be considered a form of absolute domestic jurisdiction—the exclusion of external actors from domestic authority structures within a given territory.” Local African NGOs must therefore adhere to the legal rules laid down by their national government, even if such laws appear significantly to restrict their ability to carry out their stated goals. Similarly, it is crucial to distinguish IOs and international NGOs because their legal status is very different in international law.

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59 See Offenheiser, supra note 23, at 5–6.
60 See Garrett, supra note 11.
61 Id. The U.S. government has been accused of exerting too much control over the design and priorities of AIDS programs in Africa. See id.
62 Offenheiser, supra note 23, at 12.
63 See Chinaka, supra note 1.
64 See Mark Janis, An Introduction to International Law 185 (2003).
65 See id.; Chinaka, supra note 1.
66 Janis, supra note 64, at 192; Chinaka, supra note 1.
68 See id.; Adam, supra note 55.
69 See Charnovitz, supra note 20, at 355.
A. Intergovernmental Organizations vs. International NGOs

IOs are considerably different from international NGOs, primarily because they possess “legal personality,” which was first recognized in the Reparations Advisory Opinion. International NGOs can possess legal personality under domestic laws, but they cannot under public international law. Thus, they are generally not considered to be full “subjects” of international law.

A distinguishing feature of IOs is that their existence is only attributable to the clear and express consent of the states that constitute them. In the Reparations Advisory Opinion, the International Court of Justice (ICJ) held that the U.N. could bring suit on behalf of one of its agents. A central aspect of the ICJ’s reasoning in that case was that the U.N. was granted a certain measure of “personality” by its member nations. The ICJ stated that it was important to attribute international legal personality to the U.N. because the U.N. Charter assigned the organization specific tasks, such as promotion of international economic, social, cultural, and humanitarian cooperation. The Reparations Advisory Opinion, though somewhat controversial, set a clear precedent for the legal status of IOs.

The legal status of international NGOs, however, is quite different from IOs. Unlike IOs, international NGOs are not created by treaties, but are the product of the cooperation of individuals. As one commentator noted, “International NGOs are private organizations whose membership and support come from more than one country and whose political activities cross national borders. NGOs are thus distinct from supra-national and inter-governmental organizations, such as the World Trade Organization or the U.N., which are created by States.” Thus, under the reasoning in the Reparations Advisory Opinion, interna-

71 Charnovitz, supra note 20, at 355.
72 See Nowrot, supra note 17, at 635. One commentator has advanced the argument that international NGOs should be considered “partial subjects” of international law based on primary and secondary sources of international law. See id.
73 See Janis, supra note 64, at 200, 201.
75 See id. at 179.
76 Id. at 178–79.
77 See id. at 187.
78 See MacKenzie, supra note 17, at 210.
79 See Janis, supra note 64, at 203; Charnovitz, supra note 20, at 352.
tional NGOs do not have international legal personality because they lack clear delegation from states via treaty. The individuals that make up an international NGO are committed to a collective purpose that arguably confers “moral authority” on the organization, but not “legal authority.”

Another distinguishing characteristic between IOs and international NGOs is their level of participation in international relations. According to article 71 of the U.N. Charter, “The Economic and Social Council may make suitable arrangements for the consultation with non-governmental organizations which are concerned with matters within its competence.” Article 71 thus creates a consultative relationship with NGOs as opposed to giving them actual decision-making powers. Despite these limitations, NGOs do in fact make considerable contributions to the development of international law. For instance, NGOs can correct potential mistakes or logical inconsistencies in proposals being considered for new conventions or treaties. As one scholar noted, “Besides mobilizing public pressure on governments and providing expert support for international lawmaking, NGOs are also starting direct personal appeals to . . . responsible decision-makers in international organizations as well as in national governments.”

B. International NGO Accountability Charter

The leaders of eleven prominent human rights and development international organizations created and endorsed the first international NGO Charter (Charter) in June 2006. The parties recognized that the non-profit sector was being increasingly scrutinized for their activities from both opponents and proponents of their work. The Charter seeks

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81 See Reparation for Injuries, 1949 I.C.J. at 179; Janis, supra note 64, at 203.
82 See Charnovitz, supra note 20, at 348.
83 See U.N. Charter art. 71.
84 Id.
85 MacKenzie, supra note 17, at 211.
86 See Nowrot, supra note 17, at 593.
87 Id.
88 Id. at 594–95.
90 See id.
to “enhance transparency and accountability” by working toward four key stated goals.\textsuperscript{91} The Charter outlines issues surrounding the principles, governance, and fundraising activities of international NGOs.\textsuperscript{92} The framers of the Charter recognized that, in addition to national laws and regulations, international NGOs need to create standards that transcend national boundaries.\textsuperscript{93} The signatories explicitly indicated their unique role in finding solutions to problems that governments are either unable or unwilling to address on their own.\textsuperscript{94} Furthermore, the Charter recognizes the primary role of local governments by stating, “[International NGOs] can complement but not replace the overarching role and primary responsibility of governments to promote equitable human development and well-being . . . .”\textsuperscript{95}

The Charter emphasizes that it is vital for international NGOs to maintain independence from governments and donors who may seek to influence their goals.\textsuperscript{96} The most express statement of independence found in the Charter stated, “We aim to be both politically and financially independent. Our governance, programmes and policies will be non-partisan, independent of specific governments, political parties and the business sector.”\textsuperscript{97} With respect to donors, the Charter states that: anonymity will be guaranteed except when the size of a donation would be relevant to an organization’s independence; and independence will be enhanced by recording and publishing major institutional gifts.\textsuperscript{98}

The creation of the Charter was a bold gesture to show that NGOs are truly concerned with public trust and accountability; however, it lacks binding authority in international law.\textsuperscript{99} Because the international NGOs that endorsed the Charter are not states, they can-

\begin{footnotes}
\footnotetext[91]{See Int’l Non-Governmental Organizations: Accountability Charter 2 (2006), available at http://www.oxfam.org/en/files/INGO_accountability_charter_0606 [hereinafter INGO Charter]. These four goals are: (1) identify and define shared principles, policies and practices; (2) enhance transparency and accountability, both internally and externally; (3) encourage communication with stakeholders; and (4) improve performance and effectiveness as organisations. Id.}
\footnotetext[92]{See id.}
\footnotetext[93]{See NGOs Lead, supra note 89.}
\footnotetext[94]{INGO Charter, supra note 91, at 1.}
\footnotetext[95]{Id.}
\footnotetext[96]{See id. at 3, 5.}
\footnotetext[97]{Id. at 3.}
\footnotetext[98]{Id. at 5.}
\footnotetext[99]{See NGOs Lead, supra note 89.}
\end{footnotes}
not bind themselves by treaty. The document is therefore closer to a declaration rather than a binding agreement.

C. State Sovereignty: African Nations and Domestic Laws

International law is primarily concerned with the rights and duties of states because they remain the central actors in the international legal system. A sovereign state is free to govern its own population in its own territory by enacting laws and regulations. It is therefore undisputed that international and local NGOs operating within African nations are subject to the local laws of their host state. With the proliferation of NGOs working in Africa, and mounting suspicion over their activities, certain African leaders have enacted repressive laws that significantly limit the ability of NGOs to function within those nations.

1. Zimbabwe’s NGO Act and Ghana’s NGO Law

Zimbabwe enacted the highly controversial Non-Governmental Organizations Act (NGO Act) in 2004, which gave Zimbabwe’s government broad power to interfere with the operations of NGOs. According to the Act, all organizations that provided charity, relief, community development, or lobbying must register with the Governance Board (Board) as established by the NGO Act. One of the four stated

100 See Janis, supra note 64, at 18.
101 See generally INGO Charter, supra note 91 (outlining issues surrounding principles, governance, and fundraising activities of international NGOs).
102 See Janis, supra note 64, at 185.
103 See id. A state consists of four essential elements: (1) a defined territory; (2) a permanent population; (3) a government; and (4) a capacity to conduct international relations. Id.
104 See id.
107 See NGO Act, supra note 105, part I § 3(1) (a), part IV § 9(b). The purposes of the Act are stated as follows: “An Act to provide for the registration of voluntary organizations thereof, to provide for a framework for self-governance in promotion of the principle of
goals of the NGO Act is “to facilitate a constructive relationship between government and non-governmental organizations in order to advance the public good.” Despite this noble language, many international NGOs have publicly announced their outrage at the law. A representative of Amnesty International commented on the law’s potential repercussions, stating, “If the NGO Act is enforced across the board, tens of thousands of people being assisted by NGO programs could suffer. . . . Most victims have nowhere else to turn in a country where unemployment is above seventy percent and health service has been seriously eroded.” Various aspects of the NGO Act are troubling to the international aid community.

First, the law prevents local NGOs from receiving foreign funding. Because the majority of funding for local NGOs comes from foreign sources, the effect of the law is essentially to eliminate all NGO finances within Zimbabwe. Second, the Board is granted sweeping powers to regulate activities of NGOs that have registered with it. For example, the Board has the power “to enforce the code of conduct for [NGOs] . . . and to ensure that [NGOs] act in the public interest in accordance with their objectives.” Similarly, the Board will be made up of government officials who will have interests aligned with those in power at the time. Human rights organizations are particularly concerned that these expansive powers will be applied selectively, thus hurting organizations that “promote and protect human rights.”

In 2004, Ghana began rigorously enforcing a domestic law that required local and international NGOs to provide adequate records or become “blacklisted” by the government. All blacklisted NGOs were made public and their names were given to potential local and foreign

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self-regulation by non-governmental organizations, to provide a framework for raising of funds by non-governmental organizations and for public accounting for those funds . . . to define the functions, powers and responsibilities of these bodies, and to provide for matters connected to or incidental to the foregoing.” Id. preamble.

108 Id. part II § 6(4).
109 See NGO Act is Outrageous, supra note 106.
110 Id.
112 NGO Act is Outrageous, supra note 106.
113 See id.
114 See NGO Act, supra note 105, part IV § 9.
115 Id. part IV § 9(c).
116 NGO Bill Draws Criticism, supra note 111.
117 See NGO Law is Outrageous, supra note 106.
118 Adam, supra note 55.
donors. A government official demonstrated his pessimism toward NGOs when he said, “Most NGOs spent around 80% of the money available to them from government agencies or foreign sponsors as administrative costs, for which they do not render proper accounts.”

III. Analysis

There have been a variety of proposed solutions to address the problem of the relative weakness of NGOs compared to sovereign states. The most logical solution would be to grant international NGOs the level of international personality generally associated with IOs. Thus, it is argued, these organizations will be able to function with well-defined rights and obligations in the international legal system. Furthermore, such a construction would be in accord with the many roles that international NGOs are currently playing in both international development and advocacy. This system would recognize the emergence of an “open system” in international law that acknowledges many non-state actors and grants them clearly articulated rights and responsibilities. There are, however, a number of problems with this approach, both on a theoretical and a practical level. These difficulties are of particular significance in the context of African aid because granting international NGOs greater status could be seriously detrimental to their cause. As a result, a better solution would be to reinforce the existing international legal framework, allow NGOs to maintain their independence, and create more effective mechanisms to foster communication between international NGOs and host states.

119 Id.
120 Id.
121 See MacKenzie, supra note 17, at 200 (arguing that ICSID would be a desirable option for settlement of disputes between states and international NGOs because tribunal provides existing framework for dispute resolution that puts both parties on a level playing field); Nowrot, supra note 17, at 580 (arguing there is a need to establish a legal framework for NGOs to reflect their actual participation in the international system).
122 See Nowrot, supra note 17, at 620–21.
123 See id. at 614.
124 See Charnovitz, supra note 20, at 352–55. In particular, article 71 of the U.N. Charter has served as the de facto charter for NGOs, justifying a substantial role for international NGOs when consulting with U.N. bodies. Id. at 357.
125 See Nowrot, supra note 17, at 613.
126 See id.
127 See id.
128 See id.
First, by granting international NGOs status as full subjects of international law, they would be deprived of their vital independence.\textsuperscript{129} International NGOs receive nearly all of their funding from Western developed countries, and the volume of these funds is growing.\textsuperscript{130} This tends to reinforce the view that NGOs are “part and parcel of Western powers.”\textsuperscript{131} Further legitimization from governments and organizations viewed as being dominated by Western interests would therefore hurt rather than help the current relationship between international NGOs and the African governments where they operate.\textsuperscript{132} Enhanced independence will allow the focus of health- and development-related aid groups to be on their humanitarian mission, and not the political interests those NGOs are perceived to represent.\textsuperscript{133} The fact that there has been a significant increase in funding from private donors, such as the Gates Foundation, could increase the perception of independence possessed by international NGOs.\textsuperscript{134} Because these donors primarily come from the United States and Europe, however, they might still be seen as proponents of Western interests.\textsuperscript{135}

A grant of legal personality to NGOs would run contrary to the reasoning of the \textit{Reparations Advisory Opinion}.\textsuperscript{136} In that case, the ICJ held that the U.N. was a subject of international law that was capable of possessing rights and obligations.\textsuperscript{137} One of those rights was to bring international claims on behalf of its agents.\textsuperscript{138} On a fundamental level, the constituents of NGOs are “groups of persons or societies,” not sovereign states.\textsuperscript{139} Even if international NGOs were to delegate to “organs special tasks,” it would still not confer any degree of international legal personality as articulated by the ICJ because their constituents are not states.\textsuperscript{140} Therefore, the reasoning in the \textit{Reparation Advisory Opinion} breaks down when one tries to apply it to international NGOs.\textsuperscript{141}

\textsuperscript{129} \textit{See} INGO Charter, \textit{supra} note 91, at 3.
\textsuperscript{130} \textit{See} David Hulme & Michael Edwards, \textit{NGOs States and Donors: An Overview}, in \textit{NGOs States and Donors: Too Close for Comfort?} 4 (David Hulme & Michael Edwards eds., 1997).
\textsuperscript{131} Chinaka, \textit{supra} note 1.
\textsuperscript{132} \textit{See} Hulme & Edwards, \textit{supra} note 130, at 8.
\textsuperscript{133} \textit{See id}.
\textsuperscript{134} \textit{See} Fact Sheet, \textit{supra} note 39.
\textsuperscript{135} \textit{See id}.
\textsuperscript{137} \textit{See id} at 177.
\textsuperscript{138} \textit{See id}.
\textsuperscript{139} \textit{See} Charnovitz, \textit{supra} note 20, at 350.
\textsuperscript{140} \textit{See Reparation for Injuries}, 1949 I.C.J. at 178.
\textsuperscript{141} \textit{See id}.
Another important consideration when proposing that international NGOs should possess greater legal status is the role played by the government where NGOs operate.\textsuperscript{142} International NGOs recognize that governments should not be ignored in the context of African aid delivery.\textsuperscript{143} In their proposed Charter, leaders of prominent international NGOs stated, “INGOs can complement but not replace the overarching role and primary responsibility of governments to promote equitable human development and well being, to uphold human rights and to protect ecosystems.”\textsuperscript{144} This comment highlights the fact NGOs address problems faced by African governments that they are “unable or unwilling to address on their own.”\textsuperscript{145} It will be these governments, or their successors, that will ultimately be the ones to take on such challenges in the long-term.\textsuperscript{146}

According to prominent economist Jeffrey Sachs, countries have to put aside misconceptions of massive corruption and continue to fund African governments to achieve development goals.\textsuperscript{147} Through the U.N. Millennium Project,\textsuperscript{148} Sachs argues that efforts should be made to work with African governments.\textsuperscript{149} In Kenya, for example, efforts should be made to “improve the functioning of public administration . . . , [increase] job training, [grant] higher pay for senior managers so they do not have to live off bribes or side payments, [and offer] continued support for the government’s already major efforts to improve the judicial system . . . .”\textsuperscript{150} All of these recommendations are particularly insightful—but often ignored—in the international NGO discussion.\textsuperscript{151} By starting with the assumption that all African governments are corrupt and ineffective, it is easier to focus on the status of NGOs in isolation.\textsuperscript{152}

\textsuperscript{142} See INGO Charter, supra note 91, at 1.
\textsuperscript{143} See id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} See id.
\textsuperscript{147} See Sachs, supra note 5, at 237.
\textsuperscript{148} The U.N. Millennium Project was commissioned in 2002 to create a comprehensive plan of action to achieve the Millennium Development Goals and reduce poverty, disease, and hunger. See U.N. Millennium Project, http://www.unmillenniumproject.org (last visited May 19, 2008).
\textsuperscript{149} See Sachs, supra note 5, at 237.
\textsuperscript{150} Id. According to Sachs, the international donor community should focus on enhancing what he calls the “Big Five” development goals in Africa. These include: (1) increased agricultural inputs; (2) investments in basic health; (3) investments in education; (4) increased power, transport, and communications services; and (5) safe drinking water and sanitation. Id. at 232–34.
\textsuperscript{151} See id. at 237.
\textsuperscript{152} See Chege, supra note 8.
This neglects the reality that African governments must still be considered in the development equation. Therefore, the legal status of international NGOs should be considered carefully in light of other considerations that will shape the future of aid delivery in Africa.

International NGOs can continue to put pressure on global policy changes by acting through already established legal regimes. In particular, NGOs should remain in consultation with the U.N. to bring about changes in international law as they are currently allowed to do under article 71 of the U.N. Charter. In this way, NGOs can play a prominent and important role in shaping the development of international treaties and agreements. As an example of the influential role NGOs can play within this capacity, nearly 1400 NGOs officially participated at the Rio Earth Summit in 1992. In the context of development- and health-related aid, NGOs can use their increased access to U.N. officials to lobby for change when they view an action taken by a state, such as the repressive NGO Law in Zimbabwe, as being a violation of basic human rights. According to one commentator, “In the human rights area, NGOs contribute to the political debate at the U.N. level by providing information on . . . human rights violations in different countries.” Through these established legal mechanisms, international NGOs are able to put public pressure on governments and by doing so can influence the behavior of states.

The Charter may be the best example of how communication can be enhanced between international NGOs and host governments. Because international NGOs should not be afforded international legal personality, this document would not serve as a binding legal instrument in international law. The Charter does, however, have significant implications for shaping how governments and international

153 See Sachs, supra note 5, at 237.
154 See id.
156 See id.
158 Id. One example of the level of access NGOs have achieved at the U.N. is that members of the U.N. Security Council meet with NGO representatives to discuss current affairs. See id. at 4.
159 See id. at 46.
160 Id.
161 See Nowrot, supra note 17, at 594–95.
162 See generally INGO Charter, supra note 91 (outlining proposals to promote openness, transparency, and honesty about international NGO activities).
163 See id.
NGOs will co-exist in the future.\textsuperscript{164} For instance, the organizations that drafted the Charter emphasized similar themes throughout the document, including independence, accountability, and transparency.\textsuperscript{165} In regard to transparency, the Charter states, “We are committed to openness, transparency and honesty about our structures, mission, policies and activities. We will communicate actively with stakeholders about ourselves, and make information publicly available.”\textsuperscript{166} This statement showed a clear recognition that there is a problem of effective communication both between host states and those who have a stake in the international NGOs themselves.\textsuperscript{167} By clearly defining their mission, goals, and intentions, international NGOs can more effectively distance themselves from powerful donors.\textsuperscript{168}

Similarly, local NGOs can adopt a comparable strategy, such as that proposed for international NGOs, to rebut the presumption that they lack professionalism and are prone to cronyism.\textsuperscript{169} The pessimism toward some local NGOs was expressed by an official from Ghana: “NGOs are meant to be philanthropic, but many are fake and take a share of the money for their personal use.”\textsuperscript{170} Although there will always be groups who will try to exploit aid that comes from foreign donors, as a whole, it would serve local NGOs well to let their governments know exactly how they are benefiting their community.\textsuperscript{171} By doing this, local NGOs can serve their vital role in furthering health- and development-related initiatives.\textsuperscript{172} Furthermore, greater levels of communication can foster a more unified structure of aid delivery and avoid duplication of resources.\textsuperscript{173}

By not granting international NGOs full legal personality, it will certainly put them in a more precarious position relative to IOs.\textsuperscript{174} This status will, however, encourage international NGOs to collaborate with

\textsuperscript{164} See id.
\textsuperscript{165} See generally id. (proposing multiple ways to improve communication).
\textsuperscript{166} See id. at 3.
\textsuperscript{167} See id.
\textsuperscript{168} See INGO Charter, supra note 91; Garrett, supra note 11.
\textsuperscript{169} See Offenheiser, supra note 23, at 12.
\textsuperscript{170} Adam, supra note 55. Another commentator expressed similar sentiment, stating, “This has led to accusations that some NGOs are primarily concerned with making money and not eradicating poverty, and will appear and disappear depending on where the money is.” Chege, supra note 8.
\textsuperscript{171} See Adam, supra note 55.
\textsuperscript{172} See id.
\textsuperscript{173} See Garrett, supra note 11.
\textsuperscript{174} See MacKenzie, supra note 17, at 210; Reparation for Injuries, 1949 I.C.J. 174, 179 (Apr. 1949).
governments, IOs, and other actors to achieve “shared objectives.” When collaboration occurs, all of the actors engaged in African aid delivery can heed the U.N. call to form a “new humanitarian order” where states, NGO, and IOs cooperate with one another. In other words, NGOs should not be relied on to be the exclusive actors in African aid delivery. By granting NGOs greater power relative to the nation state, it will encourage NGOs and their donors to ignore the role of governments. This would be a serious mistake because African governments are the ones that must ultimately assume the burden of providing many services that NGOs currently offer.

Finally, international NGOs can rely on their growing moral legitimacy to counteract the powers of an uncooperative host state. Moral legitimacy is greatest when the mission of international NGOs is defined in terms of alleviating poverty and promoting basic health. Thus, when NGOs strive to attack the growing AIDS epidemic or stop the spread of malaria or tuberculosis, they are pursuing what many believe to be a moral duty. When a state consistently expels international NGO field workers, such as the Doctors Without Borders personnel in Sudan, or threatens Oxfam, the international community can condemn such acts on moral grounds.

To build genuine partnerships between IOs, international NGOs, and African governments, leaders of African nations must be committed to democratic governance. Indeed, many countries are moving closer toward liberalized political systems including Benin, Ghana, Namibia, and Mali. On the other end of the spectrum, Zimbabwe has regressed politically under the rule of President Robert Mugabe. It is therefore not a surprise that one of the most repressive NGO laws is in

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175 See WHO, supra note 28. One example of successful collaboration between private actors and local government occurred in Botswana. See Garrett, supra note 11. With support from Botswana’s government, the Gates Foundation, Merck, and Bristol-Myers Squibb, an HIV/AIDS eradication program was implemented, dramatically reducing the number of newly infected patients. See id.

176 See MacKenzie, supra note 17, at 206.

177 See id.

178 See id.

179 See SACHS, supra note 5, at 237.

180 See Charnovitz, supra note 20, at 348.

181 See id.

182 Garrett, supra note 11.

183 See Chinaka, supra note 1.

184 See Offenheiser, supra note 23, at 16.

185 See id. at 3.

one of the most repressive African nations.187 In countries with the most genuinely corrupt leadership, such as Zimbabwe, leaders constantly face the reality of “open revolt” from their citizens.188 In these extreme cases, the potential for genuine partnerships can only begin when there is a change in leadership.189 Ghana, however, is a moderate and well-governed nation that has legitimate concerns about local and international NGOs.190 In countries like Ghana, abandoning the assumption that all African governments are corrupt, enhancing communication between international NGOs and government officials, and recognizing the moral legitimacy of NGOs can truly advance the goals of health and development aid.191

**Conclusion**

The efforts of international and domestic NGOs to provide aid to African countries would not be enhanced by recognizing that they possess international legal personality. At first glance, such a suggestion appears logically sound and would seemingly provide a needed check on problematic African governments. This solution, however, is contrary to the reasoning laid down by the ICJ in granting entities legal personality. This view could also compromise the vital independence on which international NGOs rely to be effective. Finally, by focusing on private actors, and ignoring the fundamental importance of the state, it could frustrate the long-term goal of aid delivery. Instead, a framework is needed that allows NGOs to be self-regulating and fosters a more collaborative working relationship between all types of actors in aid delivery. African governments can then be certain that international NGOs are there to provide much needed assistance to their citizens, and not simply to push the agenda of Western nations. Furthermore, NGOs will be able to pursue their important health and development goals without fearing negative repercussions.

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187 See NGO Act, supra note 105.
188 See Bishops Warn of Revolt, supra note 186.
189 See id.
190 See Adam, supra note 55; Offenheiser, supra note 23, at 3.
191 See Sachs, supra note 5, at 237; Adam, supra note 55; Charnovitz, supra note 20, at 348.