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INTERNATIONAL LEGISLATIVE EFFORTS TO COMBAT CHILD SEX TOURISM: EVALUATING THE COUNCIL OF EUROPE CONVENTION ON COMMERCIAL CHILD SEXUAL EXPLOITATION

Kalen Fredette

[Pages 1–44]

Abstract: This paper assesses the recent national and multinational efforts to combat global child sex tourism (CST), focusing particularly on the Council of Europe’s Convention on the Protection of Children Against Sexual Exploitation and Abuse. Ultimately, the rise in CST offenses compared to the sparse number of CST convictions strongly suggests the inadequacy of the national and multinational efforts currently in play. However, even a significant increase in convictions by “Sending States” (the focus of most legislation, including the COE Convention) is unlikely to sufficiently diminish CST unless matched by heightened enforcement efforts in “Destination States.” Properly addressing CST requires comprehensive legislation at the national and international level that stimulates multinational cooperation and motivates Destination States to prosecute offenders and foster local initiatives for victim prevention, protection and assistance.

THE IMPACT OF ALTERNATIVE CONSTITUTIONAL REGIMES ON RELIGIOUS FREEDOM IN CANADA AND ENGLAND

Ofrit Liviatan

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Abstract: This Article examines whether the global trend of codifying rights in entrenched bills accompanied by judicial review to broaden rights protection is justified. By comparing the religious freedom re-
gimes in Canada and England, this Article finds that although the Canadian constitutional transformation in the late Twentieth Century contributed to strengthening religious freedom, its overall effect has not been broader than the protection afforded by its primordial English statutory model. As such, the Article challenges the ongoing legal debate over judicially enforced constitutional systems of rights. Proponents of such systems praise their extensive contribution to rights protection, while opponents warn against their obstructive impact on the separation of powers. This Article concludes that both sides of the debate overstate their arguments by incorrectly presupposing the actual effects of a judicially enforced constitutional system of rights.

NOTES

The Emerging Custom of Human Rights-Based Development: A Model Agreement for Successful Exploitation of Lake Albert’s Oil Reserves

[Pages 83–100]

Angela M. Bushnell

Abstract: The 2006 discovery of oil reserves beneath Lake Albert on the border between the Democratic Republic of the Congo and Uganda has spawned both tension and attempts at cooperative development. History demonstrates that the process of exploiting natural resources is almost inevitably interwoven with violations of the human rights of local populations. This Note catalogs the possible human rights violations that can occur with the development of a natural resource such as oil, and discusses the growing pattern and practice of using human rights-based planning in international development agreements. The author proposes that incorporating human rights-based planning into the development agreement between the Democratic Republic of the Congo and Uganda may help to prevent violations of the recognized rights of the population in the Lake Albert region.
HOLDING “HIRED GUNS” ACCOUNTABLE: THE LEGAL STATUS OF PRIVATE SECURITY CONTRACTORS IN IRAQ

David H. Chen

[Pages 101–114]

Abstract: Since the 2003 U.S.-led invasion of Iraq, thousands of armed civilians have worked in that country providing security. The law governing these “private security contractors” (PSCs), however, has never been clear. Despite several instances involving Iraqi civilian deaths, there is still no set procedure for holding PSCs accountable. Several options have been suggested, and trying PSCs in federal district courts in the United States seems to be emerging as the preferred method. This Note argues, however, that military-run courts-martial in Iraq are preferable for several reasons.

AFFORDING DISCRETION TO IMMIGRATION JUDGES: A COMPARISON OF REMOVAL PROCEEDINGS IN THE UNITED STATES AND CANADA

Adam Collicelli

[Pages 115–128]

Abstract: In the United States, immigration judges lack the discretion to consider defenses during the removal proceedings of legal, non-citizen residents if they have committed an aggravated felony. American citizen children face the significant risk of lifelong separation from parents, who commit relatively minor crimes, because the definition of an aggravated felony is so broad. Canadian immigration laws, akin to those in a majority of developed countries, grant judges the crucial opportunity to weigh the separation of a parent and citizen child in the removal decision. This Note argues that Congress should follow Canada’s example by passing the proposed Child Citizen Protection Act. Such an equitable approach is necessary to adhere to the Convention on the Rights of the Child. Although the United States is not a party to that Convention, its duty as a signatory may still require it to promote the best interests of citizen children in its immigration courts. Further, the principles governing that Convention may be morphing into an international custom, which would place American removal proceedings directly at odds with binding international law.
Duelling Ideals: Bridging the Gap Between Peace and Justice

David Hine

[Pages 129–142]

Abstract: When the United Nations drafted the Rome Statute, it intended to create an entity, what would eventually become the International Criminal Court, that would enforce criminal justice on an international level. The Member States, upon which the authority of the ICC depends, are often far more concerned with simply ending the offenses and achieving peace than they are with prosecuting the perpetrators. As a result of this ideological conflict between peace and justice, the efficiency and value of the ICC is jeopardized. This Note discusses the current situation in Uganda as an example of the conflict of interests between a Member State and the court. After initiating the ICC’s investigation into the Lord’s Resistance Army, a militant group that has plagued the northern region of the country for decades, Uganda has since requested that the prosecution of the rebel leaders be discontinued in order to achieve peace. By examining the interests of both the ICC and the Member States, this Note argues that the language of the Rome Statute has a provision which can be interpreted in a manner that would protect the credibility and goals of every party involved.

International Intellectual Property Rights: Do TRIPS’ Flexibilities Permit Sufficient Access to Affordable HIV/AIDS Medicines in Developing Countries?

Alexandra G. Watson

[Pages 143–161]

Abstract: The World Trade Organization’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement seeks to standardize intellectual property laws around the world. TRIPS is controversial because, in effect, it limits access to affordable HIV/AIDS medicines in nations where they are desperately needed. This Note argues that although TRIPS’ compulsory licensing provision is an invaluable tool for improving access to affordable medicines, a tiered-pricing scheme in concert with a ban on parallel imports would help secure universally lower drug prices.

Christian Westra

[Pages 161–177]

Abstract: The April 2007 Open Skies Agreement between the United States and the European Union has been hailed as a landmark in aviation deregulation. Under the terms of the agreement, any U.S. or EU airline may fly between any city in the United States and Europe—a major departure from the byzantine restrictions that previously characterized transatlantic air travel. Nevertheless, in several key respects, the treaty stops short of full deregulation. This Note assesses the probable impact of the Open Skies Agreement and explores why EU negotiators were willing to compromise on several of their core objectives.
INTERNATIONAL LEGISLATIVE EFFORTS TO COMBAT CHILD SEX TOURISM: EVALUATING THE COUNCIL OF EUROPE CONVENTION ON COMMERCIAL CHILD SEXUAL EXPLOITATION

Kalen Fredette*

Abstract: This paper assesses the recent national and multinational efforts to combat global child sex tourism (CST), focusing particularly on the Council of Europe’s Convention on the Protection of Children Against Sexual Exploitation and Abuse. Ultimately, the rise in CST offenses compared to the sparse number of CST convictions strongly suggests the inadequacy of the national and multinational efforts currently in play. However, even a significant increase in convictions by “Sending States” (the focus of most legislation, including the COE Convention) is unlikely to sufficiently diminish CST unless matched by heightened enforcement efforts in “Destination States.” Properly addressing CST requires comprehensive legislation at the national and international level that stimulates multinational cooperation and motivates Destination States to prosecute offenders and foster local initiatives for victim prevention, protection and assistance.

Introduction

In many developing countries, destitute children are routinely sexually exploited by foreign visitors. Child sex tourism (CST) is a global humanitarian crisis, both in terms of scale and its devastating impact on victims and their communities. Due to the inherently clandestine nature of the activity, estimates of the number of offenses are uncertain.1 The recent estimate by the U.S. State Department—that

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each year, more than two million children fall victim to commercial sexual exploitation—provides a sobering indication of the problem’s magnitude. The number of CST perpetrators is also uncertain because few are held accountable, but the statistical indicators available are troubling. For example, among the roughly five million tourists who visit Thailand annually, perhaps two-thirds are sex tourists, ten percent of whom purportedly engage in sex with minors. Statistical inexactitude aside, CST is clearly widespread and rapidly growing. Almost every state is affected and the problem will only grow worse as perpetrators popularize new regions.


3 See Seabrook, supra note 1, at xi (noting that two-thirds of the 6 million annual tourists to Thailand during the mid-1990s were unaccompanied men, and speculating that “some percentage were CST offenders”); Svensson, supra note 1, at 645 (noting that CST numbers are uncertain because most perpetrators escape detection); Tracy Agyemang, Note, Reconceptualizing Child Sexual Exploitation as a Bias Crime Under the Protect Act, 12 Cardozo J.L. Gender 937, 939 (2006) (noting that the number of tourists is not easily calculable).


Compounding the scale of the crisis is the destructive impact of CST on victims and their communities. Repetitive sexual abuse physically and emotionally scars children. Victims endure violence from handlers, pimps and patrons alike. The abuse often damages the victims’ immature sex organs and increases their risk of contracting diseases such as AIDS. Furthermore, the children’s mental vulnerability often results in psychological trauma. All of these factors converge to diminish victim life expectancy rates.

CST not only claims child victims, it also ruptures families, causes cultural disintegration, and endangers public health. Struggling communities, seduced by the short-term financial gain that frequently accompanies CST, divest themselves of vital human capital needed for sustainable development. Moreover, CST gives rise to both corruption and organized crime, which overwhelms local law enforcement.

This Article assesses the recent state and international efforts to combat global CST, focusing particularly on the Council of Europe’s (COE) Convention on the Protection of Children Against Sexual Exploitation and Abuse (Convention). Part I briefly explores the criminological contours of CST offenses by describing perpetrators, victims, and root causes. Part II investigates the utility of various national efforts to fight CST, including those of Destination States (where the unlawful contact occurs), and Sending States, (where sex tourists originate). Finally, Part III assesses the successes and failures of relevant provisions in the recent COE Convention.

Ultimately, the rate of CST offenses compared to the sparse number of convictions strongly suggests the inadequacy of current law

7 King, supra note 6, at 16; 2008 TIP Report, supra note 2, at 25; Reuters Health, supra note 2.
8 See Abigail Schwartz, Sex Trafficking in Cambodia, 17 Colum. J. Asian L. 371, 400–01 (2004).
9 See id. at 401–02; Nicholas D. Kristof, Children for Sale: Asian Childhoods Sacrificed to Prosperity’s Lust, N.Y. Times, Apr. 14, 1996, at A8; see also Reuters Health, supra note 2 (reporting that millions of children are infected with STDs, have abortions, attempt suicide and are raped each year).
11 See Reuters Health, supra note 2.
12 See Schwartz, supra note 8, at 396–401.
13 See id.
14 See id.
enforcement efforts. Yet even a significant increase in convictions attained by Sending States is unlikely to sufficiently diminish this global problem unless it is matched by heightened enforcement and prevention efforts in Destination States. This article argues that addressing CST requires comprehensive legislation at both the state and international levels and increased international cooperation, which together will motivate Destination States to prosecute offenders and support local initiatives for victim prevention, protection and assistance.

I. CST: A Crime of International Concern

Because CST has only recently attracted global attention, many of the underlying sociological and criminological forces are not fully understood. Nevertheless, several key aspects of the CST phenomenon are describable.

A. A Trend Among Trends

CST is intimately linked with the fastest growing international criminal trend: human trafficking. Current estimates indicate that approximately 13 million persons—80% of whom are female and approximately 50% of whom are children—have been trafficked, both internally and across borders. The majority of these women and children are trafficked for purposes of commercial sexual exploitation, or sex trafficking. CST, as a prevalent type of sexual exploitation, relies heavily on this victim base.

B. Victims

CST victims principally come from rural communities and impoverished families in underdeveloped or destabilized states in East Asia, Africa, Latin America, and Eastern Europe. Targeted victims


17 2008 TIP Report, supra note 2, at 7; see also King, supra note 6, at 13–14.

18 See 2008 TIP Report, supra note 2, at 23; see also Trafficking Victims Protection Act, 22 U.S.C.A. § 7102(9) (2003) (defining sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act”).

19 See Agyemang, supra note 3, at 945.

20 See Karene Jullien, The Recent International Efforts to End Commercial Sexual Exploitation of Children, 31 Denv. J. Int’l L. & Pol’y 579, 583 (2003); see also King, supra note 6, at 9 (“the profit potential of forced slavery is at its greatest when there are weak economies and war destabilized regions”); Schwartz, supra note 8, at 381–91 (explaining historical, eco-
are often members of marginalized populations that are lacking in educational and economic opportunities. These disempowered victims are neither able to help themselves nor affect political change.

Generally, victims fall between the ages of thirteen and eighteen, though the under-thirteen victim population is growing. While victims tend to be female, the likelihood of whether a particular child will be victimized by sex tourists depends on the market in the Destination State. For example, 90% of Sri Lanka’s prostituted children are male, while Thailand’s are predominantly female.

C. Perpetrators

Perpetrators in the CST industry resist monolithic profiles. While commentators tend to focus on patrons of child sex, CST crimes involve a host of complicit persons.

1. Traffickers

International or regional criminal syndicates regularly supply the CST market with children. Traffickers facilitate the recruitment, transport, detention, and sale of children. Recruiters offer employ-


21 Mathews, supra note 6, at 659.


24 Cohen, supra note 2, at 42.

25 Id. For an informative discussion of the historical elements affecting these gender trends in CST in Southeast Asian States see Schwartz, supra note 8, at 381–91.


27 See King, supra note 6, at 15; see also Becki Young, Trafficking of Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims, 13 GEO. IMMIGR. L.J. 73, 79 (1998).

ment opportunities—legal or illegal—in remote locations.\textsuperscript{29} When such recruitment efforts fail, traffickers often simply procure victims by abduction.\textsuperscript{30}

Once in the control of traffickers, children are usually removed from their communities, further increasing their vulnerability.\textsuperscript{31} Traffickers then either sell them to vendors or market them directly. In either case, victims are forcibly held and made to provide sexual services to patrons, many of whom are sex tourists.\textsuperscript{32} Traffickers gain victim compliance by fabricating debt, confiscating identity documents, plying victims with drugs, and threatening and using violence.\textsuperscript{33} Such tactics discourage escape and attempts to notify the authorities.\textsuperscript{34}

2. Sex Tour Operators

A group of perpetrators involved in CST, who sometimes partner with traffickers, are so-called “sex tour operators.” Operating predominantly in industrialized countries, certain travel agencies arrange tour packages for tourists who seek sexual encounters with children.\textsuperscript{35} In addition to securing standard travel accommodations, operators arrange local guides who facilitate sexual encounters at brothels populated with prostituted children.\textsuperscript{36} The number of sex tour operators has increased in recent years, multiplying patrons’ avenues for exploitation.

3. Patrons

The group most responsible for driving the CST industry is the actual patrons who seek child sex.\textsuperscript{37} Generally, patrons are drawn to a destitute state by low-risk and affordable sexual access to children, as


\textsuperscript{30} See Schwartz, \textit{supra} note 8, at 377–78.

\textsuperscript{31} See id. at 376.

\textsuperscript{32} Potts, \textit{supra} note 16, at 231–32.

\textsuperscript{33} Id. at 229–30.

\textsuperscript{34} Schwartz, \textit{supra} note 8, at 376.

\textsuperscript{35} See Todres, \textit{supra} note 23, at 4.

\textsuperscript{36} See id.; see also Toddi Gutner & Ron Corben, \textit{Asian Sex Tours Are an American Business, Too}, \textit{Bus. Wk.}, June 17, 1996, at 46.

\textsuperscript{37} Svensson, \textit{supra} note 1, at 643.
well as the enhanced anonymity that comes in a foreign country.\textsuperscript{38} Patrons represent diverse groups.\textsuperscript{39} Despite frequent mischaracterizations, patrons are not exclusively, or even predominantly, Western pedophiles.\textsuperscript{40} Locals account for a significant portion, and at times the majority, of patrons.\textsuperscript{41} Even when patrons are foreigners, they are not necessarily Westerners.\textsuperscript{42} Japanese men reportedly constitute the largest number of CST perpetrators in many Asian countries.\textsuperscript{43} The most consistent characteristic of patrons is that they originate from comparatively affluent states, with more stringent law enforcement for child sex crimes.

Many patrons are not, in fact, pedophiles, defined as persons sexually aroused by physically underdeveloped children, or those under the age of thirteen.\textsuperscript{44} The narrowness of this definition is significant because of the distinction between preferential patrons (those who actively seek sexual encounters with children) and opportunistic or circumstantial patrons (those who have sex with minors if the opportunity presents itself).\textsuperscript{45} Though either type of patron can be a pedophile, opportunistic patrons likely are not. They may initially travel for legitimate purposes, and then, free of their own society’s moral restraints, choose to experiment.\textsuperscript{46} Identifying all patrons as pedophiles implies that they principally seek sex with pre-pubescent children.\textsuperscript{47} But because in most modern legal systems the age of sexual majority does not coincide with the age of puberty, even persons who

\textsuperscript{38} See Agyemang, supra note 3, at 941–42.
\textsuperscript{41} See Schwartz, supra note 8, at 383–84; Reuters HEALTH, supra note 2.
\textsuperscript{42} Svensson, supra note 1, at 651. But see Seabrook, supra note 1, at ix.
\textsuperscript{43} Svensson, supra note 1, at 651 (quoting ECPAT International Report); see also King, supra note 6, at 21 (noting that sex trade from Japan generates $400 million annually).
\textsuperscript{44} See Davidson, supra note 6, at 85 (citing to the American Psychiatric Association’s 1995 manual).
\textsuperscript{45} Seabrook, supra note 1, at x.
\textsuperscript{46} See id.; see also Svensson, supra note 1, at 641.
\textsuperscript{47} Davidson, supra note 6, at 85–86.
actively seek sex with persons considered to be minors under state law may not be pedophiles.\textsuperscript{48}

Influential definitions like those used by the World Trade Organization (WTO) and United Nations (UN), which narrowly identify offenders as persons who engage in tourism with the “primary purpose” of “commercial exchanges” for child sex, advance the problem of mischaracterization by omitting opportunistic sex tourists.\textsuperscript{49} The frequency with which foreigners avail themselves of child sex via informal commercial arrangements adds additional difficulties to the task of defining patrons. Sex industries of Destination States often have both formal and informal markets.\textsuperscript{50} In the latter, sexual arrangements with prostituted children can look remarkably non-commercial, with prostitutes performing both sex labor and non-sex labor for patrons.\textsuperscript{51} Child prostitutes may also behave like romantic companions during prolonged periods of time and for unspecified monetary amounts.\textsuperscript{52} Alternatively, tourists may integrate into communities and obtain child sex through systematic gift giving.\textsuperscript{53} Statutes risk being under-inclusive when they blindly adhere to the prominent but misguided definitions of CST patrons that only contemplate traditional commercial arrangements within formal sex markets.

Accurately identifying perpetrators is essential for good criminological analysis and effective law enforcement. For example, opportunistic sex tourists may well be more susceptible to legal deterrents than preferential sex tourists, and legislation must be sensitive to this difference in order to be successful.\textsuperscript{54} Ultimately, legislation must consider all perpetrators, and not merely patrons, to be effective.

\textsuperscript{48} See id.
\textsuperscript{50} Davidson, supra note 6, at 132–33.
\textsuperscript{51} Id. at 133.
\textsuperscript{52} Id.
\textsuperscript{53} See id. at 126.
\textsuperscript{54} See Seabrook, supra note 1, at x.
D. Economic, Political, and Cultural Causes

As CST is an entrenched, complex problem, there is no single explanation for why the industry is thriving. Some causes appear pervasive, while others are state-specific. Essentially, CST is a niche service-market that operates according to basic supply and demand principles. Many of its contributing factors appear rooted in state impoverishment, and consequently, an economic analysis of CST is necessary for a full understanding.

Given the market’s scale, CST is unsurprisingly lucrative for its criminal actors. Additionally, states also have a financial stake in CST. Tourism is the single largest global industry, and sex tourism generates billions of dollars for many Destination States with associated, legitimate tourist industries. Between 2–14% of the GDPs of Indonesia, Malaysia, the Philippines, and Thailand can be linked to sex tourism. Significant economic ties with CST have been forged in Destination States, which helps explain why they continually fail to address it.

Historically, to obtain sex tourism-related monies, Destination States have insufficiently protected and even victimized vulnerable groups within their population. Though no state has ever explicitly promoted CST, states have tolerated it by failing to enact or enforce criminal statutes. Some states indirectly encourage CST by enacting policies that rapidly develop prostitution. The most notorious examples are various wartime arrangements between states that provide sexual services to foreign military personnel on overseas deployment. Such legislation legitimizes and regulates brothels for military men.

55 See King, supra note 6, at 19; Cohen, supra note 2, at 42; Susan Tiefenbrun, Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime? 38 CASE W. RES. J. INT’L L. 249, 249–50 (2007); Cohen, supra note 2, at 42.
56 Seabrook, supra note 1, at xi (“The expansion of travel and vacations, journeys, and holidays have made tourism the largest single industry on earth.”).
57 Schwartz, supra note 8, at 389; see also Lin Lean Lim, The Economic and Social Bases of Prostitution in Southeast Asia, in The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia 1, 7–10 (Lin Lean Lim ed., 1998).
58 See Lim, supra note 57, at 7.
59 Seabrook, supra note 1, at ix.
60 See Mathews, supra note 6, at 661.
61 King, supra note 6, at 2, 9, 15; Seabrook, supra note 1, at ix.
bolstering the Destination State’s sex industry. The World Bank indirectly encouraged the growth of this tourism base as part of an “export strategy,” and numerous Destination States officially adopted this economic stimulation plan. Critics contend that key actors within the World Bank and state governments knew that these policies indirectly subsidized the sex industry and charge them with promoting tourism with a sex package.

States that simply viewed sex tourism as an “inevitable, and fairly unproblematic, by-product” of economic development are also culpable. For example, “Kisaeng” tours for Japanese tourists formed a part of South Korea’s plan for economic development. Likewise, senior Chinese officials have argued that prostitution is inevitable in any emerging economy.

Though CST is driven by economic gain, victim impoverishment generates the vulnerability that ultimately enables it. Where poverty is widespread, CST thrives. For example, before the CST boom erupted throughout the Golden Triangle, industrialism triggered rampant consumerism that disadvantaged rural villages throughout the region. Logging projects destroyed forestlands that had previously sustained

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64 Steven Schlossstein, Asia’s New Little Dragons: The Dynamic Emergence of Indonesia, Thailand, & Malaysia 197 (1991).
65 Sachs, supra note 4, at 28.
66 See id.
67 Id. at 28, 30 (discussing complicity of Robert McNamara, President of the World Bank in the 1970s, who also facilitated the 1967 Rest and Recreation treaty with Thailand as U.S. Secretary of Defense).
68 Davidsson, supra note 6, at 128.
69 Traditionally, kisaeng were a female slave class in Korea. Like their better-known Japanese counterparts, geishas, kisaeng were often highly trained entertainers, additionally valued for their erotic services. During the 1970s, many (predominantly Japanese) tourists purchased kisaeng services, erotic and otherwise, revenue from which was delivered to the South Korean government. See John Lie, The Transformation of Sexual Work in 20th-Century Korea, Gender and Society, June 1995, at 310. See generally Matsui Yayori & Lora Sharnoff, Sexual Slavery in Korea, Frontiers: A Journal of Women Studies (1977).
71 See Davidsson, supra note 6, at 128.
72 See id; see also Schwartz, supra note 8, at 410; Dateline: Children for Sale (NBC updated transcript Jan. 9, 2005), available at http://www.msnbc.msn.com/id/4038249.
villages. The ensuing rural poverty was exacerbated by a population spike and rapid urban modernization.

The collapse of rural economies coincided with a rising urban demand for child prostitutes. As income from prostitution is sometimes twenty-five times greater than legitimate rural wages, many destitute families succumb to the temptation of immediate financial gain and exploit their children. Families often are forced to choose between prostituting their children, selling them outright to recruiters, or accepting ill-advised loans with exorbitant interest, payment of which is performed through child sex work. In most cases, the problem is compounded by the fact that the children rarely receive the full financial benefit of their sex work.

The poverty of victims is only exploitable because of the comparative affluence of CST perpetrators, particularly the patrons. The widening economic gap between developing and developed states allows for sex tourists with significant disposable income, who in turn drive demand in Destination States.

Several globalization trends enhance these market forces. The ease and affordability of travel, for example, along with increased communication via the Internet, has enhanced sex tourist mobility. Ironically, this “mobility trend” does not extend to the poor of Destination States. Rather, economic desperation constricts legal immigration possibilities and increases susceptibility to trafficking. Desperate and poor individuals are baited by trafficker promises. Increasingly porous borders, which facilitate the legal migration of the affluent, merely help to mask the traffickers’ transportation of their illicit human cargo.

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74See Sachs, supra note 4, at 26–27.
76Li, supra note 4, at 508–09.
77Lillian Robinson, Touring Thailand’s Sex Industry, Nation, Nov. 1, 1993, at 492, 495.
78See Hodgson, supra note 75, at 519.
80See Mathews, supra note 6, at 661.
81See id.; see also King, supra note 6, at 15 (noting disparity between developed and developing countries).
82See Seabrook, supra note 1, at 120–21.
83Id. at xi.
84Id.
Beyond political and economic factors, CST is perpetuated by deeply-rooted cultural beliefs and stereotypes. Traditional views of male dominance support domestic consumption of child sex. Inaccurate beliefs about AIDS transmission also contribute; many consumers falsely assume that youthful prostitutes are less likely to be infected. Other cultural beliefs suggest that sex with virgins will cure infections or increase male longevity. Finally, family choices to exploit their children are sometimes reinforced by cultural beliefs that children should support their aging parents, encouraging prostitution by children with no other means of doing so.

While most commentators agree that CST is steadily increasing, others are skeptical. Several contend that while the frequency and prominence of reports has risen, no evidence of an increase in actual offenses exists. Julia O’Connell Davidson forcefully argues that the current fascination with stories of abuse is simply a function of the cravings of Westerners for such stories. These social reactions can be linked, according to Davidson, to a new socially constructed “fetishization” of children. She concludes that there is simply nothing new about the commercial sexual exploitation of children “except the term itself.”

It is not clear if this brand of skepticism is well founded. Admittedly, the data concerning the incidents of abuse is not optimal. However, this is unsurprising if one supposes, as most experts do, that trafficking in its current form is a modern criminal trend. Further, to suggest—as Davidson does—that the policy decisions of Destination States and the phenomena of globalization have had no impact at all on the number of abuses seems improbable.

86 See Wathinee Boonchalaksi & Philip Guest, Prostitution in Thailand, in The Sex Sector, supra note 57, at 133 (noting that men are perceived as natural sexual predators).
87 See Schwartz, supra note 8, at 385; Li, supra note 4, at 510.
88 See Schwartz, supra note 8, at 385.
90 Schwartz, supra note 8, at 387. For a detailed account of South East Asian cultural influences, see id. at 387–88.
91 See DAVIDSON, supra note 6, at 7–8 (quoting CHRIS JENKS, CHILDHOOD 92 (1996)).
92 See DAVIDSON, supra note 6, at 8.
93 Id. at 23.
94 Id. at 8.
II. CRIMINALIZATION AND ENFORCEMENT EFFORTS OF DESTINATION COUNTRIES

Ideally, the frontline against CST would involve the law enforcement systems of states where offenses occur. Law enforcement proceedings are most effective when temporally and spatially proximate to the crime. Detection of offenses is more likely, evidence is easier to gather and present, witnesses are more accessible for interview and testimony, and linguistic and cultural hurdles are less problematic. Addressing crimes domestically shortens the time between offenses and prosecutions, reduces party bias, improves cost effectiveness, and prompts higher rates of conviction. Any introduction of a transnational element to enforcement proceedings significantly retards these advantages.

As things exist today, the law enforcement mechanisms of Destination States rarely move with the desired level of force against CST perpetrators. A principal failure of such states has been the absence of laws addressing child sexual exploitation. For the most part, tourism-dependant Destination States have been politically hesitant to adopt laws or policies that might endanger revenue by discouraging potential tourists who tailor itineraries to include destinations with favorable criminal codes. Informal state policies of tolerance toward CST have fostered sluggishness towards legislative reform.

Alternatively, where prostitution-related law exists, weak or misdirected statutory enforcement mechanisms undermine its effectiveness. The application of criminal laws either selectively penalize only the prostituted person’s behavior or it fails to penalize perpetrators in a way that reflects the gravity of the offenses.

Under international pressure, most Destination States have begun to modernize their criminal codes by equipping them with stronger, CST-related provisions. The statutory trend among these States has been to identify children as victims of exploitation, a practice that im-

98 See Svensson, supra note 1, at 643–44.
99 See Schwartz, supra note 8, at 424.
100 Mattar, supra note 97, at 361–65.
101 See Cohen, supra note 2, at 46–47.
munizes the victims from prosecution. Other legal developments include the criminalization of sexual contact with minors and stiffer penalties for CST patrons, traffickers, and brothel owners.

Despite these advances, statutory deficiencies persist. Some states prosecute prostituted minors involved in homosexual acts, a legal artifact of Western colonialization. Consequently, CST victims who participate in homosexual sex acts often fail to report offenses. The adults, conversely, can exploit the well-trodden avenues of corruption described above and offend with impunity, making such states havens for foreign men seeking sexual encounters with boys.

Another statutory deficiency is the lack of provisions that specifically address CST as a distinct form of sexual exploitation with unique contours. An example of the statutory failure of merely offering more generalized protections is a recently proposed amendment to Sri Lanka’s criminal code that lowers the age of consent to thirteen. Currently, Sri Lanka criminalizes sex with female persons under the age of sixteen, a potentially useful legal tool against rampant CST. Reportedly, Sri Lankan men were being incarcerated for having sexual intercourse with their underage romantic partners. The proposed statute provides that cases involving persons under twenty-one apprehended for having sexual contact with persons twelve years and under will be reviewed by the Attorney General. This fix highlights the dangers of failing to statutorily address CST directly. Though the solution addresses over-penalization problems, it invites corruption from officials charged with oversight. It might be better to have a tai-

102 See, e.g., Law on the Suppression of Kidnapping, Trafficking and Exploitation of Human Beings, art. 5 (1996) (Cambodia), translated by the Legal Assistance Unit of the Cambodia Office of the U.N. High Commissioner for Human Rights (criminalizing sex with minors).


104 See Seabrook, supra note 1, at 105.

105 See Cohen, supra note 2, at 42–43.


107 See id.

108 See id.

109 See id.
lored, statutory approach to CST offenses by attaching provisions directly addressing non-nationals committing commercialized sex acts.

Even with their shortcomings, the Destination States’ newly revamped statutes, if strictly enforced, have the potential to significantly reduce CST crimes. Unfortunately, enforcement has been sluggish, and critics have criticized legal reforms as merely cosmetic. Principal encumbrances to effective enforcement include corruption and inadequate resources.

Corruption is nurtured by prior state policies, both explicit and implicit, which tolerate CST as a non-serious offense. Such policies create lax attitudes toward CST among officials who often tolerate offenses (and sometimes violate the law themselves). Now entrenched, these attitudes resist top-down policy changes and perpetrators continue to receive a soft hand at the local level. Consequently, traffickers move with impunity and patrons act without fear of real punishment from Destination States, except perhaps deportation.

Corruption is also linked to insufficient state resources. Underpaid law enforcement personnel are susceptible to bribes from perpetrators. For example, the meager salary of Cambodian judges, fifteen dollars a week, is significantly augmented by routine bribes. Sadly, this patterned abuse provides CST perpetrators a relatively easy way to either avoid arrest or ensure early release from detention.

Insufficient resources may also mean that law enforcement and judiciary personnel lack proper training and equipment to suppress CST. Police are often ill-prepared to combat highly sophisticated, technologically advanced traffickers who utilize various methods of avoiding detection. Insufficient resources may also cripple courts. For example, the Khmer Rouge robbed Cambodia of adequately trained legal

111 See Li, supra note 4, at 514.
112 Id.
114 Schwartz, supra note 8, at 140.
115 Id.; see also Seabrook, supra note 1, at 89 (providing example of law enforcement personnel giving early release to CST patron in exchange for bribe).
professionals; as a result, those who remain struggle with the implementa-
tion of the state’s potentially powerful anti-CST legislation.\textsuperscript{117}

Under-training also allows outmoded practices to persist in both law en-
forcement and judiciary systems. The adversarial questioning of child
prostitutes by authorities is an excellent example, as it often
garners incomplete or inaccurate information from intimidated and uncooperative victims.\textsuperscript{118} Worse, interrogated children frequently
evade subsequent encounters with authorities, which can compromise
future legal proceedings.\textsuperscript{119} These results are similar to the difficulties
experienced with child witnesses during courtroom proceedings that lack child-sensitive practices.\textsuperscript{120}

Antiquated practices can also undermine otherwise successful law
enforcement efforts. A review of documented cases shows that sex tour-
ists who have their passports confiscated prior to bail release are repeat-
edly successful in securing new passports at their embassies in order to
leave the country.\textsuperscript{121} In part, this miscarriage of justice reveals that poor
communication practices between local authorities and foreign State
departments can frustrate both institutions.\textsuperscript{122} Ultimately, it seems that
releasing foreign sex criminals on bail into a state with demonstrably
porous borders shows a failure to appreciate these perpetrators as obvi-
ous flight risks. Offering bail to CST offenders is a practice held over
from times past when CST crimes were not taken seriously.

Some Destination States are updating practices to fight CST and
curb corruption. For example, Sri Lanka recently tightened laws by
making pedophilia a non-bailable offense, which prevents the flight of
alleged perpetrators.\textsuperscript{123} Further, under the advisement of Non-
Governmental Organizations (NGOs), Sri Lanka instituted child sen-
sitive measures by amending its Evidence Ordinance to permit child
video testimony in court proceedings, diminishing the risk of psycho-
logical trauma to child victims.\textsuperscript{124} When child victims do participate in

\textsuperscript{117} See Svennson, \textit{supra} note 1, at 648; see also Schwartz, \textit{supra} note 8, at 408 (discussing
the role of Khmer Rogue in deteriorating legal profession, and its incapacitating effects on
1996 Anti-Trafficking Law).

\textsuperscript{118} See, \textit{e.g.}, Seabrook, \textit{supra} note 1, at 106 (providing example of how untrained po-
lice interrogators can compromise child testimony).

\textsuperscript{119} See Dep’t of Justice, \textit{supra} note 95, at 4.

\textsuperscript{120} See \textit{id.} at 4–5.

\textsuperscript{121} See Seabrook, \textit{supra} note 1, at 24, 74–75.

\textsuperscript{122} See \textit{id.} at 75.

\textsuperscript{123} Factbook on Global Sexual Exploitation: Sri Lanka, http://www.uri.edu/artsci/
wms/hughes/srilank.htm (last visited Dec. 2, 2008).

(Beth M. Schwartz-Kenney et al. eds., 2001).}
judicial proceedings, formalities are relaxed to make them more comfortable.\textsuperscript{125} Finally, reforms are augmented by the creation of the National Child Protection Agency (NCPA), which was charged with the promotion of legal reform, monitoring and improvement of enforcement activities.\textsuperscript{126} For example, the NCPA recently established the “Cyber Watch” Unit, which monitors websites in order to prevent the use of Sri Lankan children for the purposes of child pornography and other forms of commercial sexual exploitation.\textsuperscript{127}

Overall, Destination States have yet to meet the challenges presented by CST crimes. Often, this failure is a result of stale institutional practices ill-suited to political, social, and legal realities. Reforms are often ill-conceived or lack political backing, producing little or no positive changes.

III. Sending State Legislation

The unfortunate reality of Destination State failure with regard to rampant CST underscores the need for Sending State involvement. Furthermore, as their citizens are a significant source of the demand that fuels CST, Sending States share a responsibility for prosecuting CST offenses. In light of this, numerous Sending States have passed legislation addressing CST offenses.

A. Extraterritorial Legislation

Over thirty-two States have enacted Extraterritorial (ET) legislation to address CST.\textsuperscript{128} ET legislation provides States with the jurisdiction to conduct prosecutorial proceedings over certain persons for offenses committed abroad.\textsuperscript{129} While ET legislation can be an effective tool in combating CST,\textsuperscript{130} investigations and prosecutions en-

\textsuperscript{125} See id.
\textsuperscript{127} de Silva, supra note 124, at 236.
\textsuperscript{129} Seabrook, supra note 1, at 4.
counter numerous structural, procedural and evidentiary hurdles. Crafting successful ET legislation is largely a matter of surmounting these hurdles.

1. ET Statutory Structure and Scope

Scope and jurisdictional reach are two critically important features of effective ET legislation, and both can be significantly expanded through adjustments to existing child exploitation statutes. Indeed, some states have broadened the ambit of criminal laws to cover more perpetrators, offenses and victims.

a. Perpetrators

One such structural adjustment is enlarging the field of people able to be prosecuted for CST offenses. Current ET legislation varies in this respect. In part, this reflects the several theoretical bases for ET legislation. To date, most ET legislation relies on active or passive personality principles, under which jurisdiction is based on the victim or perpetrator’s nationality or resident status. Most States restrict the application of their ET legislation to nationals, while others extend the ambit of coverage to both nationals and residents.

Some theorists assert that the devastating human rights impact of CST’s exploitative acts qualify them as “crimes against humanity,” and base jurisdiction on the universality principle. Though no state has explicitly based CST legislation on this principle, both Belgium and Sweden extend application to persons who have merely passed

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131 Id. at 16–17.
132 Dep’t of Justice, supra note 95, at 2.
133 Svensson, supra note 1, at 655.
134 See Seabrook, supra note 1, at 101. See generally Strafgesetzbuch [StGB] [Ger. Penal Code] §§ 174–184 (1986) (addressing sexual abuse of person and trafficking crimes); StGB § 7 (providing for ET application for child sex crimes so long as the perpetrator is a German citizen).
137 Cf. Seabrook, supra note 1, at 113.
138 See Seabrook, supra note 1, at 68 (discussing the Law of April 1995 as it relates to the Belgian Criminal Code arts. 372–377); see also Svensson, supra note 1, at 655.
139 BrB ch. 2 § 2.
through their territories, which suggests a form of universal jurisdiction to some commentators.\textsuperscript{140} While persons apprehended under ET legislation have predominantly been nationals, non-nationals seem no less likely to offend and should therefore be prosecutable under state criminal jurisdiction.\textsuperscript{141}

b. Offenses

ET legislative scope can be further enhanced by increasing the number of covered offenses. While CST principally involves commercial sexual exploitation of children, it frequently coincides with other crimes.\textsuperscript{142} Examples which are commonly part of ET legislation include non-commercial child sex abuse and child pornography.\textsuperscript{143} States have also criminalized conduct such as the inducement of minors into prostitution and the general corruption of minors as part of an overall anti-CST strategy.\textsuperscript{144} Criminalizing related crimes of CST enables law enforcement to prosecute even when evidence of the CST itself is weak.\textsuperscript{145}

Not all states comprehensively address CST-related offenses. Generally, states exhibiting more complete coverage are those that apply their domestic penal codes extraterritorially.\textsuperscript{146} These penal codes have numerous provisions which bear on CST.\textsuperscript{147} One advantage of this approach is that children abroad are afforded the same legal protections as domestic children.

A major shortfall of this strategy is that while domestic penal codes have relevant provisions, they are rarely CST-specific and therefore are unresponsive to the uniquely exploitative conditions of foreign victims and elements.\textsuperscript{148} In particular, they withhold special protections that CST victims require. While legal protections are ostensibly equal for children residing domestically and those abroad, actual protection is uneven. Some states compensate for this failure by augmenting their domestic legislation with provisions designed to facilitate CST prosecu-

\begin{footnotesize}
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\item \textsuperscript{140} See Svensson, \textit{supra} note 1, at 655.
\item \textsuperscript{141} See Seabrook, \textit{supra} note 1, at 101.
\item \textsuperscript{142} Dep’t of Justice, \textit{supra} note 95, at 2.
\item \textsuperscript{143} See \textit{id.} at 5.
\item \textsuperscript{144} See Seabrook, \textit{supra} note 1, at 100.
\item \textsuperscript{145} See Dep’t of Justice, \textit{supra} note 95, at 5.
\item \textsuperscript{146} See Seabrook, \textit{supra} note 1, at 5–6.
\item \textsuperscript{147} Mattar, \textit{supra} note 97, at 359, n.4.
\item \textsuperscript{148} See Berkman, \textit{supra} note 5, at 409–10.
\end{itemize}
\end{footnotesize}
tions. Other states have adopted ET legislation specifically targeting CST. Either method should provide additional protection for vulnerable children in Destination States.

c. Dual Criminality

Another structural element that affects legislative scope is the dual criminality requirement, under which an offense must be recognized in both the prosecuting state and the state in which the offense occurred. Dual criminality protects both the interests of states in which the crimes occur and those of foreign nationals traveling abroad. Because jurisdiction is based principally on territoriality, states generally set the legal norms within their own borders. Usually these norms exhaustively describe the legal duties of persons, including foreign nationals. ET legislation creates an exception to this general rule by generating legal requirements for a state’s citizens traveling abroad. The dual criminality requirement, however, significantly limits the exception created through ET legislation. The dual criminality requirement also appreciates that retaining legal assistance in foreign states can be problematic when the violation is unrecognized by that state.

Critics argue that when ET legislation addresses CST concerns, dual criminality requirements undermine the effectiveness of the legislation. They encourage “criminal preference” among offenders who seek out states with reduced child protections and those who purchase experiences criminalized in their own countries. Perpetrators can offend their state’s ET legislation and then return home with impunity. Dual criminality requirements are particularly contentious in CST cases involving states with different ages of consent.

Critics also assert that international legal norms, established by agreements such as the United Nations Convention on the Rights of the Child (CRC), create an international duty for states to assist the

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149 Seabrook, supra note 1, at 6; see StGB §§ 176–184.
151 Seabrook, supra note 1, at 5.
152 Id. at 4.
153 See id.
154 Id.
155 Id. at 114–15; Svennson, supra note 1, at 655–56.
156 Seabrook, supra note 1, at 114.
157 Id.
defenseless. Many argue that these duties trump the opposing interests of states or traveling nationals, and that a failure to prosecute because of dual criminality restrictions implies that states prioritize protection for their nationals. Critics construe this prioritization as untoward solidarity or even as blatant racism.

While these criticisms are without legal force, the fact that dual criminality has the potential to derail convictions of CST offenders is uncontested. A trend is developing to drop dual criminality requirements for CST crimes. This ameliorates the obstacle of inadequate CST legislation in Destination States, and increases the scope of ET legislation. Where Destination States mainly suffer from poor enforcement—rather than inadequate laws—the benefit of excising this prerequisite is limited, however.

d. Victims

Perhaps the most contentious structural element affecting legislative scope is the age of consent for CST victims. Current ages of consent represented in ET legislation vary from thirteen to eighteen. The protections afforded also vary depending upon the particular nature of the offense.

States with lower ages of consent tend to be those that apply their domestic law extraterritorially. Such states appear reluctant to penalize sex with sexually mature consenting minors residing within their territories. This may include sex between an adult and minor where no undue influence exists. These lower age limits may reflect cultural or social values about sexual maturity, as well as beliefs about the law’s relationship to sexual development and expression.

159 Seabrook, supra note 1, at 114.
160 Id.
161 Id.
162 See id. at 115.
164 Seabrook, supra note 1, at 103.
165 Explanatory Report, supra note 163, ¶ 129.
166 See id.
Some commentators propose harmonizing the age limit at eighteen. They contend that the CRC, which defines persons under the age of eighteen as children and endorses numerous child protections, favors a universal definition. Some argue that because the provisions of the CRC are binding, member States should synchronize age limits. Moreover, because the CRC has received near-universal ratification, it has enhanced authority, prompting one advocate to suggest that CRC provisions are customary international law and bind both member and non-member states alike.

Such conclusions are spurious. Though the CRC does define “child” as suggested, it also permits member states to set divergent age protections. Also, customary law requires that there be universal or near-universal state practice; the widespread variability among child protections upsets this element of customary law. Moreover, state detractors represent persistent objectors, ultimately foreclosing any reasonable claims that the CRC’s age provisions constitute customary law.

Advocates of harmonization note that when ET legislation requires dual criminality, and age limits under the relevant state penal codes differ, the effectiveness of ET legislation is undermined. Criminal preference draws offenders to states with lower age limits; because the victim’s age constitutes an element of the offense, successful prosecutions require that state age provisions coincide. This issue is negated, however, if prosecuting states simply drop the dual criminality requirement.

Another argument for a universal standard of eighteen is that persons under that age simply cannot give informed consent. While this conclusion is perhaps overly broad, it has some merit with respect to CST. The deprivation in many Destination States strips a prostituted child’s “consent” of its autonomous character. Raising the age of consent in CST relevant legislation is one reasonable response to this enhanced vulnerability. In cases where Sending States wish to preserve the domestic age of consent for minors, states should establish

167 Seabrook, supra note 1, at 114; see Svensson, supra note 1, at 656–57.
168 CRC, supra note 158, at art. 1.
169 See Seabrook, supra note 1, at 114; Svensson, supra note 1, at 656–57.
170 Svensson, supra note 1, at 656.
171 See CRC, supra note 158, art. 1.
172 Svensson, supra note 1, at 656–57.
173 CRC, supra note 158, art. 1.
174 See Svensson, supra note 1, at 656.
175 Seabrook, supra note 1, at 114.
CST-specific ET legislation and introduce special legal protections for foreign victims.

2. Procedural Hurdles

Transnational prosecutions for CST raise unique procedural requirements which further impact the effectiveness of ET legislation. Generally, procedural devices within ET legislation aim to address differences among diverse legal systems, strengthen diplomatic relations, and avoid unfairness to accused persons. Yet these procedural mechanisms sometimes impose burdens which may preclude investigations or add significant delay and cost.\textsuperscript{176}

Some ET legislation prohibits any investigation or prosecution of accused persons until either a formal request is made by the state where the offenses occur, or a complaint is properly filed by the victim.\textsuperscript{177} Victim complaint prerequisites appear beneficial insofar as they forecast victim cooperation as well as the accusation’s veracity. Additionally, awaiting state requests promotes diplomacy where multiple states have competing interests in prosecuting offenders. Considering the extensive state assistance and cooperation that transnational prosecutions require, such diplomacy has strong policy appeal.

Relying on formal state requests also preserves resources. A formal Destination State request indicates that the case against the accused is both substantive and a priority for that government. When Destination States make requests, vital cooperation is likely to be forthcoming. Moreover, resource preservation is at issue where double jeopardy restraints exist in the Sending State and the Destination State happens to initiate criminal proceedings against the accused.\textsuperscript{178} Sending States avoid devoting significant resources to transnational proceedings that may end up being disrupted by extradition requests or convictions \textit{in absentia} in Destination States.\textsuperscript{179}

These procedures are not always followed. Despite evidence of an offense, for example, formal requests or complaints are often not

\textsuperscript{176} See generally \textit{id.} (recounting numerous transnational prosecutions of CST offenders where procedure encumbered proceedings).


\textsuperscript{178} See \textit{Seabrook}, \textit{supra} note 1, at 102–03.

\textsuperscript{179} See \textit{id.}
made. The former can be the result of numerous factors, such as a state being unaware of the formal request requirement, or simple government corruption or incompetance. The latter is often caused by individual victims’ lack of knowledge or resources.

When these procedural steps are not met, Sending State authorities who have access to the accused and sufficient evidence of the alleged crime are frustrated. Complying with procedures can consume so much time that prosecutions are compromised. Fresh evidence grows stale, witnesses become less accessible, and statutes of limitation run.

Exasperated by these shortcomings, some states have abandoned these procedural encumbrances. For example, under parliamentary Bill C-15A, Canada eased the formal requirement of state requests, amending criminal code sections 7(4.2) and (4.3) to permit prosecutions upon permission from the Canadian Attorney General. Relinquishing this requirement seems to have facilitated convictions.

3. Evidentiary Hurdles

Law enforcement personnel encounter several challenges to effectively gathering and presenting evidence in CST cases, including obtaining victim testimony and coordinating the transnational transfer of evidence while ensuring its integrity. The transnational aspect of CST enforcement proceedings is usually costly and cumbersome. Consequently, Sending States tend to assign CST crimes a low priority.

a. Child Victim Testimony

Gleaning evidence from traumatized victims is a central challenge to transnational CST prosecutions. Both the volume of child prostitutes in popular CST Destination States and their transient life-

180 See id. at 115.
181 Id.; Svennsson, supra note 1, at 648.
182 See generally Criminal Law Amendment Act, 2001 (Can.).
183 Id. ¶ 19.
184 Id. ¶ 3(2).
186 See Tiefenbrun, supra note 95, at 4.
188 See Dep’t of Justice, supra note 95, at 4.
styles make victim identification and location difficult.\textsuperscript{189} This location problem is compounded as transnational proceedings are often delayed. Aggressive handling by untrained law enforcement personnel exacerbates the avoidant behavior of victims and their reluctance to cooperate with investigations. Finally, even available victims who are willing to testify suffer from diminished recollection as time between offenses and prosecutions lengths.\textsuperscript{190}

Sending States can adopt various policy measures to alleviate difficulties in locating victims and securing quality testimony. A first step is increasing law enforcement cooperation with NGOs.\textsuperscript{191} NGOs frequently provide credible reports of CST crimes.\textsuperscript{192} Their familiarity with the victim population can facilitate foreign and domestic law enforcement contacts and interviews.\textsuperscript{193} Also, NGO aftercare facilities provide housing and support services, which help maintain witness availability.\textsuperscript{194} Furthermore, their expertise in victim care can help ensure that law enforcement contact with victims is child sensitive.

Once law enforcement personnel have a working relationship with NGOs, efforts should be made to create a practice of recording victim statements shortly after the offenses; this will help ensure the quality, admissibility and availability of witness testimonies.\textsuperscript{195} Videotaped statements can preserve testimony where victims become inaccessible or exhibit poor recall.\textsuperscript{196} Videotaped depositions taken in the presence of defense lawyers help ensure admissibility in courts.\textsuperscript{197} Sending States can facilitate these measures by either training local law enforcement personnel or by establishing law enforcement liaisons in popular Destination States. Financial considerations may dictate a preference between these two approaches.\textsuperscript{198}

Finally, because child victims can be traumatized by traveling to culturally unfamiliar states,\textsuperscript{199} resulting testimony may be compromised or misconstrued by courts.\textsuperscript{200} As such, a mutual agreement by

\textsuperscript{189} See id.
\textsuperscript{190} Id.
\textsuperscript{191} See id. at 3–4.
\textsuperscript{192} See id. at 3.
\textsuperscript{193} See Seabrook, supra note 1, at 9; Dep’t of Justice, supra note 95, at 3.
\textsuperscript{194} Dep’t of Justice, supra note 95, at 4.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Dep’t of Justice, supra note 95, at 6.
\textsuperscript{199} Seabrook, supra note 1, at 85.
\textsuperscript{200} Id.
the involved states to permit testimony via video or satellite link is advisable. Because this technology is both costly and inconsistent with some states’ fair practice procedures, some commentators have found this use of technology impracticable.\textsuperscript{201} However, these aids seem more economical than transporting witnesses, and these aids appear to be the only way to ensure dependable witness testimony. Australia, a leader in addressing CST-related evidentiary issues, has implemented several technology aids that have successfully enhanced victim protections and curbed the state’s prosecution expenditures. In particular, Australian courts permit foreign child witness testimony by video link when witness reliability is threatened by unreasonable expense, inconvenience, psychological harm, or intimidation.\textsuperscript{202}

When victims do testify in foreign courts, testimonial aids should be implemented and court personnel should undergo cultural training. Some states have endorsed the use of closed-circuit television (CCTV), conditioned upon the presence of a support person during the testimony, while others have conducted closed proceedings.\textsuperscript{203} These provisions both enhance victim protections and ultimately limit expenditures.

b. \textit{Physical Evidence}

In CST cases, physical evidence can include anything from contraception to sexual toys, gifts, and border control records, and even records from hotels where sexual activity occurred.\textsuperscript{204} The most common and vital evidence, however, are sexually explicit images of victims, and the equipment that manufactures and contains them.\textsuperscript{205} Increasingly, perpetrators record their crimes with photographic or video equipment for personal or communal consumption.\textsuperscript{206} Such evidence can play numerous roles in CST enforcement efforts. Discovery of explicit images can spark CST investigations or substantiate existing allegations.\textsuperscript{207} Furthermore, some Sending State courts have allowed images to establish a victim’s age,\textsuperscript{208} the perpetrator’s knowl-

\textsuperscript{201} Li, \textit{supra} note 4, at 526.
\textsuperscript{202} Crimes (Child Sex Tourism) Amendment Act, 1994, § 50EA(d) (i)–(iii) (Austl.).
\textsuperscript{203} Dep’t of Justice, \textit{supra} note 95, at 5.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} See Seabrook, \textit{supra} note 1, at 124.
\textsuperscript{208} See, e.g., Crimes (Child Sex Tourism) Amendment Act, 1994, § 50FA (1)–(2) (Austl.).
edge of the victim’s age,\textsuperscript{209} or even the occurrence of a criminal act,\textsuperscript{210} making the victim’s presence and testimony unnecessary.\textsuperscript{211}

The prominence of images in CST prosecutions does create problems, however. A review of CST apprehensions suggests that authorities have focused on particularly conspicuous offenders, such as those with images recording their exploits.\textsuperscript{212} Offenders can thus insulate themselves from detection by destroying or better concealing such evidence. Cautious and opportunistic CST offenders are less likely to endanger their anonymity by retaining incriminating evidence. Furthermore, as digital imaging has grown more prominent, the need for commercial developers has been reduced. Without such physical evidence, elements of CST offenses are harder to establish, reliance on child victim testimony increases, and convictions become more difficult. Commentators have suggested that CST investigations can obviate the need for image-based evidence by conducting undercover sting operations.\textsuperscript{213} The preservation of evidence from Destination States, however, and the expense of foreign sting operations remain problematic for prosecutions.

Finally, consistent preservation and custody procedures between Sending and Destination State law enforcement officials are vital to the admissibility of physical evidence.\textsuperscript{214} Sending States can progress in this area by providing liaisons to local law enforcement and training them in relevant evidentiary standards.\textsuperscript{215} Though these measures have upfront costs, they reduce the number of law enforcement agents from Destination States that are needed to testify, and ultimately reduce the costs of proceedings.\textsuperscript{216} Legislative measures taken in Destination States can also be helpful in easing some expected evidentiary difficulties.\textsuperscript{217} For example, a Thai law empowers that state’s Attorney General to gather and transfer evidence to prosecuting states.\textsuperscript{218}

\textsuperscript{209} See id.
\textsuperscript{210} See id.
\textsuperscript{211} See id.
\textsuperscript{212} See Agyemang, supra note 3, at 938.
\textsuperscript{214} See Dep’t of Justice, supra note 95, at 4–6.
\textsuperscript{215} Id. at 5–6.
\textsuperscript{216} Id.
\textsuperscript{217} See, e.g., Berkman, supra note 5, at 410–11.
B. Domestic Legislation

In addition to passing ET legislation, some Sending States have enacted domestic laws aimed at CST offenses occurring principally within their territory. The implementation of these laws creates a unique set of benefits and obstacles.

1. Inchoate Crimes

Some Sending States have criminalized inchoate crimes that occur domestically. For example, under the U.S. PROTECT Act (Act), criminal liability exists if the accused traveled with the intent to engage in sexual conduct with a minor. This intent provision offers several enforcement advantages. First, authorities can apprehend offenders prior to the violation, preempting victimization. Second, no proof that a sexual violation actually occurred is required for conviction. Where evidence of sexual violations is scant, convictions for these inchoate offenses may still be attainable. Finally, prosecutors can rely solely on stateside evidence and avoid the difficult and costly task of collecting evidence overseas.

Establishing proof of intent is challenging. To alleviate this burden, the Act acknowledges that sex with a minor need not be the primary purpose of travel. Nevertheless, when offenders raise competing purposes for traveling, establishing criminal intent can still be troublesome. In one successful prosecution, U.S. agents arrested John Seljan for violating the intent provision of the act as he boarded a plane for the Philippines. Proof of intent was established through intercepted correspondence and was corroborated by his possession of pornography, sexual aids, chocolate, and foreign currency. Cases


\[\text{221 See id.}


\[\text{223 See generally 117 U.S.C. § 2422.}


\[\text{225 Agyemang, supra note 3, at 938.} \]
rarely yield such damning evidence, however. Because persons must possess criminal intent prior to travel, opportunistic offenders are not covered. Despite this, laws criminalizing inchoate crimes do expand the legal arsenal against CST.\footnote{See Kathy J. Steinman, Sex Tourism and the Child: Latin America’s and the United States’ Failure to Prosecute Sex Tourists, 13 Hastings Women’s L.J. 53, 72 (2002).}

2. Sex Tour Operator Prosecutions

Other forms of legislation target CST facilitators such as sex tour operators who operate within Sending States.\footnote{See Todres, supra note 23, at 1–23 (arguing for extension of U.S. criminal liability to sex tour operators).} Recently, the British government enacted legislation targeting domestic actors who organize sex tours or encourage others to sexually exploit children abroad.\footnote{Sexual Offences (Conspiracy and Incitement) Act, 1996, c. 29 (Eng.).} Similarly, both Australia and New Zealand have legislation targeting operator activity.\footnote{C. Hall, The Legal and Political Dimensions of Sex Tourism: The Case of Australia’s Child Sex Tourism Legislation, in Sex Tourism and Prostitution: Aspects of Leisure, Recreation and Work 87–90 (M. Opperman ed., 1998).} Australia criminalizes persons who act “with the intent of benefiting from or encouraging” prohibited conduct.\footnote{Crimes (Child Sex Tourism) Amendment Act, 1994, (Austl.).} New Zealand outlaws conduct that facilitates CST, such as making travel arrangements or printing or publishing information intended to promote child sex tours.\footnote{Michael Pina, Despite Stigma, Underground Operators Thrive, Travel Wkly., Apr. 22, 1996, at 38 (quoting New York-based sex tour operator).}

Prosecuting sex tour operators can be a complicated process, however. As one commentator notes, there are no “paedophile [sic] package tour operators.”\footnote{Davidson, supra note 6, at 130.} Rather, child sex tourists are principally aided by mainstream tour operators\footnote{Id. at 9.} who invariably deny that their tours involve children and assert that it is not their intention for their customers to exploit minors.\footnote{Id. at 9.} These agents make themselves known to interested parties by way of thinly-veiled advertisements that fall just short of promising commercial sex.\footnote{Todres, supra note 23, at 9, 12.} Discreet sex tour advertisements may boast an introduction to a “female companion” who accompanies the tourist,\footnote{Id. at 9.} or they may pose as “match-making” services.\footnote{Todres, supra note 23, at 9.}
Despite these hurdles, it is still possible to establish the requisite criminal elements for offenses committed by operators.\textsuperscript{238} One element, criminal encouragement, is evidenced by tour advertisements motivate individuals to travel abroad for illicit sex.\textsuperscript{239} Despite carefully-worded brochures, sex with child prostitutes is the determinative factor for numerous consumers purchasing advertised services.\textsuperscript{240} Operators facilitate these offenses with their services.\textsuperscript{241}

Another common element linked to operators is criminal intent. Because the high incidence of child prostitution in Destination States has been widely reported, operators should be considered to have constructive knowledge.\textsuperscript{242} Combined with the fact that operators arrange tours to red light districts with rampant child prostitution and abysmal enforcement, it may be possible to prove that operators intend for their clientele to engage in CST.\textsuperscript{243}

Despite some practical difficulties, legislation targeting sex tour operators does help diminish CST. Unlike legislation aimed at patrons, shutting down sex tour operators eliminates entire avenues.\textsuperscript{244} Perhaps more importantly, prosecuting operators helps raise public awareness and deters perpetrators.\textsuperscript{245}

3. Incentive-Based Aid and Sanctions

Though legislation expanding Sending State prosecutorial capacity is crucial, there are limitations. In particular, detection rates of offenders and the root causes behind victim vulnerability are insufficiently impacted. Accordingly, some Sending States have adopted legislation designed to motivate Destination States to bolster their own domestic law enforcement, victim prevention, and aid programs.\textsuperscript{246} Responding to Destination States’ need for financial assistance to combat CST-related activity, some Sending States have offered direct financial assistance aimed at reform.\textsuperscript{247} Given the historical link between weak law enforcement and CST in most Destination States, extending direct

\begin{footnotes}
\item[238] Id. at 9–11
\item[239] Id. at 9.
\item[240] Id.
\item[241] See Agyemang, supra note 3, at 950.
\item[242] See Todres, supra note 23, at 20.
\item[243] See id.
\item[244] Id.
\item[245] See generally Todres, supra note 23.
\item[247] See Explanatory Report, supra note 162, ¶ 261.
\end{footnotes}
financial assistance provides strong new incentives to tourism dependant states. It also introduces an important element of accountability to states that commit their resources toward reform.

The most visible legislative effort to combat CST-related crimes through incentive-based programs is the recently augmented U.S. Victims of Trafficking and Violence Protection Act of 2000 (TVPA). At the center of the TVPA’s incentive program is the Office to Monitor and Combat Trafficking, which publishes annual Trafficking in Persons Reports (TIP Reports). TIP Reports compile and analyze information on global trafficking, and provide this data to the U.S. Congress, partner agencies and the NGO community.

In addition to providing statistically significant data, TIP Reports act as both accountability mechanisms and catalysts for foreign governments to combat global trafficking. They rate states based on government efforts to remedy trafficking and on compliance with the TVPA “minimum standard” guidelines. States are placed in tiers, which form the basis for various incentives and disincentives. For incentives, the TVPA offers assistance to states either directly or through international programs that provide aid to victims and high-risk populations. In 2002, the United States dedicated fifty-five million dollars to anti-trafficking programs in over fifty countries. In 2004, the United States provided ninety-six million dollars. TVPA disincentives include economic sanctions levied against the “worst offenders,” as well as the international stigmatization associated with having a poor human rights record.

Upon the release of the first TIP Report, numerous governments took immediate steps to prevent trafficking, prosecute traffickers and

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249 Tiefenbrun, supra note 55, at 255.
250 Id. at 255–56.
251 See 2008 TIP Report, supra note 2, at 4; Tiefenbrun, supra note 55, at 266–68 (discussing TIP Report tiering system and various criteria used to evaluate states).
253 Victims of Trafficking and Violence Protection Act, § 108(a)–(b).
256 See 2008 TIP Report, supra note 2, at 5.
protect victims. Poorly-rated states increased their anti-trafficking efforts to avoid economic sanctions and shed harmful stigma that threatened to impact their international trade, tourism, and aid.\textsuperscript{257} Many of the worst offenders sought direct assistance from the United States to improve their TIP rating.\textsuperscript{258} Overall, the general trend was improved performance by states in subsequent TIP Reports.\textsuperscript{259} In those rare cases where third-tier states made no progress, the United States did in fact impose sanctions.\textsuperscript{260}

**IV. A New International Initiative**

To some extent, recent local efforts have improved CST enforcement, increasing arrests and convictions. Despite these positive indicators, however, CST offenses continue to increase and the bulk of offenders continue to go unpunished,\textsuperscript{261} indicating that unilateral local efforts alone are inadequate. International bodies have mobilized against the escalation of CST offenses with collaborative efforts, including treaties and agreements, that encourage member states to legislate aggressively against child sexual exploitation.\textsuperscript{262} The most recent attempt to form a multi-state instrument addressing CST crimes is the COE Convention.\textsuperscript{263}

\textsuperscript{257} Dep’t of Justice, supra note 95, at 1.
\textsuperscript{258} See Tiefenbrun, supra note 55, at 268.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Seabrook, supra note 1, at ix.
\textsuperscript{263} See Convention, supra note 15 (noting that it opened for signature October 25, 2007).
A. Background

On May 22, 2005, a COE committee convened to assess the need for a new instrument addressing child sexual exploitation.\textsuperscript{264} Addressing the committee, COE Deputy Secretary-General Boer-Buquicchio stressed that existing international instruments were simply “not working.”\textsuperscript{265} Among the principal deficiencies she cited was the lack of “universal, legally-binding” documents specifically addressing child sexual exploitation.\textsuperscript{266} Relevant COE texts were similarly flawed: none were both legally-binding and sufficiently focused.\textsuperscript{267}

Deputy Secretary-General Boer-Buquicchio urged a “move forward,” contending that, in addition to being binding and focused, an optimally functioning instrument required “greater awareness, increased cooperation and immediate action.”\textsuperscript{268} She added that critically important inter-state cooperation necessitated the establishment of “common standards and definitions,” harmonized criminal provisions across Europe, and state court jurisdiction over offenders irrespective of nationality or location.\textsuperscript{269}

According to COE negotiators, harmonized legislation facilitates action against CST in several ways.\textsuperscript{270} First, it spoils perpetrators’ criminal preference for offending in Destination States that have lenient child protection laws.\textsuperscript{271} Second, shared laws yield comparable data that assists criminal research, as well as the exchange of information and experience.\textsuperscript{272} Finally, and perhaps most importantly, harmonization facilitates international cooperation in the form of extradition and reciprocal legal assistance.\textsuperscript{273}

Subsequent COE Committee deliberations resulted in the Convention, a collaborative response to deficiencies in member states’ child sexual exploitation protections. Even though the Convention is a re-

\begin{itemize}
\item \textsuperscript{264} Id.; Maud de Boer-Buquicchio, Deputy Sec’y-Gen. of the Council of Europe, Remarks at the Opening of the First Committee of Experts on the Protection of Children Against Sexual Exploitation and Abuse Committee of Experts on the Protection of Children Against Sexual Exploitation and Abuse (May 22, 2005) (transcript available at http://www.coe.int/T/DC/Press/news/20060522_disc_sga_EN.asp).
\item \textsuperscript{265} See id.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} de Boer-Buquicchio, supra note 264.
\item \textsuperscript{270} Explanatory Report, supra note 163, ¶ 112.
\item \textsuperscript{271} Id.; see Svensson, supra note 1, at 647–48.
\item \textsuperscript{272} Explanatory Report, supra note 163, ¶ 112.
\item \textsuperscript{273} Id.
\end{itemize}
gional document for COE Member States, it is open to outside signature and accession. The scope of the Convention spans both key Destination States in Eastern Europe and numerous Sending States of Western Europe. Consequently, the instrument addresses CST both domestically and abroad through a “comprehensive international instrument” which protects children, assists victims, and combats offenses.

B. Enforcement Measures

Arguably the Convention’s central effort, from a criminal law perspective, is the creation and enhancement of law enforcement measures that target sexually exploitative offenses. Perhaps unsurprisingly, many of the Convention’s CST-related provisions incorporate components of national CST legislation that have already been discussed.

1. Jurisdiction

Because the Convention covers both Sending and Destination States, its law enforcement measures must address local as well as ET offenses. To this end, the Convention’s criminalization program enhances statutes against exploitative conduct domestically, while also mandating that member states establish ET jurisdiction over Convention offences committed abroad by nationals or “habitual resident[s].” This latter requirement advances the position of those member states that are currently without CST-relevant ET legislation or that only have ET legislation covering nationals.

Additional provisions remove jurisdictional obstacles and extend states’ prosecutorial power. Notably, Articles 25(4) and 25(5) remove dual criminality and formal victim requests and state complaints as requirements of criminal prosecutions.

2. Criminalization: Perpetrators, Offenses

As important as broadening ET jurisdiction is to the Convention’s law enforcement program, at the document’s heart are those provisions that criminalize exploitative acts. Under Article 19, child prostitution is defined as the use of a child for sexual activities where

274 Convention, supra note 15, art. 45(1) (noting that non-member signature is available for all participants that have participated in its elaboration).
276 Convention, supra note 15, pmbl.
277 Id. art. 25(d)–(e).
money “or any other form of remuneration or consideration [is] . . . promised as payment.” 278 Child prostitution offenses include recruiting, causing, and coercing a child into prostitution as well as profiting from, otherwise exploiting, or having recourse to child prostitution. 279 Additionally, Article 24 criminalizes intentionally aiding, abetting, and attempting offenses linked to child prostitution. 280 Finally, Article 20 criminalizes production, possession, and distribution of child pornography. 281 Together, these provisions empower member states to pursue a wide range of CST offenses and perpetrators. Moreover, because Article 24 covers attempts, many of the legal benefits offered under the Act, such as pre-emptive enforcement, appear to be available.

Both traffickers and sex tour operators can be held criminally liable for causing, profiting from, or otherwise exploiting child prostitutes, as well as for intentionally aiding and abetting related offences. These provisions have unique consequences for sex tour operators because Article 26 establishes administrative liability when persons inside a legal entity commit or “[make] possible” offenses on its behalf. 282 By targeting the legal entity, the Convention threatens the driving force behind these operations: profitability. 283

This is not to say that these criminalization provisions are without problems. The Convention does not define “sexual activities,” leaving member states to come up with their own interpretations. 284 This in turn invites the defense that allegedly criminal conduct is not in fact covered under narrow statutory interpretations. 285 While the term “sexual activities” looks sufficiently general, a “laundry list” approach, describing some examples of covered acts, would better support prosecution efforts. This approach was utilized in the UN Protocol to Prevent, Suppress and Combat the Trafficking in Persons, Especially Women and Children 286 (UN Protocol) to define and criminalize human trafficking. Commentators on the UN Protocol credit this defi-

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278 Id. art. 19(2).
279 Id. art. 19(1)(a)–(c).
280 Id. art. 24(1)–(2).
281 Convention, supra note 15, art. 20(1).
282 Id. art. 26(1)–(2).
283 See, e.g., Agyemang, supra note 3, at 938–39 (discussing how prosecution of a sex tour operator business can halt productivity).
284 Explanatory Report, supra note 163, ¶ 127.
285 See SEABROOK, supra note 1, at 108–09 (discussing how this defense is asserted by perpetrators in numerous documented prosecutions).
tional specificity as the reason for more robust criminal statutes and enhanced national enforcement.287

Another problem with the Convention is that its focus on child prostitution involving commercial exchanges is limiting in light of the types of exploitation regularly occurring in informal sex markets. The Convention’s broad description of commercial exchanges invites a wider understanding of CST offenses, perhaps including some that are more indicative of the activity of informal markets. In situations, however, where patrons receive both sexual and non-sexual services which have not been specified or promised in advance, authorities saddled with the Convention’s definition may be unduly restrained and will ultimately have difficulty proving related offenses.

This shortcoming is significantly ameliorated by the Convention’s criminalization of “non-commercial” forms of child exploitation. Article 18(1)(a) requires members to criminalize intentional sexual conduct with an underage child as defined by national law.288 This provision does not require that sexual conduct be overtly commercial. It does, however, allow member states to set their own ages of consent. This departure from the Convention’s overall harmonization program is unlikely to create the disastrous outcomes some critics have suggested.289 The removal of dual criminality requirements weakens criminal preference among patrons who travel to states with low ages of consent and preserves criminal liability. Further, Article 18(1)(b) criminalizes intentional sexual conduct with any person under the age of eighteen, regardless of state-endorsed ages of consent, when there is an abuse of influence over a child.290 Under the Convention, abuses of influence include situations exhibiting unequal economic or social standing that enable individuals to “control, punish, or reward,” children.291 This encompasses the majority of CST cases, including those occurring in informal markets.

3. Victims and Criminal Justice Procedures

In addition to establishing broad criminalization provisions, a group of Convention provisions make several adjustments to criminal justice procedures, with particular concern to how they affect CST vic-

287 Mattar, supra note 97, at 368; Potts, supra note 16, at 236.
288 Convention, supra note 15, art. 18(1)(a).
289 See Seabrook, supra note 1, at 103, 114; Svensson, supra note 1, at 656.
290 Convention, supra note 15, art. 18(1)(b).
291 Explanatory Report, supra note 162, ¶ 124.
tims. These provisions track the progressive trends pursued by national legislation. Ultimately, however, Convention negotiators desired to minimize disparities between state procedural practices and transition beyond the standards set by previous national and international instruments.

Generally, member states are to be guided by the victims’ rights and “best interests” while implementing a “protective approach” that avoids aggravating victim trauma and incorporates state assistance to victims.292 Notably, under Article 31, states are required to protect the rights and interests of victims, “including their special needs as witnesses.”293 A threshold issue addressed by this provision is the non-criminal status of child victims. By aligning children’s roles as witnesses with their victim rights, the victim’s utility as a mere witness is de-emphasized.

The Convention provides children, as both victims and witnesses, with specific protections designed to promote victim safety and comfort as well as witness cooperation.294 Article 31(a) requires states to inform victims of their rights and available services;295 this further assures victims of their non-criminal status. Additionally, 31(b) requires that victims are informed when detained perpetrators are released, in order to minimize intimidation, retaliation, or re-victimization.296 Child-friendly proceedings are furthered by safeguards placed on the victim’s identity and privacy, so long as they comport with the fair trial procedures of the state.297 In particular, publication of the victim’s image and identifying information is prohibited, victim contact with perpetrators is minimized, and intermediaries—instead of victims—may address courts and present evidence.298 All information is presented in a “manner adapted to their age and maturity and in a language that [victims] can understand.”299 Other provisions mandate that investigatory and judicial interviews be conducted on child-friendly premises, by specially trained personnel.300 Finally, victim trauma is reduced during trial by permitting both closed hearings and the use of

292 Convention, supra note 15, art. 30(1)–(2); see also Explanatory Report, supra note 163, ¶¶ 209, 214.
293 Convention, supra note 15, art. 31(1).
294 See, e.g., Explanatory Report, supra note 163, ¶ 208.
295 Convention, supra note 15, art. 31(1)(a).
296 Id. art. 31(1)(b); see also Explanatory Report, supra note 163, ¶¶ 210(d), 219–21.
297 Explanatory Report, supra note 163, ¶¶ 212, 222.
298 Convention, supra note 15, art. 31(1)(c)–(e).
299 Id. art. 31(6).
300 Id. art. 35(1)(b)–(c).
appropriate communication technologies for victim testimony and confrontation with the accused.\textsuperscript{301}

Other key provisions also reduce victim trauma, enhance testimony quality, and account for various time and cost considerations of proceedings. In particular, as seen in the Australian system, victim interviews are videotaped “where appropriate,” and accepted as evidence.\textsuperscript{302} Similarly, CCTV and direct satellite feeds that offer real time witness testimony from remote locations are promoted.\textsuperscript{303}

A final procedural adjustment eases statutory limitations on Convention offenses. As noted, CST victims frequently lack the opportunity to identify offenders via formal channels. For this reason, the statute of limitations on offenses often expires before offenders are brought to justice. Seeking to address this problem, the Convention requires that the statute of limitations run within a “reasonable” time from the victim’s age of majority, not from the time of the offense.\textsuperscript{304}

4. Inter-Party Cooperation

Supporting the Convention’s criminalization and procedural provisions are several measures bolstering international cooperation.\textsuperscript{305} One prominent provision aims to accelerate “circulation of information and evidence” in the areas of prevention, investigation, and prosecution, as well as victim protections and assistance. These efforts are designed, at least in part, to enhance the prosecutorial process, which will undoubtedly lead to lower costs and will improve the quality of evidence.

The cooperative provision which most affects CST prosecutions is that which establishes the Convention as the legal basis for mutual legal assistance in criminal matters or extradition.\textsuperscript{306} When perpetrators flee across international boundaries, insufficient cooperation between states can stifle transnational criminal proceedings, adding significant cost and delay to the process.\textsuperscript{307} Mutual legal assistance agreements al-

\textsuperscript{301} Id. art. 36(2)(b).
\textsuperscript{302} Id. art. 35(2).
\textsuperscript{303} Convention, supra note 15, art. 36(2)(b).
\textsuperscript{304} Id. art. 33.
\textsuperscript{305} Id. art. 38(1)–(4).
\textsuperscript{306} Id. art. 38(3); see also Explanatory Report, supra note 163, ¶¶ 252, 254 (citing COE instruments such as the Convention on Extradition and the Convention on Mutual Assistance in Criminal Matters, and EU instruments such as the Council Framework Decision regarding arrest warrant and the surrender procedures between member states).
\textsuperscript{307} See Seabrook, supra note 1, at 111.
leviate such burdens on international investigations and prosecutions. Moreover, bureaucratic obstacles diminish as the frequent use of these instruments increases both the bonds between distinct state enforcement mechanisms and the familiarity with foreign operational systems.\footnote{308}{See Explanatory Report, supra note 163, ¶ 254.} Because COE members and the European Union (EU) are already party to instruments that operate as mutual legal assistance agreements,\footnote{309}{See id. ¶¶ 252, 254, 258, 260.} the impact here will be most pronounced for states outside the COE and EU who accede to the Convention under Article 45.\footnote{310}{See id. ¶ 260.}

Finally, the Convention requires states “to endeavor to integrate” action programs aimed at assisting Destination States to combat Convention offenses within their borders.\footnote{311}{Convention, supra note 15, art. 38(4); Explanatory Report, supra note 163, ¶ 261.} If CST truly addressed, key Destination States must be integrated into international enforcement and prevention initiatives. Foreign assistance programs offer benefits to these Destination States by providing law enforcement training and resources to apprehend perpetrators, as well as by supplementing victim assistance programs. Programs that provide additional occupational, educational, or informational assistance to at-risk children can also be used to tackle some of the root causes of CST.

A potential criticism is that the Convention’s provision concerning these vital programs is merely permissive and not binding. However, it is difficult to imagine that any provision which requires members to aid non-member states would garner collective agreement and necessary signatories. This is particularly true considering the long histories of corruption in many Destination States.

A more serious criticism is that the Convention provision fails to establish the possibility of rendering coordinated economic sanctions for states which perpetuate CST offenses. Because states have traditionally tolerated and even indirectly promoted CST for financial gain, levying multilateral economic burdens on these same states could motivate a dramatic, curative response. Given the successful unilateral effort of the TVPA, a collaborative economic response would presumably yield even stronger results. With the proper financial motivators, Destination States may come to realize that their financial stake in CST is relatively small. Creating a financial cost for tolerating CST industry might prompt such states to finally crack down on CST, while retaining their “standard” sex tourism industry.
There is some evidence that states may be willing to back orchestrated economic sanctions to combat global criminal trends. One example is “The Forty Recommendations” offered by the Financial Action Task Force (FATF), which include coordinated countermeasures to penalize states that flout the FATF recommendations and harbor criminal behavior.\footnote{312} The criminal trends addressed by the FATF have significant, immediate economic consequences for coordinating states that might mitigate the economic backlash that could accompany economic sanctions, and help explain a sanctioning state’s willingness to coordinate with others. Such economic considerations, however, are not necessarily dispositive for states trying to determine whether or not to join such a coordinated effort. Ultimately, the FATF’s reliance on a multilateral sanctions program shows that it is at least possible to achieve dramatic results from rogue states whose interest in criminal behavior is principally economic. This example holds out a beacon for change in states committed to curbing the global criminal trend of CST.

C. Prevention

Several provisions of the Convention’s comprehensive program are aimed at preventing exploitation.\footnote{313} Article 9 prompts states to encourage private-sector participation, particularly in the tourism and technology industries, in information campaigns designed to raise awareness about exploitation among travelers and communities with at-risk child populations.\footnote{314}

Information campaigns are often championed as vital anti-CST measures because they address serious information deficiencies that perpetuate offenses.\footnote{315} As trafficked persons lack sufficient knowledge of immigration procedures, they are susceptible to a trafficker’s false advertisements for work abroad. The information deficit among child victims is especially problematic. Additionally, new evidence confirms that CST perpetrators increasingly exploit newly available technologies, such as text messaging and the Internet, to facilitate offenses.\footnote{316} Such technologies provide new distribution avenues for recruitment advertisements.\footnote{317} Arguably, the Convention’s promise of raising awareness

313 Convention, supra note 15, art. 4.  
314 Id. art. 9(2).  
315 See Explanatory Report, supra note 163, ¶ 70.  
317 Id.}
of CST among Internet service providers and adjusting industry norms is responsive to such technologically informed exploitation techniques.

There is evidence, moreover, that tourists fail to understand the exploitative conditions of CST and assume their patronage principally benefits the prostituted child.\textsuperscript{318} Tourists may also be unaware of the consequences of committing offenses in foreign states where child prostitution appears culturally acceptable. Such misunderstandings may contribute to the CST offenses, especially among opportunistic patrons. Information campaigns within the tourism industry highlighting the exploitative conditions of child prostitution, as well as health and legal risks associated with CST offenses, may act as effective deterrents for some offenders. Given their COE membership, Eastern European states in particular stand to benefit from these industry-based programs. To date, several states have teamed with the tourist sector to implement information campaigns, which appear to have achieved stricter criminal enforcement.\textsuperscript{319}

Article 8(2) prohibits the dissemination of materials advertising services which would be an offense under the Convention.\textsuperscript{320} Which materials are prohibited by this measure, however, remains unclear. Arguably, advertisements published by sex tour operators would be covered, as they are in New Zealand.\textsuperscript{321} While successfully prohibiting such materials may dampen the industry and make child sex less accessible to perpetrators, problems will inevitably persist. As Convention drafters suggest, these prohibitions may encounter difficulties with freedoms of information and speech in several European nations protected under the ECHR, so the positive impact of this provision is uncertain.\textsuperscript{322} It should also be noted that while information campaigns are vital, they can offer governments a merely cosmetic solution to CST.\textsuperscript{323} Making a show of compliance, states can ignore remedies that address more systemic causes.\textsuperscript{324}

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\textsuperscript{318} See generally Norbert Schnorbach, States and Travel Agencies Move Against Sex Tourism, BC CYCLE, July 5, 1994.

\textsuperscript{319} See id.

\textsuperscript{320} Convention, supra note 15, art. 8(2).

\textsuperscript{321} See Crimes Act, 1961 S.N.Z. No. 43 § 144 (N.Z.).

\textsuperscript{322} See Explanatory Report, supra note 163, ¶ 67 (discussing ECHR art. 10 protections).

\textsuperscript{323} Jonathan Todres, The Importance of Realizing “Other Rights” to Prevent Sex Trafficking, 12 CARDozo J.L. & GENDER 885, 886–87 (2006). This article appeared as part of a symposium issue, entitled Sexual Slavery: New Approaches to an Old Problem.

\textsuperscript{324} Id.
D. Victim Assistance

Under the Convention, victim assistance provisions aim to establish “social programs” and “multidisciplinary structures” to support victims and their directly affected caregivers.\(^{325}\) The Convention establishes both short and long-term programs for “physical and psychosocial recovery.”\(^{326}\) Doing so positively impacts victims’ performance as witnesses. Long-term recovery initiatives respond forcefully to persistent criticisms of earlier instruments that victim care improperly focused on immediate rescue care and the victim’s performance as a witness.\(^{327}\) Convention negotiators note that protracted trauma may require long-term care, which also comports with the Convention’s goal of integrating victims back into society.\(^{328}\)

Along these lines, the Convention stands out in addressing psychological scars that accompany the sexual victimization of children and impede social reintegration.\(^{329}\) Victim rehabilitation is further advanced by commitment to the family unit, particularly by prescribing “therapeutic assistance” for persons close to the victim.\(^{330}\) Investing in the family unit as a primary instrument for long-term victim rehabilitation is an innovative step forward for this type of legislation.

While these state assistance programs appear ambitious, the Convention alleviates some burden by requiring members to collaborate with victim aid organizations, particularly NGOs, to meet program goals.\(^{331}\) Historically, NGOs have played a major role in the rehabilitation stage of child victims of sexual exploitation. Earnest collaborative efforts between states and NGOs will enhance the effectiveness of state assistance measures.

Despite its innovative program for victim assistance, the Convention is less directive than desirable when it comes to naming specific social and health services obligations of states. For example, negotiators note that state obligations for victim recovery could include medical screening and treatment concerning STD and HIV infection.\(^{332}\) The lack of requirements by the Convention regarding which health and

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\(^{325}\) Convention, supra note 15, art. 11(1); Explanatory Report, supra note 163, ¶ 88.
\(^{326}\) Convention, supra note 15, art. 14(1).
\(^{328}\) See Explanatory Report, supra note 163, ¶ 95.
\(^{329}\) See id. ¶¶ 96–97.
\(^{330}\) Convention, supra note 15, art. 14(4).
\(^{331}\) Id. art. 14(2).
\(^{332}\) Explanatory Report, supra note 163, ¶ 95.
social services states should pursue may allow states to evade taking more substantive steps toward victim recovery and rehabilitation. A major failure of the Convention, unlike other prior instruments, is that it fails to contemplate other basic victim needs, such as housing, food, and education—a glaring omission, given the economic deprivation that so commonly leads to child exploitation.  

CONCLUSION

Now that CST has attracted global attention, it frequently appears on the domestic and foreign policy agendas of national legislatures. Despite these signs of progress, CST offenses continue to escalate. To combat this, multinational approaches that synchronize various states’ legislation are needed.

The Convention is currently the best standard. Its comprehensive program incorporates some of the best practices of both Sending and Destination States, and adds new, innovative enforcement and assistance provisions. Ultimately, participating states are moved toward robust action and greater legal homogenization while still enjoying a fair margin of leeway to realize their commitments.

Perhaps the greatest limitation of the Convention with respect to CST is the fact that, despite being open for outside ratification, its membership is unlikely to include many of the popular Destination States outside Europe. Because the ability of Sending States to detect, investigate, and prosecute CST offenders is limited even under the best circumstances, gaining serious involvement from all Destination States is vital to curbing the current escalation of CST.

For this reason, failing to adopt measures that would unite Convention members into a formidable economic bloc that could levy steep sanctions against states persistently tolerant of CST was a serious oversight. Future multi-national instruments should either secure the membership of all Destination States, or adopt provisions to coordinate economic sanctions against the remaining outliers.

\footnote{See UN Protocol, \textit{supra} note 286, art. 6(3).}
THE IMPACT OF ALTERNATIVE CONSTITUTIONAL REGIMES ON RELIGIOUS FREEDOM IN CANADA AND ENGLAND

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Abstract: This Article examines whether the global trend of codifying rights in entrenched bills accompanied by judicial review to broaden rights protection is justified. By comparing the religious freedom regimes in Canada and England, this Article finds that although the Canadian constitutional transformation in the late Twentieth Century contributed to strengthening religious freedom, its overall effect has not been broader than the protection afforded by its primordial English statutory model. As such, the Article challenges the ongoing legal debate over judicially enforced constitutional systems of rights. Proponents of such systems praise their extensive contribution to rights protection, while opponents warn against their obstructive impact on the separation of powers. This Article concludes that both sides of the debate overstate their arguments by incorrectly presupposing the actual effects of a judicially enforced constitutional system of rights.

Introduction

Observers have detected a trend in the late Twentieth Century of states opting to better protect fundamental rights by enacting authoritative constitutional texts that entrust courts with the power to invalidate legislation infringing on these rights.1 This Article examines the trend toward constitutional adjudication of rights protection through a comparison of Canada and England.2

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2 Great Britain is composed of England, Wales, Scotland, and Northern Ireland, each with its own legal system. England is the largest of these in both size and population. Eng-
Canada underwent a transformative constitutional reform in the early 1980s, culminating with the adoption of an entrenched bill of rights known as the Canadian Charter of Rights and Freedoms (Charter). While the Canadian public reacted positively to the enactment of the Charter, a fierce debate has taken place in Canada’s academic circles regarding this change. Charter supporters embrace the possibilities for judicial enforcement of rights and fundamental freedoms. Charter critics, on the other hand, portray its enactment as a perilous development, with right-leaning critics blaming the Charter for creating a power shift from parliamentary supremacy to judicial supremacy, and left-leaning critics pointing to its failure to advance social justice in Canada.

England is among the few remaining states without a codified constitution. Sharing Canada’s desire to broaden rights protection, England also debated whether to join the global trend and adopt an entrenched constitutional text. Committed to its fundamental principle of parliamentary sovereignty, famously articulated by A.V. Dicey, England has thus far refrained from undertaking such a transformation. Nevertheless, in 1998 the English Parliament enacted the Human Rights Act (HRA), incorporating the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) into English law. Although the content of the Convention is similar to many constitutional texts around the world, it includes several constructions that effectively block the entrenchment of rights in England.

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3 Canada Act (UK) 1982, c. 11, sched. B.
5 Id.
7 Dicey’s famous quote: “The Principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . [had], under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.” A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 39–40 (10th ed. Macmillan 1959) (1885).
8 Human Rights Act, 1998, c. 42 (Eng.).
land as well as the possibility of judicial encroachment on parliamentary supremacy. As such, England, under the HRA, remains committed to its traditional model of statutory protection of rights.

Because the practice of safeguarding rights and freedoms is among the fundamental principles of a liberal democracy, any meaningful policy debate on the merit of a constitutionally entrenched legal system should involve a factual assessment of the scope of protection afforded to fundamental rights. Accordingly, this Article critically appraises the effects of the two legal regimes—a judicially enforced constitutional system of rights in Canada and a statutory protection model in England—on the right to religious freedom, a keystone in Western human rights ideology that has continually remained “the most common form of human rights violation in the world.”

The following analysis is organized in four parts. Part I lays out the contextual foundation for this comparative study by explaining its warrant in the context of the controversy over rights protection. Part II analyzes the developments of the Canadian legal framework with respect to religious freedom, including the changes caused by the enactment of the Charter. Part III traces the protection of religious freedom within the English system. Finally, Part IV compares specific issues concerning religious freedom that have arisen in both states and the effects of each model on the scope of protection afforded to religious freedom.

I. RATIONALE FOR COMPARING CANADA AND ENGLAND

The extensive ties between Canada and England motivate a comparison of the two states for a number of reasons, three of which have particular relevance. First, England’s historic dominance in Canada (although never exclusive due to strong French influence in Quebec), generated lasting social and cultural links in addition to strong political and legal ties. Canada’s Confederation in 1867 was prescribed under English legislation, the British North America Act 1867 (B.N.A. Act),


10 The British North American Act, 1867, 30 & 31 Vict., c. 3, reprinted in R.S.C. app. § 2, no. 5 (1985). In this Article, following Professor Peter W. Hogg, I will continue to use the Act’s historical name when discussed in a historical context.
ultimately preserving Canada’s status as a British colony.\textsuperscript{11} Moreover, despite adopting a federal system upon Confederation, Canada continued to follow the English model of parliamentary supremacy as its federal and provincial legislatures all had full legislative powers.\textsuperscript{12} Over the years the legal ties between Canada and England loosened, but the fundamental termination of these ties correlates with the adoption of the Charter by Canada.\textsuperscript{13} As such, a comparison between Canada and England highlights a particular point in time—the adoption of a judicially enforced constitutional system by Canada in 1982—from which it is possible to measure the effects of alternative legal systems.

Second, the strong historical, cultural, and political ties between these two countries have generated a reasonable academic tendency to group them together in many legal studies, most notably when contrasted with their distant cousin, the United States.\textsuperscript{14} Nevertheless, Canada chose to transform its English-based model of parliamentary supremacy by adopting a constitutional model, limited somewhat by the Charter’s section 33 override (authorizing federal and provincial legislatures to declare legislation operative “notwithstanding” the Charter for a renewable period of five years).\textsuperscript{15} An argument can be

\textsuperscript{11} The Preamble to the B.N.A. Act proclaimed the adoption of a federal system in the Dominion of Canada with “a Constitution similar in principle to that of the United Kingdom.” Hogg argues that “apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before.” Peter W. Hogg, \textit{Canada: From Privy Council to Supreme Court, in Interpreting Constitutions} 55–105 (Jeffrey Goldworthy ed., 2006). This conclusion is further supported by the fact that the B.N.A. Act did not include an amendment procedure, leaving the main constituent powers in British Parliamentary hands. Peter Oliver argues that this was “not an oversight,” but a “constitutional understanding” that “the Canadian constitution [was] also necessarily Imperial.” Peter C. Oliver, \textit{The Constitution of Independence} 111 (2005).

\textsuperscript{12} See Gardbaum, supra note 1, at 719.

\textsuperscript{13} Oliver, supra note 11, at 2. Although Canada remained connected to the English monarchy, Oliver rightly argues that this does not detract from its “constitutional independence” as a separate legal system, since Canada “can at any moment put a permanent end to that arrangement of its own volition.” \textit{Id}.

\textsuperscript{14} James B. Kelly, \textit{Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent} 263 (2005). Canada and England are often grouped together (along with Australia and New Zealand) under the characterization of the “commonwealth model of constitutionalism.” \textit{Id}. See generally Gardbaum, supra note 1.

\textsuperscript{15} See Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982, § 33(1) (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [the substantive rights provisions] of this Charter.”). Sections 33(3) and (4) declare that such a legislative override of a Charter right is limited to five years but may be reenacted. See § 33(3), (4).
made that the inclusion of section 33 undermines the constitutional status of the Charter. The framers’ intent, however, was that section 33 would only be used in “rare instances where the legislature was in disagreement with judicial interpretation regarding major matters of public policy,” and with time this extremely controversial section has been increasingly viewed as a dead letter. Canada’s departure from the traditional parliamentary supremacy model necessitates this comparison in order to assess the effects of such a choice on the legal protection of fundamental rights and freedoms.

The last motivation for comparing Canada and England hinges on the fact that neither state opted for the classic liberalist formula of separating religion and political affairs as the means to protect religious freedom. In England, religious independence from Catholicism in the Sixteenth Century was linked to the establishment of Anglicanism as the state’s religion. In Canada, religion played a central role at the time of Confederation in establishing a bicultural Anglo-Protestant and French-Catholic nation. Also, while the historical effects of religion on the political arrangements of these states have been quite different, contemporary times are marked by a growing convergence in the role of religion. In the latter part of the Twentieth Century, both Canada and England relaxed their immigration policies, yielding increased religious diversity in these formerly Christian

17 See, e.g., W.A. Bogart, Courts and Country: The Limits of Litigation and the Social and Political Life of Canada 311 (1994) (“[Section] 33 has been so excorciated that it is ‘politically speaking . . . almost unusable.’”); Julie Debeljak, Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights, 26 Melb. U. L. Rev. 285, 322 (2002) (“The use of § 33 has gained a reluctant acceptance in Quebec and only once to date has it been used to directly overturn a judicial decision. Outside of Quebec, use of the override clause appears to be politically unacceptable.”); Gardbaum, supra note 1, at 726 (“[A] constitutional convention appears to have arisen . . . that the override provision should not be used at all.”); Howard Leeson, Section 33, The Notwithstanding Clause: A Paper Tiger?, 6 Choices 3, 20 (2000) (arguing that although § 33 is available in theory, “the less it is used, the less likely it will be used.”).
18 See John Locke, A Letter Concerning Toleration 1689 (Hackett 1983) (1689) (setting forth the idea of separating religious and state affairs in the interest of religious liberty).
19 Shannon Ishiyama Smithey, Religious Freedom and Equality Concerns Under the Canadian Charter of Rights and Freedoms, 34 Can. J. Pol. Sci. 85, 88 (2001). Legal guarantees were made to ensure the continuation of this cultural distinctiveness, most notably through the funding of minority religious education for the Catholic and Protestant minorities in each of the provinces.
nations. During this period, both countries experienced sharp declines in active worship within the long-established Christian churches and the emergence of new religious movements. These transformations of the religious demography in England and Canada gave rise to growing social discontent in both states against the original church-state arrangements, and created the need for political and legal reforms (detailed in the next two sections) to overcome the newly emerging religious tensions.

The contemporary religious demography of the two states is similar. As of 2001, approximately 74% of the Canadian population self-identified as Christian; roughly 43% were Catholic, and 31% belonged to a variety of Protestant denominations. Muslims comprised 2%, while Jews, Buddhists, Hindus and Sikhs each comprised approximately 1%. Roughly 17% self-identified as non-religious, and 2% either did not state their religion or belonged to a religion comprising less than 0.1% of the total population. According to the British Office of National Statistics, approximately 72% of the British population currently identifies as Christian; at 29% of the total, Anglicanism is the largest denomination. Muslims comprise nearly 3% of the population, with Hindus, Sikhs, Jews and Buddhists each comprising 1% or less. An additional 15% claim no religion at all.

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There is general agreement among Canadian scholars that the enactment of the Charter was a watershed point in Canadian constitutional history. This consensus, however, is overshadowed by bubbling controversy over the extent of the Charter’s significance and its scope of influence within Canada’s parliamentary democracy. To clarify, there are primarily two interrelated debates. The first centers on the legitimacy of institutionalizing judicial activism through the enactment of the Charter. Taken together, section 52 of the Constitution Act\textsuperscript{26} and section 24(1) of the Charter\textsuperscript{27} establish the power of judges to restrain the other branches of government by invalidating their actions on constitutional grounds. Supporters of this structural change characterize it as a fundamental revolution in the scope of rights protection in Canada. Lorraine Weinrib argues that the Charter granted legitimacy to minority claims that would otherwise have been blocked by majoritarian calculations, substantially transforming Canadian politics.\textsuperscript{28}

This view, however, is widely criticized by scholars from all over the academic spectrum. Socially progressive academics emphasize the Charter’s inability to rectify social injustices in Canada; the deeply political nature of Charter adjudication processes, existing social and political power structures, economic inequalities, and institutionalized support for majoritarianism all undermine the possibility of generating any real progressive change under the Charter.\textsuperscript{29} Conservative critics focus on the institutional power shift from parliamentary sovereignty to judicial supremacy. The power of judicial review authorized by the new constitutional principles, critics argue, enables an unelected and unaccountable group of judges to make policy and shape political discourse. Legislative power is weakened, thus undermining

\textsuperscript{26} Constitution Act, 1982, § 52 (“the Constitution of Canada is the Supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force of effect.”).

\textsuperscript{27} Canada Act (UK) 1982, c. 11 sched. B, § 24(1) (“[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”).


the potential for reaching political compromises, a particularly worrisome problem in light of Quebec’s separatist movement.\textsuperscript{30} The main problem with this latter rationale, however, lies in the fact that the expansion of judicial review in Canada was intended by the framers and established by a democratic process. The framers chose to substitute the English model of parliamentary supremacy (limited by section 33 of the Charter) with a constitutional model aimed at broadening the protection to fundamental rights and freedoms.\textsuperscript{31}

The other debate within Canadian academia focuses on the Charter’s overall political influence, effectively curbing the debate on judicial review. Critics of the Charter’s far-reaching effects, most notably Charles Epp, downplay the importance of the Charter as an instrument of rights protection, perceiving it as insignificant without what Epp identifies as “a support structure for legal mobilization.”\textsuperscript{32}

Contrasting with this view are those emphasizing the Charter’s invaluable contribution to the task of generating a shared political responsibility for rights protection in Canada. Among those who view the Charter as a positive development, two primary approaches are identifiable. Peter W. Hogg and Allison A. Bushell described the Charter as altering the relationship between the legislative and the judicial branches, forcing them to relate to and reflect on each other’s decisions as they formulate social values and decide on the scope of rights protection in Canada.\textsuperscript{33} James B. Kelly, alternatively, advances a “cabinet-centered approach” to rights protection. The significance of the Charter, Kelly argues, lies much earlier in the legislative process.


\textsuperscript{31} This rationale has been described in Justice Lamer’s opinion in \textit{Re B.C. Motor Vehicle Act} 1985 SCC 36; see also Kelly, supra note 14, at ch. 2.


namely in transforming the way in which the cabinet and its bureaucracy address and transmit Charter values into their activities.\textsuperscript{34}

English politicians and commentators have also been engaged in a long and lively debate as to whether the adoption of a bill of rights would improve the protection of rights in England.\textsuperscript{35} Reminiscent of the Canadian narrative, opponents of a constitutional transformation raised concerns that it would undermine the democratic nature of parliamentary supremacy, empowering and politicizing the non-elected judicial branch and weakening the flexibility of England’s existing political arrangements.\textsuperscript{36} Nevertheless, as a growing consensus argued that the common law and existing legal documents afforded insufficient protection to fundamental rights and freedoms,\textsuperscript{37} a number of possible solutions were suggested.\textsuperscript{38} Eventually, a majority emerged in favor of incorporating the Convention into English law, believing this to be the best fit for English legal and political traditions.\textsuperscript{39} In 1998 the New Labor government made this idea a reality when it enacted the HRA, incorporating most Convention provisions (subject to reservations and derogations made by Britain) to England.

The HRA made several significant changes to the English system. It created the first explicit statutory protection of rights and implemented anti-discrimination measures that were enforceable by English courts.\textsuperscript{40} It also authorized courts to scrutinize whether legislation violated human rights standards, thereby requiring legislators to give

\textsuperscript{34} Kelly, \textit{supra} note 14, at 16 (“The increasing frequency with which cabinet introduces amendments to ensure the constitutionality of nullified statutes and attempt to develop legislation that is more consistent with the Charter highlights...the emergence of coordinate constitutionalism in Canada.”).

\textsuperscript{35} Gardbaum, \textit{supra} note 1, at 732.


\textsuperscript{40} K.D. Ewing, \textit{The Human Rights Act and Parliamentary Democracy}, 62 Mod. L. Rev. 79, 79 (1999) (discussing the scope of the incorporation of the HRA into English law).
effect to Convention rights. Nevertheless, these institutional reforms have not transformed the English system into a quasi-constitutional system. Parliamentary supremacy continues to define the English system, and it is statutory, not constitutional protection, that remains the primary mechanism for protecting rights.

These conclusions stem from the following five indicators.

First, the legislative process of the HRA undoubtedly signals that any change in rights protection in England is confined to the boundaries of parliamentary supremacy. The White Paper introducing the HRA Bill declared that the government:

[H]as considered very carefully whether it would be right for the Bill to go further, and give to courts in the United Kingdom the power to set aside an Act of Parliament which they believe is incompatible with the Convention rights. . . . The Government has reached the conclusion that courts should not have [such] power. . . . Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament.

Second, the HRA was enacted as an ordinary piece of legislation with an ordinary majority and its amendment does not require any special procedure as is common with entrenched texts. Furthering the conclusion that the HRA was not intended to transform the English system into a constitutionally entrenched system is the fact that the HRA was enacted in 1998, but its application was delayed until 2000, bestowing the Joint Committee on Human Rights with the power to scrutinize the conformity of legislation to the HRA rather than leaving it to the judicial branch.

41 Human Rights Act § 3(1) (“So far as it is possible to do, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”).


Third, although the HRA created a new rule for statutory interpretation, its ability to impose constitutional constraints is highly limited. The HRA requires the English domestic courts to “take into account” the case law of the European Court of Human Rights (ECHR) and the European Commission of Human Rights when “determining a question which has arisen in connection with a Convention right.”44 It also requires the courts to interpret English legislation “so far as it is possible” in a manner “compatible with the Convention rights.”45 English courts, however, are not bound to follow the ECHR’s jurisprudence, and an attempt to impose a stronger constraint on the English courts has been rejected.46

Fourth, Parliament has retained the ability to legislate in violation of fundamental rights. When there is an incompatibility between an English provision and a Convention right, the HRA authorizes the English courts to “make a declaration of that incompatibility,”47 alerting the government of the inconsistencies. Despite this, such a declaration does not automatically invalidate the legislation as it does in Canada. Instead, the government is given three options: (i) the legislature can choose to ignore the declaration of incompatibility altogether, leaving the incompatible legislation in force;48 (ii) the legislature can choose to repeal or amend the incompatible legislation by the ordinary legislative process; or (iii) a minister can take remedial action to correct the incompatibility.49 In any case, rectifying incompatibility with a Convention right remains beyond the competence of English courts.

Fifth, the scope of human rights protection under the Convention lends further support to the argument that a constitutional transformation has not taken place in England. The ECHR has generally afforded a wide margin of appreciation (deference) to domestic authorities. Its guiding principle has been that European states have autonomy in de-

44 Human Rights Act, § 2.
45 Id., § 3(1).
48 See Eric Barendt, An Introduction to Constitutional Law 50 (1998) (criticizing the compromise resulting from the English tradition of parliamentary supremacy, and noting that “[t]he reliance on government to put things right shows . . . the political character of the United Kingdom Constitution.”).
49 Human Rights Act, § 10 and Sch. 2.
termining how the government will interact with religion.\textsuperscript{50} This has often translated to non-intervention on the part of the ECHR and, by extension, the perpetuation of human rights violations. Moreover, this policy of nonintervention has generated inconsistent European human rights jurisprudence, and led to an operative difficulty on the part of English courts in extracting clear or systematic authoritative principles from ECHR case law. Under these circumstances, the effectiveness of incorporating European standards as a vehicle to extend the scope of protection afforded to religious freedom in England seems fundamentally lacking.\textsuperscript{51}

In light of these indicators, it seems that England’s adoption of the HRA allows the state to remain loyal to its Dicean heritage as it continues to place the principal responsibility of protecting fundamental rights in the hands of the legislators and the executive branch.\textsuperscript{52} As such, it is safe to conclude that the primary contribution of the HRA is not to be measured as a constitutional transformation of the English system. A more accurate description may be that the HRA facilitated communication between Parliament and the courts regarding how best to advance the protection of rights. This can be seen in the way that “disagreements about their interpretation are mediated by a new relationship between courts and Parliament, both of which have an explicit role in pronouncing on human rights issues.”\textsuperscript{53}

To conclude, the theoretical deliberations in Canada and England remain primarily confined to the debate over the institutional outcomes and effects stemming from the legal changes in each state. This Article seeks to shift the focus toward a much more fundamental quest; namely, a factual evaluation of the success of each model in perfecting the protection of rights by way of comparing the Canadian constitutional model to its ancestral parliamentary supremacy model. In other words, while most commentators assume a similar level of rights protec-

\textsuperscript{52} See Ariel L. Bendor & Zeev Segal, \textit{Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model}, 17 Am. U. Int’l L. Rev. 683, 686 (2002) (sharing the conclusion and arguing that, following the enactment of the HRA, the British system “does not focus on the judiciary as a guardian of human rights. Rather, it revolves around Parliament and Government’s heightened sensitivity to their traditional roles as the dominant protectors of human rights”); see also Campbell, supra note 1, at 6.
tion in either state, focusing their contentions on the institutional division of power, the quest here is to put to the test this very assumption and to determine the actual progress in protecting religious freedom by each model—the judicially enforced Canadian constitutional system versus the English model it sought to replace.

II. RELIGIOUS FREEDOM PROTECTION IN CANADA AND ENGLAND

A. The Development of the Canadian Religious Freedom Regime

As subordinates to English Imperial rule, Canada’s Confederation arrangements had deep English roots. Evidence of this connection can be seen in Canada’s establishment of religion as an integral factor in public affairs as well as in its lack of any formal articulation of the right to religious freedom. The protection of religious freedom, prior to the Charter, was therefore a result of piecemeal and often cumbersome English-Canadian legislation and judicial interpretation.

Two issues relating to the protection of religious freedom were notable in the early decades of the Twentieth Century: Sunday observance laws and the public actions of Jehovah’s Witnesses. On both matters, Canada’s highest court limited its intervention in legislation to federalism grounds. That is, the court did not focus on evaluating the alleged infringement on religious freedom. Rather, it determined the validity of a challenged piece of legislation by considering its conformity with the division of powers between federal and provincial governments under sections 91 and 92 of the B.N.A. Act.

In 1903, the Privy Council found Ontario’s Act to Prevent the Profanation of the Lord’s Day 1897 to be “beyond the competency of the Ontario Legislature.” The Council found that such a statute was part of the criminal law, which was reserved for the exclusive power of the federal government under section 91(27) of the B.N.A. Act. This rationale was followed by the Supreme Court of Canada in a series of subsequent cases challenging provincial and federal Lord’s Day Acts throughout Canada.

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54 See, e.g., B.N.A. Act § 93 (guaranteeing public funding for denominational schools of the Catholic minority in Ontario and the Protestant minority in Quebec that, in time, became highly contentious).

55 Ontario (Attorney-Gen.) v. Hamilton St. Railway, [1903] 7 C.C.C 326, 326 (Can.).

During the 1950s, the Duplessis government in Quebec exercised suppressive measures against Jehovah’s Witnesses to limit their public activities in the province.\textsuperscript{57} As part of this concerted effort, municipal bylaws were used to prosecute Jehovah’s Witnesses who distributed written materials in the streets. When these measures came under judicial evaluation, the doctrine of division of powers was still the courts’ primary mechanism for reviewing the Jehovah’s Witnesses’ appeals.\textsuperscript{58} \textit{Saumur v. the City of Quebec}\textsuperscript{59} marked the ascent of religious freedom discourse in the Supreme Court of Canada’s review process. The Court invalidated a municipal bylaw prohibiting the distribution of literature as applied against Jehovah’s Witnesses. Justice Rand, writing for the majority, constructed the right to religious freedom in Canada by tracing it back to legal sources as early as 1760.\textsuperscript{60} The Canadian legal system, according to Justice Rand, recognized religious freedom as one of the “original freedoms which are . . . the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.”\textsuperscript{61} Such freedoms are the foundation of Canadian democracy, and “[d]emocracy cannot be maintained without its foundation.”\textsuperscript{62}

The majority of the justices in \textit{Saumur} did not join in Justice Rand’s rationale of invalidating the municipal legislation as an infringement of the fundamental right to religious freedom. Nevertheless, due to a complex overlap between different parts of the nine opinions, this construction of religious freedom as a possible tool to invalidate discriminatory legislation became part of the majority opinion.\textsuperscript{63} As a result, the \textit{Saumur} precedent represented a substantial expansion in the scope of protection to religious freedom in Canada, albeit still as part of the Court’s application of the division of power doctrine.


\textsuperscript{59} See generally \textit{Saumur v. Quebec (City)}, [1953] 2 S.C.R. 641 (Can.).

\textsuperscript{60} Id. at 688.

\textsuperscript{61} Id. at 670.

\textsuperscript{62} Id. at 672.

\textsuperscript{63} See Macklem, \textit{supra} note 58, at 54–55 (discussing the Court’s internal division in \textit{Saumur} and how the majority opinion was constructed).
The *Saumur* decision (along with several other decisions on other issues) led some scholars to conclude that an implied Bill of Rights exists in Canada; that is, fundamental rights appeared to be judicially enforced. Nevertheless, the doctrine of an implied Bill of Rights was deficient in its protection of religious freedom. First, it was nonsystematic and depended upon the ability of an ever-changing combination of justices to reach a consensus. Second, the scope of the protection afforded to fundamental rights under the implied Bill of Rights doctrine remained limited, employed only as part of the larger context of the Canadian federal division of powers.

Between Confederation and the mid-Twentieth Century, Canada’s demographic composition changed dramatically as a result of vast immigration, creating a need for legal reform to reflect these sweeping changes. After much controversy, the 1960 Canadian Bill of Rights was enacted to answer this need. Its provisions provided an English-type statutory protection of fundamental rights applicable only at the federal level. The Preamble proclaimed deference to parliamentary supremacy, and section 1 textually restricted the judiciary to protect only those rights that “have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex.” Commentators explained the legislative choice of opting for statutory protection for fundamental rights instead of the judicially enforced constitutional model with two arguments. First, they pointed to a continued impasse between federal and provincial governments on the appropriate procedure to self-amend the B.N.A. Act, a power which had remained in English hands since 1867. This impasse effectively shelved any possibility of adopting an entrenched document in Canada. Second, they indicated that the lingering Eng-

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66 See Margarite H. Ogilvie, *Religious Institutions and the Law in Canada* 25–44 (1994) (arguing that while Canadian society has been changing rapidly, laws still reflected notions of Western European Christianity).

67 *Canadian Bill of Rights*, 1960 S.C., ch. 44 (Can.).

68 *Id.* (The Preamble proclaims that it is “desirous of enshrining . . . human rights and fundamental freedoms . . . in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority . . .”).
lish legacy of parliamentary supremacy left legislators wary about re-
defining the role of the courts in an entrenched Bill of Rights.69

Echoing these textual constraints, the Supreme Court of Canada
afforded very limited protection to religious freedom under the Ca-
nadian Bill of Rights. In Robertson and Rosetanni v. The Queen,70 op-
erators of a bowling alley open on Sundays challenged as unconsti-
tutional the federal 1906 Lord’s Day Act, which prohibited commercial
activities and the performance of work on Sundays. Justice Ritchie,
writing for the majority, refused to identify the Lord’s Day Act as a vio-
lation of the religious freedom of minority religions in Canada.71

Rights, he said, can be restricted in “in an organized society . . . based
upon considerations of decency and public order.” To allow these
limitations on rights, Justice Ritchie employed the purpose versus ef-
fect doctrine: even if the purpose of the Lord’s Day Act is “safeguard-
ing the sanctity of the Sabbath,” its effect (regulating the official day
of rest) is a “purely secular and financial one.”72 By refusing to invali-
date the Lord’s Day Act, Justice Ritchie essentially legitimized the
process of translating the majority’s religious values into law at the
expense of economic hardship to minority religious groups.

Because the Canadian Bill of Rights placed no limitations on pro-
vincial legislatures, the Supreme Court of Canada continued to review
challenges to municipal legislations under the division of powers doc-
trine. In Walter v. Attorney General of Alberta,73 a group of Hutterians chal-
 lenged Alberta’s Communal Property Act,74 a law that limited their abil-
ity to purchase communal land. Hoping to benefit from the Saumur
precedent,75 the Hutterians argued that the law infringed on their abil-
ity to exercise a central tenet of their religion, the communal holding
of land, and was therefore beyond the powers of the Province.76

The Supreme Court of Canada was unwilling to follow the line of
reasoning Justice Rand established in Saumur, choosing instead to ex-

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69 See Macklem, supra note 58, at 58; Fowler, supra note 65, at 718; McWhinney, supra
note 65, at 92. See generally Walter S. Tarnopolsky, THE CANADIAN BILL OF RIGHTS
71 Id. at 658.
72 Id. at 657–58.
74 An Act Respecting Lands in the Province Held as Communal Property, R.S.A., ch. 52
(1955).
76 See id.
exercise a highly restrained approach to rights protection. It found Alberta’s Act to be *intra vires*, because it regulated the control of land ownership, consistent with section 92(13) of the B.N.A. Act. The Court reasoned:

While it is apparent that the legislation was promoted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal properties, it does not forbid the existence of the Hutterite colonies. . . . The Act is not directed at Hutterite religious beliefs or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property.

Using the distinction between “religious belief” and the “profession of religious belief,” the Court upheld a law enacted specifically against the Hutterians. This was a regrettable outcome in the context of rights protection, for it undermined the primary rationale of affording protections to minorities: safeguarding them against the exertion of power by a majority that often finds their practices strange and threatening.

This restrictive approach to rights protection was also unhelpful to another minority group, the Salish Indians, who were convicted for hunting contrary to the British Columbia Wildlife Act of 1979 (Wildlife Act). The appellants invoked religious freedom, arguing that they hunted a deer in order to burn its meat and offer it to the spirits of their ancestors, a practice which the Court held to be a historic fundamental religious ritual. Although already in force, the Charter was not applied in this case, as the hunting incident occurred prior to its proclamation. The prohibition by the Wildlife Act of killing deer, asserted the Court, does not affect religious freedom because the hunt took place “in preparation for a religious ceremony” rather than “as part of the ceremony.” The Court went on to suggest that the appellants could have stored deer meat obtained during the hunting season, consistent with the Wildlife Act, to be used at a later time.

77 Id. at 393.
78 Id.
79 Id. at 392.
81 See Moore, supra note 28, at 1097–99.
82 Jack and Charlie v. The Queen, [1985] 2 S.C.R. 332 (Can.).
83 Id. at 335–37.
84 Id. at 344.
85 Id.
This rationale seems to undermine the purpose of protecting wildlife under the Wildlife Act, as it implicitly encourages the Salish to kill as many animals as possible during those times when hunting is allowed.

The narrow scope of protection afforded by the Supreme Court of Canada to religious freedom was characteristic of the limited protection afforded to other fundamental rights, and prompted a protracted political process for constitutional change. Prime Minister Pierre Elliott Trudeau, Canada’s principal architect for constitutional reform, envisioned the enactment of Canada’s Charter as providing a double benefit: entrenching the protection of fundamental rights, and countering Quebec’s separatism by strengthening Canadian national unity.86 Already a visionary Minister of Justice in Pearson’s government, Trudeau outlined his proposed constitutional transformation in the abandonment of the English legislative model in favor of a constitutionally entrenched system of rights.87 The constitutional process, however, proved to be a complex political endeavor that was repeatedly jeopardized by Quebec’s separatist movement, power bargaining by the provincial premiers, and a number of baffling judicial rulings documented elsewhere.88 The end result was a constitution that did not fit the single document constitutional model, as seen in the U.S. example. Rather, Canada’s constitution groups together historic legal arrangements (Constitution Act, 1867) with the newly enacted Charter, reflecting the long and gradual process of Canada’s evolution from English rule.

87 Pierre Elliott Trudeau, The Canadian Charter of Human Rights 11, 14 (1968) (“A constitutional bill of rights in Canada would guarantee the fundamental freedoms of the individual from interference, whether federal or provincial. It would as well establish that all Canadians, in every part of Canada, have equal rights. . . . A bill of rights so enacted would identify clearly the various rights to be protected, and remove them henceforth from governmental interference. Such an amendment . . . would involve a common agreement to restrict the power of governments. The basic human values of all Canadians—political, legal, egalitarian, linguistic—would in this way be guaranteed throughout Canada in a way that the 1960 Canadian Bill of Rights, or any number of provincial bills of rights, is incapable of providing.”).
The Charter accords an entrenched constitutional status to religious freedom.\(^{89}\) It prohibits discrimination on the basis of religion\(^ {90}\) and prescribes the conditions that must be met in order to derogate from this fundamental right.\(^ {91}\) The Charter also bestows the courts with the power of judicial review, authorizing them to nullify federal and provincial legislation conflicting with the protected rights.\(^ {92}\)

After the enactment of the Charter, the Supreme Court of Canada had several opportunities to develop a constitutional test for protecting religious freedom. Post-Charter constitutional jurisprudence generated a robust definition of religious freedom and overcame many of the drawbacks characterizing the pre-Charter era. The Court reinvigorated the importance of protecting minority religions as well as non-believers from “the tyranny of the majority.”\(^ {93}\) It also limited the applicability of the purpose/effect distinction used historically to dismiss claims of rights infringement only to situations in which legislation carries a valid purpose.\(^ {94}\) Furthermore, the Court endorsed a “subjective understanding” of freedom of religion in Charter analysis, asserting that once an individual demonstrates the sincerity of his or her beliefs, it is irrelevant that such a belief or practice may not be “required by official religious dogma or is in conformity with the position of religious officials.”\(^ {95}\) Finally, under the Charter regime, the Court significantly extended the protection afforded to freedom of religion on a case by case basis. For example, confidential communications with religious advisors were recognized as privileged in particular circumstances and as such were protected from forced disclosure as evidence in criminal proceedings.\(^ {96}\) Also, the private sphere of influence for religious communities was recognized within the larger society when the Court upheld a private

\(^{89}\) Canadian Charter of Rights and Freedoms § 2 (“Everyone has the following fundamental rights: (a) freedom of conscience and religion.”).

\(^{90}\) Id. § 15.

\(^{91}\) Id. § 1 (“[r]ights in Canada are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

\(^{92}\) Id. § 24 (1); \textit{see also} Constitution Act, 1982, § 52 (1). As discussed above, a solid consensus has emerged against the override in § 33. Consequently, § 33 has never been used in the context of a religious freedom issue.


\(^{94}\) Id. at 334 (“[T]he effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.”).


Evangelical university’s teacher training program that discriminated on the basis of homosexual behavior.\(^97\)

Nevertheless, this constitutional transformation has not afforded an absolute protection to religious freedom. Employing section 1 of the Charter, the Court has recognized limits to religious freedom in situations where it collided with the constitutional rights of others or with compelling state interests. Such a conflict has been reconciled according to the *Oakes* test,\(^98\) assessing: (i) whether a legislative objective is sufficiently important to permit a limitation on constitutional rights; and (ii) whether means chosen by the state are proportional to that legislative objective. Using this test, the Court has authorized emergency medical help to a child, against the wishes of the parents, who were Jehovah’s Witnesses.\(^99\) The Court has also used the test to allow the dismissal of a teacher who made anti-Semitic statements, based on his religion, to ensure an educational environment free from discrimination.\(^100\)

The Supreme Court of Canada has also been hesitant to extend Charter protection of religious freedom claims in family-related disputes. For example, in child custody battles, the Court has deferred to the child’s best interest, refusing to accommodate religious freedom claims raised by non-custodial parents.\(^101\) Similarly, the Court has upheld a judgment for damages against a Jewish husband for his unilateral breach of a divorce contract which left his wife unable to remarry and have children under Jewish law for an extended period of time.\(^102\)

### B. The Development of the Legal Freedom Regime in England

The diffused structure of the Canadian Constitution pales in comparison to the complexity of the rights protection regime in England.

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\(^{97}\) *Trinity Western Univ. v. B.C. Coll. of Teachers*, [2001] 1 S.C.R. 772, 773, 817–19 (Can.).


There is no written document declaring the constitutional sources of England, and rights do not enjoy an entrenched status. The first explicit recognition of the right to religious freedom in English law came with the enactment of the HRA in 1998. Until then, two sources of law protected religious freedom: (i) common law, which recognized religious freedom as a negative right (meaning that religion could be manifested in any way that was not legislatively restricted); and (ii) piecemeal legislation from the Sixteenth Century. This early legislation focused on different aspects of religious beliefs and often provided uneven protection to the different religious groups in England. As parliamentary supremacy continues to be the central element of the English system, this legislation remains legally unhindered in principle.

This precarious framework of rights protection resulted in periods of overt discrimination against non-Anglican. Nevertheless, it also generated attempts on the part of English law makers to accommodate the diverse religious needs of England’s many minorities. Beginning in the Seventeenth Century, after Anglicanism had established religious supremacy, concessions were made to religious minorities which gradually allowed them to publicly exercise their faith. By the Twentieth Century, the legal and political framework that developed in England with regard to religion consisted of the legally established privileged status of the Church of England, along with specific legal provisions.

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103 The 1215 Magna Carta, providing the historic cornerstone to English constitutionalism, has mostly been repealed in subsequent English legislation, primarily through Statute Law Revision Acts of 1856, 1861 and 1863. The symbolic importance of the Magna Carta has receded in England, and today greater prestige is attributed to it in the United States. See generally Ralph V. Turner, The Meaning of the Magna Carta Since 1215, 53(9) History Today 29 (2003).

104 Richard Clayton & Hugh Tomlinson, The Law of Human Rights 962–63 (2000). Following England’s break from Rome, efforts to solidify the Church of England’s status resulted in the exclusion of non-Anglicans from public life. See, e.g., Coronation Oath Act, 1688, 1 W. & M., c. 6 (making Anglicanism a precondition of succession to the throne); Corporation Act, 1661, 13 Car. 2, c. 1 (effectively barred non-Anglicans from taking part in political affairs); Act of Uniformity, 1559, 1 Eliz., c. 1 (imposing a range of punishments on those who failed to adhere to Anglican Protestantism).

105 See, e.g., Jewish Relief Act, 1845, 8 & 9 Vict., c. 53; Roman Catholic Relief Act, 1791, 31 Geo 3, c. 32; Schism and the Occasional Conformity Acts, 1719, 13 Ann., c. 7 (granting limited rights to non-Anglican Protestants); Toleration Act, 1689, 1 W. & M., c. 18. See generally Clayton & Tomlinson, supra note 104.

106 The established status of the Church of England is reflected in the following features of the English system: a legal requirement that the monarch be an Anglican; twenty-six of the most senior Anglican bishops are members of the House of Lords; the ecclesiastical law of the Church of England is part of English law; the Church of England is protected by the common law offence of blasphemy; only Christian festivals are public holidays; and several universities reserve specific posts in their theology faculties to Anglican
enacted separately for non-Anglican Protestants, Catholics and Jews, facilitating limited manifestations of their faiths.

This system remained unchallenged during the first part of the Twentieth Century. By the 1960s, however, social developments within English society were exposing the system’s limitations. The mass immigration from South Asia, the Caribbean, East Africa and the Middle East generated blatant intercultural clashes. The flourishing of these new religious movements was met with suspicion and resentment. This generated calls for stronger measures against discrimination.

English law makers responded by enacting the Race Relations Act, 1965. The Race Relations Act outlawed discrimination on the basis of “color, race, nationality or ethnic and national origins,” but not religion. In retrospect, addressing these pluralistic tensions through the legal prism of race (as opposed to religion) resulted in the creation of a new form of religious inequality. When questions of discrimination came before the English courts, they afforded racial protection to certain religious groups, such as Sikhs and Jews, but withheld this protection from other religious, multi-ethnic groups such as Muslims, Rastafarians and Jehovah’s Witnesses, who


107 See generally Winder, supra note 20.


110 For an examination of the inequities that can result when this type of practice is perpetuated, see generally Nathaniel Stinnett, Defining Away Religious Freedom in Europe: How Four Democracies Get Away With Discriminating Against Minority Religions, 28 B.C. INT’L & COMP. L. REV. 429 (2005).

111 Mandla (Sewa Singh) v. Dowell Lee, (1983) 2 AC 548 (H.L.) (appeal taken from Eng.).


113 In Niyazi v. Rymans, EAT/6/88 [1988], the Employment Appeal concluded that Muslims do profess a common religion; however, this religion “is widespread, covering many nations, indeed many colours and languages, and it seems to us that the common denominator is religion.” Islam, it concluded, was therefore not an “ethnic group” under the meaning of the Race Relations Act.


were seen as less socially cohesive than the former groups and therefore not “races” in the legal sense of the word. 116

These developments reflected the insufficient protection of religious freedoms under existing English law, which ultimately prompted passage of the HRA. 117 The HRA included the first explicit protection of religious freedom in England, drawing from Article 9 of the Convention. 118 While the protection fell short of creating an entrenched right, it did include anti-discrimination measures that recognized religion as a protected characteristic. 119

Because the HRA only came into force in 2000, it may be too early to provide a comprehensive assessment of its impact in protecting religious freedom in England. 120 Two substantial effects, however, are already apparent. First, citing Canada’s Syndicat Northcrest precedent, the House of Lords set down a broad interpretation of what may be identified as a religious belief for the purpose of evaluating religious freedom claims under the HRA. 121 Like the Supreme Court of Canada, the House of Lords concluded that it need not evaluate a claimant’s belief against any objective criteria to determine its sincerity.

A second observation regarding the HRA involves its apparent influence on the jurisprudence of the lower courts, prompting broad judicial protection to religious freedom on a case-by-case basis. For ex-


118 Article 9 of the Convention prescribes: “(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.” Conv. for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, Europ. T.S. No. 155, 213 U.N.T.S. 221 (hereinafter Convention).

119 Article 14 of the Convention prescribes: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

120 There are studies beginning to assess the HRA’s impact on the human rights culture in England. See, e.g., CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION 205 (2004).

121 R. (Williamson) v. Sec’y of Educ. & Employment, [2005] UKHL 15, 2 All E.R. 1, 10–14 (Eng.).
ample the High Court accepted a father’s challenge to enroll his daughter in an oversubscribed same-sex school on religious grounds, asserting that “since the coming into effect of the Human Rights Act 1998, the religious conviction of a parent is something to which due weight must be given in considering admission to a particular school.”

But the House of Lords, whose decisions are binding upon lower courts, has thus far proven much more reluctant to employ the HRA in broadening the protection afforded to religious freedoms. An example of this resistance may be seen in the Begum case. There, a public school had a uniform with a specific dress option designed for Muslim girls. Shabina Begum, a student at the school, wanted to wear a more traditional Muslim dress, but the school refused to allow it, arguing that it would generate divisiveness among the students. The House of Lords unanimously rejected Begum’s claim that the school was infringing on her religious freedom protected by Article 9 of the Convention.

The holding in Begum is somewhat problematic, considering the Lords’ choice to consult ECHR jurisprudence on employment cases where there was a voluntary acceptance of conditions unaccommodating to religious beliefs; education is mandatory in England and therefore does not fit the Lords’ analogy. The case, however, provides significant support for the conclusion that the HRA has not changed the division of power within the English system. While the House of Lords acknowledged that the HRA afforded greater scrutiny to review human rights claims, the Lords explicitly stated that this power has not shifted to “merits review,” but instead remains confined to finding proportionality in connection to the pursued aim. Moreover, the Lords’ decision also acknowledges that incorporating the Convention has not broadened the protection of rights in England.

Statutory exemptions have been another well-accepted method of expanding the protection of religious freedom in England. Samantha Knights observed that these exemptions “have been ad hoc rather than systematic and largely confined to major world religions with greater

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124 Knights rightly questions the relevance of employment precedents to the field of education, especially when the assumption about Begum’s free choice was questionable without a feasible education alternative for her in the area. SAMANTHA KNIGHTS, FREEDOM OF RELIGION, MINORITIES, AND THE LAW 48 (2007).
125 Governors of Denbigh High School, UKHL 15, at ¶ 30.
126 Id. ¶ 24.
bargaining power vis-à-vis the state.” \textsuperscript{127} Recently, the protection against discrimination on the grounds of religion or belief has been reinforced with the enactment of the 2003 Employment Equality (Religion or Belief) Regulations and the 2006 Equality Act. Together, these laws made discrimination on the grounds of religion or belief unlawful in the contexts of employment and the provision of goods, services, or education. \textsuperscript{128} This enhanced protection for members of minority religions and nonbelievers against both direct and indirect discrimination. \textsuperscript{129}

III. **Comparing the Effects of Different Legal Models on Religious Freedom**

Next we compare the effects of alternative religious freedom regimes—the judicially enforced Charter in Canada and the statutory protection of religious freedom in England—on the scope of protection that each affords to religious freedom. We do so by examining the legal outcomes under each constitutional framework arising from similar circumstances.

**A. Definitions**

Religious freedom and its limitations have been defined differently in Canada and England. In Canada, section 2(a) of the Charter declares a right to religious freedom without defining what this means. \textsuperscript{130} The Supreme Court of Canada has established a generous interpretation of the right, leading to a safe assumption that Canada operates with an expansive definition. \textsuperscript{131} The adoption by England of Article 9

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\textsuperscript{127} *Knights*, *supra* note 124, at 24. For example, turbaned Sikhs are exempted from wearing motorcycle helmets under the Road Traffic Act 1976, § 17, and the Jewish and Muslim religious methods of slaughter are exempted under the Slaughterhouses Act 1976 § 36.


\textsuperscript{129} For example, the 2003 Regulations resolved the lack of explicit protection against indirect discrimination towards shop workers and betting workers who wish to observe their Sabbath on a day other than Sunday, because § 41 of the Employment Rights Act, 1996 prescribes the possibility to opt out of work only on Sunday. See Gay Moon & Robin Allen, *Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of Rights and Their Implication*, 5(6) *Eur. Hum. Rts. L. Rev.* 580, 586 (2000) (observing indirect discrimination prior to the enactment of the 2003 Regulations).

\textsuperscript{130} Canadian Charter of Rights and Freedoms § 2. (“Everyone has the following fundamental rights: (a) freedom of conscience and religion.”).

\textsuperscript{131} See *supra* text accompanying notes 89–93.
of the Convention provides statutory proclamation of religious freedom, along with specific examples for this right.\textsuperscript{132}

The limitations on religious freedoms are also prescribed differently in the two states. Section 1 of the Charter declares a general limitation clause to all protected rights, subjecting them to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” In England, Article 9(2) of the Convention places more specific limitations on religious freedom: only the \textit{manifestation} of the right is qualified, not the right itself.\textsuperscript{133} Such limitations occur when they “are prescribed by law and public order, health or morals or for the protection of the rights and freedoms of others.”\textsuperscript{134}

**B. Sunday Closing Laws**

In its history, Canada has adopted two primary approaches to Sunday closing: (i) federal and provincial legislation that prohibited different activities on Sundays, typically entitled “Lord’s Day” legislation; and (ii) provincial legislation enacted in the second part of the Twentieth Century that focused on employment standards, restricting commercial activity on Sundays and holidays.\textsuperscript{135} Directly following the enactment of the Charter, these two types of Sunday closing laws were challenged as inconsistent with freedom of conscience and religion, as they coerced religious minorities and nonbelievers to conform to majoritarian religious tenets. In \textit{R. v. Big M Drug Mart},\textsuperscript{136} the first post-charter religious freedom case, the Supreme Court of Canada examined the constitutionality of the 1906 Lord’s Day Act formerly upheld under the Bill of Rights. Striking it down, the Court found this imposition of the majority’s religious tenets inconsistent with section 2(a) of the Charter.

The following year, in \textit{R. v. Edwards Books and Art Ltd.},\textsuperscript{137} the Court examined the constitutionality of Ontario’s Retail Business Holiday Act of 1980, a law that criminalized retail business on Sundays and other holidays. Distinguishing \textit{Big M}, the Court found a secular legislative purpose for the provincial act: securing a uniform “pause” day for retail workers. Furthermore, the Court found the infringe-

\textsuperscript{132} Convention, \textit{supra} note 118, art. 9.

\textsuperscript{133} R. (Williamson), 2 All E.R. at 9.

\textsuperscript{134} Id.


\textsuperscript{136} [1985] 1 S.C.R.337.

\textsuperscript{137} [1986] 2 S.C.R. 713, 714.
ment on religious freedom to be sufficiently small and justified under section 1 of the Charter, primarily because the Act contained an exemption to smaller retailers who close on Saturdays.\textsuperscript{138} The decision was controversial, and public pressure throughout Canada eventually led to a legislative resolution that saw most of the provinces opt for the deregulation of commercial activity on Sunday.\textsuperscript{139} From a religious freedom perspective, however, *Edwards Books* stands as an abrupt retreat from the promising path shown in *Big M*. This retreat once again left religious minorities with limited protection, despite living in a post-Charter Canada.

The history of Sunday trading in England is long and multifaceted. Commercial activity on Sundays was banned in England as early as the Fifteenth Century for the purpose of preserving the Christian Sabbath.\textsuperscript{140} In the Nineteenth Century, the issue of Sunday closings became hotly debated in relation to the possibilities of selling certain goods on Sunday, as well as to the importance of protecting shop-workers. These debates resulted in the enactment of several laws\textsuperscript{141} and court interpretations that discussed which goods came under the different legislative exemptions.\textsuperscript{142} The ongoing endeavor to protect the Christian Sabbath, however, transformed in the 1980s to a broad coalition of stores, workers associations, family organizations and Christian groups campaigning to “Keep Sunday Special.”\textsuperscript{143} This coalition generated a statutory compromise in the form of the Sunday Trading Act of 1994. The new law, which remains in force today, repealed the Shops Act of 1950 and allowed commercial activity on Sunday. The only shops it continued to restrict were those with an area larger than 280 square

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\textsuperscript{138} See generally Retail Business Holidays Act, 1990, c. 30 (Eng.) (exempting essential and recreational services, as well as businesses that used less than a certain amount of square footage on Sundays).


\textsuperscript{140} See, e.g., Sunday Fairs Act, 1448, 27 Hen. 6, c. 5 (Eng.); Sunday Observance Act, 1677, 29 Car. 2, c. 7 (Eng.) (repealed 1969).

\textsuperscript{141} See, e.g., Retail Meat Dealers Shops (Sunday Closing Act), 1936, 26 Geo. 5, ch. 30 (Eng.); Shops Act, 1950, 14 Geo. 6, ch. 28, §§ 47–67 (Eng.).


\textsuperscript{143} See generally Keep Sunday Special Campaign, http://www.keepsundayspecial.org.uk (last visited Dec. 9, 2008).
meters. Unless exempt for another reason, these large stores may open on Sunday for a maximum of six hours, between 10:00 AM and 6:00 PM. Trading remains forbidden for large stores on Easter Sunday and on Sundays that coincide with Christmas Day. The Sunday Trading Act does include an unqualified exemption to store owners who, for religious reasons, close their stores on Saturday.

The comparison between the two countries suggests that the statutory protection for religious minorities under English law was broader than that achieved under constitutional adjudication in Canada. While the rhetoric of Big M employed the multicultural nature of post-Charter Canada to invalidate the Christian law, the Court later furnished a secular explanation for the provincial act in order to justify upholding the burden on religious freedom. England, on the other hand, never fully abandoned the religious motivation of its Sunday closing arrangement, as reflected in the Act’s title and as evident from its legislative history. At the same time, the Act afforded broad protection to religious minorities by including a complete religious exemption for Saturday observers.

C. Religious Objects

In England, the House of Lords in the Begum decision interpreted the right to wear the Jilbab narrowly. Muslim female attire has not yet produced any legal proceedings in Canada, and according to Côté and Gunn, it has not been a point of contention for students or teachers.

In both countries, however, legal concerns arose with respect to the kirpan, a ceremonial metal dagger carried by Sikh men as a sacred symbol of Sikhism’s commitment to protect the weak and promote justice.

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144 Exempt shops include farm shops, shops selling motor and cycle accessories, pharmacies, shops at airports, railway stations and ports, gas stations, motor service stations, and stands at exhibitions. See Sunday Trading Act, 1994, ch. 20, § 1(1), sched. 1 (Eng.).

145 Askham explains the procedure as follows: “Any person of the Jewish religion who wishes to open a large shop on Sundays outside the six-hour provision gives a notice to the relevant local authority stating that he is a person of the Jewish religion and that he intends to keep the shop closed for the serving of customers on the Jewish Sabbath (Saturday) . . . . In the case of a partnership or a company such certificate will be given in respect of each of the persons by whom a notice has been given, i.e. by the majority of the partners or directors. . . . Sch 2, para 9 of the 1994 Act also accepts that other religious bodies observe the Jewish Sabbath. In respect of such other religions, the appropriate certificate is given by the Minister of the religious body concerned.” Askham, supra note 142, at 46.

146 Governors of Denbigh High School, UKHL 15, at ¶ 2.

In Canada the issue of carrying a kirpan arose in the school environment in *Multani v. Commission Scolaire Marguerite-Bourgeoys.*\(^{148}\) The school’s governing board, pursuant to its authority to approve safety measures under the Education Act, prohibited a Sikh student from carrying the kirpan in school, as it was considered a dangerous object. The Supreme Court of Canada unanimously nullified the school board’s decision, but disagreed on its rationale. The majority applied a constitutional standard of review, finding the prohibition on carrying the kirpan to be a considerable violation of the student’s freedom of religion and not proportionate to the objective of school safety. As such, the governing board’s decision could not be upheld under section 1. The majority emphasized the importance of religious tolerance in Canada, asserting that “the absolute prohibition [of carrying a kirpan] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of others.”\(^{149}\) The concurring judgment applied an administrative law standard of review, finding the decision of the school’s governing board to be simply unreasonable.

In England, the right to carry religious weapons is exempted from criminal prosecution.\(^{150}\) In fact, this exemption is even applicable on school premises.\(^{151}\) The protection afforded to religious beliefs manifested by the carrying of weapons is, therefore, far wider under English law than in Post-Charter Canada. In England, the religious exemption is neither limited to a specific religious group nor to a specific environment. Any person with a religious obligation to carry a dangerous object enjoys the exemption and is free to do so in any public place. Druids, for example, who are religiously obliged to carry a sword, were covered by this exemption.\(^{152}\) In Canada, the *Multani* case only discussed the Sikh practice. There is no guarantee that courts will extend the same protection to other religious practices. Moreover, the *Multani* decision limits the exemption to the school’s premises, and decisions by lower Canadian tribunals have prohibited Sikhs from carrying kirpans

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\(^{148}\) [2006] 264 D.L.R. 577 (Can.).

\(^{149}\) *Multani*, 264 D.L.R., at ¶ 78.

\(^{150}\) *See* Criminal Justice Act (1988), c. 33 § 139 (entitled “Offence of having article with blade of point in public place,” and prescribing that “[i]t shall be a defense for a person charged with an offence under this section to prove that he has the article with him . . . for religious reasons”).

\(^{151}\) *See* Chapter 26 of the Offensive Weapon Act 1996 (incorporating the language of the Criminal Justice Act, § 139A, to the carrying of sharp articles for religious reasons in schools).

\(^{152}\) *See* KNIgHTS, *supra* note 124, at 189.
in courts\textsuperscript{153} and on airplanes.\textsuperscript{154} Justice Charron, writing for the majority in \textit{Multani}, distinguished these cases, asserting that:

\begin{quote}
[T]he school environment is a unique one that permits relationships to develop among students and staff . . . [making] it possible to better control the different types of situations that arise in schools. . . . [E]ach environment is a special case with its own unique characteristics that justify a different level of safety, depending on the circumstances.\textsuperscript{155}
\end{quote}

Such limitations do not exist in the English system.

\section*{D. Religious Education}

Education is one of the spheres where the political choices by Canada and England to not separate religious and state matters has the most potential for volatility. Education is a state’s primary vehicle for transmitting values, creating a sense of national identity, and facilitating social integration. When religion is endorsed by the state, religious values are bound to be communicated through the educational system, generating multicultural tensions particularly amongst the nonreligious and the smaller religious minorities. In Canada and England, these tensions arose as a result of religious prayer in the public schools and in response to state funding of religious schools. Section 93 of Constitution Act, 1867, grants the provinces the exclusive power to legislate on education. As such, provincial legislation on both religious prayer and education has generated a number of judicial challenges. Meanwhile, England is constantly trying to adjust its web of statutes, which currently grant Anglicanism a privileged status in the education system, in order to better reflect England’s current multicultural reality.\textsuperscript{156}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} \textit{Multani}, 264 D.L.R. 577, ¶¶ 65–66.
\item \textsuperscript{156} For sample statutory authority on religious instruction and funding of religious schools, see School Standards and Framework Act, 1998, ch. 31 (U.K.); Education Act, 1996, ch. 56 (U.K.); Education Reform Act, 1988, c. 40 (U.K.); Education Act, 1944, 7 & 8 Geo. 6, c. 31 (U.K.).
\end{itemize}
\end{footnotesize}
1. Religious Education in Public Schools

Public education in Canada, introduced by Christian denominations, historically included compulsory Christian education and daily exercises such as reading scriptures and singing hymns. Beginning in the 1960s, Canada experienced a slow transformation of the Christian-based education system to fit its increasingly diverse society.\footnote{157} Once the Charter was enacted, minority religious groups and nonreligious people initiated judicial challenges against the enduring privileged status of Christianity in the public schools.\footnote{158} The issue has not yet reached the Supreme Court of Canada, but was successfully brought in the courts of appeal in Ontario and British Columbia.\footnote{159}

In \textit{Zylberberg v. Sudbury Board of Education (Director)},\footnote{160} the court struck down a regulation requiring public schools to conduct daily religious exercises, explaining that it was a violation of section 2(a) of the Charter. The court held that the available exemption to non-Christians did not negate the coercive characteristic of the required exercise.

Similarly, in \textit{Canadian Civil Liberties Ass’n v. Ontario (Minister of Education)},\footnote{161} the court concluded that the challenged program of religious education was a form of religious indoctrination, even for those who could exempt themselves. Explaining its conclusion, the court stated:

\begin{quote}
The right to be excused from class, or to be exempted from participation does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as nonconformists and setting them apart from their fellow students who are members of the dominant religion. In our opinion, the conclusion is inescap-\end{quote}

\footnote{157}{See David Seljak, \textit{Education, Multiculturalism, and Religion, in Religion and Ethnicity in Canada} 178–96 (Paul Bramadat & David Seljak eds., 2005).}
\footnote{158}{\textit{Id.}; Marguerite van Die, \textit{Religion and Public Life in Canada: Historical and Comparative Perspectives} 13–14 (2001).}
\footnote{159}{\textit{See Russo v. B.C.}, [1989] 4 W.W.R. 186 (Can.).}
\footnote{160}{[1988] 52 D.L.R. 577 (Can.).}
\footnote{161}{\textit{See Canadian Civil Liberties Ass’n v. Ontario}, [1990] 65 D.L.R. 1.}
able that the exemption provision fails to mitigate the infringement of freedom of conscience and religion.162

By recognizing that exemptions from religious instruction and prayer in public schools may not be enough to overcome discrimination, Canada went much further than England in affording protection to minority religious groups and the non-religious. In England, religious education is part of the core curriculum of public schools. Its statutory framework requires each school to create a syllabus that reflects Christianity as England’s main religious tradition, while taking into account the practices of the country’s other principal religions.163 Each school decides separately on the content of the syllabus, based on the recommendation of the Local Advisory Council on Religious Education, which is required by law to consist of Christian representatives and representatives from other religious denominations that “appropriately reflect the religious traditions in the area.”164 As such, in areas with a non-Christian majority, greater consideration is given to alternative religions.

In addition to religious education, English state-schools are required to conduct a daily act of Christian worship.165 The collective worship “is of broadly Christian character . . . without being distinctive of any particular Christian denomination.”166 Children may be excused from religious education and the daily religious worship at the request of their parents (subject to the approval of the school), and the Advisory Council has the authority to waive the requirement of religious worship altogether if it considers the practice inappropriate for some or all students. According to the 2006 Religious Freedom Report on the United Kingdom, published annually by the U.S. Department of State,167 religious prayer in schools has been greatly criticized, primarily by teacher’s organizations.

164 Education Reform Act of 1988, § 11.
166 See id.
2. Public Funding of Religious Schools

Section 93 of Constitution Act, 1867, requiring Ontario and Quebec to fund denominational education for their respective Catholic and Protestant minorities, developed into a controversial arrangement as Canada’s population became increasingly diversified. In recent decades, all provinces except Ontario amended these legal requirements in order to generate greater equality among religious groups, either by extending financial support to the other minorities, or by abolishing the historic privileges of the Christian denominations.168

As for Ontario, Canada’s most populous province, two demographic developments since the time of Confederation are worth mentioning. First, the number of Catholics has increased in proportion to Protestants, who have historically been the province’s largest religious group. Second, Ontario’s population has grown increasingly diverse, as previously miniscule religious groups have developed into substantial minorities. Accordingly, the continued public funding of Catholic schools, a reflection of historic Christian biases, has become overtly discriminatory in recent decades.169

Following the enactment of the Charter, the Catholic schools’ privileges were challenged in court. In Reference re an Act to Amend the Education Act (Ontario),170 also known as The Bill 30 Case, the Supreme Court of Canada was asked to review the constitutionality of Bill 30, which extended the funding of Catholic education through high school.171 The Court found the Bill immune from Charter review pursuant to section 29 of the Charter, which states that “[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed under the Constitution of Canada in respect of denominational, separate or dissentient schools.” Justice Wilson’s rationale was that this special treatment of Catholics is exempt by section 29, “even if it sits uncomfortably with the concept of equality embodied in the Charter,” because it represents “a fundamental part of the Confederation compromise.”172

169 Id. at 16–17.
170 [1987] 1 S.C.R. 1197 (Can.).
171 Until Bill 30, Catholic education in Ontario was funded from kindergarten only through the tenth grade. See Bayefsky & Waldman, supra note 168, at 18.
172 The Bill 30 Case, 1 S.C.R. 1197, § 62.
The issue was litigated again in Adler v. Ontario. The parents of children attending Jewish and other independent religious schools sought the extension of public funding to all minority religions in the province based on the Charter guarantees of religious freedom and equality. The Supreme Court of Canada, affirming its earlier rationale, refused to employ the Charter to reform the historic arrangement, however discriminatory it became.

Ontario’s discrimination in religious education was challenged internationally as well. When a complaint was filed with the U.N. Human Rights Committee, Canada was found to be in breach of “rights under Article 26 of the Covenant to Equal and Effective Protection Against Discrimination.” Nevertheless, Ontario has still not extended its funding to other religious schools, nor has it discontinued its practice of funding Catholic schools.

In England, Anglicanism’s established status has generated a continuing challenge for minority religious groups, as well as law makers attempting to dilute Christianity’s privileged position. Nearly a third of the schools in the state-funded education system are religious schools. According to the 2006 International Religious Freedom Report, out of approximately 25,000 state-funded schools there were 6874 religious schools. Of these, 4659 were Anglican, 2053 were Roman Catholic, 115 represented other Christian denominations, thirty-six were Jewish, seven were Muslim, two were Sikh, one was Greek Orthodox and one was Seventh-Day Adventist; additional Jewish, Muslim and Sikh schools have been tentatively approved. While Christian and Jewish schools have been well-established in England for many years, the approval of state funded schools for Muslims and Sikhs, who are newer to England, occurred only recently, after years of robust cam-

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175 See Bayefsky & Waldman, supra note 168, at 25.
176 These are state funded religious schools, independent of the private religious schools, which are funded by the different religious communities, and educate about eight percent of the children in England and Wales. See Claire Dwyer & Astrid Meyer, The Establishment of Islamic Schools: A Controversial Phenomenon in Three European Countries, in Muslims in the Margin: Political Responses to the Presence of Islam in Western Europe 218, 221 (Wasif A.R. Shadid & P. Sgoerd van Koninsveld eds., 1996); see also David Harte, The Law of Employment and Education, in Religious Liberty and Human Rights 159, 159–84 (Mark Hill ed., 2002) (discussing the place of religion in the modern English education system).
177 See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, supra note 167.
Interestingly, this campaigning has not yet produced any legal challenges on the basis of religious discrimination.

The principal lessons to draw from the comparison of religious education are as follows. Canadian courts played a strong activist role in protecting the individual manifestation of religious beliefs, both in their decisions regarding religious objects and in the context of religious education. The Supreme Court of Canada, however, refused to interfere in Ontario’s funding arrangements, ultimately deferring to the established historical considerations. This rationale is somewhat odd in light of the English developments, where the elevated status of Anglicanism has not proven to be an obstacle to achieving greater equality in educational funding. One possible explanation for this discrepancy is the distinction between an individual rights approach, broadly safeguarded by the courts, and a group rights approach, which has been afforded a lower level of protection. This explanation is weakened, however, by the explicit recognition in the Charter of group rights with respect to language. It is clear that the protection of religious minorities in Canada, bolstered by the Charter, fell short of the English statutory protections, as exemplified by the examples of religious objects and Ontario’s funding of religious schools. Nevertheless, as far as religious education is concerned, the incremental progress in England in reducing inequalities between religious minorities and the privileges of the Anglican Church has placed England almost at the point of pre-Charter Canada.

E. Parental Religious Freedom Rights

The last issue to generate similar legal challenges in both countries thus far concerns the conflict between the rights of parents to educate their children in accordance with their religious beliefs and the states’ interest in supervising education. In Canada, this conflict arose when a pastor who was home schooling his children was convicted of truancy, after neglecting to obtain the required certification from the education authorities under the Alberta School Act. He claimed that the statutory requirement was a violation of his religious freedom because it would be a sin for him “to request the state to permit him to do God’s will.”

178 See Knights, supra note 124, at 108; Cumper, supra note 116, at 235.
This case was one of the earliest to interpret section 2(a) of the Charter, and the Supreme Court of Canada had yet to establish its Syndicat Northcrest doctrine, requiring a low threshold for a belief to come under a section 2(a) evaluation. The Court unanimously agreed that the claim of a limitation on religious freedom should be dismissed, but was again divided on the rationale. A minority of three justices recognized an infringement on the father’s religious belief, only to find that it was justified as a compelling interest of the province to ensure adequate education for children (citing section 1 as authority). The majority did not find the statutory requirement for certification offensive to section 2(a), as it accommodates the right of parents to make educational decisions for their children, including whether or not to home school them. Justice Wilson resorted to the purpose-effect distinction, finding that the purpose of the certification requirement was to ensure efficient education to all, and that the effect of such a requirement on the appellant’s religious freedom was an “extremely formalistic and technical one” not rising to a violation of section 2(a).

In England, the issue of parental religious freedom rights arose when a statutory ban on corporal punishment in schools was challenged. In R. (Williamson) v. Secretary of Education and Employment, parents of children in Christian independent schools sought the authorization of their children’s schoolteachers to administer physical punishment for disciplinary purposes as part of their religious belief. The House of Lords agreed that the statutory ban on corporal punishment in schools interfered with the parents’ religious beliefs guaranteed under Article 9(1) of the Convention. They found this interference to be justified, however, as a necessary protection of the children’s well-being under Article 9(2).

The courts of both states have taken similar paths when demarcating the limitations on the right of parents to raise their children in the tenets of their faith. Supervising the education of the young has been identified in both countries as a compelling state interest prevailing over the parents’ right to religious freedom. Neither the supposed difference in constitutional protection between the two models nor the differences in the elements constructing the balancing test between fundamental rights and state interest in each state was material, as both courts reached identical results.

181 See generally Syndicat Northcrest, 2 S.C.R. 551.
182 Jones, 2 S.C.R. 284, ¶ 69.
183 UKHL 15, 2 All E.R. 1.
CONCLUSION

Is a judicially enforced bill of rights the best instrument to protect religious freedom? A comparative analysis reveals that both sides of the debate on the value of an entrenched system of rights overstate their positions. In Canada, critics of the Charter who caution against judicial intervention in public policy choices can certainly support their arguments with cases such as Big M, Syndicat Northcrest, Zylberberg and Canadian Civil Liberties. At the same time, Bill 30, Adler and Edwards Books severely contradict this argument, as those respective courts staunchly refused to substitute their own judgment for that of the legislature. Those who value the Charter as a vehicle for advancing rights protection in Canada are surely content with the outcome of Multani, but must realize that the statutory protection, which the Charter was supposed to transform, has proven to be much more expansive in England, as exemplified by the legislation on dangerous objects and the Sunday Retail Act. The English statutory protections that the Canadians sought to replace proved resilient. Nevertheless, deficiencies still exist within the English model, as exemplified by Begum and the reality of religious education, where the HRA was not helpful in broadening the protection of religious freedom.

Advocates of an entrenched bill of rights generally raise several arguments to support their position. First, fundamental rights receive better protection under a bill of rights that clearly states and outlines their meanings. Second, a bill of rights charts the division of powers, enabling courts to impose restraints on the legislative or executive branches that may be more susceptible to political influences. Finally, a bill of rights has educational value, as it generates greater awareness of human rights and a culture of rights protection.

While the first two arguments are still open for debate, the third argument, as a matter of legal policy, seems to hold true for Canada: a bill of rights was useful in creating an institutional foundation for advancing the protection of rights in that state. On its twenty-fifth anniversary, we can confidently conclude that the Charter did contribute to a change in tone and discourse on the part of the Supreme Court of Canada in relations to rights protection, and facilitated the devel-

184 Fowler somewhat overstates that the unwritten constitutional English model “more adequately protected civil liberties than has any written instrument in other societies.” Fowler, supra note 65, at 725 (emphasis added).
opment of clearer tests to evaluate infringements on rights. Moreover, it provided Canada with a fast track to broaden the pre-Charter protection that had been sporadically afforded as part of a limited enforcement of rights created by the federal and provincial division of power. At the same time, the greatest achievements of the Canadian system concerning religious freedom simply brought Canada, in most cases, to the level of protection afforded under the English legislative system—one which the English themselves find insufficient.186

Opponents of a bill of rights focus on its obstructive effect on the separation of powers. The comparative findings of this Article suggest that it might not be realistic to attribute such revolutionary powers to a bill of rights, as they have proven rather limited as a paradigm for optimizing rights protection even in one of the world’s most progressive democracies.187 These findings suggest that the focus of the debate should shift from its current emphasis on institutionalism toward critically evaluating the role that societies bestow upon the law in their quest for the protection of rights. Newly emerging or struggling democracies continually seek guidance in existing Western constitutions to overcome their social tensions, yet those documents have produced only mediocre results in improving the protection of religious freedom. Should we conclude that the possibility of perfecting rights protection lies beyond the legal realm and focus our attention on the social and political theaters instead? Perhaps the answer can be found in the words of Learned Hand:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.188

186 Barendt, supra note 48, at 32.
THE EMERGING CUSTOM OF HUMAN RIGHTS-BASED DEVELOPMENT: A MODEL AGREEMENT FOR SUCCESSFUL EXPLOITATION OF LAKE ALBERT’S OIL RESERVES

ANGELA M. BUSHNELL*

Abstract: The 2006 discovery of oil reserves beneath Lake Albert on the border between the Democratic Republic of the Congo and Uganda has spawned both tension and attempts at cooperative development. History demonstrates that the process of exploiting natural resources is almost inevitably interwoven with violations of the human rights of local populations. This Note catalogs the possible human rights violations that can occur with the development of a natural resource such as oil, and discusses the growing pattern and practice of using human rights-based planning in international development agreements. The author proposes that incorporating human rights-based planning into the development agreement between the Democratic Republic of the Congo and Uganda may help to prevent violations of the recognized rights of the population in the Lake Albert region.

INTRODUCTION

In 2006, Canada’s Heritage Oil Corporation discovered oil reserves beneath Lake Albert, one of Africa’s seven great lakes.1 The discovery brought as much tension as it did hope: Lake Albert sprawls across the indistinct border between the Democratic Republic of the Congo (DRC) and Uganda.2 The countries’ overlapping claims are set amidst a region that has been fraught with conflict for years, fueled in part by

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2 See Do You Want to Share or to Fight? The Question Posed by the Oil Find in Lake Albert, economist, Aug. 25, 2007, at 45 [hereinafter Share or Fight?].
disputes over valuable natural resources. For the moment, DRC and Uganda have agreed to resurvey the watery border and collaborate on oil exploration and development, including the building of a pipeline.

History, however, warns of additional problems that will require a cooperative solution: oil exploitation has been consistently linked to environmental degradation, human rights abuses, and local conflict. Indigenous populations in oil-rich regions in Ecuador, Equatorial Guinea, and Nigeria have all suffered negative repercussions from development, including destruction of their livelihoods, the taking of land without compensation, involuntary resettlement, and in some cases, violent repression and protest. These harsh by-products are violations of the local population’s fundamental rights, including the right to adequate living conditions, the right to earn a livelihood, and the right to property, which are enshrined in treaties and customary international law.

The 2006 oil strike has already negatively impacted the economic rights of the Lake Albert-area inhabitants: their ability to fish is devastated and they are restricted from certain areas. Continued oil development will likely create fundamental changes to the environment, which will further damage the local population’s livelihood and property rights. Yet just as the experiences of other states foretold of the conflicts in development, the emerging custom of human rights-based

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9 See, e.g., Inter-Am. C.H.R., supra note 5, ch. VIII.
development poses a solution. A human rights approach to oil exploitation would enable DRC and Uganda to minimize the risk of violations of rights, and address problems that do arise through a strategy that promotes social sustainability.

This Note thus proposes human rights-based policies, programs and standards that DRC and Uganda should incorporate into their 2007 oil development agreement. Part I outlines the oil agreements between DRC and Uganda, and each country’s human rights obligations under international law. Part I also demonstrates the empirical link between oil exploitation and human rights violations, and provides an overview of customary international law. Part II discusses the human rights violations that are likely to occur in DRC and Uganda, and how other states have used human rights-based development to mitigate such effects. Part III applies human rights-based development planning to the exploitation of oil reserves in Lake Albert.

I. BACKGROUND

A. Existing Oil-Sharing Agreements

DRC and Uganda have two agreements regarding shared oil reserves. A bilateral agreement signed in 1990 pledged cooperation in petroleum exploration in the Lake Albert region (1990 Agreement). DRC and Uganda agreed to negotiate in goodwill the development of any discovered oil reserves, relying on continued cooperation as opposed to a strict delimitation of the shared border.

In 2006, Heritage Oil Corporation (Heritage Oil) struck oil in the Ugandan waters of Lake Albert. Heritage Oil owns a fifty-percent share in two exploration licenses on the Ugandan side of the lake, and has a Production Sharing Agreement with DRC for exploitation on the

12 See OHCHR, supra note 10, at 19.
14 See Uganda News Release, supra note 4; Nyakairu, supra note 13.
15 See Nyakairu, supra note 13.
16 See Heritage Third Quarter Results, supra note 1.
Congolese side.\textsuperscript{17} U.K.-based Tullow Oil P.L.C. (Tullow Oil) has an interest in three concessions in Ugandan waters.\textsuperscript{18} Tullow Oil also has a production sharing agreement with DRC.\textsuperscript{19} At present, no exploration has taken place in DRC-controlled waters.\textsuperscript{20}

Congolese President Joseph Kabila and Ugandan President Yoweri Museveni signed an agreement in 2007 (2007 Agreement) that largely reiterated the commitments in the 1990 Agreement.\textsuperscript{21} Both countries pledged to create a joint committee to resurvey the common border, establish a joint security force on Rukwanzri Island, and cooperate in the exploration and exploitation of shared oil reserves.\textsuperscript{22}

B. Oil Exploitation and Human Rights Violations

There is no shortage of examples of how oil exploitation can irreparably degrade the environment, and deprive the local population of fundamental economic rights.\textsuperscript{23} Nigeria, the largest oil exporting nation in Africa,\textsuperscript{24} is one of the worst examples of development-related human rights abuses.\textsuperscript{25} After decades of unresolved pollution and land disputes with the federal government, the Ogoni, an ethnic group in one of the oil-rich regions, peacefully mobilized to protest against oil development policies.\textsuperscript{26} The government responded by creating a special security force that forcefully silenced any opposition and committed wide-spread human rights abuses.\textsuperscript{27} Oil exploitation continued with no regard for the rights of the local population: the construction of pipelines and wells altered the environment, often polluting waterways with spills and other waste, while residents watched as their land was essentially “taken” from them and their fishing livelihoods were de-

\textsuperscript{17} See Heritage Oil Corp., About Heritage Oil, http://www.heritageoiltd.com/about.cfm (last visited Nov. 20, 2008).

\textsuperscript{18} See Nyakairu, \textit{supra} note 13; Tullow Oil plc, Uganda Operations and Licences http://www.tullowoil.com/tlw/operations/africa/uganda/ (last visited Nov. 20, 2008).


\textsuperscript{20} See Nyakairu, \textit{supra} note 13; Tullow Oil plc, \textit{supra} note 19.

\textsuperscript{21} See Uganda News Release, \textit{supra} note 4.

\textsuperscript{22} See id.; \textit{Oil Tensions Ease, supra} note 4.

\textsuperscript{23} See O’Neill, \textit{supra} note 6, at 99, 102, 108–09, 111, 112; Inter-Am. C.H.R., \textit{supra} note 5, ch. VIII.

\textsuperscript{24} See O’Neill, \textit{supra} note 6, at 100.

\textsuperscript{25} See id. at 97–117; \textit{The Price of Oil, supra} note 5, at I.

\textsuperscript{26} See O’Neill, \textit{supra} note 6, at 113; \textit{The Price of Oil, supra} note 5, at I.

\textsuperscript{27} See O’Neill, \textit{supra} note 6, at 113; \textit{The Price of Oil, supra} note 5, at I.
 stroved.\textsuperscript{28} Today, the frustration and disenfranchisement manifests in armed rebels who wreak havoc in the delta states.\textsuperscript{29} 

Ecuador’s oil development resulted in similar, egregious rights abuses.\textsuperscript{30} The indigenous population has title to oil-rich lands in the Oriente region, but neighboring development of those resources caused significant damage to the local ecosystem.\textsuperscript{31} The resultant pollution caused wide-spread health problems and interfered with the indigenous people’s agricultural and fishing practices.\textsuperscript{32}

These tragic examples chronicle the oil-related environmental degradation that can deprive local populations of sustainable resources for their livelihoods, as well as their land.\textsuperscript{33} Although human rights abuses are not necessarily inevitable, abuse is more likely to occur during early stages of economic transition.\textsuperscript{34} DRC and Uganda will need to construct drill sites and pipelines as they transition into oil exploitation, and such construction can alter the environment, thus risking derogation of human rights.\textsuperscript{35} Moreover, political pressure can provoke rights abuses as society transitions from a fishing, agrarian and trading economy to an oil-based one.\textsuperscript{36}

C. Primary Sources of Congolese and Ugandan Human Rights Obligations: International and National Instruments

The three fundamental economic rights that are implicated in oil development are the right to adequate living conditions, the right to earn a livelihood, and the right to property.\textsuperscript{37} These rights are recognized by DRC and Uganda in international and regional agreements, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples’

\begin{itemize}
\item \textsuperscript{28} See O’Neill, \textit{supra} note 6, at 97–117.
\item \textsuperscript{29} See id.
\item \textsuperscript{31} See Barrera-Hernandez, \textit{supra} note 30, at 49–50.
\item \textsuperscript{32} See Inter-Am. C.H.R., \textit{supra} note 5, ch. VIII.
\item \textsuperscript{33} See id.; O’Neill, \textit{supra} note 6, at 99, 102, 108–09, 111, 112.
\item \textsuperscript{35} See id.; Inter-Am. C.H.R., \textit{supra} note 5, ch. VIII.
\item \textsuperscript{36} See Donnelly, \textit{supra} note 34, at 312, 313, 316–17.
\item \textsuperscript{37} See, e.g., O’Neill, \textit{supra} note 6, at 99, 102, 108–09, 111, 112.
\end{itemize}
Rights (Bujal Charter).\textsuperscript{38} Both countries also uphold these rights in their national constitutions.\textsuperscript{39} DRC and Uganda have thus internalized obligations to protect these rights and should use preventive or compensatory actions to do so.\textsuperscript{40}

D. Emerging Customary International Law

A custom in international law is established by a pattern of state practice that implies general consent to a binding principle of international law.\textsuperscript{41} The creation of a customary norm is much like creating a snowball by rolling the core down a wintery hill: as more and more states adopt similar practices, the pattern of practice grows into a consensus.\textsuperscript{42} Consensus is not determined by the passage of time, but rather by the extent to which state practices are uniform both internally (the same state implements the same practice over time) and collectively (a pattern of practice amongst states).\textsuperscript{43} Relatively uniform practice can create a binding custom on states, but the extent to which the custom becomes a rule is largely dependent on whether states believe that the conduct is legally permissible or creates legal obligations.\textsuperscript{44} This \textit{opinio juris sive necessitates} defines when a pattern of practice becomes customary international law.\textsuperscript{45}

An emerging custom is a snowball in the making—a common practice adopted by different states in similar situations, but one that has not been repeatedly used by the same states, uniformly applied by a substantial number of states, or incurred legal effects.\textsuperscript{46} Although

\begin{itemize}
  \item \textsuperscript{39} See Constitution de la République Démocratique du Congo Preamble, arts. 30, 34, 35, 36, 48, 54, 58; Constitution of the Republic of Uganda arts. 26, 40.
  \item \textsuperscript{40} See Moser et al., supra note 11, at 48.
  \item \textsuperscript{43} See ILA Report 2000, supra note 41, at 731, 732.
  \item \textsuperscript{44} See Filartiga, 630 F.2d at 880–81; ILA Report 2000, supra note 41, at 745.
  \item \textsuperscript{45} See Filartiga, 630 F.2d at 880–81; ILA Report 2000, supra note 41, at 745.
  \item \textsuperscript{46} See ILA Report 2000, supra note 41, at 731–34.
\end{itemize}
the emerging custom is not yet legally binding, the common practice expresses preferred outcomes, and can serve as a soft law precedent.\textsuperscript{47}

A substantial number of states have recognized and applied a human rights-based approach to development, which integrates human rights norms into the plans and operations for growth.\textsuperscript{48} State action has largely been through the articulation of human rights-centered policies, and the actual mechanisms in development programming have varied.\textsuperscript{49} Human rights-based development is thus an emerging custom, because it is a common practice adopted by different states in similar situations, but one which still has significant variation and no legal effects.\textsuperscript{50} Although not yet binding, human rights-based development is an important precedent for DRC and Uganda as they move forward with oil exploration and development.\textsuperscript{51}

\section*{II. Discussion}

The empirical link between oil exploitation and environmental damage and human rights abuses indicates that DRC and Uganda face a real risk of violating their obligations under international human rights law through oil development activities.\textsuperscript{52} The growing practice of human rights-based development can be a valuable soft law precedent for addressing those anticipated violations of human rights and promoting sustainable society in the Lake Albert region.\textsuperscript{53}

\subsection*{A. DRC and Uganda: The Risk of Human Rights Violations}

The current burdens on the Congolese and Ugandan populations who live and work along the shores of Lake Albert presage the human rights violations that commonly occur during the exploration and de-
velopment of oil reserves. The situations in Nigeria and Ecuador are representative of the relationship between oil development and infringements of the right to adequate living conditions, the right to earn a livelihood and the right to property.

The development of oil reserves beneath Lake Albert will require the building of new infrastructure similar to that in Nigeria and Ecuador, such as the drilling of additional wells to draw on subsurface oil, and the construction of a pipeline to transfer reserves to the coast for export. The massive excavation and construction can unavoidably alter waterways and drainage patterns, which can lead to flooding during the rainy seasons, pollution of water sources through waste run-off, and the spread of diseases. Such conditions can thus infringe the local population’s right to adequate living conditions.

The exploitation of oil reserves also poses a substantial risk of pollution from leaks and spills, which can destroy agrarian and fishing livelihoods. Thousands of Nigerians living in the delta region watched helplessly as leaking pipelines polluted the water and killed or drove away the fish that were their livelihood. Similarly, a substantial Congolese and Ugandan population relies on fishing in Lake Albert for both subsistence and trade. Local fishermen already face restriction related to the oil-inspired border dispute: an August 2007 ban on fishing at night negatively impacts the income of approximately 20,000 fishermen who rely on a nighttime harvest of a particular kind of fish. Future environmental degradation like that in Nigeria could further deprive thousands of Congolese and Ugandans of their right to earn a livelihood.

Furthermore, the devastating environmental changes caused by development activities in some countries have been linked to unlawful takings of private land, which amount to a deprivation of the individual’s right to property. Local populations may be forced to resettle

54 See Grainger, supra note 8; Inter-Am. C.H.R., supra note 5, ch. VIII.
55 See O’Neill, supra note 6, at 97–117; Inter-Am. C.H.R., supra note 5, ch. VIII.
56 See Share or Fight?, supra note 2, at 45; Inter-Am. C.H.R., supra note 5, ch. VIII.
57 See O’Neill, supra note 6, at 108–12; Inter-Am. C.H.R., supra note 5, ch. VIII.
58 See Inter-Am. C.H.R., supra note 5, ch. VIII.
59 See O’Neill, supra note 6, at 108–09, 111, 112.
60 See id. at 99, 102, 108–09, 111, 112.
62 See id.
63 See O’Neill, supra note 6, at 88, 97–117.
64 See id. at 108–09, 111, 112; Inter-Am. C.H.R., supra note 5, ch. VIII.
when the land becomes uninhabitable and their ability to earn a livelihood is diminished.\(^65\) Also, the needs of oil exploitation may necessitate state-seizure of private land.\(^66\) In addition to resettlement, the displaced population is entitled to adequate compensation for lost property.\(^67\) The state that lacks a resettlement plan for oil-related development activities, and is otherwise unprepared to compensate the local population for seized land, violates the individuals’ right to property.\(^68\) Resettlement and compensation plans will pose a special challenge for DRC and Uganda, where years of fighting between government and rebel forces have internally displaced large numbers of persons and placed an enormous strain on national resources.\(^69\)

**B. Evidence of an Emerging Custom and a Solution**

A number of states have acknowledged a rights-based approach as a norm for the preferred outcome of protecting human rights during development.\(^70\) Human rights approaches have been applied by states individually and through their participation in international organizations.\(^71\) The World Bank and various divisions of the United Nations, including the UN Development Program, require or encourage states to incorporate certain provisions into development agreements in order to protect human rights.\(^72\) State parties to those agreements explic-
itly consent to and adopt this practice in their development planning and operations.73 Much of state practice consists of verbal acts regarding the policies of an international organization, such as the World Bank’s policy regarding involuntary resettlement.74 Some states have also acted by implementing these policies through development agreements with the international organization.75

The practices of the World Bank and the United Nations represent the essential consensus of state practice,76 and one defining element of customary international law.77 Each division of an international organization derives its authority from the agreement of a substantial number of member states.78 The policies and practices of those organizations thus represent the consensus of a number of states.79 The policies and practices can therefore support the emergence of a custom in international law.

Human rights-based development can be categorized into three main attributes: development policies aimed at fulfilling human rights; programming that focuses on both the holders of the rights (rights-holders) and the entity obligated to protect and promote those rights, such as the state (duty-bearers); and human rights-based standards to evaluate projects.80 The UN Development Program’s Millennium Project exemplifies the creation of human rights-conscious development policies.81 The Millennium Project developed ten goals (Millennium Development Goals) representing fundamental human rights that are

76 See ILA Report 2000, supra note 41, at 730; David A. Wirth, Partnership Advocacy in World Bank Environmental Reform, in The Struggle For Accountability 51, 56 (Jonathan A. Fox & L. David Brown eds., 1998); see also Weiss, supra note 47, at 352 (noting that the “guidelines, principles and recommended practices” of multinational organizations “are sometimes influential legal instruments”).
77 See Filartiga, 630 F.2d at 881–82, 884.
79 See id.; Wirth, supra note 76, at 56.
80 See OHCHR, supra note 10, at 15–16.
81 See id. at 8; Millennium Project Plan, supra note 72, at 2–3, 7–8, 118, 119, 120.
to be advanced through development agreements.\textsuperscript{82} For example, the first Millennium Development Goal to alleviate extreme poverty and hunger protects economic rights such as the right to earn a livelihood and the right to property.\textsuperscript{83} The Millennium Project’s success relies on participant states’ integration of those human rights-based policies into development plans, and the Project, therefore, makes numerous programming recommendations, such as the use of human rights assessments.\textsuperscript{84}

The World Bank’s pipeline project in Brazil and Bolivia is an example of programming that targeted rights-holders.\textsuperscript{85} The pipeline project posed a unique planning challenge, because similar development in the region had caused involuntary resettlement and infringements of the rights of the indigenous peoples.\textsuperscript{86} Although human rights-based approaches were not conditions of the loan agreement,\textsuperscript{87} the project addressed anticipated problems through the creation of community-based organizations that consulted the local population on regulations and assessments.\textsuperscript{88} The project also addressed resettlement and compensation for land loss by granting more secure land rights and paying a share of project funds to local landowners in exchange for an easement for the pipeline to pass through their land.\textsuperscript{89} The overall success of these mechanisms was noted in follow-up evaluations conducted by the World Bank.\textsuperscript{90}

The World Bank’s Operational Policies now explicitly require borrower states to engage in human rights-conscious development planning to address involuntary resettlement, and thus propose programming aimed at duty-bearers.\textsuperscript{91} Operational Policy 4.12 recognizes that involuntary resettlement is related to two fundamental human rights:

\begin{itemize}
  \item \textsuperscript{82} See Millennium Project Plan, supra note 72, at 2–3, 7–8, 118, 119, 120.
  \item \textsuperscript{83} See id. at 7–8 (discussing how empowering poor people with property rights can enable the use of infrastructure and human capital that is vital to growth in agriculture and other economies); see also Bujal Charter, supra note 38, arts. 14, 21 (regarding the right to property), ICESCR, supra note 7, art. 6 (recognizing, implicitly, the right to earn a livelihood).
  \item \textsuperscript{84} See Millennium Project Plan, supra note 72, at 118, 119, 120.
  \item \textsuperscript{85} World Bank, Infrastructure at the Crossroads 73 (2006).
  \item \textsuperscript{86} See Inter-Am. C.H.R., Res. No. 12/85, supra note 65, 1–3, 5–9.
  \item \textsuperscript{88} See Inf. Crossroads, supra note 85, at 73.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} See id.; World Bank, Project Performance Assessment Report, at xii–iii (2003).
  \item \textsuperscript{91} See World Bank Operational Manual, supra note 65, OP 4.12.
\end{itemize}
the right to property and the right to earn a livelihood. The World Bank obligates borrower states, as a condition of the loan agreement, to respect these human rights in development plans, and directs that states should explore alternative project designs, engage in resettlement planning with affected groups, and set aside sufficient resources to compensate involuntary resettlement.

Chad and Cameroon, as duty-bearers, implemented Operational Policy 4.12 as required under their loan agreements with the World Bank for oil development and construction of a pipeline, and experienced some success in addressing losses of property and livelihoods. Both countries used periodic human rights assessments to gauge effects on livelihoods and real property, although the monitoring needed improvement. Chad and Cameroon enacted compensation plans to address the involuntary taking of land and paid sufficient compensation to some of the affected individuals. Chad also developed agricultural training programs to offset losses of livelihoods and land.

The European Union’s (EU) trade and investment policies are examples of how human rights may be used as a standard to assess performance in development. For example, the 2000 Cotonou Agreement on trade and development between EU member states and 77 foreign states provides that human rights violations trigger a dialogue

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92 Operational Policy 4.12 states that involuntary resettlement is defined by the taking of land, which can result from a “loss of income sources or means of livelihood, whether or not the affected persons must move to another location” among other factors. See id.

93 See id.

94 See Cameroon Loan Agreement, supra note 75, at 9, 20, 39; Chad Loan Agreement, supra note 73, at 10, 17, 19, 20, 44; Robert Barclay & George Koppert, Chad Resettlement and Compensation Plan Evaluation Study: Main Report, at v–vii (Jan. 2007) [hereinafter Chad Resettlement Study]. Despite some success, the project was terminated in August 2008 due to Chad’s failure to meet other conditions of the financing agreement. See Press Release, World Bank, World Bank Statement on Chad-Cameroon Pipeline (Sept. 9, 2008), available at www.worldbank.org (follow “News” hyperlink; then follow “Press Releases” hyperlink; then input September 9 2008 into the search browser).


96 See IAG Report 2007, supra note 95, at i; Chad Resettlement Study, supra note 94, at v–vi.

97 See Chad Resettlement Study, supra note 94, at 5–1–5-5.

between state parties, and, if they persist, can result in sanctions or suspension of development projects.\textsuperscript{99}

III. Analysis

The policies and procedures established and implemented by other states provide a useful framework for amending DRC and Uganda’s 2007 Agreement.\textsuperscript{100} The incorporation of human rights-based development policies, programming addressed to both rights-holders and duty-bearers, and human rights standards to guide project evaluations could minimize anticipated infringement of economic rights, consistent with DRC and Uganda’s obligations under international law.\textsuperscript{101}

A. Policies

The process of amending the 2007 Agreement must begin with the acknowledgment of the fundamental rights of the Lake Albert population.\textsuperscript{102} DRC and Uganda’s task would benefit from following the example of the Millennium Project.\textsuperscript{103} Formation of the Millennium Project’s goals began with recognition of empirical links between certain phenomena and poverty.\textsuperscript{104} Those phenomena thus became the goals or policies to be addressed through development projects.\textsuperscript{105} Similarly, the experiences of other states have already demonstrated the well-established link between oil exploitation, environmental degradation, and resulting violations of certain economic rights.\textsuperscript{106} The local populations in the Lake Albert region, most notably the fishermen, have already suffered damage to their means of livelihood from initial oil-related activities.\textsuperscript{107} Thus, DRC and Uganda have a starting point from which to form development policies: oil exploitation in Lake Albert should not damage the environment so as to infringe on the right to


\textsuperscript{100} See, e.g., \textit{World Bank Operational Manual}, \textsuperscript{\textit{supra}} note 65, OP 4.12.

\textsuperscript{101} See \textit{OHCHR}, \textsuperscript{\textit{supra}} note 10, at 15–20; Moser et al., \textit{supra} note 11, at 37–38, 48.

\textsuperscript{102} See \textit{OHCHR}, \textit{supra} note 10, at 15; Moser et al., \textit{supra} note 11, at 17–18.

\textsuperscript{103} See \textit{OHCHR}, \textit{supra} note 10, at 8; \textit{Millennium Project Plan}, \textsuperscript{\textit{supra}} note 72, at 1–12.

\textsuperscript{104} See \textit{Millennium Project Plan}, \textsuperscript{\textit{supra}} note 72, at 1–12.

\textsuperscript{105} See \textit{OHCHR}, \textit{supra} note 10, at 8; \textit{Millennium Project Plan}, \textsuperscript{\textit{supra}} note 72, at 1–12.

\textsuperscript{106} See O’Neill, \textsuperscript{\textit{supra}} note 6, at 97–117; Inter-Am. C.H.R., \textit{supra} note 5, ch. VIII.

\textsuperscript{107} See Jaramogi & Kayizzi, \textit{supra} note 61.
HOLDING “HIRED GUNS” ACCOUNTABLE: 
THE LEGAL STATUS OF PRIVATE SECURITY CONTRACTORS IN IRAQ

DAVID H. CHEN*

Abstract: Since the 2003 U.S.-led invasion of Iraq, thousands of armed civilians have worked in that country providing security. The law governing these “private security contractors” (PSCs), however, has never been clear. Despite several instances involving Iraqi civilian deaths, there is still no set procedure for holding PSCs accountable. Several options have been suggested, and trying PSCs in federal district courts in the United States seems to be emerging as the preferred method. This Note argues, however, that military-run courts-martial in Iraq are preferable for several reasons.

Introduction

On September 16, 2007, members of a private security firm known as Blackwater Worldwide1 were escorting a convoy of U.S. State Department personnel through western Baghdad.2 As the convoy passed through Nisour Square, the Blackwater guards, perceiving some threat, opened fire on several civilian vehicles.3 Seventeen Iraqis were killed in the incident; a subsequent Federal Bureau of Investigation (FBI) report found that fourteen of these killings were unjustified.4

Prior to the Nisour Square incident, private security contractors (PSCs)5 had already been involved in several high-profile incidents in

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1 At the time, the company was known as “Blackwater USA”; it has since changed its name to “Blackwater Worldwide” but will be referred to simply as “Blackwater” in this Note. See Blackwater Home Page, http://www.blackwaterusa.com/about/ (last visited Nov. 17, 2007) (providing a brief description of the company and its capabilities).


3 See id.


Iraq. The killing of four Blackwater personnel in Fallujah sparked a fierce battle in that city in April 2004. Several civilian contractors were also involved in the notorious Abu Ghraib prisoner abuse. With traditional military forces in short supply, the United States has recently relied on PSCs to perform missions traditionally falling to soldiers or marines. Such missions include protecting fixed sites and guarding the numerous U.S. civilians in Iraq, such as members of the State Department and (until it was disbanded in 2004) the Coalition Provisional Authority (CPA). As PSC visibility has increased, however, their legal status has come under scrutiny. Nisour Square provides a telling example: the Iraqi government quickly declared the killings unjustified and demanded compensatory payments for the victims’ families, and some Iraqis have demanded prosecution. The incident has thus brought into sharp focus a question unanswered since the start of the Iraq War—what law should apply to PSCs for crimes committed in that conflict?

This Note attempts to answer that question. Part I contains an overview of three ways that PSCs might be prosecuted for crimes
committed in Iraq: Iraqi jurisdiction, U.S. civilian jurisdiction, and U.S. military jurisdiction. Part II presents some of the procedural and jurisdictional issues that might arise from each. Finally, Part III assesses their relative merits, and concludes that U.S. military jurisdiction is the best option.

I. Background

The United States made extensive use of contractors in its late-twentieth-century overseas involvements, but most provided supplies, not security, and were therefore not PSCs for the purposes of this Note. While armed contractors guarded U.S. diplomats in Haiti in 1994, they were few in number. It was not until the 2003 invasion of Iraq that PSCs appeared in force, performing tasks “far more extensive . . . than in past wars.”

The PSC phenomenon is so recent that there is little applicable case law. Any prosecution would be precedent-setting, and an analysis must begin with an overview of the laws that might apply should one occur. First, PSCs might simply be prosecuted under Iraqi criminal law, since states generally have jurisdiction over crimes committed within their territory, regardless of the defendant’s nationality. The law likely to be applied in this scenario is

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16 Another option would be to subject PSCs to the jurisdiction of some international body, such as the International Criminal Court; this raises jurisdictional issues beyond the scope of this Note. See generally Rome Statute of the International Criminal Court Part II, July 17, 1998, 37 I.L.M. 999, 1003–11.


19 See id.

20 Singer, Outsourcing War, supra note 5, at 120. The total number of PSCs in Iraq is not clear, but one estimate places the number at 6000. See id.


22 See id. at 581–86.

23 See Statute of the Iraqi Special Tribunal, art. 1(b) (2003) (Iraq), available at http://www.cpa-iraq.org/human_rights/Statute.htm (stating that the Tribunal, which was promulgated by the CPA, only has jurisdiction over Iraqi nationals and residents).

24 See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (“[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”). One of several exceptions can include the “status of forces” treaties the United States often negotiates with states in which it maintains a permanent military presence. See Christopher Dickey, The
the Iraqi Penal Code of 1969, under which Iraqi courts currently operate. The basis of jurisdiction under this option is nationality; states often exercise jurisdiction over their citizens even when they are abroad. The Military Extraterritorial Jurisdiction Act (MEJA) of 2000 appears to grant federal courts authorization to hear cases involving PSCs by giving them jurisdiction over those who commit crimes “while employed by or accompanying the Armed Forces outside the United States.” It is therefore possible that criminal charges could be brought against PSCs in U.S. district court.

Regarding this second option, it should be noted that because the MEJA language initially seemed to exempt PSCs whose contracts were not with the Department of Defense (such as Blackwater, whose contract was with the Department of State), Congress recently amended the statute, which now governs those “employed by the Armed Forces outside the United States . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.”


27 See 18 U.S.C.A. § 1112(a) (2007) (defining voluntary and involuntary manslaughter, the charges most likely to be brought for the Nisour Square incident under federal civilian law); see also 18 U.S.C.A. § 1112(b) (2007) (establishing sentences for the respective crimes).

28 See Blackmer v. United States, 284 U.S. 421, 436 (1932) (“By virtue of the obligations of citizenship, the United States retained its authority over [Blackmer], and he was bound by its laws made applicable to him in a foreign country.”); see also United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2006) (“although there is a presumption that Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States . . . that presumption can be overcome when Congress clearly expresses its intent to do so”) (citation omitted).

29 See 18 U.S.C.A. § 3261(a) (2007). It is worth noting that the MEJA is inapplicable if charges are brought by a foreign government, but can apply even if charges are brought under the Uniform Code of Military Justice. See 18 U.S.C.A. § 3261(b)–(c) (2007).

30 See id.

31 See Stein, supra note 21, at 598–600.

The third and final option would be for PSCs to be prosecuted under U.S. military law;\textsuperscript{33} as with civilian law, the basis of jurisdiction would be the nationality of the accused.\textsuperscript{34} The Uniform Code of Military Justice (UCMJ) is the law that governs members of the U.S. Armed Forces,\textsuperscript{35} and its jurisdiction generally does not extend to civilians.\textsuperscript{36} Indeed, a military court “has no jurisdiction beyond that given by statute, and, since there is no statute giving it jurisdiction over persons not in the military service, it may not assume such jurisdiction either as a matter of convenience or public policy.”\textsuperscript{37} As with the MEJA, however, recent changes to the UCMJ jurisdictional statute may have given military courts the necessary authority.\textsuperscript{38}

10 U.S.C. § 802(a) lists the categories of persons subject to courts-martial jurisdiction.\textsuperscript{39} Prior to 2006, one of these was, “in time of war, persons serving with or accompanying an armed force in the field.”\textsuperscript{40} In 1970, a court ruled that the first clause rendered the statute inapplicable except in times of declared war.\textsuperscript{41} Congress, however, recently addressed the “declared war” issue.\textsuperscript{42} In 2006, it added a key clause: UCMJ jurisdiction now extends over, “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”\textsuperscript{43} The purpose of this addition seems

\textsuperscript{33} See 10 U.S.C.A. § 919 (2007) (defining both voluntary and involuntary manslaughter, the charges most likely to be filed under military law for the Nisour Square incident).
\textsuperscript{34} See Blackmer, 284 U.S. at 436.
\textsuperscript{35} See Stein, supra note 21, at 581 (stating that art. I, § 8 of the U.S. Constitution provides Congress with the authority to make rules for the Armed Forces).
\textsuperscript{36} See, e.g., Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (holding that UCMJ is not applicable to dependents of service members for non-capital crimes); Reid v. Covert, 354 U.S. 1, 19–20 (1957) (holding that the UCMJ is not applicable to dependants of service members for capital crimes); United States ex rel. Toth v. Quarles, 350 U.S. 11, 22 (1955) (holding that the UCMJ is not applicable to former service members who had reverted to civilian status).
\textsuperscript{37} Ex parte Wilson, 33 F.2d 214, 215 (D.C. Va. 1929).
\textsuperscript{39} See 10 U.S.C.A. § 802(a) (2007).
\textsuperscript{40} 10 U.S.C.A. § 802(a)(10) (2005).
\textsuperscript{43} See 10 U.S.C.A. § 802(a) (2007).
\textsuperscript{44} Id. (emphasis added).
clear—to avoid the declared war distinction previously used to deny UCMJ jurisdiction over civilians.\textsuperscript{45}

II. Discussion

A. Iraqi Law

The largest obstacle to prosecuting PSCs under Iraqi law is the immunity they have already been given from such prosecution.\textsuperscript{46} In 2004,\textsuperscript{47} CPA leader L. Paul Bremer (who relied on PSCs for his own personal protection) issued a proclamation (CPA Order 17) concerning the “status of certain . . . personnel in Iraq.”\textsuperscript{48} Section 4 of this order, entitled “Contractors,” stated that “[c]ontractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract.”\textsuperscript{49}

While the Iraqi government has expressed a desire to prosecute those responsible for Nisour Square, it has not (as of this Note) formally repealed CPA Order 17.\textsuperscript{50} Until and unless it does, the PSC immunity is still in effect, and there would be no Iraqi jurisdiction for the Nisour Square incident unless it was asserted retroactively.\textsuperscript{51}

B. U.S. Civilian Law

Despite legislative attempts to close gaps in the law, the jurisdiction of U.S. federal courts over PSCs (as defined by this Note) is untested.\textsuperscript{52} Only three persons have been prosecuted under the MEJA to


\textsuperscript{46} See Dickey, supra note 24.

\textsuperscript{47} See id. (noting that Iraqi sovereignty was formally restored, and Bremer departed the country on the following day—June 28, 2004).


\textsuperscript{49} Id. at 5.

\textsuperscript{50} See Alissa J. Rubin, Iraqi Cabinet Votes to End Security Firms’ Immunity, N.Y. Times, Oct. 31, 2007, at A10. Iraq has approved draft legislation to this end, which is pending ratification by its Parliament. See id.

\textsuperscript{51} See Steven Lee Myers & Sam Dagher, Agreement with Iraq over Troops Is at Risk, N.Y. Times, Sept. 19, 2008, at A6 (noting that disagreements over contractor immunity have prevented Iraq and the United States from reaching an “agreement to extend the American military mandate.”).

\textsuperscript{52} See Peters, supra note 45, at 385. As this Note was going to print, federal prosecutors had just indicted five of the Blackwater personnel involved in the Nisour Square incident for manslaughter. See 5 Guards Charged with Manslaughter in Iraq Deaths, NYTimes.com, Dec. 8, 2008,
date: the wife of a U.S. serviceman stationed in Turkey, a dual Canadian/Iraqi citizen serving as an interpreter, and a former Marine charged after leaving the military. There is thus no clear precedent for using the MEJA in a situation like Nisour Square.

There is reason to think that use of the MEJA against PSCs might be upheld, however, as Iraq certainly appears to be a “Department of Defense mission.” There are, after all, approximately 165,000 U.S. troops currently present, with a U.S. Army general (as opposed to a State Department official) in overall command. Furthermore, the clear intent behind amending the MEJA seems to have been permitting prosecution of PSCs in federal district court.

Notwithstanding the unanswered question of jurisdiction, the major difficulty with U.S. civilian prosecution of PSCs is logistical. For

http://www.nytimes.com/aponline/washington/AP-Blackwater-Prosecution.html?emc=eta1. The defendants’ attorneys planned to “argue that the guards cannot be charged under a law intended to cover soldiers and military contractors since the men worked as civilian contractors for the State Department.” Id. Prosecutors noted, however, that because the PSCs were “supporting the military’s mission” in Baghdad, they were covered by the MEJA. See id.

53 See generally United States v. Arnt, 474 F.3d 1159 (9th Cir. 2007). Note that the constitutionality of the MEJA was not challenged. See id.

54 See Michael R. Gordon, Military Role Overseeing Contractors Tested in Iraq, N.Y. TIMES, Apr. 6, 2008, at A16 (noting defendant’s intention to challenge U.S. jurisdiction). The interpreter “was sentenced to five months of confinement after pleading guilty in the stabbing of a colleague.” Two U.S. Soldiers Killed in Iraq After Small-Town Meeting, SEATTLE TIMES, June 24, 2008, at A5.

55 See Acquittal of Former Marine in Landmark Case Expected to Cause Change in Legislation, Says Defense Team, BIOTECH WEEK, Sept. 24, 2008, available at 2008 WLNR 17737925. The Marine, Jose Luis Nazario Jr., was acquitted of murder charges stemming from an incident during the November 2004 Battle of Fallujah. See id. Significantly, “[e]ven one of MEJA’s authors, Senator Jeff Sessions, has been quoted as saying that this type of prosecution was not the motivation behind MEJA.” Id. (emphasis added).

56 See id. Another statutory means of doing so, the 1996 War Crimes Act, is probably inapplicable to the Nisour Square incident; the War Crimes Act is designed to prosecute civilians for crimes that would be punishable under the Geneva Conventions, such as willful killing or torture. See Peters, supra note 45, at 392–93. It should also be noted that an extradition treaty between the United States and Iraq may still technically be in effect, although it dates back to the Iraqi monarchy. See Extradition Treaty, U.S.-Iraq, June 7, 1934, 49 Stat. 3380.


60 See Stein, supra note 21, at 599.

61 See, e.g., Peters, supra note 45, at 388–89.
example, any trial would involve transporting witnesses, parties, and evidence to the United States.\textsuperscript{62} Regarding investigations, although there are FBI personnel stationed in Iraq, their focus is counter-terrorism; the team that investigated the Nisour Square shooting had to be deployed from the United States.\textsuperscript{63} Investigations would undoubtedly be hampered by such delays, as well as by unfamiliarity with local culture, security issues, and interagency disputes that could well arise.\textsuperscript{64}

\textbf{C. U.S. Military Law}

As there have been no court rulings on the latest amendment to the UCMJ jurisdictional statute, it remains unclear whether PSCs may now be court-martialed.\textsuperscript{65} A remaining issue could potentially be the phrase “serving with or accompanying an armed force.”\textsuperscript{66} A court could interpret it to refer only to PSCs physically accompanied by troops at the time in question, which might exempt PSCs operating independently.\textsuperscript{67} A court could also interpret the “armed force” phrase to refer only to PSCs employed by the Department of Defense, as opposed to the Department of State or another federal agency; this would also exempt the PSCs involved in the Nisour Square incident.\textsuperscript{68}

The actual procedures for court-martialed a PSC under the UCMJ are uncertain.\textsuperscript{69} For example, UCMJ action is initiated when a commissioned officer with command authority over the accused formally prefers charges against them.\textsuperscript{70} PSCs operate outside the military chain of command, however, and it is unclear which officers (if any) might have the authority to do so.\textsuperscript{71} Since the military does not


\textsuperscript{63} See id.

\textsuperscript{64} See Jeremy Scahill, Op-Ed., \textit{Blackwater’s Loopholes}, L.A. Times, Nov. 16, 2007, at A25; see also \textit{5 Guards Charged with Manslaughter in Iraq Deaths}, supra note 52 (noting that these same issues were projected to cause difficulties for the prosecution).

\textsuperscript{65} See generally Peters, supra note 45.


\textsuperscript{67} See id. U.S. military personnel do not appear to have been present during the shootings at Nisour Square. See \textit{Blackwater Incident: What Happened}, supra note 2. State Department personnel, however, were presumably present as Blackwater was escorting a State Department convoy. See id. If any were armed, that might satisfy the “armed force” clause. See 10 U.S.C.A. § 802(a)(10) (2007).

\textsuperscript{68} See 10 U.S.C.A. § 802(a)(10) (2007); Broder & Rohde, supra note 18.

\textsuperscript{69} See Fidell, supra note 42, at 30.


\textsuperscript{71} See id.
have a formal procedure for court-martialing PSCs, one would have to be improvised.\footnote{See generally Manual For Courts-Martial, United States (2008 ed.) (outlining court-martial procedures for uniformed service members only), available at http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf.}

Another issue is that all U.S. service members take an oath to obey orders “according to regulations and the Uniform Code of Military Justice.”\footnote{10 U.S.C.A. § 502(a) (2007).} Lacking such a clause in their employment contracts, PSCs might argue that UCMJ jurisdiction is improper; they might also challenge constitutionality based on the absence of grand jury indictments or civilian juries—the primary differences between military and civilian trials.\footnote{See Anthony Giardino, Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act, 48 B.C. L. Rev. 699, 719 (2007). See generally Reid v. Covert, 354 U.S. 1 (1957) (rejecting UCMJ jurisdiction over civilian in part because of Fifth and Sixth Amendment considerations).}

III. Analysis

A. The Case Against Iraqi Jurisdiction

There are two main arguments for Iraqi jurisdiction. First, lifting PSC immunity could increase the legitimacy of the Iraqi government—a major goal, after all, of the current U.S. involvement.\footnote{See Alissa J. Rubin & Andrew E. Kramer, Iraqi Premier Says Blackwater Shootings Challenge His Nation’s Sovereignty, N.Y. Times, Sept. 24, 2007, at A6.} Second, the U.S. Executive branch has thus far shown little inclination to hold PSCs accountable for their actions.\footnote{See, e.g., Eric Schmitt, Report Details Shooting by Drunken Blackwater Worker, N.Y. Times, Oct. 1, 2007, at A10. In December 2006, after a Blackwater employee allegedly shot and killed a bodyguard of one of Iraq’s vice presidents, the State Department arranged for him to be sent back to the United States almost immediately. See id. Although an FBI investigation is ongoing in Seattle, no charges have been filed as of this Note. See John M. Broder, Ex-Paratrooper Is Suspect in Drunken Killing of Iraqi, N.Y. Times, Oct. 4, 2007, at A10.} Although the FBI investigation into the Nisour Square incident may indicate a change in policy, it is unclear whether charges will follow.\footnote{See Karen DeYoung, Immunity Jeopardizes Iraq Probe, Wash. Post, Oct. 30, 2007, at A1. Federal prosecution of the PSCs involved—presumably under the MEJA—was complicated recently by reports that State Department officials had granted limited immunity to Blackwater personnel involved in the incident during their initial investigation. See id.}

A strong argument against Iraqi jurisdiction, however, is the potential for bias against PSCs by Iraqi courts.\footnote{See Rubin & von Zielbauer, supra note 15.} Regardless of whether such bias is real, if the perception arose, subjecting PSCs to Iraqi ju-
risdiction would probably decrease the number of non-Iraqi civilians willing to work there.\textsuperscript{79} Besides PSCs, there are thousands of such contractors in Iraq performing such critical tasks as restoring the oil infrastructure, training police, and advising the Defense Ministry.\textsuperscript{80} These contractors might be unwilling to stay for fear of being brought before Iraqi courts of questionable fairness.\textsuperscript{81} Even if such an attitude was held only by PSCs, a mass exodus of that group alone would force many civilian agencies to find alternate methods of operating in a hostile environment.\textsuperscript{82} The gap might have to be filled by thinly-spread U.S. military forces; if these were unavailable, civilian agencies could be severely limited in their activities.\textsuperscript{83} Any legitimacy gained by Iraqi prosecution of PSCs could thus be offset by instability.\textsuperscript{84}

B. The Case for Military Jurisdiction

Courts martial are currently conducted in Iraq for military personnel; the infrastructure prosecuting PSCs is therefore already in place.\textsuperscript{85} Iraqi witnesses are more easily brought before tribunals in that country, and U.S. personnel who testify are likewise able to quickly return to their normal duties.\textsuperscript{86} PSC trials in district court, by contrast, could require transporting Iraqi, U.S. military, and PSC witnesses between Iraq and the United States, removing the latter two groups from areas where they are sorely needed for long periods.\textsuperscript{87}

Another argument supporting military over civilian jurisdiction is that military tribunals have experience with issues likely to arise with

\textsuperscript{79} See Brad Knickerbocker, A Legal Danger Zone for Blackwater, CHRISTIAN SCI. MONITOR, Sept. 21, 2007, at 3.

\textsuperscript{80} See Merle, supra note 5.

\textsuperscript{81} See Knickerbocker, supra note 79, at 3.

\textsuperscript{82} See generally Broder & Rohde, supra note 18.

\textsuperscript{83} See Ned Parker, U.S. Restricts Movement of Its Diplomats in Iraq, L.A. TIMES, Sept. 19, 2007, at 1; see also Rubin & Kramer, supra note 75 (noting that the removal of Blackwater could create a “security imbalance”). In the days following the Nisour Square incident, State Department personnel were confined to the Green Zone in Baghdad while Blackwater’s activities were put temporarily on hold. See Parker, supra note 83. It is significant that despite fallout from Nisour Square, Blackwater’s contract was recently renewed, in part because there were simply no other security alternatives for the State Department. See James Risen, Iraq Contractor in Shooting Case Makes Comeback, N.Y. TIMES, May 10, 2008, at A1.

\textsuperscript{84} See id.


\textsuperscript{86} See Gonzalez, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470.

\textsuperscript{87} See Singer, Above Law, supra note 10; Herszenhorn, supra note 62.
PSCs.88 PSCs resemble soldiers far more than civilians in Iraq—they carry weapons in a dangerous environment where the use of deadly force is common.89 While court-martia ling civilians might infringe on the “Constitutional right . . . to a trial by one’s peers” in a strict constructionist sense, being judged by persons who are likewise familiar with the stress of combat is arguably closer to the Framers’ intent behind the “peers” language.90 The UCMJ could also be revised to require grand jury indictments in cases involving PSCs, thus solving the Fifth Amendment problem.91

The application of military law has already proven effective.92 Following the prisoner abuse scandal at Abu Ghraib, eleven U.S. soldiers were convicted for their respective roles, receiving sentences of up to ten years in prison.93 Perhaps because the UCMJ was applied to such effect,94 no such scandal has since occurred; in contrast, there have already been two other reported killings of civilians involving PSCs since the Nisour Square incident.95

Other problems that might arise with the application of military law are not insurmountable. UCMJ articles inapplicable to PSCs simply need not be applied.96 Judge Advocate officers could both prosecute and defend PSCs; the UCMJ already allows for civilian attorneys to supplement defense counsel and this provision could easily be ex-

88 See generally Priest, supra note 11.
89 See id.
90 See Giardino, supra note 74, at 738.
91 See U.S. Const. amend. V (“No person shall be held to answer for a . . . crime, unless on [a]n indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .”).
92 See, e.g., Gonzalez, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470; see also Singer, Above Law, supra note 10.
94 See Christian Davenport & Michael Amon, Three to Be Arraigned in Prison Abuse, Wash. Post, May 19, 2004, at A1 (noting that charges were preferred a month after the Abu Ghraib story became public); see also Graner Gets Ten Years, supra note 93 (noting that the Abu Ghraib story broke in April 2004).
tended. Acknowledgement of UCMJ authority could be required of all PSC contracts. Finally, PSCs could be brought under direct military control, thus facilitating the military’s ability to prosecute when necessary. This last action would have the added benefit of providing more oversight over PSC actions, a deterrence to future misconduct regardless of which law is applied.

Aside from potential Constitutional issues, there are several other negatives associated with UCMJ jurisdiction for PSCs. The increased case load would certainly burden the limited number of military lawyers in Iraq, and adding supervisory duties over PSCs would increase the burden for combat troops as well. The alternative, however, is to place that burden on either U.S. district courts on another continent, or an Iraqi judicial system unable to handle its own case load.

If the phrase “a person accompanying an armed force” is interpreted very broadly, there could be unintended consequences from expanding military jurisdiction. The phrase could theoretically include an embedded reporter, for example, allowing the military to court-martial members of the media. The UCMJ jurisdictional statute could be revised, however, to avoid this possibility.

**Conclusion**

PSCs must not remain outside any legitimate jurisdiction. Combat, in which PSCs are now unequivocally involved, is chaotic and deadly even with some force of law acting as a restraint; arming and training

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99 See John M. Broder & David Johnston, U.S. Military Will Supervise Security Firms, N.Y. Times, Oct. 31, 2007, at A1. The U.S. military is beginning to take this step; it has instituted a requirement that all State Department convoys (and implicitly, their PSC guards) fall under military control. See id.
100 See id.
101 See Giardino, supra note 74, at 738.
102 See Singer, Above Law, supra note 10.
103 See Stein, supra note 21, at 599.
people to kill without holding them accountable for their actions allows violence to spiral out of control.\textsuperscript{108}

Whether accurate or not, the perceived partiality of the Iraqi justice system makes this an unpalatable option for prosecuting PSCs. Such a move might appease Iraqis in the short term, but would likely reduce the number of foreign civilians willing to work there, and thus hamstring the country’s long-term rebuilding efforts. While district courts could provide a fair trial, the logistical challenges of investigating and prosecuting crimes in Iraq from the United States would be great. Furthermore, the question of which killings in combat zones are unjustified is one unfamiliar to most federal prosecutors, judges, and defense lawyers.

The best solution is to hold PSCs legally accountable under the UCMJ. To do this, they must be brought under direct military control to facilitate the military’s ability to prefer charges when necessary, and to deter unlawful conduct. Acceptance of UCMJ jurisdiction should be a prerequisite for the awarding of any U.S. government security contract. At a lower level, acknowledgment of UCMJ jurisdiction should be a clause in every individual PSC’s contract.

It is worth noting that if its military were large enough to meet the security requirements of its foreign policy, the United States’ need for PSCs would largely evaporate.\textsuperscript{109} This is not to say that PSCs have no role to play in international relations. There has been debate, for example, about using PSCs to help keep the peace in Darfur, where many states have been loath to commit regular troops.\textsuperscript{110}

A discussion on the merits of using PSCs is beyond the scope of this Note. What is clear is that PSCs must be legally accountable for their actions, as those actions, for better or worse, reflect directly upon those who employ them.


risdiction would probably decrease the number of non-Iraqi civilians willing to work there.\textsuperscript{79} Besides PSCs, there are thousands of such contractors in Iraq performing such critical tasks as restoring the oil infrastructure, training police, and advising the Defense Ministry.\textsuperscript{80} These contractors might be unwilling to stay for fear of being brought before Iraqi courts of questionable fairness.\textsuperscript{81} Even if such an attitude was held only by PSCs, a mass exodus of that group alone would force many civilian agencies to find alternate methods of operating in a hostile environment.\textsuperscript{82} The gap might have to be filled by thinly-spread U.S. military forces; if these were unavailable, civilian agencies could be severely limited in their activities.\textsuperscript{83} Any legitimacy gained by Iraqi prosecution of PSCs could thus be offset by instability.\textsuperscript{84}

\textbf{B. The Case for Military Jurisdiction}

Courts martial are currently conducted in Iraq for military personnel; the infrastructure prosecuting PSCs is therefore already in place.\textsuperscript{85} Iraqi witnesses are more easily brought before tribunals in that country, and U.S. personnel who testify are likewise able to quickly return to their normal duties.\textsuperscript{86} PSC trials in district court, by contrast, could require transporting Iraqi, U.S. military, and PSC witnesses between Iraq and the United States, removing the latter two groups from areas where they are sorely needed for long periods.\textsuperscript{87}

Another argument supporting military over civilian jurisdiction is that military tribunals have experience with issues likely to arise with


\textsuperscript{80} See Merle, supra note 5.

\textsuperscript{81} See Knickerbocker, supra note 79, at 3.

\textsuperscript{82} See generally Broder & Rohde, supra note 18.

\textsuperscript{83} See Ned Parker, \textit{U.S. Restricts Movement of Its Diplomats in Iraq}, \textit{L.A. Times}, Sept. 19, 2007, at 1; see also Rubin & Kramer, supra note 75 (noting that the removal of Blackwater could create a “security imbalance”). In the days following the Nisour Square incident, State Department personnel were confined to the Green Zone in Baghdad while Blackwater’s activities were put temporarily on hold. See Parker, supra note 83. It is significant that despite fallout from Nisour Square, Blackwater’s contract was recently renewed, in part because there were simply no other security alternatives for the State Department. See James Risen, \textit{Iraq Contractor in Shooting Case Makes Comeback}, \textit{N.Y. Times}, May 10, 2008, at A1.

\textsuperscript{84} See id.


\textsuperscript{86} See Gonzalez, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470.

\textsuperscript{87} See Singer, \textit{Above Law}, supra note 10; Herszenhorn, supra note 62.
PSCs. PSCs resemble soldiers far more than civilians in Iraq—they carry weapons in a dangerous environment where the use of deadly force is common. While court-martialed civilians might infringe on the “Constitutional right . . . to a trial by one’s peers” in a strict constructionist sense, being judged by persons who are likewise familiar with the stress of combat is arguably closer to the Framers’ intent behind the “peers” language. The UCMJ could also be revised to require grand jury indictments in cases involving PSCs, thus solving the Fifth Amendment problem.

The application of military law has already proven effective. Following the prisoner abuse scandal at Abu Ghraib, eleven U.S. soldiers were convicted for their respective roles, receiving sentences of up to ten years in prison. Perhaps because the UCMJ was applied to such effect, no such scandal has since occurred; in contrast, there have already been two other reported killings of civilians involving PSCs since the Nisour Square incident.

Other problems that might arise with the application of military law are not insurmountable. UCMJ articles inapplicable to PSCs simply need not be applied. Judge Advocate officers could both prosecute and defend PSCs; the UCMJ already allows for civilian attorneys to supplement defense counsel and this provision could easily be ex-

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88 See generally Priest, supra note 11.
89 See id.
90 See Giardino, supra note 74, at 738.
91 See U.S. Const. amend. V (“No person shall be held to answer for a . . . crime, unless on [a]n indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .”).
92 See, e.g., Gonzalez, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470; see also Singer, Above Law, supra note 10.
94 See Christian Davenport & Michael Amon, Three to Be Arraigned in Prison Abuse, WASH. POST, May 19, 2004, at A1 (noting that charges were preferred a month after the Abu Ghraib story became public); see also Graner Gets Ten Years, supra note 93 (noting that the Abu Ghraib story broke in April 2004).
tended.\textsuperscript{97} Acknowledgement of UCMJ authority could be required of all PSC contracts.\textsuperscript{98} Finally, PSCs could be brought under direct military control, thus facilitating the military’s ability to prosecute when necessary.\textsuperscript{99} This last action would have the added benefit of providing more oversight over PSC actions, a deterrence to future misconduct regardless of which law is applied.\textsuperscript{100}

Aside from potential Constitutional issues, there are several other negatives associated with UCMJ jurisdiction for PSCs.\textsuperscript{101} The increased case load would certainly burden the limited number of military lawyers in Iraq, and adding supervisory duties over PSCs would increase the burden for combat troops as well.\textsuperscript{102} The alternative, however, is to place that burden on either U.S. district courts on another continent,\textsuperscript{103} or an Iraqi judicial system unable to handle its own case load.\textsuperscript{104}

If the phrase “a person accompanying an armed force” is interpreted very broadly, there could be unintended consequences from expanding military jurisdiction.\textsuperscript{105} The phrase could theoretically include an embedded reporter, for example, allowing the military to court-martial members of the media.\textsuperscript{106} The UCMJ jurisdictional statute could be revised, however, to avoid this possibility.\textsuperscript{107}

\textbf{Conclusion}

PSCs must not remain outside any legitimate jurisdiction. Combat, in which PSCs are now unequivocally involved, is chaotic and deadly even with some force of law acting as a restraint; arming and training

\begin{footnotesize}
\begin{enumerate}
\item See John M. Broder & David Johnston, \textit{U.S. Military Will Supervise Security Firms}, \textit{N.Y. Times}, Oct. 31, 2007, at A1. The U.S. military is beginning to take this step; it has instituted a requirement that all State Department convoys (and implicitly, their PSC guards) fall under military control. See \textit{id}.
\item See \textit{id}.
\item See Giardino, supra note 74, at 738.
\item See Singer, \textit{Above Law}, supra note 10.
\item See Stein, supra note 21, at 599.
\item See 10 U.S.C.A. § 802(a) (10) (2007).
\item See 10 U.S.C.A. § 802(a) (10) (2007).
\end{enumerate}
\end{footnotesize}
people to kill without holding them accountable for their actions allows violence to spiral out of control.\textsuperscript{108}

Whether accurate or not, the perceived partiality of the Iraqi justice system makes this an unpalatable option for prosecuting PSCs. Such a move might appease Iraqis in the short term, but would likely reduce the number of foreign civilians willing to work there, and thus hamstring the country’s long-term rebuilding efforts. While district courts could provide a fair trial, the logistical challenges of investigating and prosecuting crimes in Iraq from the United States would be great. Furthermore, the question of which killings in combat zones are unjustified is one unfamiliar to most federal prosecutors, judges, and defense lawyers.

The best solution is to hold PSCs legally accountable under the UCMJ. To do this, they must be brought under direct military control to facilitate the military’s ability to prefer charges when necessary, and to deter unlawful conduct. Acceptance of UCMJ jurisdiction should be a prerequisite for the awarding of any U.S. government security contract. At a lower level, acknowledgment of UCMJ jurisdiction should be a clause in every individual PSC’s contract.

It is worth noting that if its military were large enough to meet the security requirements of its foreign policy, the United States’ need for PSCs would largely evaporate.\textsuperscript{109} This is not to say that PSCs have no role to play in international relations. There has been debate, for example, about using PSCs to help keep the peace in Darfur, where many states have been loath to commit regular troops.\textsuperscript{110}

A discussion on the merits of using PSCs is beyond the scope of this Note. What is clear is that PSCs must be legally accountable for their actions, as those actions, for better or worse, reflect directly upon those who employ them.

\textsuperscript{108} See William J. Fenrick, \textit{Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities}, 30 B.C. \textsc{Int’l} \& \textsc{Comp. L. Rev.} 111, 113 (2007).


AFFORDING DISCRETION TO IMMIGRATION JUDGES: A COMPARISON OF REMOVAL PROCEEDINGS IN THE UNITED STATES AND CANADA

Adam Collicelli*

Abstract: In the United States, immigration judges lack the discretion to consider defenses during the removal proceedings of legal, non-citizen residents if they have committed an aggravated felony. American citizen children face the significant risk of lifelong separation from parents, who commit relatively minor crimes, because the definition of an aggravated felony is so broad. Canadian immigration laws, akin to those in a majority of developed countries, grant judges the crucial opportunity to weigh the separation of a parent and citizen child in the removal decision. This Note argues that Congress should follow Canada’s example by passing the proposed Child Citizen Protection Act. Such an equitable approach is necessary to adhere to the Convention on the Rights of the Child. Although the United States is not a party to that Convention, its duty as a signatory may still require it to promote the best interests of citizen children in its immigration courts. Further, the principles governing that Convention may be morphing into an international custom, which would place American removal proceedings directly at odds with binding international law.

Introduction

Mario Pacheco, a native of Mexico, became a legal permanent resident (LPR) of the United States in 1981 when he was only two months old. In the twenty-four years that he lived on U.S. soil, Mario obtained a general equivalency diploma, worked sixty hour weeks in the shipping department of a warehouse, and cared for his three U.S.

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citizen children. \(^2\) Presently, he faces removal (deportation) for possession of 2.5 grams of marijuana with intent to distribute, a state misdemeanor but an aggravated felony under immigration law. \(^3\) Stunned at the severe repercussions for his son’s relatively minor offense, which occurred when he was only nineteen, Mario’s mother stated, “[h]e’s being punished for something he did when he was a teenager. He didn’t even go to jail.” \(^4\) His young children now may live their lives without a father. \(^5\) According to current U.S. law, judges have no discretion to weigh Mario’s meager criminality against the life-altering consequences of separating him from his children. \(^6\)

Mihailo Krusarouski, originally from the former Yugoslavia, moved to Canada at the age of thirteen. \(^7\) Between 1971 and 1995, Mihailo had accrued thirty criminal convictions, including assault, breaking and entering, and impaired driving. \(^8\) Canada’s Immigration and Refugee Board Appeal Division (IRBAD) determined that Mihailo’s subsequent removal order was legally valid. \(^9\) In exercising its discretionary jurisdiction, \(^10\) however, IRBAD determined that Mihailo should not be removed. \(^11\) This decision was based heavily upon the best interests of his baby daughter. \(^12\) To help ensure that the baby was raised by both of her parents, IRBAD stayed the execution of the removal order conditioned upon Mihailo’s personal rehabilitation. \(^13\)

The startling contrast between Mario’s and Mihailo’s stories serves to showcase a very distressing distinction between U.S. and Canadian immigration laws. \(^14\) Though Canadian law has, since 2002, become more restrictive, discretionary review of removal orders by IRBAD remains available for a wide range of lesser criminals if they are LPRs. \(^15\)

\(^2\) See Human Rights Watch, supra note 1, at 21.
\(^3\) Id.
\(^4\) Id.
\(^5\) See id.
\(^8\) Id.
\(^9\) Id.
\(^11\) See Krusarouski, I.A.D. T99-04248.
\(^12\) See id.
\(^13\) See id.
\(^14\) See id.; Human Rights Watch, supra note 1, at 21.
\(^15\) See Immigration and Refugee Protection Act, S.C., §§ 63(3), 64(1) (2001) (Can.).
This legal procedure is not an anomaly. In fact, the lack of discretion available to U.S. immigration judges to consider defenses to deportation made by LPRs convicted of an aggravated felony puts this country in a clear minority among industrialized states. Though there are certainly situations where the removal of an LPR is appropriate, as with very violent criminal offenders, the U.S. immigration system’s current rigidity eliminates any possibility of equitable treatment for those residents who clearly deserve it.

Part I of this Note provides a brief survey of the current state of immigration law that governs the growing population of LPRs in the United States. Part II focuses on current U.S. immigration laws that have the capability of rendering such residents, with relatively minor criminal convictions, removable without any discretionary examination of mitigating factors. In particular, this Note examines the compelling factor of a citizen child’s best interests. Next, it discusses the discretionary jurisdiction of the Canadian immigration system and its source in international law, which is, in part, its ratification of the Convention on the Rights of the Child (CRC). Finally, Part III argues that passage of the Child Citizen Protection Act (CCPA), which was recently proposed in the House of Representatives, is in line with the international legal standards found in the CRC and represents one remedy for this serious injustice of U.S. immigration law.

I. Background

Between the years 1997 and 2005, over 600,000 non-citizens have been removed from the United States due to criminal convictions. In 2002 alone, the number of criminal deportees surpassed the total of those between 1905 and 1986. The numbers of this type of removal have continually risen in the last decade, springing from 51,874 in 1997

16 See Human Rights Watch, supra note 1, at 49–50.
17 See id.
to 90,426 in 2005. Of those removed in 2005, it is estimated that around 80,000 were LPRs.

In 2005, 64.6% of the removals for criminal convictions were based on non-violent offenses, 20.9% on violent offenses, and 14.7% on “other” undisclosed crimes. The most common crimes leading to removal involve drugs, non-sexual assault, and the amorphous group of “other” offenses. Though this latter category is somewhat mysterious, stories of deportations for minor offenses have been far from uncommon in recent years.

Besides having obvious negative effects on the deportees, these removals have particularly distressing consequences on families. Since 1997, approximately 1.6 million husbands, wives, sons, and daughters have been separated from family members because of this process. The separation may be legally enforced, as in cases where the U.S. citizen child is not accepted into the country to which the parent is removed. More often, however, the family division results from the parent’s desire to leave the child in the United States to enjoy better living standards, education, and job opportunities.

The removal of Gerardo Antonio Mosquera, an LPR in the United States for thirty years, depicts one tragic consequence of this all-too-common occurrence. Mosquera was removed after selling ten dollars worth of marijuana to a police informant. His wife and children, all U.S. citizens, were left to fend for themselves. Mosquera’s seventeen

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22 Human Rights Watch, supra note 1, at 38.
23 See Kanstroom, supra note 21, at 196 (noting that though the government does not disclose how many of those removed were LPRs, as opposed to illegal border-crossers, the figure can be estimated).
24 Human Rights Watch, supra note 1, at 5–6.
25 Id. at 42.
28 See Human Rights Watch, supra note 1, at 44.
30 See id.
32 See id.
33 See id.
year old son, unable to cope with the loss of his father, committed suicide.\textsuperscript{34}

The immigration laws of many countries provide for judicial discretion in removal proceedings, helping to alleviate the sometimes unjust and often devastating consequences associated with mandatory deportations due to criminal convictions.\textsuperscript{35} Human Rights Watch reported that sixty-one governments currently allow LPRs to present defenses prior to deportation.\textsuperscript{36} Forty-six of those states do so because they are a party to the European Convention of Human Rights.\textsuperscript{37} Twenty-four governments allow family-related defenses as part of their domestic law.\textsuperscript{38}

Canadian domestic law currently provides discretion to impartial immigration judges to consider family ties prior to removal.\textsuperscript{39} Even though this discretion has been restricted in recent years, LPRs that are not “serious criminal[s]”\textsuperscript{40} may appeal removal orders and the judges must weigh “humanitarian and compassionate considerations” including “the best interests of a child directly affected by the decision.”\textsuperscript{41} The United States, on the other hand, provides absolutely no discretion for the broad spectrum of LPRs that are designated as aggravated felons.\textsuperscript{42}

Representative Jose Serrano (D–NY) recently sponsored the CCPA in an effort to provide U.S. immigration judges with the opportunity to employ at least some discretion in such cases.\textsuperscript{43} The bill would amend § 240(c)(4) of the Immigration and Nationality Act to allow immigration judges to weigh the execution of a removal order against the best interests of the child when faced with the possibility of separating a non-citizen parent from a U.S. citizen child.\textsuperscript{44} Serrano’s bill would supply this discretionary jurisdiction broadly to cases involv-

\textsuperscript{34} See id.
\textsuperscript{35} See Human Rights Watch, supra note 1, at 49–50; Yuval Merin, The Right to Family Life and Civil Marriage under International Law and Its Implementation in the State of Israel, 28 B.C. Int’l & Comp. L. Rev. 79, 79–80 (2005) (noting how international law has long recognized and protected the family unit for the crucial role it has in human society).
\textsuperscript{36} Human Rights Watch, supra note 1, at 49–50.
\textsuperscript{37} Id.; see also Merin, supra note 35, at 122.
\textsuperscript{38} Human Rights Watch, supra note 1, at 49–50.
\textsuperscript{40} Immigration and Refugee Protection Act § 64.
\textsuperscript{41} Id. § 69(2).
\textsuperscript{43} See H.R. 1176, 110th Cong. (2007); Schepers, supra note 29.
\textsuperscript{44} See H.R. 1176.
ing any “alien” parent, even undocumented residents.\textsuperscript{45} The CCPA is presently under consideration in the House of Representatives, but has not made any progress since it was referred to an immigration subcommittee in March 2007.\textsuperscript{46}

II. Discussion

A. Current U.S. Laws \& Rationales Behind Those Laws

The U.S. government has always held and utilized the power to remove any non-citizen as an inherent part of its sovereignty.\textsuperscript{47} Removal, however, was not a common procedure in the nation’s first century and was reserved for those that posed a serious threat to society.\textsuperscript{48} Instead, most legislation focused on controlling entry into the United States.\textsuperscript{49}

In 1952, the McCarran-Walter Act developed much of the procedures governing deportations that exist in current immigration law.\textsuperscript{50} Until 1990, the § 212(c) waiver was in place, which allowed LPRs convicted of a crime the ability to provide defenses to deportation, including the negative impact on a child, before an immigration judge.\textsuperscript{51} This discretion to weigh family unity into a removal proceeding was available to any LPR who had resided in the United States for at least seven years.\textsuperscript{52}

In the past decade, however, as the number of immigrants has risen\textsuperscript{53} and the threat of terrorist attacks has increased, the executive branch has begun using its power to remove non-citizens more frequently and boldly.\textsuperscript{54} This newly invigorated removal power was made

\textsuperscript{45} See id. This bill only restricts discretion in removal proceedings for cases involving criminal convictions based on threats to national security or sex trafficking. Id.


\textsuperscript{48} See Hutchinson, supra note 47, at 12–13; Human Rights Watch, supra note 1, at 10.

\textsuperscript{49} See Human Rights Watch, supra note 1, at 10.

\textsuperscript{50} See id.


\textsuperscript{52} See id.


\textsuperscript{54} Human Rights Watch, supra note 1, at 16.
possible by legislation that was adopted, in large measure, to defend the nation from terrorism. In his signing statement for one such piece of legislation, President William J. Clinton warned against the loose connection between terrorism and LPRs with criminal convictions: “This bill . . . makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism. These provisions eliminate most remedial relief for long-term residents.”

The president’s signing statement was in reference to the first of two remarkably powerful immigration bills passed by Congress in 1996. The Antiterrorism and Effective Death Penalty Act (AEDPA) broadened the list of criminal convictions that would designate a non-citizen as an “aggravated felon” and thus subject to removal. The seventeen new crimes included forgery, bribery, obstruction of justice, and certain offenses relating to gambling and prostitution. The Board of Immigration Appeals has shown its willingness to designate a broad array of criminal offenses as aggravated felonies. As a result, certain misdemeanor offenses under state law have been construed as aggravated felonies under the federal statute.

Also in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which lowered the term of imprisonment required to become an aggravated felon from five years to only one year. In addition, section 322(a)(1)(B) of IIRIRA construes even one-year convictions with suspended sentences as aggravated felonies. Therefore, immigration judges cannot recognize lenient judg-

55 See id. at 17–18.
57 See id.
58 See Immigration and Nationality Act § 101(a)(43). There are other criminal offenses besides aggravated felonies that render non-citizens deportable, such as crimes of moral turpitude and failure to register as a sex offender. See Immigration and Nationality Act § 237(a)(2).
60 Anti-Terrorism and Effective Death Penalty Act § 440(e).
62 See, e.g., United States v. Urias-Escobar, 281 F.3d 165, 167 (5th Cir. 2002); Human Rights Watch, supra note 1, at 21 (noting that Mario was only a misdemeanor offender under Illinois law); see also Kramer, supra note 61, at 162.
64 See Immigration Reform and Immigrant Responsibility Act § 322(a)(1)(B).
ments handed out in criminal court that allow lesser criminal offenders the opportunity to serve probation instead of time in prison.65

Moreover, AEDPA specifically prevents immigration judges from allowing § 212(c) waivers for any aggravated felons, not just those with at least five-year imprisonments, as was practiced previously.66 Without the ability to file a § 212(c) waiver, a staggering amount of LPRs are facing mandatory removal proceedings for an increasingly wide array of relatively minor offenses.67 Immigration judges simply do not have the ability to provide any discretionary relief in such cases.68 Senator Edward Kennedy (D–MA) predicted the repercussions of these broad laws: “An immigrant with an American citizen wife and children sentenced to one year of probation for minor tax evasion and fraud would be subject to this procedure. And under this provision, he would be treated the same as ax murderers and drug lords.”69

B. Current Canadian Approach in Relation to the CRC

Until 2002, the Canadian Immigration Act allowed LPRs broad access to petition for relief following a removal order.70 The current Immigration and Refugee Protection Act (IRPA) restricts discretionary appeals to lesser criminals, effectively eliminating the discretion provided for “serious criminals” who had been punished with two years in prison.71

Though the candidate pool for discretionary relief has decreased, the process remains largely the same.72 The petitions may be brought before the IRBAD, which possess discretionary jurisdiction and an obligation to examine “humanitarian and compassionate” considerations.73 Canadian law requires that immigration judges at this stage examine all of the relevant circumstances of the case to determine whether a deportation should occur.74

65 See id.; Cook, supra note 26, at 308–09.
67 See generally Human Rights Watch, supra note 1, at 3–83.
68 See Anti-Terrorism and Effective Death Penalty Act § 440(a), (d).
69 Human Rights Watch, supra note 1, at 24–25.
72 See id. § 63(3).
73 See id. § 67(1)(c).
74 See id. § 69(2).
In *Ribic v. Canada*, a twenty-six-year-old citizen of Yugoslavia legally entered Canada in 1983 to marry Janez Solar. The marriage, however, never occurred and Ribic found herself in violation of immigration law and removable. The IRBAD then laid out the different types of factors that immigration judges must weigh in employing “equitable jurisdiction” with regard to all the circumstances of the case. These include the seriousness of the offense that led to the removal order, the likelihood of rehabilitation, length of time spent living in Canada, family ties in Canada, and negative impact on the family that the removal would cause.

The family unit factor is most pertinent for the purpose of this Note. The Canadian Supreme Court, in *Baker v. Canada*, reviewed a removal order faced by a woman with dependent Canadian citizen children. The Court decided, in part, that the Appeal Division judge should consider the effects of a removal on a family: “[F]or the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give substantial weight, and be alert, alive and sensitive to them.”

One important rationale given in *Baker* for emphasizing the importance of this discretionary judgment in appeals to removal orders is Canada’s ratification of the CRC. The Court adopted the values and objectives of this treaty as a part of Canadian domestic law despite the fact that it has not been implemented by Parliament and is not legally binding. The Court reasoned that international law, “both customary and conventional,” must be reflected when possible in the interpretation of Canadian legislation.

### C. The United States and the CRC

The CRC entered into force on September 2, 1990. The relevant provisions in the CRC are Articles 3 and 9. Article 3 establishes

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76 *Id.* ¶¶ 1, 10.
77 *Id.* ¶ 14.
78 See *id.*
80 *Id.* ¶ 75.
81 See *id.* ¶¶ 69–71.
82 See *id.*
83 *Id.* ¶ 70.
85 See *id.* arts. 3, 9.
that all courts of law, legislatures, and administrative agencies should act with the “best interests of the child” as a primary concern. In Article 9, separation of a child from his or her parents can only occur after judicial review that is attentive to the child’s best interests.

Though a whopping 192 states are parties to the CRC, the United States and Somalia remain the only two states that still have not ratified it. Former U.S. Ambassador to the United Nations Madeleine Albright signed the CRC in February 1995. President Clinton, however, never submitted the document to the Senate for ratification and the administration of President George W. Bush has expressed its clear opposition to the treaty.

III. Analysis

The United States should adopt a more discretionary approach, allowing immigration judges to weigh such factors as family unity before removing LPRs, like the procedure employed under the Canadian IRPA. In fact, there may be an obligation to take such action, derived from the nation’s duty as a signatory to the CRC and possibly even under a nascent international custom that the CRC may now embody. The CCPA currently before Congress represents a good first step toward both sustaining the overall purpose of the CRC and supplying the more equitable judicial review that is provided not only by Canada, but by numerous other States.

86 Id. art. 3, para. 1.
87 Id. art. 9, para. 1.
88 See CRC, supra note 84, Status of Ratifications; see generally UNICEF, CONVENTION ON THE RIGHTS OF THE CHILD, http://www.unicef.org/crc/index_30229.html (last visited Sept. 28, 2008) (stating that the CRC is the most widely and rapidly ratified human rights treaty in history).
92 See Starr & Brilmayer, supra note 27, at 229–30; see also HUMAN RIGHTS WATCH, supra note 1, at 46–47 (arguing for a more discretionary approach based on sources of international law other than the CRC, including the International Covenant on Civil and Political Rights and the American Convention on Human Rights).
93 See H.R. 1176, 110th Cong. (2007); HUMAN RIGHTS WATCH, supra note 1, at 49.
The legislative aim of the 1996 immigration reform in the United States was similar to the 2002 reform in Canada: to make it easier for non-citizens with serious criminal convictions to be removed from the country.\textsuperscript{94} Canada maintained an important balance in providing discretionary review for lesser criminals and only eliminating it for serious offenders.\textsuperscript{95} The IRPA restricts the review of removal orders for “serious” criminal offenders, who were punished with a term of imprisonment of two years or more.\textsuperscript{96} A similar measure in the United States, ensuring that § 212(c) waivers are only eliminated for very serious criminal offenders, is a feasible option.\textsuperscript{97}

The United States, however, has simply gone too far in its attempt to reach an otherwise laudable national security goal.\textsuperscript{98} With such an expansive list of crimes now designated as aggravated felonies, the need for judicial discretion is dire.\textsuperscript{99} In the absence of any discretion, the many LPRs in the United States that have lived here since infancy are treated the same as immigrants that have only recently arrived.\textsuperscript{100} Similarly, a rapist or a murderer receives the same immigration penalty as a mother convicted of stealing baby clothes that cost $14.99.\textsuperscript{101} In situations where lesser offenders are parents, the need for some sort of balancing approach becomes even more apparent.\textsuperscript{102} Considering a citizen child’s interests in this process would provide the children of such offenders with some hope of avoiding potentially permanent separation from their parents.\textsuperscript{103} Under the CRC, this type of balancing approach would be necessary as immigration courts are required to take the child’s best interests as a “primary consideration.”\textsuperscript{104}

The U.S. government refuses to ratify the CRC, stifling the family unity factor in removal proceedings, because of religious and political
pressure that stems from a fear of excessive government involvement in the parent-child relationship.\textsuperscript{105} There is a concern that ratification would delegate parental control to an international authority and weaken parents’ rights.\textsuperscript{106} Also, the CRC directly conflicts with U.S. law by banning the death penalty for juveniles.\textsuperscript{107} Yet, the United States could simply make reservations to the CRC, as many other nations have done,\textsuperscript{108} in order to ratify the core of the treaty.\textsuperscript{109} Many of President Bush’s hesitations relate to provisions outside of Articles 3 and 9, which are most relevant for removal proceedings.\textsuperscript{110} Still, the United States has not made reservations and instead refuses to ratify the treaty altogether.\textsuperscript{111}

Even though the United States has not ratified the CRC, its signature on this treaty still provides some attenuated responsibilities under Article 18 of the Vienna Convention on the Law of Treaties.\textsuperscript{112} In particular, the United States is obliged to “refrain from acts which would defeat the object and purpose of a treaty.”\textsuperscript{113} The broad language of Article 3 suggests that a “best interests of the child” standard encompasses even actions where children are only indirectly involved.\textsuperscript{114} In this way, non-discretionary and potentially permanent separation of a parent from a child by an immigration court defies an objective of the CRC.\textsuperscript{115}

In addition, a universal norm preserving family unity may eventually become customary international law, placing a direct obligation on the United States to weigh the needs of children into removal proceedings despite its refusal to ratify the CRC.\textsuperscript{116} The emergence of this custom is supported by the development of the “best interests of the child” standard into a “ubiquitous feature of international institu-

\textsuperscript{106} See Canadian Children’s Rights Council, supra note 90.
\textsuperscript{107} See id.
\textsuperscript{108} See CRC, supra note 84, Declarations and Reservations.
\textsuperscript{110} See Smolin, supra note 105, at 90–107.
\textsuperscript{111} See CRC, supra note 84, Declarations and Reservations; Anderson, supra note 90.
\textsuperscript{112} Vienna Convention on the Law of Treaties, supra note 109, art 18.
\textsuperscript{113} Id.
\textsuperscript{114} See CRC, supra note 84, art. 3.
\textsuperscript{116} See Starr & Brilmayer, supra note 27, at 230.
Furthermore, the International Court of Justice has noted that extremely widespread participation in a treaty may itself sufficiently establish a customary law. As 192 States (all but the United States and Somalia) have ratified the CRC, a new international custom may already exist, legally binding the United States.

Canadian cases such as Naidu v. Canada show that a discretionary approach in removal proceedings does not provide unlimited support to any person with a citizen child. There, a Canadian LPR was deported based on a 2001 conviction for trafficking cocaine. Naidu, however, utilized his ability to appeal this decision before the Immigration Appeal Division in 2003. The Appeal Division stayed Naidu’s removal order based on the best interests of his son, with the condition that Naidu maintain a clean criminal record in the future. By imposing this condition, minor offenders, now fully cognizant of the consequences of their behavior, can remain in Canada to care for their children if they avoid further trouble with the law. Naidu continued his criminal behavior, however, and now faces an arguably more deserved removal where the needs of his son will likely not rescue him.

To provide a similar discretionary approach, the U.S. Congress should adopt Representative Serrano’s proposed CCPA in adherance with the international legal standards that are already in place and those that continue to evolve. This legislation would ensure that immigration judges do not have their hands completely tied in removal proceedings that significantly affect a U.S. citizen child. If necessary to ensure passage, the bill should be amended to apply discretionary jurisdiction only to LPR parents, instead of to the much broader group of all legal and illegal non-citizens.

The CCPA would not create an automatic safety net for all non-citizen parents facing removal. An impartial immigration judge

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117 Id. at 225, 229–31.
119 See CRC, supra note 84, Status of Ratifications.
121 Id. ¶ 3.
122 Id. ¶ 4.
123 Id. ¶ 5.
124 See id. ¶¶ 5–6.
126 See CRC, supra note 84; North Sea Continental Shelf, 1969 I.C.J. at 42; H.R. 1176, 110th Cong. (2007); Starr & Brilmayer, supra note 27 at 229–31.
127 See H.R. 1176; Serrano, supra note 46.
128 See H.R. 1176.
129 See id.; Serrano, supra note 46.
would make the final decision with full knowledge of the facts.130 Even in Canada, where commitment to the CRC led to wide discretionary jurisdiction, the mere existence of a citizen child will not always prevent a parent’s removal.131 Thus, in Baker v. Canada, the Canadian Court concluded that the child’s best interests must not necessarily be the strongest of all considerations to be weighed by the decision-maker, but must certainly be one such consideration.132 In the same way, the CCPA would include the child’s best interests as one equitable factor in the judicial review of a removal order, allowing for at least some opportunity to offer a defense in the face of this colossal penalty.133

Conclusion

Canada’s immigration law, in line with international norms, provides discretion to immigration judges in removal proceedings, better securing family unity for LPRs. New restrictions associated with the IRPA ensure that discretionary relief be granted to only lesser criminals. For the LPRs able to appeal their removal orders, the effect of a parent’s removal on a Canadian citizen child must be considered, in part, due to Canada’s adherence to the CRC.

The United States, though not a party to this treaty, should nonetheless take on the responsibilities associated with the international custom that the CRC now embodies or soon will represent. The injustices leveled upon long-term LPRs that stem from a decade of harsh legislation need to be tempered. Perhaps the best hope to make quick progress toward this end is to focus initially on the numerous U.S. citizen children that are being immeasurably harmed by current immigration laws. Accordingly, Congress should closely deliberate over Congressman Serrano’s proposed CCPA, which represents a real opportunity to adopt a removal procedure similar to the sensible approach taken by our northern neighbor.

130 See H.R. 1176.
133 See H.R. 1176.
DUELING IDEALS: BRIDGING THE GAP BETWEEN PEACE AND JUSTICE

David Hine*

Abstract: When the United Nations drafted the Rome Statute, it intended to create an entity, what would eventually become the International Criminal Court, that would enforce criminal justice on an international level. The Member States, upon which the authority of the ICC depends, are often far more concerned with simply ending the offenses and achieving peace than they are with prosecuting the perpetrators. As a result of this ideological conflict between peace and justice, the efficiency and value of the ICC is jeopardized. This Note discusses the current situation in Uganda as an example of the conflict of interests between a Member State and the court. After initiating the ICC’s investigation into the Lord’s Resistance Army, a militant group that has plagued the northern region of the country for decades, Uganda has since requested that the prosecution of the rebel leaders be discontinued in order to achieve peace. By examining the interests of both the ICC and the Member States, this Note argues that the language of the Rome Statute has a provision which can be interpreted in a manner that would protect the credibility and goals of every party involved.

Introduction

When the General Assembly of the United Nations (U.N.) opened the Rome Statute for signature on July 17, 1998, they did so with a hope of solidifying a global sense of respect for the enforcement of international justice.¹ The carefully constructed document appeared to provide the perfect balance between a relinquishment of prosecutorial duties and a simultaneous recognition of every state’s right and duty to exercise criminal jurisdiction over those responsible for international crimes.² In order to achieve this comfortable equilibrium between individual state authority and the power of what would become the Interna-

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² See id.
tional Criminal Court (ICC), the drafters of the Rome Statute first lim-
ited the court’s jurisdiction\(^3\) and then limited the methods of admissi-
bility.\(^4\)

Perhaps a better way to understand the drafters’ actions is to say
that they defined what American lawyers would call the Court’s sub-
ject matter jurisdiction and then moved on to the personal jurisdic-
tion.\(^5\) The subject matter jurisdiction of the court was limited to those
crimes the U.N. believed posed the most serious threats to the inter-
national community as a whole: the crime of genocide, crimes against
humanity, and war crimes.\(^6\) Even those crimes do not automatically
fall within the jurisdiction of the ICC, however, for violations need to
be admitted to the court in one of three ways, thereby fulfilling a sort
of personal jurisdiction requirement.\(^7\) Article 13(b) provides that the
U.N. Security Council may refer situations to the Court\(^8\) and Article
13(c) allows the Prosecutor to initiate investigations in situations that
seem to involve crimes within the jurisdiction of the Court that are
not otherwise being addressed.\(^9\) While each of these methods for ad-
mitting a case to the jurisdiction of the ICC seem to further the Gen-
eral Assembly’s stated goal, a resolution to guarantee lasting respect
for the enforcement of international justice,\(^10\) there remains a third

\(^3\) Id. art. 5(1) (“The jurisdiction of the court shall be limited to the most serious crimes
of concern to the international community as a whole. The court has jurisdiction in ac-
cordance with this Statute with respect to the following crimes: (a) The crime of genocide;
(b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”).

\(^4\) Id. art. 13 (“The court may exercise its jurisdiction with respect to a crime referred to
in article 5 in accordance with the provision of this Statute if: (a) A situation in which one
or more of such crimes appears to have been committed is referred to the Prosecutor by a
State Party in accordance with article 14; (b) A situation in which one or more of such
crimes appears to have been committed is referred to the Prosecutor by the Security
Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prose-
cutor has initiated an investigation in respect of such a crime in accordance with Article
15.”).

\(^5\) Jamie A. Mathew, The Darfur Debate: Whether the ICC Should Determine That the Atrocities
in Darfur Constitute Genocide, 18 FLA J. INT’L L. 517, 520 (2006); cf. Milena Sterio, The Evolu-
tion of International Law, 31 B.C. INT’L & COMP. L. REV. 213, 234 (2008) (discussing the
jurisdictional limitations of the ICC).

\(^6\) Rome Statute, supra note 1, art. 5 (The Statute also includes the crime of aggression,
but Article 5(2) explains that the court will not have jurisdiction over the crime of aggres-
sion until a provision has been adopted in accordance with Articles 121 and 123, defining
the crime and setting out the conditions under which the court shall exercise jurisdiction
with respect to the crime); see Mathew, supra note 5, at 520.

\(^7\) Rome Statute, supra note 1, art.13; see Mathew, supra note 5, at 520.

\(^8\) Rome Statute, supra note 1, art. 13(b).

\(^9\) Id. art. 13(c).

\(^10\) Id. pmbl.
The issue that arises out of state referrals to the ICC comes from the likelihood that the referring states possess different interests and intentions than the court. While the ICC, like any other court, is focused on bringing justice to its respective jurisdiction, the referring state parties very often have other factors to consider, namely the peace and safety of their citizens. As a result of these different interests, a rift can be and, in fact, has been created between the ICC and its Member States. This division of parties plays the important role of distinguishing the oft coupled ideals of peace and justice. At the same time though, it also poses a tremendous threat to the Court; the ICC must address these differences and decide whether or not it ought to acknowledge the wishes of the Member States and abandon its own purpose or press on in the name of justice, despite the state parties’ opposition.

This Note begins by summarizing the first and only example of this phenomenon in the ICC: the situation in Uganda with the Lord's Resistance Army (LRA). It then explains the steps that were taken by each party, Uganda and the ICC, on the way to reaching the current dilemma. The Note goes on to explain why this dilemma, a conflict between peace and justice, is a product of the unique situation in Uganda as well as the Rome Statute’s language and methodology. It examines what the ICC stands to gain from each option going forward, and also what it has to lose. Finally, this Note explains why the best option may, in fact, be one that the Court has to invent for itself.

I. Background

The process that Uganda and the ICC had to go through to reach the current schism of ideals was a long, labor intensive and,
most importantly, violent procedure. After breaking away from decades of British rule in 1962, Uganda found itself dealing with the remnants of European colonization. In an effort to maintain control over the locals, the British had divided the country into two regions, the North and the South, and pitted the two areas against each other. For years, this division was exploited by overly ambitious individuals who used violence to rally one region against the other in order to catapult themselves into power. By the middle of the 1980s, President Yoweri Museveni and his National Resistance Movement had gained control of Uganda, causing members of previous governments to seek protection in northern Uganda and southern Sudan.

It was from this rebellious region that, in 1986, an organization calling itself the Holy Spirit Movement, led by Alice Auma Lakwena, rose up against Museveni’s government. Though they were quickly defeated by the National Resistance Movement’s forces, the short-lived Holy Spirit Movement gained significance in its defeat. A young relative of Lakwena, Joseph Kony, soon took over the role of leading the resistance, utilizing the same religious rhetoric as his predecessor and adding a political element to his fast growing organization, the LRA. In reality, though, the political element, a professed desire to overthrow Museveni and the Ugandan government, was only nominal. The LRA never had any “coherent ideology, rational political agenda or public support,” and in fact focused most of its violence on the very people for whom it claimed to be fighting, the Acholis in the northern region.

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18 Chatlani, *supra* note 17, at 279.

19 Id.

20 See *id.* at 279–80.

21 Id. at 280.

22 Akhavan, *supra* note 17, at 406. Lakwena claimed to have supernatural spiritual powers and told her soldiers that “bathing in holy water would make bullets bounce off them and the stones they threw would turn into grenades.” *Id.* Her forces suffered heavy casualties during a battle with the National Resistance Movement’s forces in late 1987, and Lakwena fled to Kenya. *Id.*

23 See *id.*

24 Chatlani, *supra* note 17, at 281 (Joseph Kony claimed to have inherited the spirit of Lakwena and marketed himself as a “messenger of God and a liberator of the Acholi people”).

25 Id.

26 See *id.* at 282.

27 Akhavan, *supra* note 17, at 407.
After 1991, Kony and his followers became increasingly violent as they killed and raped civilians across northern Uganda, leaving thousands of maimed people in their wake.28 But apart from the LRA’s reputation for amputating limbs and brutally disfiguring the faces and bodies of its victims, the LRA also abducted thousands of children, forcing them to serve as child soldiers and sex slaves.29 Some estimate that the abducted child soldiers made up nearly eighty-five percent of the LRA’s forces30 while others put the figures even higher.31 Regardless of the precise numbers, the fact of the matter was simple: the vast majority of the LRA’s members were also victims of the organization’s torturous reign.32 It was for this reason that Uganda enacted The Amnesty Act in 2000, an expression of forgiveness and an attempt to end the conflict without any further violence.33 As a result, “from January 2000 to June 2005, Uganda granted amnesty to over 15,000 of the LRA’s combatants and abducted.”34 This peaceful progress continued to be overshadowed by the ongoing violence, however, and on December 16, 2003, President Museveni sought outside help and referred the LRA situation to the ICC, marking the first invitation for the court to exercise its jurisdiction.35

After more than a year of investigating,36 the ICC decided that the situation was in fact serious enough to justify criminal prosecution and issued warrants for the arrest of five LRA leaders.37 Lacking a police force of its own though, the ICC had to rely on Member States, legally bound to enforce the Court’s warrants, to arrest the wanted men.38 After months of inaction, it seemed that the Court was losing

28 Chatlani, supra note 17, at 282.
29 See id.
31 Chatlani, supra note 17, at 282. Chatlani made reference to an estimate that the LRA currently consists of approximately 200 armed commanders and 3000 child soldiers, setting the child soldier contribution to nearly ninety-four percent. Id.
32 See Hanlon, supra note 11, at 304.
33 Id. Anyone who had participated, collaborated, or assisted in the commission of any crime related to the war or armed rebellion could take advantage of the amnesty by reporting to authorities, surrendering any weapons, and renouncing their involvement in the rebellion. Id.
34 Id.
35 Id.
36 Di Giovanni, supra note 15, at 25 (the warrants were originally issued on July 8, 2005; the indictments were unsealed on October 13, 2005).
37 Hanlon, supra note 11, at 304–05. The court issued warrants for the arrest of Joseph Kony, Vincent Otti, Okot Odhiambo, Dominci Ongwen, and Raska Lukwiya. Id.
38 See id. at 305.
credibility.\textsuperscript{39} In an effort to counter this shift in public perception and give strength to the ICC’s warrants for arrest, Interpol issued five wanted person notices, one for each of the men indicted by the ICC.\textsuperscript{40}

Yet while the case against the LRA was developing in the ICC, and perhaps as a result of the way that things seemed to have stalled, President Museveni and the Ugandan government continued to push their amnesty policy.\textsuperscript{41} In August 2006, Museveni declared a cease-fire which was signed and agreed to by the LRA.\textsuperscript{42} In addition, the government proposed a peace deal which offered amnesty to the accused members of the LRA, despite their leading roles in years of “systematic murder, abduction, sexual enslavement and mutilation of Ugandan civilians.”\textsuperscript{43}

Today, Uganda is still pushing for amnesty and resisting the ICC’s decision to prosecute the leaders.\textsuperscript{44} Perhaps more important than the government’s decision to implement such a policy is the amount of domestic support it has received.\textsuperscript{45} Many Ugandans believe that forgiveness, not the criminal justice system, is the path to a peaceful life.\textsuperscript{46} This is a sentiment shared not only among those who have remained relatively unaffected, but also by those who have themselves been mutilated and tortured.\textsuperscript{47} It is this mentality and these people—those in search of peace—that form the ICC’s opposition.\textsuperscript{48}

II. Discussion

It is the state referral method of submitting a case to the ICC that has proven to be problematic.\textsuperscript{49} Article 13(a) of the Rome Statute allows State Parties to refer potential criminal situations to the ICC for

\textsuperscript{39} See Di Giovanni, supra note 15, at 34–35.

\textsuperscript{40} Id.


\textsuperscript{43} Greenawalt, supra note 41, at 619.

\textsuperscript{44} Id.

\textsuperscript{45} See id.; Gettleman, supra note 42, at A1.

\textsuperscript{46} See Gettleman, supra note 42, at A1 (“Peace is more important than punishment, Acholi elders say, and they would rather have Mr. Kony return to Gulu for a [traditional Ugandan forgiveness ceremony] than rot in some European prison.”).

\textsuperscript{47} See id. (“Typical is Christa Labol, whose ears and lips were cut off by bayonet-wielding prepubescent soldiers she now says she would welcome home. ‘Only God can judge,’ Mrs. Labol said through a mouth that is always open.’”).

\textsuperscript{48} See Di Giovanni, supra note 15, at 35; Gettleman, supra note 42, at A1.

\textsuperscript{49} See \textit{Rome Statute}, supra note 1, art. 13(a); Hanlon, supra note 11, at 319–35.
investigation. Article 14 goes on to explain that state referrals are made specifically to determine whether charges ought to be brought against any individuals, cutting off any further involvement by the state at that point. With that statutory purpose in mind, the state referral method for exercising the court’s jurisdiction appears to liken itself to the other two methods in that it too furthers the General Assembly’s goal of solidifying a global sense of respect for the enforcement of international justice.

The problem, as seen in the Uganda situation, arises after the decision to press charges has been made, for while it is unlikely that the Prosecutor or the Security Council would ever revoke their support for the prosecution of cases that they initiated, referring states have done just that. This apparent revocation may not ultimately have any effect on the Court’s actual authority to prosecute the crimes, but it does indicate a serious clash between the interests of individual sovereign nations and the interests of the greater global theater. Furthermore, the existence of such a schism stands as an enormous obstacle in the way of realizing the “lasting respect for the enforcement of international justice” for which the ICC was created. Perhaps the most difficult aspect of this obstacle, the State Party’s practical revocation, is the fact that it is not motivated by greed or by violence, but instead by a desire for peace; peace, that is to say, is standing directly in the way of justice.

With the division now more clearly defined as a split between a sovereign state’s desire for peace and the court’s ambitions for justice, and continuing to use the Uganda situation as an example, one can examine the different options that the ICC has available. One op-

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50 Rome Statute, supra note 1, art. 13(a).
51 Id. art. 14(1) (“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”)
52 Id. pmbl., arts. 13(b), (c) & 14.
53 See Hanlon, supra note 11, at 329–35.
54 See Di Giovanni, supra note 15, at 35; Greenawalt, supra note 41, at 619–20.
55 Rome Statute, supra note 1, pmbl.; see Greenawalt, supra note 41, at 619–20.
56 See Di Giovanni, supra note 15, at 35.
tion is for the ICC to simply exercise the authority that Uganda gave the Court when it submitted its referral.\textsuperscript{58} Taking such action could be the very thing the ICC needs to finally realize its goal of establishing a sense of respect for the enforcement of international justice.\textsuperscript{59} As James D. Kole points out, “[i]n the long run peace does require justice. History teaches that accumulated injustices eventually lead to violence.”\textsuperscript{60} Certainly one must acknowledge the difficulties that such tactics cause for those in search of peace, but never, says Kole, should justice be denied or delayed to lessen those hardships; justice is a necessary element on the road to peace.\textsuperscript{61}

There are some who also believe that denying Uganda’s request to drop the indictments is the right thing to do, but are driven by a different motivation: deterrence.\textsuperscript{62} As Nsongurua Udombana argues, “[i]f the ICC succeeds in bringing the LRA to justice, then it may deter others currently engaging in or contemplating mass atrocities.”\textsuperscript{63} The ICC could simply acknowledge that immediate peace in Uganda may be secondary to a plan that would discourage further atrocities around the world and save millions of lives.\textsuperscript{64}

The problem with this first option is that the court still lacks any reliable way of apprehending the indicted men.\textsuperscript{65} Without any police force, the ICC would be forced to rely upon the Ugandan government, a government whose wishes the ICC will have recently disregarded, to produce them.\textsuperscript{66} The ICC would be crippling Uganda’s opportunity to negotiate for peace in order to realize something that the ICC is literally powerless to attain without Uganda’s help.\textsuperscript{67} Some, like Udombana, believe this is a mere hiccup in the international justice system and should be no cause for concern, claiming instead that “the international community must take comfort in the fact that there is no time bar for these crimes.”\textsuperscript{68} Even if Uganda must endure years

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\textsuperscript{58} See Udombana, \textit{supra} note 57, at 102–03.
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\textsuperscript{59} See Rome Statute, \textit{supra} note 1, pmbl.; Udombana, \textit{supra} note 57, at 102–03.
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\textsuperscript{60} Kole, \textit{supra} note 57.
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\textsuperscript{61} \textit{Id}.
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\textsuperscript{62} See Udombana, \textit{supra} note 57, at 103.
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\textsuperscript{63} \textit{Id}.
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\textsuperscript{64} See \textit{id}.
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\textsuperscript{65} See Hanlon, \textit{supra} note 11, at 305.
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\textsuperscript{66} See \textit{id}; Udombana, \textit{supra} note 57, at 103.
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\textsuperscript{67} See Hanlon, \textit{supra} note 11, at 305; Udombana, \textit{supra} note 57, at 103.
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\textsuperscript{68} Udombana, \textit{supra} note 57, at 103.
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of war before the indicted men are arrested, the result will have been well worth the wait, for justice is the ultimate goal.  

Others take a very different approach, viewing the court’s inability to enforce its policies as a sign of its fragility. In their article, Mahnoush H. Arsanjani and W. Michael Reisman warn that “the failure of governments will simply become the failure of the ICC.” The solution to this problematic scenario introduces a second option for the ICC: turn the issue back over to Uganda. Rather than deterrence, one motivation behind the second option is the notion of holding Member States accountable for their own political problems. Uganda has been unable to end the civil war within its borders for two decades, and while the referral to the ICC technically asked for help in dealing with human rights violators, the referral also effectively asked the ICC to end the conflict. This, of course, is something the ICC is not designed to do. Or, as Arsanjani and Reisman phrase the issue, “If neither [military action nor negotiation] has proven effective, what will referral of the situation to the ICC accomplish?” The answer is simple: nothing, because the ICC, a court of criminal justice, is not equipped to solve political problems.  

More importantly, when the ICC fails in its role of problem solver, it will simultaneously expose itself as a weak authority, thereby jeopardizing its ability to enforce international criminal law. “To start war crimes investigations for the sake of justice at a time when the war is not yet over, risks having, in the end, neither justice nor peace delivered,” one Ugandan religious representative explained. This is why so many Ugandans believe that the ICC should discontinue its pursuit of the indicted men.  

This raises another plausible motivation for the second option (dropping the charges and handing sole control of the situation back

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69 See id.
70 See Arsanjani & Reisman, supra note 57, at 395.
71 Id.
72 See id.
73 See id. at 393–95.
74 See id.
75 Arsanjani & Reisman, supra note 57, at 393–94.
76 Id. at 395.
77 See id.
79 Id.
80 See id.
over to Uganda): peace.\textsuperscript{81} Just as there are people who feel that peace should never interfere with justice, so are there people who believe that justice, or at least the kind doled out by courts, should never interfere with peace.\textsuperscript{82} In fact, it seems that a growing number of Ugandans adhere to this preference.\textsuperscript{83} With so much support among the people, and with a real possibility of having a nation at peace for the first time in decades, Ugandan officials feel that the judges of the ICC should reconsider the necessity of the indictments.\textsuperscript{84}

Unfortunately, while dismissing the indictments may help Uganda achieve peace, it will do absolutely nothing to further the enforcement of international justice, the very thing that the ICC was created to do.\textsuperscript{85} The time that the ICC spent developing the case, the unprecedented issuing of international indictments, and the months spent waiting for the wanted men to be apprehended would all be quickly tossed aside.\textsuperscript{86} The court would be turning its back on a situation that, according to its own conclusions, involved crimes against humanity so egregious that they warranted official action.\textsuperscript{87} Such a move would be utterly damning to the ICC: establishing itself, in these early days of its existence, not as a trumpeter of justice and truth but instead as a hypocrite who does nothing to stop the violations.\textsuperscript{88} In the face of this decision, a matter of determining whether the ICC should continue to pursue justice and risk further war or step aside in the name of peace and sacrifice its own credibility, peace and justice seem to be as incompatible as two goals could possibly be.\textsuperscript{89}

III. Analysis

In reality, the situation is not nearly as bleak as the polarized options may lead one to believe.\textsuperscript{90} It is true that the ICC is, and ought to

\textsuperscript{81} See Cassel, \textit{supra} note 57.
\textsuperscript{82} See Gettleman, \textit{supra} note 42, at A1.
\textsuperscript{83} See \textit{id}.
\textsuperscript{84} See \textit{id}. (“‘We can go to the judges and say there are new circumstances and that the indictments are no longer needed,’ said a Ugandan government spokesman, Robert Kabushenga.”).
\textsuperscript{86} See Clark, \textit{supra} note 85; Di Giovanni, \textit{supra} note 15.
\textsuperscript{87} See Clark, \textit{supra} note 85; Di Giovanni, \textit{supra} note 15.
\textsuperscript{89} See Clark, \textit{supra} note 85; Di Giovanni, \textit{supra} note 15.
\textsuperscript{90} See Hanlon, \textit{supra} note 11, at 336–37.
be, actively pursuing the enforcement of international justice.\textsuperscript{91} It is also true that by stepping away from the Uganda situation at this point, the ICC may appear more passive and tolerant of violations than a developing international authority ought to be.\textsuperscript{92} So while it may seem that pursuing justice and backing out of Uganda are contradictory options, there may actually be a way to align their interests: empowering the court and bringing peace to Uganda.\textsuperscript{93} Indeed, by using the unique and complex circumstances that surround the LRA situation in Uganda, the ICC may be able to justify a decision that is very different from that which most people would expect from a court of this nature.\textsuperscript{94}

Perhaps the most famous instance of international criminal justice can be seen in the trials of war criminals before the Nuremburg Military Tribunals after World War II.\textsuperscript{95} There, the tribunals were meticulous in the prosecution of every potential offender.\textsuperscript{96} High ranking officers and subordinate soldiers were subject to the same, or at least comparable, charges; even doctors who facilitated the Nazi regime were tried at Nuremberg.\textsuperscript{97}

The same will not ever be said about the pending trials in the Uganda situation, for only five men were indicted by the ICC, compared to the dozens of individuals tried at Nuremberg.\textsuperscript{98} This, of course, is a result of the LRA’s bizarre composition: the vast majority of the offenders are, or were at some point, also counted among the victims.\textsuperscript{99} While the reasoning behind the limited scope of prosecution is sound, it does nothing to silence the objections of those who desire peace.\textsuperscript{100} Instead of delaying peace to bring the entire LRA to justice, a decision which might have been justifiable, the ICC would be crippling
peace negotiations in order to bring charges against just five men. In fact, since Raska Lukwiya is already dead, and there are reports of both Vincent Otti and Dominic Ongwen’s deaths as well, the ICC would be subjecting a nation to further violence and torment so that they could cling to the possibility of prosecuting as few as two persons. Such behavior on behalf of the ICC is so reckless that some may count it as a human rights violation itself and certainly not in the best interests of justice.

The issue of stabilizing the Court’s authority still remains. The ICC has officially determined that the men at large are, in fact, human rights violators; it can not simply turn its back on its own conclusions without providing a well reasoned explanation. Such an explanation may already exist in the very document which created the ICC: the Rome Statute. Though not exactly on point, Article 53 discusses the different factors the Prosecutor is to consider when determining whether an investigation should be initiated; one of those factors is whether an investigation and subsequent prosecution is in “the interests of justice.” At no point beyond Article 53 does the Rome Statute indicate that such a consideration is ruled out after the pre-investigation period; in fact, “the interests of justice” are constantly referenced as an ongoing concern of the court throughout the entire Rome Statute. This fact makes the decision to discontinue plans to prosecute the indicted men a much easier one for the Court. Instead of simply turning its back on the earlier decision to prosecute the men, the ICC may now, by the authority of the Court, determine that the prosecution of the indicted men would no longer serve the “interests of justice.”

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101 See Di Giovanni, supra note 15, at 35; Hanlon, supra note 11, at 304–05.
103 See Rome Statute, supra note 1, arts. 5, 53.
105 See id. at 304–05.
106 See Rome Statute, supra note 1, art. 53.
107 Id.
This may seem like useless rhetoric, but by having the ability to take an active role in its decision making process rather than simply being bullied by international cries for peace, the ICC gives itself an opportunity to save face. Instead of continuing with the prosecutions and appearing coldhearted and even inhumane, the ICC can abandon the indictments and come across as a benevolent protector of human life. Furthermore, in making such a decision, the court will no longer look spineless and manipulated, but instead wise and decisive. As for Uganda, it will get exactly what it asked for: the opportunity to have peace within its borders for the first time in decades. Everybody wins.

Conclusion

This analysis of the ICC’s options in dealing with the LRA case in Uganda should help people understand the complexity and potentially life threatening implications that come with the situation. It is important for people to understand that the decision to pursue justice may at times adversely affect thousands, if not millions, of lives. It is equally important to realize that ignoring justice in the name of peace very often carries consequences as well. Hopefully, the ICC recognizes this balance and finds a way to allow the peace negotiations to continue without damaging its own practical authority. To date, the court has given little indication on what it plans to do with the LRA situation; only time will tell.

112 See id. at 336–37.
113 See Arsanjani & Reisman, supra note 57, at 395; Hanlon, supra note 11, at 336–37.
INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS: DO TRIPS’ FLEXIBILITIES PERMIT SUFFICIENT ACCESS TO AFFORDABLE HIV/AIDS MEDICINES IN DEVELOPING COUNTRIES?

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Abstract: The World Trade Organization’s Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement seeks to standardize intellectual property laws around the world. TRIPS is controversial because, in effect, it limits access to affordable HIV/AIDS medicines in nations where they are desperately needed. This Note argues that although TRIPS’ compulsory licensing provision is an invaluable tool for improving access to affordable medicines, a tiered-pricing scheme in concert with a ban on parallel imports would help secure universally lower drug prices.

Introduction

The notion of international protection for intellectual property rights stirs up emotional dilemmas.1 Pharmaceutical companies invest billions of dollars to research and develop innovative new medicines, and the only way to recoup these costs and incentivize future research is to grant companies temporary monopolies on their innovations and allow them to charge high prices for patented medicines.2 At the same time, the World Health Organization estimates that half the population in regions of Africa and Asia lacks access to essential medicines.3 Further, patent protection itself is a foreign concept in many of these nations, and forcing them to abide by international intellectual property

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1 See A Gathering Storm: Drugs Companies’ Patents Are Under Attack, Economist, June 9, 2007, at 100.


agreements seems to be an unfair imposition of Western values. The question remains: How can pharmaceutical companies be compensated adequately for their exorbitant expenses and, at the same time, poor nations be ensured access to affordable HIV/AIDS medicines?

Given the increasing interconnectedness of global markets, protecting intellectual property on an international scale has become a critical concern for the World Trade Organization (WTO). In response to pressure from developed countries such as the United States, the WTO passed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994. Each of the more than 150 WTO member-states was required to ratify the Agreement. TRIPS attempts to create a global intellectual property consensus by requiring nations to establish minimum baseline intellectual property laws. The Agreement also provides exceptions for rare circumstances.

A crucial flexibility contained in TRIPS is compulsory licensing, which is the process by which a government compels a patent-holder to license its rights to a generic manufacturer in exchange for compensation. Global health advocates praise the increased use of compulsory licensing because it leads to lower-priced medicines, but drug executives insist that the method was intended to be used only as a last resort during emergencies.

This Note first discusses the WTO’s adoption of TRIPS and several subsequent initiatives and outlines the flexibilities that they provide. Next, this Note highlights the controversies surrounding TRIPS and compulsory licensing and it introduces possible improvements. Finally, this Note analyzes how effectively TRIPS achieves its competing goals

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6 See Harrelson, supra note 2, at 175.
8 TRIPS, supra note 7, art. 1.
9 See id. art. 33.
10 Id. art. 31.
11 Id.; see Bass, supra note 4, at 198–99.
12 A Gathering Storm, supra note 1, at 100.
and proposes ways to enhance the current international intellectual property system.

I. Background

A. TRIPS and Its Progeny: A Chronology of Initiatives

International intellectual property rights are not a new idea. The Paris Convention, signed in 1883, was an early international agreement to address the subject. Nevertheless, it merely required nations to offer the same patent protection to foreign inventors that they provided to domestic innovators. Moreover, there was no mode of enforcement and thus the Convention was essentially a guideline that nations were free to ignore. In 1967, the World Intellectual Property Organization (WIPO) was formed, but it was criticized for favoring the needs of developing nations and failing to provide substantial international intellectual property protections. These disappointing initiatives ultimately led to the formation of the WTO and the adoption of the TRIPS agreement.

Following proposals by the United States and Japan, as well as years of negotiations, the WTO adopted TRIPS during the 1994 Uruguay Round negotiations. TRIPS protects various types of intellectual property, including pharmaceuticals, by mandating that signatories adopt patent laws conforming to the minimum standards enunciated in the Agreement. Specifically, TRIPS requires member-states to provide at least twenty years of patent protection for innovators. Nevertheless, the Agreement also allows for exceptions in rare circumstances. Most significantly, TRIPS lists the situations in which a country may engage in compulsory licensing, a process by which a government authorizes a manufacturer to produce a patented item without the patent-owner’s

13 See Harrelson, supra note 2, at 178.
14 See id. at 178–79.
15 Id.
16 See id.
17 See Bass, supra note 4, at 195.
18 See id. at 195–96.
20 Id. at 16.
21 TRIPS, supra note 7, art. 33.
22 Id. art. 31.
TRIPS also contains dispute settlement provisions, a feature that its predecessors lacked.

In response to questions from developing countries about how strictly TRIPS would be interpreted, the WTO issued a Declaration on TRIPS and Public Health at a conference in Doha, Qatar, in 2001. The Doha Declaration clarified various aspects of TRIPS and generally loosened developing nations’ obligations under the Agreement. Specifically, it stated that TRIPS “can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.” This was considered a major victory for developing nations. The Declaration also extended the deadline for developing nations to comply with TRIPS’ requirements until 2016.

In August 2003, the WTO General Counsel addressed another lingering issue: the fact that nations lacking manufacturing capabilities were unable to use TRIPS’ compulsory licensing provision. TRIPS Article 31(f) requires that compulsory licensing be used “predominantly” to supply goods to a nation’s domestic market. This serves to limit compulsory licensing in the developing world, as many poorer nations lack the technological resources to produce pharmaceuticals. The WTO’s 2003 decision addressed this deficiency by creating a waiver for TRIPS Article 31(f), allowing member-states to export generic drugs to poorer nations. The 2003 decision is frequently referred to as the

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23 Id.
24 Id. art. 64; Harrelson, supra note 2, at 178–79.
26 See Sherman & Oakley, supra note 5, at 358–59.
27 Doha Declaration, supra note 25, para. 4.
29 Doha Declaration, supra note 25, para. 7.
31 TRIPS, supra note 7, art. 31(f).
32 See Whobrey, supra note 25, at 636.
33 See Paragraph Six Decision, supra note 30, para. 2; Whobrey, supra note 25, at 636.
Paragraph Six Decision because the sixth paragraph of the Doha Declaration specifically identified the manufacturing capabilities issue.  

Perhaps unsurprisingly, the United States agreed to the Paragraph Six Decision on the condition that the exportation method was to be used solely to address public health needs and was not for commercial purposes. This extra condition led some public health groups to conclude that the Decision was doomed because developing countries, many of which lack organized governmental infrastructures, would be discouraged by the bureaucratic “red tape.” The Decision contains other restrictions, as well; for instance, states that utilize the compulsory licensing provisions must fulfill notification obligations and follow several other complicated steps.

Since the Paragraph Six Decision was issued, many developed countries have pledged not to use the waiver provision to import cheap generic drugs. Several other countries have announced that they will not use the waiver unfairly but instead will utilize it only during national emergencies. Perhaps as a result of the pervasive perception that developed countries will exert pressure on nations that use the new mechanism, only one country has done so thus far. In October 2007, Canada issued a compulsory license for the production and export of a generic AIDS medicine to Rwanda.

In December 2005, WTO members agreed to incorporate the 2003 waivers into the TRIPS Agreement permanently. The amendment will

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36 Id.
37 Paragraph Six Decision, supra note 30, para. 2; see Gamharter, supra note 19, at 275.
39 TRIPS and Public Health: The Situation in Late 2005, supra note 38.
40 See John Boscarel, Canada Is First to Grant WTO Compulsory License for Export of Generic Drug, MONDAQ BUS. BRIEFING, NOV. 2, 2007.
enter into force when two-thirds of WTO members ratify it, which was originally expected to occur by the end of 2007.\textsuperscript{43} In December 2007, the General Council decided to extend the deadline by two years until the end of 2009.\textsuperscript{44} Thus far, eighteen members, including the United States and the European Union (EU), have officially accepted the amendment.\textsuperscript{45}

**B. TRIPS’ Flexibilities in Detail: Compulsory Licensing and Parallel Importation**

The TRIPS Agreement permits compulsory licensing in a section entitled, “Other use without authorization of the right holder.”\textsuperscript{46} According to the Agreement, the entity or individual applying for a compulsory license first must attempt to obtain a voluntary license from the patent-holder.\textsuperscript{47} If that effort is unsuccessful, the government may issue a compulsory license and the license-user must provide the patent-owner with monetary compensation.\textsuperscript{48}

Nevertheless, TRIPS permits exceptions during national emergencies and other urgent situations.\textsuperscript{49} In these instances, the user is not obliged to make an initial attempt to secure a voluntary license.\textsuperscript{50} The Doha Declaration further loosened this national emergency exception by allowing nations to develop their own definitions of “national emergency.”\textsuperscript{51} In addition, TRIPS previously reserved compulsory licensing for domestic uses, but the 2003 Paragraph Six Decision made it possible for developing nations to import copies of drugs that they are incapable of manufacturing domestically.\textsuperscript{52}

Parallel importation is another crucial avenue of drug access for developing nations.\textsuperscript{53} This occurs when a manufacturer sells a medicine

\textsuperscript{43} World Trade Organization, Countries accepting amendment of the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last visited Nov. 21, 2008); Whobrey, supra note 25, at 637–38.

\textsuperscript{44} Countries accepting amendment of the TRIPS Agreement, supra note 43.


\textsuperscript{46} TRIPS, supra note 7, art. 31. Although the words “compulsory licensing” do not appear in the TRIPS Agreement, the WTO has stated that the practice falls under this broad heading. WTO Fact Sheet, supra note 42.

\textsuperscript{47} See TRIPS, supra note 7, art. 31(b).

\textsuperscript{48} Id. art. 31(b), (h).

\textsuperscript{49} Id. art. 31(b).

\textsuperscript{50} Id.

\textsuperscript{51} Doha Declaration, supra note 25, para. 5(c).

\textsuperscript{52} See Paragraph Six Decision, supra note 25.

\textsuperscript{53} See Harrelson, supra note 2, at 192.
to different countries at varying prices, and a buyer purchases the drug from the country with the lowest price.\textsuperscript{54} Thus, if a patent-holder sold a drug to country A for $1.00 and country B for $5.00, and a company buys the drug cheaply in country A and imports it into country B, parallel importing has occurred.\textsuperscript{55} The legal principle behind parallel importation is “exhaustion;” once a company sells a batch of its product, it no longer has any rights over the batch; and thus its rights have been exhausted.\textsuperscript{56} By extension, there are no restrictions on what the new owner of the product can do with it.\textsuperscript{57} While the doctrine of exhaustion is recognized on a national level, the concept of ‘international exhaustion’ is hotly contested.\textsuperscript{58}

Because the issue is so divisive, TRIPS does not expressly permit or prohibit the practice of parallel importation.\textsuperscript{59} In fact, the Agreement explicitly states, “[N]othing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.”\textsuperscript{60} The Doha Declaration reiterated that member-states can address parallel importation on an individual basis according to their domestic policy goals.\textsuperscript{61} Currently, parallel importation is a common practice, especially within the European Union.\textsuperscript{62}

II. Discussion

A. General Tension over TRIPS

TRIPS has been a source of controversy since its inception.\textsuperscript{63} Some developing countries protest that patents are a Western concept and TRIPS forces Western values on their cultures.\textsuperscript{64} Indeed, some cultures in developing nations value shared knowledge and reject the competitiveness embodied in TRIPS.\textsuperscript{65} Furthermore, intellectual property laws

\textsuperscript{54} Whobrey, supra note 25, at 632-33.
\textsuperscript{55} See WTO Fact Sheet, supra note 42, at 5; Whobrey, supra note 25, at 632-33.
\textsuperscript{56} WTO Fact Sheet, supra note 42, at 5.
\textsuperscript{57} See id.
\textsuperscript{59} See WTO Fact Sheet, supra note 42, at 5; Sherman & Oakley, supra note 5, at 373.
\textsuperscript{60} TRIPS, supra note 7, art. 6.
\textsuperscript{61} Doha Declaration, supra note 25, para. 5(d).
\textsuperscript{62} See Harrelson, supra note 2, at 193.
\textsuperscript{64} See Bass, supra note 4, at 205.
\textsuperscript{65} See id.
may seem unnecessary in developing countries with few resources and low levels of technological development. Developing countries object most forcefully to the implementation of Western values in an area of great concern to them: access to affordable pharmaceuticals. Justifiably, these nations fear that TRIPS will limit access to crucial medications by raising prices.

By stark contrast, the United States, other developed nations, and the pharmaceutical industry have complained that TRIPS is too lenient. In particular, they oppose the transitional grace periods for compliance provided to developing countries and TRIPS’ built-in flexibilities, such as compulsory licensing. Indeed, the United States’ insistence on an additional statement in the Paragraph Six Decision regarding commercial use exemplifies its tough approach to TRIPS.

B. The Debate over Compulsory Licensing

The controversy over compulsory licensing, especially in the context of desperately needed HIV/AIDS pharmaceuticals, rightly has been referred to as “an emotional battleground.” Of all HIV-infected patients, eighty-nine percent live in the poorest ten percent of all nations. In the United States, the annual cost of HIV/AIDS drugs is more than $10,000, a cost which is far beyond the means of almost all patients in developing countries. Therefore, compulsory licensing has clear appeal because it lowers prices.

Interestingly, developing countries can benefit from compulsory licensing even when they do not implement the method. In the past, mere threats to issue compulsory licenses have motivated pharmaceutical companies to quickly drop their prices. In 2001, for instance, Brazil threatened to issue a compulsory license for an AIDS drug

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66 Whobrey, supra note 25, at 629.
67 See Bass, supra note 4, at 205.
68 See id. at 204–05.
69 Id. at 205.
70 Id. at 205–06.
71 See Becker, supra note 35, at 1.
72 Harrelson, supra note 2, at 189.
73 Id.
74 See id. at 190.
75 See id. at 190–91.
77 See Jennifer L. Rich, Roche Reaches Accord on Drug with Brazil, N.Y. Times, Sept. 1, 2001, at Cl.
produced by Swiss pharmaceutical company Roche Holding, and the company reacted by lowering its prices to about thirty percent of the price in the United States.\textsuperscript{78} To the relief of the pharmaceutical industry, Brazil agreed to the discount; drug companies had feared that other developing nations would follow Brazil’s example and issue compulsory licenses for much-needed medicines.\textsuperscript{79}

Unfortunately, compulsory licensing suffers from several notable shortcomings, including the fact that many poor nations do not employ the method for fear of trade sanctions or business repercussions.\textsuperscript{80} Indeed, developed countries and pharmaceutical companies have not hesitated in the past to exert pressure on nations with weak intellectual property laws.\textsuperscript{81} As evidenced by the fact that only one country has used the new Paragraph Six method in the years since its adoption, nations are cautious about potentially exposing themselves to a mountain of international pressure.\textsuperscript{82} This remains a pressing problem, as many developing countries lack pharmaceutical manufacturing capabilities.\textsuperscript{83}

The United States’ actions toward Brazil’s intellectual property laws exemplify the developed world’s approach to weak intellectual property regimes. In 1987, even before TRIPS was enacted, the United States imposed “Special 301” sanctions on Brazil because it considered Brazil’s flimsy intellectual property laws and failure to denounce piracy of pharmaceuticals to be unacceptable.\textsuperscript{84} The sanctions consisted of a one hundred percent tariff on Brazilian imports to the United States.\textsuperscript{85} After the passage of TRIPS, Brazil enacted its Industrial Property Law in an attempt to meet its new obligations under the Agreement.\textsuperscript{86} This new law required that foreign goods seeking Brazilian patent protection be produced at least partially within Brazil.\textsuperscript{87} As a result, the United States filed a complaint with the WTO in 2001.\textsuperscript{88} Ultimately, the United States withdrew its complaint following much international pressure.\textsuperscript{89}

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See \textit{id.}
\textsuperscript{80} See Harrelson, \textit{supra} note 2, at 189.
\textsuperscript{81} See Whobrey, \textit{supra} note 25, at 624.
\textsuperscript{82} See Boscariol, \textit{supra} note 40; Rich, \textit{supra} note 77, at C1.
\textsuperscript{83} See Whobrey, \textit{supra} note 25, at 636.
\textsuperscript{84} See Bass, \textit{supra} note 4, at 206–07.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} See \textit{id.} at 208 (describing the United States’ allegation that the Industrial Property Law violated TRIPS Article 27, which prohibits discrimination against foreign manufacture of goods).
\textsuperscript{89} See Bass, \textit{supra} note 4, at 208.
The international community also took a strong stance against one of South Africa’s laws. In 1997, South Africa passed the Medicines and Related Substances Control Amendment Act (Medicines Act), which empowered the Minister of Health to use sweeping measures, such as unrestricted compulsory licensing, during health emergencies. The United States and various organizations considered these provisions to be TRIPS violations, and as a result, the United States placed South Africa on its “watch list” in 1998 and attempted to challenge the Medicines Act before the WTO. Furthermore, upon passage of the Medicines Act, the Pharmaceutical Manufacturers’ Association (PMA) of South Africa filed a lawsuit against the South African government on behalf of forty domestic and international drug companies. In response to public pressure, the United States removed South Africa from its list in 2001 and issued a statement acknowledging the AIDS epidemic, and the PMA dropped its suit. Nevertheless, the United States has continued to closely monitor South Africa’s patent protections.

More recently, Thailand was targeted for the perceived weaknesses in its intellectual property practices. In January 2007, Thailand approved a compulsory license for an AIDS drug, thereby allowing its domestic drug makers to copy the patent-holder’s formula and sell the medicine in Thailand at a low price. Shortly thereafter, the United States elevated Thailand to its “priority watch list” and EU Trade Commissioner Peter Mandelson wrote a letter to the nation attacking its weak intellectual property standards. Even more devastatingly, the patent’s owner, Abbott, announced that it would no longer sell seven of its newest products in Thailand, including a highly desirable heat-stable AIDS medicine. The United States claimed that its actions were based on Thailand’s cumulative disregard for intellectual property, as well as

90 See id. at 210–13.
91 Id. at 210–11.
92 See id. at 211–12; Sherman & Oakley, supra note 5, at 395.
93 Park, supra note 63, at 137.
94 See id.
95 See Harrelson, supra note 2, at 185.
97 Id.
98 See id.
its failure to include all stakeholders in the discussions leading up to the issuance of the license.\(^{100}\) It did, however, acknowledge Thailand’s legal right under TRIPS to issue a compulsory license.\(^{101}\)

Thus there is a strong international perception that developed nations and the pharmaceutical industry will react swiftly and harshly to what they perceive to be intellectual property infractions.\(^{102}\) The threat of trade sanctions or other business repercussions is alarming to developing nations that are already in desperate economic positions.\(^{103}\) As a result, developing countries are hesitant to issue compulsory licenses, especially for Paragraph Six purposes.\(^{104}\)

Besides instilling fear of sanctions in developing countries, another drawback to compulsory licensing is that it arguably destroys the pharmaceutical companies’ incentives to research and develop medicines to treat the diseases that strike developing countries.\(^{105}\) If the pharmaceutical industry’s fears are realized and compulsory licensing becomes a common practice, it could be “the last blow” to the drug industry’s attempts to cure diseases of the developing world, which are overlooked even today.\(^{106}\) One Doctors Without Borders report reads, “For [some] diseases there is no treatment: no effective medicine exists and nobody is looking for a cure.”\(^{107}\) Indeed, pharmaceutical companies will not invest in new medicines unless there is an economic incentive to do so, and pervasive compulsory licensing may destroy this motivation.\(^{108}\)

A related weakness is that compulsory licensing allows and perhaps even encourages free-riding.\(^{109}\) That is, an inventor invests a huge amount of money into researching and developing new medicines, and another company simply copies the formula and makes a significant

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100 See Gov’t Accountability Office, U.S. Trade Policy on WTO Declaration on Access to Medicines May Need Clarification (Nov. 1, 2007) (detailing the United States’ argument that Thailand failed to follow proper procedure when issuing compulsory licenses).

101 Id.

102 See Sherman & Oakley, supra note 5, at 398.

103 See id.

104 See Rich, supra note 77, at C1; Boscariol, supra note 40.


106 See A Gathering Storm, supra note 1, at 100.

107 Singham, supra note 105, at 392.

108 See id. at 392–93.

109 See id. at 363, 390.
profit from its sales.\textsuperscript{110} In this sense, some argue that compulsory licensing is anti-competitive and takes an economic toll on society.\textsuperscript{111}

Another realistic danger is that middle-income nations will take advantage of compulsory licensing to the detriment of poorer developing countries.\textsuperscript{112} As one member of the Gates Foundation stated, “Brazil is not Rwanda, which cannot afford to pay.”\textsuperscript{113} Further, some argue that the prices of drugs created by compulsory licensing are not low enough to justify the massive intrusion on patent rights.\textsuperscript{114} Indeed, the prices of generic drugs are reduced, but they are still far beyond the means of many developing nations.\textsuperscript{115}

C. Other Options: Parallel Importation and Tierred Pricing

Parallel importation is another method through which developing countries can obtain affordable pharmaceuticals.\textsuperscript{116} Supporters of parallel importation contend that once a product has been sold, manufacturers can no longer control what happens to it, and thus an importing country is free to resell the products at a higher price if it so chooses.\textsuperscript{117} An attractive quality of parallel importation is that, unlike the type of compulsory licensing widely used in the world today, it does not require countries to have domestic manufacturing capabilities; rather, nations can simply import the cheapest version of a drug that they can find.\textsuperscript{118}

The United States and other developed countries fundamentally oppose the practice of parallel importation, arguing that it destroys the monopoly a patent-holder has on its innovation and undermines the patent system.\textsuperscript{119} Opponents further hold that parallel importation eliminates any incentive to offer lower prices to developing nations, a tactic which is further described below.\textsuperscript{120}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id. at 391.
\item See A Gathering Storm, supra note 1, at 100.
\item Id.
\item See Singham, supra note 105, at 390.
\item See Harrelson, supra note 2, at 175.
\item See id. at 192–95.
\item See Whobrey, supra note 25, at 632–34.
\item Sherman & Oakley, supra note 5, at 375. It should be noted that compulsory licensing under the 2003 Paragraph Six Decision also does not necessitate domestic manufacturing facilities. Nevertheless, as stated previously, this type of compulsory licensing has only been employed on one occasion since the decision was issued. See Boscariol, supra note 40.
\item See Harrelson, supra note 2, at 194.
\item See id.; Sherman & Oakley, supra note 5, at 375.
\end{enumerate}
\end{footnotesize}
Furthermore, it is debatable whether parallel importation even benefits poor patients in developing countries. The primary beneficiaries of parallel importation are often the importers themselves, who proceed to raise the price of the drug and resell it to patients at an un-reduced rate. In addition, the governments of some developing nations are corrupt and the poor patients are often unable to reap the benefits of parallel importation. In other instances, developed countries purchase lower-priced drugs intended for the developing world, which is arguably unfair.

Tiered pricing is another option, inextricably linked to parallel importation, which may help make medicines more affordable in the developing world. In a tiered pricing scheme, drug companies charge less for patented medicines in developing nations than they do in developed countries. The TRIPS Agreement does not address tiered pricing, although differential pricing can lead to parallel importation, as explained above. Tiered pricing already exists to a fairly large extent in the world, especially in relation to vaccines and contraceptives, but questions remain as to whether it can solve access problems in the developing world and whether it should be mandated by TRIPS.

The chief argument against tiered pricing is that sales in developing countries would not be profitable for pharmaceutical companies, which rely on large profits to offset their exorbitant research and development costs. Furthermore, tiered pricing also can negatively affect profits in developed countries. When distributors in one nation realize that a drug is available for a lower price in another country, there is an incentive for the distributor to buy the drug cheaply and resell it for a higher price. Opponents of tiered pricing therefore argue that because it is difficult, if not impossible, to keep lower-priced

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121 See Sherman & Oakley, supra note 5, at 375; Harrelson, supra note 2, at 194.
122 See Sherman & Oakley, supra note 5, at 375.
123 See Whobrey, supra note 25, at 633.
124 See A Gathering Storm, supra note 1, at 100.
125 See Harrelson, supra note 2, at 195.
126 Id.
127 See Harrelson, supra note 2, at 196; see generally TRIPS, supra note 7.
129 See Harrelson, supra note 2, at 196.
130 See Sherman & Oakley, supra note 5, at 374–75.
131 See id.
drugs within the country for which they are intended, this alternative is not a viable solution.132

III. Analysis

As it exists, TRIPS fairly effectively achieves its dual goals of facilitating access to affordable medicines and protecting intellectual property on an international scale.133 Nevertheless, one of TRIPS’ most significant mechanisms, the Paragraph Six method of compulsory licensing, has been used on only one occasion.134 Therefore, it is premature to conclude that TRIPS has effectively struck a balance between its competing aims.135 That is, if developing nations routinely used the Paragraph Six provision and imported from other countries medicines created using compulsory licenses, the pharmaceutical industry would likely be outraged.136 Accordingly, TRIPS will need to be continuously evaluated in the coming years.137 In the meantime, prices are still high and many developing nations are too intimidated to issue compulsory licenses, and thus, several additional provisions would help improve medicine access.138

First, TRIPS or a supplementary WTO declaration should mandate a tiered pricing scheme based on gross domestic product.139 Tiered pricing allows nations with limited resources to pay lower prices for much-needed pharmaceuticals.140 Differential pricing already exists, but researching developing countries’ buying power and standardizing price tiers would benefit patients in poor nations.141 To offset higher prices for medicines in developing countries, an incentive such as tax credits should be offered to those nations.142 Research reflects that tiered pricing’s impact on pharmaceutical profits would be insignificant because eighty to ninety percent of global sales occur in the thirty

132 See Harrelson, supra note 2, at 196.
133 See Whobrey, supra note 25, at 642.
134 See WTO Notifications, supra note 41.
135 See Rich, supra note 77, at C1.
136 See A Gathering Storm, supra note 1, at 100. At present, many pharmaceutical executives are furious that developing nations are issuing compulsory licenses. The Paragraph Six mode of compulsory licensing is arguably more objectionable to executives because any developing nation can use it, not just those that have pharmaceutical manufacturing facilities. See Paragraph Six Decision, supra note 30, para. 2; Boscariol, supra note 40.
137 See Bass, supra note 4, at 222.
139 See id. at 640–41.
140 See id.
141 See id.
142 See A Gathering Storm, supra note 1, at 100.
wealthy countries that make up the Organization for Economic Coop-
eration and Development (OECD). That is, sales in developing coun-
tries are so low—likely because medicines are too expensive—that lowering prices in that sector of the world would not have a major impact on cost recovery.

In concert with the pricing scheme, TRIPS also should reflect an explicit ban on parallel importation. This ban would allow the differential pricing plan to function as intended because it would prevent middle-income countries from abusing the system and buying cheaper drugs for purely commercial reasons. This would avoid loss of profits to pharmaceutical companies through their sales to developed nations because these nations would be prevented from importing cheaper drugs from developing nations. The WTO also would need to develop regulations and sanctions to ensure that parallel importation did not occur. Strict supply-chain management by purchasers and use of different trademarks and packaging may also help prevent trade diversion. Thus, pharmaceutical companies could recoup their research and development costs and continue to develop new medicines in the meantime.

A recent European Community (EC) regulation incorporated a similar combination of initiatives. In 2003, the EC adopted a differential pricing scheme, which was accompanied by a ban on trade diversion (or parallel importation) of certain named medicines. The EC regulation has been criticized, however, for its rigid pricing scheme and the fully voluntary nature of participation. Indeed, only one pharmaceutical company used the pricing scheme in the year after its entry

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144 See id.

145 See Whobrey, supra note 25, at 641.

146 See A Gathering Storm, supra note 1, at 100.

147 See Whobrey, supra note 25, at 641.

148 See Gamharter, supra note 19, at 258. The European Community has enacted a tiered pricing scheme and the devices it has adopted to prevent parallel importation, such as the temporary suspension of trade, could guide the WTO in this area. See id.


150 See Whobrey, supra note 25, at 640–41.


153 See Gamharter, supra note 19, at 260.
into force. Thus, although it has not been a major success, the EC regulation forms a useful starting point for the WTO.

Likewise, the International Intellectual Property Institute (IIPI), a non-profit organization devoted to promoting the use of the intellectual property system as a tool for economic growth, has proposed a comparable plan. The IIPI’s proposal includes: (1) the division of nations into price-sectors based on ability to pay; (2) the adoption of appropriate prices for each segment; and (3) the development of a system of international subsidies. The IIPI has stressed that a key to its plan is prohibition of parallel importation.

As a final observation, generic drug makers operate sophisticated manufacturing facilities and their technological capabilities are becoming increasingly advanced. It is predicted that soon they will be able to produce novel drugs and obtain their own patents. Somewhat ironically, a board member of one of India’s large generic drug companies stated, “[w]e are very supportive of intellectual-property rights, as innovations must be given their reward.” This new development bodes well for access to affordable medicines because many generic manufacturers are located in developing countries.

Conclusion

The TRIPS Agreement was a major accomplishment and the international community’s efforts to improve it, although often marked by controversy, indicate a crucial shift in focus from trade issues to public health. Despite its numerous shortcomings and drawbacks, compulsory licensing remains an invaluable tool, especially because the mere threat to use it has triggered pharmaceutical companies to significantly reduce their prices. Nevertheless, because many developing countries fear sanctions and business repercussions and refuse to issue compulsory licenses, additional measures are needed to ensure access to af-

154 Id.
155 See id.
157 Id.
158 Id.
159 See A Gathering Storm, supra note 1, at 100.
160 See id.
161 See id.
162 See id.
163 See Lucyk, supra note 3, at 216.
164 Rich, supra note 77, at C1.
fordable HIV/AIDS medicines. A standardized tiered pricing scheme accompanied by a ban on parallel imports would help secure universally lower prices for developing countries.

An overarching criticism of TRIPS is that its flexibilities, such as compulsory licensing, are intended to be used only on a temporary basis, but the problem of access to affordable pharmaceuticals is structural and therefore permanent.\footnote{See Gamhardt\textsc{er}, supra note 19, at 276.} Indeed, securing lower prices does not guarantee access to vital medicines, but it is a critical piece of a complex puzzle. Nevertheless, it is encouraging to note that the international community is prepared to amend the TRIPS agreement if the need arises.

CHRISTIAN WESTRA*

Abstract: The April 2007 Open Skies Agreement between the United States and the European Union has been hailed as a landmark in aviation deregulation. Under the terms of the agreement, any U.S. or EU airline may fly between any city in the United States and Europe—a major departure from the byzantine restrictions that previously characterized transatlantic air travel. Nevertheless, in several key respects, the treaty stops short of full deregulation. This Note assesses the probable impact of the Open Skies Agreement and explores why EU negotiators were willing to compromise on several of their core objectives.

Introduction

On April 30, 2007, the first aviation agreement between the United States and the European Union (EU) was signed in Washington.1 Hailed by European Commission Vice-President Jacques Barrot as a “centerpiece for today’s reinvigorated transatlantic relationship,”2 the U.S.–EU Open Skies Agreement (Open Skies Agreement)3 marks a clear departure from the web of tangled bilateral treaties that have governed transatlantic aviation since World War II.4 For the first time in the history of modern aviation, any U.S. or EU airline will be permitted to fly between any city in the United States and Europe.5

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1 2007 O.J. (L 134) 4–41 [hereinafter Open Skies Agreement].
3 See generally John Bruton, The Sky’s the Limit for Trans-Atlantic Air Travelers, Seattle Times, June 23, 2006 (noting that in Europe, the treaty is generally referred to as “Open Aviation Agreement”).
4 See Robert M. Hardaway, Of Cabbages and Cabotage: The Case for Opening up the U.S. Airline Industry to International Competition, 34 TRANSP. L. J. 1, 2–12 (2007).
5 Open Skies Agreement, supra note 1, art. 2(a); see also EU Backing for “Open Skies” Deal, BBC News, Mar. 22, 2007, http://news.bbc.co.uk/2/hi/business/6477969.stm (“any
Yet, just how significant is this departure in treaty law for airline passengers? Michael O’Leary, chief executive officer of the European low-cost airline Ryanair, has gone so far as to proclaim the advent of fifteen dollar transatlantic tickets by 2010. Others have heralded the Open Skies Agreement as a first step towards opening the U.S. domestic aviation market to foreign competition. In reality, however, unless the European Union manages to wrest more concessions from the United States in the next round of Open Skies treaty negotiations, such prognostications are likely to go unmet.

This Note begins in Part I by providing historical context on the development of aviation regulatory law, offering a comparative view of trends in the United States and Europe before examining the transatlantic regulatory order. Part II discusses the negotiations leading up to finalization of the Open Skies Agreement and examines the most significant provisions of the treaty, namely those related to cabotage—the right to transport passengers within a given country—and foreign investment control. Part III analyzes the key concessions made to seal the Open Skies Agreement. Finally, Part IV concludes by arguing that passengers on both sides of the Atlantic would have benefited had the European Union realized more of its strategic objectives. Major issues for consideration during the second round of open skies negotiations, which is scheduled to commence by the end of 2008, are highlighted in closing.

I. Background

A. The United States

For most of the Twentieth Century, the U.S. government smothered airline competition under a thick blanket of legislative regulation. In the early years of U.S. commercial aviation, foreign invest-
ment in U.S. airlines was heavily restricted. The Air Commerce Act of 1926 (ACA) mandated that U.S. citizens own at least fifty-one percent of any aircraft registered in the United States. Moreover, the ACA also stipulated that the board of directors of any U.S. airline be comprised of at least two-thirds U.S. citizens. Anxious to safeguard U.S. neutrality in the aftermath of World War I, Congress sought to block foreign control of U.S. aircraft that might conceivably be co-opted into armed service abroad.

The Civil Aeronautics Act of 1938 (CAA) went considerably further in restricting competition. As an additional bar to foreign investment, the CAA required that U.S. citizens own or control at least seventy-five percent of the voting rights in any U.S. carrier. Beyond fixing prices for air transportation in a manner akin to the way in which the Interstate Commerce Commission fixed prices for U.S. railroads, the CAA also established “virtually absolute barriers to entry” for new competitors. Although new entrants into the U.S. market could theoretically obtain permission to fly, in reality the Civil Aeronautics Board established under the CAA did not allow a single new competitor to enter the market between 1938 and 1975. During that period, the U.S. aviation industry grew by a staggering 23,800 percent, even as the five largest carriers operating in the United States enjoyed a de facto oligopoly.

By the 1970s, pressure for deregulation had reached a breaking point. During the 1975 Kennedy hearings on aviation deregulation, industry experts testified that regulated airfares were between forty and one-hundred percent higher than they would be without government price fixing, with a resultant cost to consumers of roughly

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10 See Hardaway, supra note 4, at 2–12.
11 McBay, supra note 9, at 175.
12 Id.
13 Id.
14 See Hardaway, supra note 4, at 4.
15 McBay, supra note 9, at 176.
16 See Hardaway, supra note 4, at 3 (noting how ICC obligated government to do “dirty work of fixing prices” in much same way that CAA would obligate government with regard to aviation industry).
17 See id. at 4.
19 Hardaway, supra note 4, at 4 (citing Stephen Breyer, Regulation and Its Reform 206 (1982)).
20 See id. at 3–4; see also McBay, supra note 9, at 178.
$3.5 billion annually in excess fares.\textsuperscript{21} Congress responded with the Airline Deregulation Act of 1978 (ADA), which eliminated government price fixing and opened the aviation industry to new entrants.\textsuperscript{22} Over the next few decades, a host of new airlines entered the U.S. market and fares fell considerably.\textsuperscript{23} Nevertheless, foreign investors were still barred from taking any more than twenty-five percent of voting stock in a U.S. carrier.\textsuperscript{24}

\textbf{B. Europe}

In 1957, the European Economic Community (EEC)\textsuperscript{25} was established under the Treaty of Rome.\textsuperscript{26} Although the Treaty of Rome granted the EEC the authority to create “the framework of a common transport policy”\textsuperscript{27} within Europe, it limited this authority to rail, road, and inland waterway transport.\textsuperscript{28} The Treaty of Rome permitted pan-European regulation of maritime and air transport, but only in the event of a unanimous vote by the Council of Europe (Council).\textsuperscript{29} Despite the language of the Treaty of Rome, throughout the 1970s and 1980s a number of European Court of Justice (ECJ) decisions lent support to the notion that the EEC had some power to regulate maritime and air transport within its member states, even without universal Council approval.\textsuperscript{30} By 1987, the question had been made moot by the Single European Act, which formally amended the Treaty of Rome to change the Council’s voting system from a unanimous system to a qualified majority system.\textsuperscript{31}

\textsuperscript{21} Hardaway, \textit{supra} note 4, at 4.
\textsuperscript{22} See \textit{id.} at 4.
\textsuperscript{23} See \textit{id.} at 5.
\textsuperscript{24} McBay, \textit{supra} note 9, at 176.
\textsuperscript{25} The European Economic Community was formed in 1952. In 1992, the term “Economic” was removed by the Maastricht Treaty, which made the newly-termed European Communities one of three pillars of the European Union, along with Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters.
\textsuperscript{27} Id.
\textsuperscript{29} Id.
\textsuperscript{30} See \textit{id.} at 232–33 (citing Commission v. French Republic (\textit{French Seaman}) (1974) (holding that general principles of Treaty of Rome could be applied to maritime travel); Ministere Public v. Lucas Asjes (\textit{Nouvelles Frontieres}) (1986) (holding same to be true with regard to air travel)).
\textsuperscript{31} Id. at 233.
Aviation deregulation followed between 1987 and 1992 with enactment of the “three packages,” a series of regulatory reforms.\(^{32}\) Although the “first package” had little real impact, the “second package” increased the power of airlines to set fares and allowed for expanded travel within Europe.\(^ {33}\) By 1997, when the provisions of the “third package” had come into force, all EU Member States enjoyed full cabotage rights to fly routes within other EU countries.\(^{34}\) As in the United States, a number of new low-cost airlines emerged to challenge the dominance of established legacy carriers.\(^{35}\)

C. Transatlantic Aviation

As the U.S. Third Army rumbled toward Nazi Germany in the closing months of World War II, trade negotiators from the Allied powers set about laying the foundation for a postwar transatlantic aviation order in Chicago.\(^{36}\) Affirming the central precept of the 1919 Paris Aeronautical Convention—that states maintain sovereignty over their airspace—the 1944 Chicago Convention established the principle that although nations are free to bar foreign carriers from commercial access to their airports, they may not restrict foreign carriers from entering their national airspace.\(^ {37}\) As the strongest commercial aviation power, the United States pushed for further liberalization in air travel, although it was unable to achieve a broader multilateral consensus.\(^{38}\)

Instead, scores of bilateral agreements between the United States and other nations were enacted following the Chicago Convention.\(^ {39}\) The most significant of these early agreements was the 1946 “Bermuda I” agreement between the United States and Great Britain, which

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\(^{34}\) Id. at 234.

\(^{35}\) Among the most successful early low-cost European carriers were Selios Haji-Ioannou’s UK-based Easyjet and Ireland-based Ryanair. See *Ryanair Profits Take Off*, BBC News, August 9, 2002, http://news.bbc.co.uk/2/low/business/2175319.stm.


\(^{37}\) Id. at 307–09 (noting that Convention on International Civil Aviation signed at Chicago in 1944 established nine so-called “freedoms of the air”).

\(^{38}\) See id. at 308.

\(^{39}\) Id. at 311.
served as a model for hundreds of subsequent bilateral aviation agreements around the world. Under Bermuda I and its progeny, fares and tariffs were set by an international body, the International Air Transport Association. Consequently, throughout much of the postwar period, airlines traveling international routes competed not on price but on “capacity and service frequency,” with the result that international air travel remained beyond the means of most U.S. and European travelers.

In 1977, the Bermuda I agreement was amended as “Bermuda II.” Under Bermuda II, only two U.S. airlines—American Airlines and United Airlines—were permitted to service London’s Heathrow Airport. In addition, non-stop service from Great Britain to America was restricted to a fixed number of “gateway cities” in the United States. The agreement represented a successful effort by British protectionists to eliminate the supposed “excess capacity” of U.S. carriers traveling to Britain. Although the U.S. government pushed strenuously for looser regulation, the British controlled access to Heathrow, Europe’s busiest airport, and thus exercised considerable leverage.

Despite the highly restrictive nature of Bermuda II, transatlantic aviation became increasingly open following passage of the U.S. Airline Deregulation Act of 1978. Airline alliances and code sharing agreements enabled U.S. carriers to circumvent restrictions on air travel within Europe by partnering with EU carriers. Moreover, bilateral open skies agreements between the United States and individual European countries began to proliferate, enabling transatlantic service to new U.S. cities.

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40 See Warden, supra note 28, at 230.
41 Id. at 230–31.
42 Id. at 231.
43 Kreis, supra note 36, at 311–12.
46 Kreis, supra note 36, at 311–12.
47 See id. at 312.
48 See id. at 312–14.
49 See Hardaway, supra note 4, at 24 (discussing Oneworld, SkyTeam and Star Alliance).
50 See Kreis, supra note 36, at 312–14.
51 Warden, supra note 28, at 236–37.
The first of these bilateral agreements, a 1992 treaty between the United States and the Netherlands, permitted unrestricted landing rights within each signatory’s territory.52 Prior to the agreement, flights between the United States and the Netherlands had been limited in number and restricted to certain airports.53 As a result of the agreement, Dutch carrier KLM found itself at a significant competitive advantage as compared to other European carriers.54 KLM not only enjoyed the flexibility to chart routes anywhere in the United States to meet market demand; as a further incentive to the Dutch government, the U.S. Department of Transportation also exempted KLM from U.S. antitrust restrictions in its alliance with Northwest Airlines.55 Other bilateral Open Skies agreements soon followed between the United States and various members of the European Union.56 By 2007, bilateral agreements had been concluded with sixteen EU Member States.57

Although the bilateral Open Skies agreements negotiated between the United States and individual European countries may have helped to liberalize transatlantic aviation, they nevertheless fell flat in the face of European integration.58 The ECJ signified its disapproval in a series of consolidated rulings in 2002.59 Noting that bilateral Open Skies agreements between the United States and the European Union contradicted the spirit of the “three packages” reforms, the ECJ held that EU Member States entering into such agreements “infringed the rules on the division of powers between the Community and the Member States.”60 The court extended its condemnation to the Bermuda II

53 See id.
54 Warden, supra note 28, at 236–37.
55 Kreis, supra note 36, at 314 (noting immunity as method of enticing countries to enter into open-skies agreements).
57 Id.
60 Id. at Concluding Observations.
agreement. Yet even if the ECJ was unambiguous in its criticism of bilateral aviation treaties negotiated by individual EU Member States, it did not rule out a broader Open Skies agreement between the United States and the European Union as a whole. On the contrary, the ECJ explicitly endorsed the notion. As European Commission Vice President for Transport and Energy Loyola de Palacio commented, “it is clear from the Court’s ruling that we will all have to work together in Europe to identify and pursue our objectives jointly.”

I. Discussion

It took five years for the United States and the European Union to emerge from the rubble of the ECJ’s 2002 rulings. Finally, in the spring of 2007, the United States and the European Union concluded a comprehensive Open Skies treaty. The U.S.–EU Open Skies Agreement, signed on April 30, 2007 in conjunction with a U.S.–EU summit in Washington, took effect on March 30, 2008. Although it touches on many aspects of commercial aviation, from code sharing to security, the most contentious provisions of the treaty relate to cabotage and foreign airline ownership rights.

Article 3 of the Open Skies Agreement deals with cabotage. Under Article 3(c)(i), U.S. carriers have the right to fly from Europe to the United States via “intermediate points” in any EU Member State. For example, American Airlines may fly from Berlin to Amsterdam before continuing on to Boston. Likewise, under Article 3(c)(ii), EU carriers are free to fly from any point in the European Union to any point in the United States without necessarily touching their “home country.” A British Airways flight, in other words, may...

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61 Id.
62 Commission Welcomes ECJ Ruling, supra note 58.
63 Id.
64 Id.
66 Open Skies Agreement, supra note 1.
67 Id.
69 Open Skies Agreement, supra note 1, art. 3.
70 Id. art. 3(c)(i).
71 See id.
72 Id. art. 3(c)(ii).
fly from Madrid to Chicago without landing in London.\textsuperscript{73} Notably, however, Article 3 does not authorize EU carriers to fly between points in the United States before returning to Europe.\textsuperscript{74} Thus, Virgin Atlantic may not operate flights within the United States, although it may take a limited equity stake in U.S. carriers.\textsuperscript{75}

Ownership rights under the Open Skies Agreement are discussed in Article 6 of the treaty and elaborated in Annex 4.\textsuperscript{76} U.S. investors are guaranteed the right to participate as minority shareholders in any EU carrier, provided that the carrier is majority-owned and controlled by EU Member States or nationals.\textsuperscript{77} EU investors may hold up to 49.9 percent of total equity in a U.S. carrier, but are limited to twenty-five percent voting equity.\textsuperscript{78} On a case-by-case basis, ownership by EU nationals of fifty percent or more of the total equity of a U.S. carrier is permitted under the agreement, although such ownership “shall not be presumed to constitute control of that airline.”\textsuperscript{79} Notwithstanding the other provisions in Annex 4, the European Community reserves the right to limit investment by U.S. nationals in the voting equity of EU carriers “to a level equivalent to that allowed by the United States for foreign nations in U.S. airlines.”\textsuperscript{80}

The issue of foreign ownership rights is not technically linked to the concept of cabotage, but European negotiators insisted from the beginning that the European Union would not implement an open skies agreement unless the United States relaxed its “regulatory grip on airline investment.”\textsuperscript{81} While foreign investors may participate passively on the corporate boards of U.S. carriers, they have nonetheless been historically restricted under the CAA from taking an active role in most operational decisions.\textsuperscript{82} As a prerequisite to any Open Skies agreement, European negotiators demanded that their U.S. counter-

\textsuperscript{73} See id.
\textsuperscript{74} Id. art. 3.
\textsuperscript{75} See John Hughes, Branson, Rejected or Not, May Win in U.S. Airline Bid, BLOOMBERG, Dec. 5, 2006, http://quote.bloomberg.com/apps/news?pid=20601109&sid=aQs7zO5NbyQw (noting that this is essentially what UK-based Virgin Atlantic has done by putting up twenty-five percent of the initial $177 million investment to start Virgin America).
\textsuperscript{76} Open Skies Agreement, supra note 1, art. 6 & annex 4.
\textsuperscript{77} Id. art. 2.
\textsuperscript{78} Id. annex 4, art. 1(a).
\textsuperscript{79} Id. annex 4, art. 1(b).
\textsuperscript{80} Id. annex 4, art. 3.
\textsuperscript{81} Phillips, supra note 68, at 10.
\textsuperscript{82} Id.
parts agree to loosen their restrictions on foreign investment. Early on, at least, it seemed this might happen.

U.S. and EU negotiators reached a preliminary Open Skies agreement in November 2005. The terms of the tentative agreement granted each U.S. and EU carrier the right “to fly between every city in the EU and every city in the United States,” and “to operate without restrictions on routes or capacity.” EU Commission support for the agreement was predicated upon U.S. congressional approval of an administrative rule proposed by the Department of Transportation (DOT) to allow foreign investors a greater role in the management of U.S. carriers. Under the proposed DOT rule, foreign investors from Open Skies partner nations would be free to make “operational decisions” on issues such as rates and routes, although they would still be prohibited from having control over “security, safety and defense issues related to the airlines.” According to the DOT, the proposed rule would reinterpret, rather than replace, the ownership requirements of the CAA.

After a preliminary Open Skies agreement was negotiated in November 2005, the proposed DOT rule was submitted to Congress for comments. Officials from the DOT testified at length in favor of the proposal. Nevertheless, this did little to allay congressional concerns.

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83 See id.
85 Id.
86 Id.
89 Id.
related to labor and aviation security. Additional concerns regarding the breadth of DOT’s power to issue rules reinterpreting established law were also raised. By the end of 2006, the proposed rule had been withdrawn from consideration. “It is necessary now,” said lead U.S. negotiator John Byerly, “on both sides of the Atlantic to accept the reality that a major change in U.S. rules governing control of U.S. airlines is simply not in the cards.”

One might infer from the great efforts taken by the White House to implement the proposed DOT rule that no Open Skies agreement with the European Union would be feasible without it. On the contrary, once the DOT proposal was withdrawn from Congress, a U.S. delegation rushed to Brussels in January 2007 “to discuss possible solutions to the stalemate.” Less than two months later, U.S. and EU negotiators reported a breakthrough—without any change to U.S. aviation foreign investment law. How was the seemingly intractable gap between the U.S and EU positions closed? What concessions were made by each side, and just how meaningful were they? Finally, what implications do these concessions have for passengers on both sides of the Atlantic?

III. Analysis

On its face, there is little question that the U.S.–EU Open Skies Agreement favors the United States. In terms of cabotage rights, the agreement is clearly lopsided. Although it grants U.S. carriers the right to fly routes within Europe, the Open Skies Agreement does not

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92 See id.

93 See id. (noting “members of the House Transportation and Infrastructure Subcommittee on Aviation uniformly questioned not only the rule itself but even [DOT’s] authority to issue it”).

94 Foreign Control Rule Might be Delayed, supra note 84.


96 See id.

97 Id.

98 U.S., EU Reach Long-Sought Accord, supra note 87.


100 See Open Skies Agreement, supra note 1, art. 3.
permit EU carriers the right to fly within the United States. In terms of foreign investment rights, the picture is murkier. U.S. and EU investors alike are proscribed from gaining “control” of each other’s carriers. On the other hand, while U.S. nationals are limited to a minority stake in EU carriers, EU nationals may, on a case-by-case basis, take more than a fifty percent equity stake in U.S. carriers, provided that the investment is not interpreted as signifying control. Given that the discretion to adjudicate on a case-by-case basis will presumably be vested in the DOT, it is unclear how real the impact of this provision will be. Certainly, the provision is a far cry from the initial EU demands that engendered the DOT’s proposed rule on foreign management control. The question thus arises: why were EU negotiators willing to accept such unbalanced terms on cabotage in exchange for what is arguably a negligible enhancement in foreign investment rights?

U.S. concessions undoubtedly played some role in bringing EU negotiators to the table. When the U.S. delegation flew to Brussels in January 2007 following withdrawal of the DOT proposal, it reiterated a number of modest proposals, including one to open some forms of U.S. government-funded travel to EU carriers. The U.S. delegation also reiterated Washington’s support for granting antitrust immunity to U.S. and EU carriers entering into airline alliances, even though the persuasive impact of such assurances was no doubt negligible because the United States already granted antitrust immunity to most of its bilateral Open Skies partners. The U.S. delegation seems to have gained real ground when it shifted the dialogue on foreign investment rights from a focus on “control” to a focus on “ownership.” Even though the European Union had demanded broader

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101 Id. art. 3(c)(i).
102 See id. art. 6 & annex 4.
103 Id.
104 Id.
105 See id.
106 See U.S., EU Reach Long-Sought Accord, supra note 87.
107 See id.
109 See Kreis, supra note 36, at 314; see also Foreign Control Rule Might be Delayed, supra note 84.
110 See U.S., EU to Look at Options, supra note 95.
investment control from the start of negotiations, by January 2007 the U.S. delegation could point towards Congress’s intractability as a way of arguing credibly that if the European Union wanted any sort of Open Skies agreement, it would have to retreat from its initial position. Ultimately, the proposal to grant EU nationals greater than fifty percent ownership of U.S. carriers on an ad hoc basis—albeit without traditional majority shareholder control rights—appears to have tilted the balance.

Broader considerations played a crucial role in motivating the European Union to finalize an open skies agreement with the United States. For one thing, EU negotiators viewed any potential Open Skies agreement with the United States as simply the first in a series of commercial aviation agreements. The language of the Open Skies Agreement reflects this understanding. Article 21 of the agreement explicitly calls for “second stage negotiations” and stipulates that negotiations must begin “not later than 60 days after provisional application” of the treaty. Among the “items of priority interest” identified for second stage negotiations are “further liberalisation of traffic rights” and “foreign investment opportunities.” Thus, in the second stage of negotiations following application of the Open Skies Agreement, EU cabotage rights within the United States, along with broader foreign investment control rights, will presumably be issues for discussion. Whether this will do anything to alter the current U.S. position, however, is another matter.

Perhaps the single greatest motivating factor for EU negotiators was the perceived economic value of a transatlantic Open Skies agreement. In March 2007, the EU Commission issued a press statement predicting that if approved, the Open Skies Agreement

111 See id.
112 See id. (noting that following the U.S. delegation’s January 2007 trip to Brussels, one observer suggested that, “ownership is an area where the U.S. administration can do something to allay European concerns”).
114 Id.
115 Open Skies Agreement, supra note 1, art. 21.
116 Id.
117 Id. art. 21(2).
118 See id.
119 See id.
120 U.S., EU Reach Long-Sought Accord, supra note 87.
would “provide for a thirty-four percent increase in trans-Atlantic air passenger traffic, [generating] up to $16 billion in economic benefits over five years and [creating] a total of 80,000 new jobs on the two sides of the Atlantic.”121 Another study prepared for the EU Commission by the consultancy Booz Allen Hamilton put the economic benefits of a transatlantic Open Skies agreement between $9 billion and $17 billion over five years.122 Such perceptions seem to have been genuinely held by the European Union and the U.S. Department of State.123 Faced with such potentially immense benefits, EU negotiators were hardly in a position to walk away from negotiations in January 2007, even after the U.S. Congress repudiated the compromise they had wrested from U.S. negotiators.124

Ironically, the 2002 ECJ rulings concerning bilateral Open Skies agreements with EU Member States may have also undermined the European Union’s bargaining position.125 In its 2002 rulings, the ECJ held that bilateral aviation agreements with individual EU Member States would no longer be permitted, yet the existing agreements were not immediately nullified.126 During negotiations leading up to completion of the Open Skies Agreement, the EU Commission “made clear that it would ask the [ECJ] to require EU members to terminate their bilateral agreements with the United States” in the event that no agreement was reached.127 Undoubtedly, the EU Commission took this tack in the hope of wresting further concessions from U.S. negotiators.128 Nevertheless, the prospect of unraveling the entire transatlantic aviation regulatory order effectively acted as a double-edged sword, serving, if anything, to underscore the necessity of reaching an Open Skies agreement, whatever the cost.129

121 Id.
123 See Alford & Champley, supra note 56, at 3 (noting that “[t]he EU estimates are reportedly drawn from a Brattle Group study concluded in 2002” and that “State Department representatives have indicated they broadly agree with those figures.”).
124 See id.
125 See U.S., EU to Look at Options, supra note 95.
127 U.S., EU to Look at Options, supra note 95.
128 See id.
129 See id.
Moving forward, the European Union will face real challenges as it attempts to address some of the second stage objectives enumerated in Article 21. It will not, however, be without negotiating power. Congress invoked the talisman of aviation security to condemn the DOT’s proposed rule on foreign management rights. There is no reason to believe that it would not do so again if the White House entertained the notion of granting broader management control rights to EU investors, let alone cabotage rights for foreign air travel within the United States. Labor groups, in particular, would be adamantly opposed. Nevertheless, EU negotiators have two powerful levers to pull as a way of drawing their U.S. counterparts to the table. First, the Open Skies Agreement contains an exit provision that permits EU Member States to suspend cabotage rights for U.S. carriers operating within Europe if there is no consensus on a second stage accord by 2010. Second, the critical issue of airport slot allocations remains unsettled. Currently, slots are distributed to airlines on a legacy basis that favors carriers which have been flying the same routes for years. If the slot system were altered, however, to permit greater U.S. carrier access to Heathrow, for example, a powerful incentive could be created to wrest concessions from the United States.

**Conclusion**

The U.S.–EU Open Skies Agreement will undoubtedly benefit passengers on both sides of the Atlantic. New routes will link hitherto unconnected cities in the United States and Europe. Artificial restrictions on flight routing will be lifted, enabling carriers to chart their routes in greater accord with market forces. U.S. carriers will soon be permitted to compete within Europe, offering European travelers more options for air travel. Whether the economic benefits it yields

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130 See Open Skies Agreement, supra note 1, art. 21.
131 See id.
132 House Approves Moratorium, supra note 90.
133 See id.
134 See id.
135 See U.S., EU Reach Long-Sought Accord, supra note 87; see also United States Hails Aviation Pact, supra note 113.
136 United States Hails Aviation Pact, supra note 113.
137 U.S., EU Reach Long-Sought Accord, supra note 87.
139 See id.
over the next five years are closer to $9 billion or $17 billion, the Open Skies Agreement will certainly usher in a more competitive transatlantic aviation order. Indeed, the only clear losers from the treaty are the carriers that benefited from the former protectionist regime, most notably British Airways and Virgin Atlantic. It is no coincidence that the greatest resistance to implementing the Open Skies Agreement came from Westminster.\(^\text{140}\)

And yet, despite its promise, the Open Skies Agreement is hardly an optimal accord. There is little question that EU investors would have benefited from a more assertive EU negotiating stance, particularly with regard to foreign management control rights. At the same time, the benefits to passengers—ironically, to U.S. passengers, in particular—would also have been considerable. With the notable exception of certain low-cost carriers, the troubled U.S. aviation industry has been cash-strapped for years and heavily reliant on government bailouts. Had EU negotiators enjoyed more success in securing traditional management control rights for EU investors, greater EU investment in U.S. carriers might have been encouraged, thereby fostering a more financially solvent industry, with potential benefits to passengers, as well as to stockholders. Spurred by a desire to grow the market share of their carriers, foreign investors might well have used their control to offer passengers new routes, better service and more modern aircraft.

Regardless of how far the current Open Skies Agreement evolves, transatlantic travel is certain to change. At least in the near term, the domestic U.S. aviation market is unlikely to benefit from a dramatic infusion of foreign capital. The North Atlantic market, however, appears destined to grow and to become ever more competitive. Ryanair and its progeny will probably never fly between JFK and Heathrow, but over the next several years they could feasibly launch flights between Hartford, Connecticut, or Providence, Rhode Island and some of the satellite airports ringing London. Budget airlines flying out of mid-market airports would not draw many corporate travelers from the main urban hubs, but they might well carve out a niche for themselves amongst leisure travelers and small business owners. In the end, this could potentially drive down the price of economy-class tickets on more established carriers. It is ironic that the United States, a pioneer

in air travel liberalization, has taken such a resolutely protectionist position toward foreign ownership rights and domestic cabotage. At the same time, the United States may ultimately find the costs of intractability untenable.