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Feature Articles

Student Articles

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International Focus at Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not studied only in theoretical, abstract terms but primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax, antitrust, intellectual property – have strong international and comparative components.

International Centers

The United Nations has designated Loyola Chicago School of Law as the home if its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is expanded by its foreign programs and field study opportunities:

International Programs

- A four-week summer program at Loyola's permanent campus in Rome, Italy, the John Felice Rome Center, focusing on international and comparative law
- A three-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on African legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. The most recent trip was to Tanzania.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on an aspect of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring in an oral argument involving an international moot arbitration problem. One team participates in Vienna, Austria against approximately 255 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 80 law school teams.

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We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program at Loyola University Chicago by their support of the Willem C. Vis International Commercial Arbitration Moot Program:

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INDEFINITE DETENTION IN THE WAR ON TERROR: WHY THE CRIMINAL JUSTICE SYSTEM IS THE ANSWER

Wesley S. McCann*

* Department of Criminal Justice and Criminology, PhD Student, Washington State University. Thanks to Dr. Craig Hemmens, JD, Dr. David Brody, JD, and Adam Jussel, JD for the guidance, added perspective and comments. Also thank you to Lindsey A. Marco for all the love and encouragement throughout this process.

Indefinite Detention in the War on Terror

Abstract

The act of terrorism is not a new form of deviance or bravado. Yet since 9/11, it has been treated as a form of 'war' rather than as 'crime'. This distinction has served to legitimize terrorist organizations objectives, weaken the rule of law, converge the military and traditional criminal justice system models in adjudicating terrorists, and call into question the reach humanitarian law has in this convergence. This article examines the development of indefinite detention as it has been used in the 'War on Terror' and argues that the American criminal justice system holds the key to resolving many of these aforementioned issues. Thus, a divergence of military and criminal justice models is necessary if we are to preserve constitutional safeguards and exemplify both a strong and unified response to terrorism, while simultaneously exhibiting the standards of an evolving society under the paradigm of Just War.

I. Introduction

A discernible problem with the War on Terror, other than its amorphous definition, is how to impose justice upon those who are committing these acts of terror. The transition from the enemy being the 'nation-state' to the unidentified arbiter of terror has created a legal conundrum concerning what must be done with these individuals once captured by our nation's armed forces and law enforcement. Since 9/11 and the use of Guantanamo Bay Naval Base as the predetermined residence for many unlawful enemy combatants, we have incrementally solved several of the legal problems regarding their confinement and constitutional rights. This includes: extraterritoriality questions,[1] the right to habeas corpus petitions,[2] and the legality of detention of enemy combatants.[3] Following landmark Supreme Court decisions *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, the Obama Administration responded by promoting legislation that seeks to curb the individual due process rights of detained enemy combatants.[4] Furthermore, there is a 'tug-of-war' that is occurring between the executive and judicial branches. When the former restricts the rights endowed to detainees, the latter concedes alternative routes to previously embargoed liberties.[5] In light of each

[1] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008).

[2] *Id.*

[3] *Id.*; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 670 (2006).

[4] Boumediene, 533 U.S. 723 at 739. ("If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to Hamdan's holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute." The Supreme Court also cited relevant floor statements and agreed with the Court of Appeal's conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.").

[5] Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that a U.S. citizen being held as an "enemy combatant" had the same procedural due process rights as lawful citizens in that they were entitled to the opportunity to refute such accusations before a rightful authority. Detainees had a right to challenge the legality of their detention via 28 U.S.C. §2241, at the federal district court in Washington D.C.); *see also* Rasul v. Bush, 542 U.S. 466, 466-67 (2004) (explaining that in 2005, The DoD established Combatant Status Review Tribunals (CSRT) where detainees are allowed to defend themselves against their reason for detention. Later that year, the DoD enacted the Detainee Treatment Act, which prevented them from

branch's differing opinions on the efficacy of indefinite detention, it is important to understand the basic controversies that lie at the root of the War on Terror. Collectively, they can most aptly be described as:

> the international legality of the U.S. invasion and occupation of Iraq; our indefinite detention of so-called "enemy combatants" at Guantanamo and perhaps other secret locations; our use of cruel, inhumane and degrading interrogation methods at Abu Ghraib and elsewhere; our "extraordinary rendition" of alleged terrorists to countries that we know engage in torture; our arrest and sentencing to death of aliens without having informed their consulates as required by the Vienna Convention on Consular Relations.[6]

The purpose of this paper is to examine whether indefinite detention is a viable, practical and ethical form of incarceration within the paradigm of the War on Terror as compared to traditional criminal justice modes of adjudication. This article argues that while both the criminal justice and military models each have their respective benefits, the former posits the least long-term concerns and costs, and by solely using the criminal justice model to adjudicate terrorists, we can increase the strength of the rule of law, see the incorporation of international humanitarian law into domestic courts, and witness a divergence of military and criminal procedure.

While significant review of detainee due process has been evident, the question regarding the viability and legality of indefinite detention has not been fully answered. Moreover, the Obama administration plans to counter the Bush administration's policy on indefinite detention.[7] Nations around the world decide how to adjudicate terrorists in different ways. Their various responses have yet to depict a clear cut set of procedural safeguards in accordance with the laws of war,[8] which will be discussed in depth in section III.

seeking habeas corpus relief in federal courts, but allowed them to seek further review of their CSRT determinations in the D.C. Circuit. In *Hamdan* the Supreme Court held that the use of military commissions were invalid because they violated both the Uniform Code of Military Justice (UCMJ) and common article 3 of the Geneva Conventions. Congress then passed the Military Commissions Act in 2006 baring the application to federal courts by detainees seeking habeas corpus relief. In 2008, the Supreme Court ruled in Boumediene that the suspension of the writ was unconstitutional and that all detainees had access to Article III courts for habeas relief. Congress then passed the Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, S. 3081 and the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Public Law 112-81. The former seeks to curb the Department of Justice's involvement in prosecuting terrorists in Article III courts, while the latter allows for the indefinite detention of suspected terrorists, namely alien unlawful enemy combatants. *See also* Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, at 1108-1119 (explaining the procedures of the current military model).

[6] Richard B. Bilder, *On Being an International Lawyer*, 3 LOY. U. CHI. INT'L L. REV. 135, 135 (2007).

[7] *See* Lolita C. Baldor, *Obama Restarts Guantanamo Trials After Two-year Ban*, Salon.com (Mar. 7, 2011) http://www.salon.com/2011/03/07/obama_restarts_guantanamo_trials/.

[8] Chesney & Goldsmith, *supra* note 5, at 1092 ("The variability of these frameworks . . . belies any claim that a specific set of procedural safeguards is mandated by the customary laws of war. Indeed, it would be difficult to show that any particular set of procedures used in actual practice reflects opinion juris rather than practical or political expediency.").

II. Development of Current Legislation

Following the September 11 attacks, Congress expeditiously constructed the USA PATRIOT Act to hasten the search and seizure and, when warranted, execution of unlawful enemy belligerents that were responsible for the attacks. This piece of legislation also served as the gateway for what many Americans feel has evolved into an abusive use of power with regards to the surveillance and intelligence community. Irrespective of the specific sections of the act, the prime focus of this legislation, in accordance with the newly mandated Authorization for Use of Military Force (AUMF), was to bring to justice those responsible for the hostilities against the United States on 9/11 and to protect America from future attacks from these organizations, persons or nations.[9] The President has the authority to use any means necessary to enforce these motivations. However, the PATRIOT Act has been scrutinized for its authorization to indefinitely detain suspected and 'certified' alien terrorists. Nonetheless, several questions remain regarding the legal means the President can use to see that our nation's objective goals come to fruition. More importantly, the question remains whether the President can 'indefinitely detain' suspected or confirmed enemy combatants. What measures has the government taken to ensure that 'indefinite detention' does not mean 'forever', and how is this not a violation of due process? How does 'indefinite detention' comport with International Humanitarian Law, namely the Geneva Conventions? Lastly, is 'indefinitely detention' a viable, albeit legal route in adjudicating the War on Terror? This section seeks to examine these aforementioned questions and in doing so, will examine the legislation and legal reasoning that the executive feels they are justified in using.

A. Government Restriction?

1. Stripping the Courts

As of May 2014, there are 149 detainees[10] being held at Guantanamo Naval Base, despite close to 779 detainees having stayed there at some point since 2002.[11] Current rationales for detaining enemy combatants are as follows:

> (1) persons [are] placed in non-penal, preventative detention to stop them from rejoining hostilities; (2) persons who have been brought, or are expected to be brought, before a military tribunal to face criminal charges for alleged war crimes; and (3) persons who have been cleared for trans-

[9] *See* Authorization for Use of Military Force Act of 2001 [hereinafter AUMF], Pub. L. No. 107-40, 115 Stat. 224.

[10] *See* Fox News, *US soldier held captive by Taliban in Afghanistan for nearly five years freed,* May 31, 2014, *available at* http://www.foxnews.com/politics/2014/05/31/wh-us-solider-held-in-afghanistan-bergdahl-is-released-after-five-years/ ("There are now 149 detainees remaining at Guantanamo Bay.").

[11] *See* The New York Times, *The Guantanamo Docket*, *available at* http://projects.nytimes.com/guantanamo (last visited February 15, 2015).

> fer or release to a third country, whom the United States continues to detain pending transfer.[12]

While significant literature exists on the jurisdiction question (whether Article III courts have the authorization to hear *habeas corpus* petitions of detainees),[13] the legality of our mode of indefinite detention is unclear. What is clear, however, is that the passage of the National Defense Authorization Act for Fiscal Year 2012[14] limited the Executive's ability to only detain unlawful aliens captures outside of the United States.[15] The Executive refuses to entitle individuals we capture during hostilities as 'prisoners of war' (POW), and instead uses the term 'unlawful enemy combatant;' a term not explicitly defined within international humanitarian law (IHL). This enables the Executive to determine the treatment of unlawful enemy combatants without an explicitly mandated rubric. This changed slightly when the Obama administration redefined those being detained as 'unprivileged belligerent(s)' in order to make the system more party to IHL.[16] This was done to preclude the notion that we were in a declared war and to abstain from conceding international humanitarian rights to non-state actors- despite the fact that over the past decade, non-state actors have been achieving gradual forms of legal personality.[17]

Furthermore, repeated efforts to "strip the federal courts of jurisdiction to hear challenges by detainees [was] a key part of this strategy" by the executive.[18] In each case, the executive's objective was to minimize the legal constraints on executive action, to confine decision making within the executive branch, and to avoid the procedural and substantive protections.[19] One of the first attempts of the executive to accomplish this objective was restricting the ability of article III courts to hear or even have jurisdiction over such cases. The Court in *Boumediene* relied on the *Insular* cases to determine the 'de facto' sovereignty that the United States exercises over Guantanamo Bay, Cuba.[20] In doing so, the

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[12] Michael John Garcia et al., *Closing the Guantanamo Detention Center: Legal Issues*, Cong. Research Serv. R40139, (2009), *available at* http://assets.opencrs.com/rpts/R40139_20090115.pdf; *see also* NDAA, *supra* note 5.

[13] *See* sources cited *supra* note 5; *see also* Munaf v. Geren, 553 U.S. 674, 679 (2008) ("Federal district courts. . .may not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution."). *See also* 28 U.S.C.A. § 2241(c)(1) (West 2008)).

[14] NDAA, *supra* note 5 at § 1021; 10 U.S.C.A. § 801 (2006).

[15] Hedges v. Obama, 724 F.3d 170, 173 (2d Cir. 2013).

[16] *See* Scott Wilson & Al Kamen, *Global War on Terror Is Given New Name*, WASH. POST (Mar. 25, 2009) *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR20090324028 18.html. *But cf.* John Floyd & Billy Sinclair, *Is Osama bin Laden a Terrorist or an Unprivileged Belligerent*? JOHN T. FLOYD: CRIM. JURISDICTION: ARTICLES ON CRIMINAL LAW (Nov. 21, 2009), http://www.johntfloyd.com/blog/is-osama-bin-laden-a-terrorist-or-an-unprivileged-belligerent.

[17] Wilson, *supra* note 16.

[18] Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 553 (2013).

[19] *Id.*

[20] *See* Boumediene v. Bush, 553 U.S. 723, 758-59 (2008); *see also* Balzac v. Puerto Rico, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted, but em-

Court structured an avenue for future habeas petitions to be heard and questions of jurisdiction quelled. More specifically, the Court construed the applicability of the Suspension Clause in *Boumediene*. Despite the lack of territorial sovereignty, Guantanamo Bay remained under 'effective control' by the United States.[21] The Court also addresses this in *Dorr v. United States* (1904):

> In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution.[22]

2. Limiting the Reach of International Law

Subsequently, invoking Common Article III of the Geneva Convention instead of Convention IV bridged the gap between IHL and U.S. law.[23] The Court subjected the entire War on Terror, not just action in Afghanistan, to the limitations of IHL.[24] When President Obama took office, he not only declared that Common Article III of the Geneva Convention was the 'minimum baseline'[25] with regards to treatment of detainees, but also that if it was feasible to do so, detainees would be prosecuted in Article III courts.[26] This would temporarily halt the use of military commissions.[27] Also, despite the passing of the Detainee Treatment Act (2005), the Military Commissions Act of 2006 failed to set forth adequate procedures and standards for future use.[28] Since 9/11, the detention policy allowed

phasized, by this court in all its authoritative expressions upon the issues arising in the Insular Cases, especially in the Downes v. Bidwell and the Door Cases. The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Puerto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements."); *see generally* Torres v. Puerto Rico, 442 U.S. 465 (1979).

21 Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 15-34 (2004).

22 Fred L. Dorr v. US, 195 U.S. 138, 142 (1904); *see also* Downes v. Bidwell, 182 U.S. 244, 288 (1901).

23 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 670 (2006).

24 *Id.; see generally* Eric Heize, *The Evolution of International Law in Light of the 'Global War on Terror*, 37 REV. INT'L STUD., 1069 (2011).

25 Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009) ("Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict.").

26 Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

27 *Id.*

28 *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. (2006) [hereinafter *MCA*]; *see also* Pub. L. No. 109-148, 119 Stat. 2739 (regarding the Detainee Treatment Act).

criminal trials, military commissions, and indefinite military detention to adjudicate the War on Terror.[29]

The government also amended the War Crimes Act in redefining the scope of what constitutes violations of common Article III of the Geneva Conventions[30]:

> The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.[31]

Also, it limits the reach of the Conventions themselves into habeas proceedings:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[32]

The MCA holds that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions."[33]

A chief concern of the PATRIOT Act and subsequent legislation is that its overarching structure and scope abridges individual rights, mainly the right to privacy. The argument that its broad scope undermines some individual protections for the greater good of society is beyond the purpose of this piece. Nonetheless, Lewis Dunn sheds some prophetic light on what might evolve from the threat of terrorism:

> At least some of the measures required to deal with the threats of clandestine nuclear attack . . . will be in tension with or in outright violation of the civil liberties procedures and underlying values of Western liberal democracies. Because of the stakes, there will be strong pressures to circumvent or set aside-in the United States and elsewhere- various constitutional and legal restrictions on invasions of privacy or other traditional civil liberties. . . . The use of warrantless or illegal wiretaps, and the secret detentions and questioning of suspects for days or even weeks might follow, all motivated by the need to acquire information as fast as

[29] *See* Chesney & Goldsmith, *supra* note 5, at 1080.

[30] *See generally* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322 (2007).

[31] MCA, *supra* note 28, at 6(a); 18 U.S.C. § 2441 (2006).

[32] MCA, *supra* note 28, at 5(a); 18 U.S.C. § 2441 (2006).

[33] MCA, *supra* note 28, at 6(a)(3)(A).

> possible. . . . Within the United States, both rigorous administrative supervision of any emergency measures and strict judicial review after the fact would help prevent those measures from spilling over their boundaries and corrupting procedures in other areas of law enforcement. . . . But if the frequency of proliferation-related threats grows, and if violations of traditional civil liberties cease to be isolated occurrences, it will become more difficult to check this corrosion of liberal democracy here and elsewhere.[34]

Even though Dunn's focus is nuclear proliferation and the threats that non-state actors pose to Western democracies, that threat was and is still a viable one, hence the invasion of Iraq, focus on WMDs following 9/11, and other preventive measures taken by other nations in the War on Terror. Nonetheless, despite the immeasurable costs we would suffer if WMD's were employed by a terrorist organization, terrorists acquire and use such weapons.[35] The important take-away is how government responses to terrorism may lead to acerbic curtailment of individual liberties in a utilitarian framework that posits national security and defense above individual freedom. The sacrifice of individual liberties may be necessary, to an extent. In sum, the courts will serve as the balancing test for this challenge.[36]

B. Expansion of Powers

1. Are the President's Powers 'Sweeping'?

The world has witnessed a 'closing of the gap' between the law of non-international armed conflicts and international armed conflicts.[37] The law of war "does indeed provide for detention without charge of both prisoners of war and civilians in certain circumstances; however, the question here is whether the indefinite detention currently at issue can truly be called 'law of war' detention."[38] Within the paradigm of an international armed conflict, the detention powers of the state are 'sweeping.'[39] However, the *Hamdan* court ruled that despite the

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[34] Lewis Dunn, *What Difference Will it Make?*, *in* THE USE OF FORCE: INTERNATIONAL POLITICS AND FOREIGN POLICY 525-526 (Art and Waltz, 1993).

[35] *See* Gary LaFree et al., *The Interplay between Terrorism, Nonstate Actors, and Weapons of Mass Destruction: An Exploration of the Pinkerton Database, 7* INT'L STUD. REV. 155, 156 (2005) ("Incidents involving these weapons remain a rare occurrence. In fact, only forty-one of the 69,000 cases in our database used such weapons. Most involved long-range missiles capable of carrying warheads; chemical attacks typically included the use of mercury, acid, napalm, cyanide (found in water supplies), and chemical bombs, often intended to disrupt the targeted nation's economy.").

[36] *See* Doe v. Ashcroft, 334 F. Supp. 2d 471, 478 (S.D.N.Y. 2004) ("The high stakes here pressing the scales thus compel the Court to strike the most sensitive judicial balance, calibrating by delicate increments toward a result that adequately protects national security without unduly sacrificing individual freedoms, that endeavors to do what is just for one and right for all.").

[37] Marco Sassòli & Marie-Louise Tougas, *International Law Issues Raised by the Transfer of Detainees by Canadian Forces in Afghanistan*, 56 MCGILL L. J. 959, 969-970 (2011).

[38] Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1170 (2011).

[39] Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War*, 51 VA. J. INT'L L. 549, 560 (2011).

President's powers to create such Commissions to determine the detention and prosecution of unlawful belligerents, his power *is not* 'sweeping.'[40] The court made reference to the laws of war through the sublime invocation of section 821 of the U.C.M.J., namely mandating compliance with common Article 3 of the Geneva Conventions.[41] Article 3 addresses the prevention of the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[42] Nonetheless, in *Boumediene*, the Court maintained that the MCA was an unconstitutional suspension of habeas corpus rights. The MCA was a prime example of government intention to mold constitutional limits into what best served the 'War on Terror.' Furthermore, history has shown us that:

> constitutional limits have flexed not merely to protect the public but also to advance new ambitions and interests. . . . In the twentieth century, the Supreme Court rarely got in the way of the exercise of executive power in wartime, . . . [but] since September 11, 2001, the U.S. Supreme Court has refused to rubber-stamp Executive Branch security programs in the "war" against global terrorism. . . . [T]he Court has also declined to take steps that bind the Executive and Congress all that tightly in their exercise of foreign affairs powers.[43]

Nonetheless, the Court has chosen not to fully bind the remaining branches' exercise of foreign affairs.[44] Despite further developments in the due process rights available to detainees, Congress continues to limit the fruition of these rights via subsequent legislation[45] that mandates the detention of alien enemy combatants.[46] The overall scope and purpose of detention, pursuant to both the AUMF and PATRIOT Act, should be to detain enemy combatants who are responsible for attacks previously conducted against the United States and those

[40] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593 (2006) ("Contrary to the Government's assertion, however, even Quirin did not view the authorization as a sweeping mandate for the President to invoke military commissions when he deems them necessary."); *id.* at 594 ("The Government would have us dispense with the inquiry that the Quirin Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, "and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."). *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004); *see generally* Ex *Parte Quirin*, 317 U.S. 1 (1942); *see Yamashita v. Styer,* 327 U.S. 1, 11 (1946).

[41] Chesney*, supra* note 39, at 630.

[42] *See* Geneva Convention Relative to the Treatment of Prisoners of War art., 3 Aug 12. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Article 118.

[43] John Fabian Witt. *Law and War in American History*, AMERICAN HISTORICAL REVIEW, 777 (2010).

[44] *Id.* at 778 (citing *Rasul*, 542 U.S. at 466; *Hamdi*, 542 U.S. at 507; *Hamdan* 548 U.S. at 557; Boumediene v. Bush, 553 U.S. 723, 801 (2008) (Roberts, C. J, dissenting) ("The modest practical results of the majority's ambitious opinion.")).

[45] *See* NDAA, *supra* note 5, at §§ 1021-22.

[46] *Id*. at §§ 1562-65.

who are suspected to be mounting future attacks as well. Detaining aliens who do not fall into either of those categories exemplifies the slippery slope stance that both the Bush and Obama Administrations have maintained. One can argue that preventive detention is a useful tool for insuring the risks posed by suspected terrorists can be negated.[47] Furthermore, many scholars contend that a utilitarian framework justifies preventive detention.[48] However, as this article will argue that preventive detention may not serve a utilitarian framework better than criminalizing terrorist acts and using conventional criminal justice methods of adjudication to do so.

2. The Politicization of Terrorism

Removing "politics from terrorist acts for purposes of jurisdiction and extradition" may enable the continual development of international legal norms and treatises and serve as a maximum benefit for future international gains.[49] While this note does not focus on the living conditions or interrogation techniques utilized by either the military or the intelligence community, it is essential in understanding the Guantanamo narrative. For example, a study by the Seton Hall Law School Center for Policy Research has shown that most of the individuals incarcerated at Guantanamo were not captured by American forces, but were instead acquired through the use of 'bounty hunters,' and then subsequently were transferred to Guantanamo.[50] Furthermore, the study analyzed declassified information from the Department of Defense (DoD) and concluded that a majority of these detainees were 'low-level enemy combatants.'[51] This is in stark contrast to the Bush administration's claims that the United States was incarcerating known terrorists and dangerous enemy combatants. The significance of authority to use force in detaining unlawful enemy combatants is inherently derived from the AUMF, which is in danger of losing its power if hostilities end in the near future.[52] The purposes of detention and the trial by military commission are also delineated in the 'Detention, Treatment, and Trial of Certain Non-Citizens in the

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[47] *See* Alec Walen, *A Unified Theory of Detention, With Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 891 (2011).

[48] *Id*. (citing Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror,* London: Penguin Books (2009); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 Calif. L. Rev. 693, 698 (2009); Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 105 (2005)).

[49] Zdzislaw Galicki, *International Law and Terrorism.* 48 AM. BEHAVIORAL SCIENTIST 743, 749 (2005) *available at* http://www.sagepub.com/martin3study/articles/Galicki.pdf.

[50] *See* Scott Horton, *Law School Study Finds Evidence Of Cover-Up After Three Alleged Suicides At Guantanamo in 2006,* HUFFINGTON POST (Dec. 7, 2009), *available at* http://www.huffingtonpost.com/2009/12/07/law-school-study-finds-ev_n_382085.html.

[51] *Id*.

[52] *See* Kylie Alexandra, *Battlefield Earth: The Danger of Executive Overreach in the Global Fight Against Terrorism and Why Congress Must Act*, 82 GEO. WASH. L. REV. 471, 475-476 (2014); *see also* Barack Obama, President of the United States, *State of the Union Address* (Jan. 28, 2014), *available at* http://www.washingtonpost.com/politics/transcript-state-of-the-union-address-2015-remarks-as-prepared-for-delivery/2015/01/20/fd803c4c-a0ef-11e4-b146-577832eafcb4_story.html.

War Against Terrorism', or Mil. Order 2001.[53] Given these purposes of detention, it is curious as to what will happen to the remaining detainees if hostilities do indeed end. If this becomes reality, the Obama and future administrations, will have to combat the limited authority that the Supreme Court in *Hamdi* v. *Rumsfeld* placed on the AUMF's ability to 'detain enemy combatants' once the hostilities end.[54] Furthermore, prisoners are not to be detained once hostilities have ended, per the Geneva Conventions,[55] "unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences."[56]

To better understand the juncture between incorporating international law into the criminal justice mode, we need to look at the instigating legislation that began the practice of indefinite detention in the 'War on Terror'. Section two of the AUMF states:

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[57]

The National Defense Authorization Act for Fiscal Year 2012 indicates that there may be evidence that there has been an evolution of scope concerning who falls into the indefinite detention pit:

> A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.[58]

While the distinction between alien and non-alien combatant determinations has come under scrutiny, the Armed Forces are not required to take U.S. citizens into military custody pending a determination.[59] Furthermore, in an appeal to the Second Circuit, a group of journalists and human rights activists maintained that

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[53] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833- 57,835 (Nov. 16, 2001). *But cf.* Tucker Culbertson, *The Constitution, the Camps, and the Humanitarian Fifth Amendment*, 62 U. MIAMI L. REV. 307, 312-313 (2004).

[54] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004).

[55] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *supra* note 42.

[56] Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 HARV. INT'L L. J. 503, 510–11 (2003) (citing *id.* arts. 118, 85, 99, 119, 129; 6 U.S.T., at 3384, 3392, 3406, 3418).

[57] AUMF, *supra* note 9, at § 2(a).

[58] *See* NDAA, *supra* note 5, at § 1021(b)(2).

[59] *Id.* at § 1022(b)(1) ("The requirement to detain a person in military custody under this section does not extend to citizens of the United States. (2) . . . The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.").

the Government increased the scope of the original AUMF by positing potential dangers of indefinite detention on both U.S. citizens and lawful resident aliens. The court maintained:

> While it is true that Section 1021(e) does not foreclose the possibility that previously "existing law" may permit the detention of American citizens in some circumstances—a possibility that *Hamdi* clearly envisioned in any event—Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence.[60]

The court concluded that existing law regarding the detainment of citizens was not enumerated in the NDAA and that the plaintiffs essentially lacked standing to challenge Section 1021 in Article III courts.[61] Furthermore, the court declined to answer whether the laws of war have any bearing on the indefinite detention question under Section 1021.[62] This ruling vacated an earlier ruling, which placed a temporary injunction on Section 1021 validity.[63] In *Al-Bihani,* the Court of Appeals for the D.C. Circuit held that, "there is no indication . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. [They] as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts."[64] While these arguments delineate alleged shifts in scope, the determination of how international law as a whole being incorporated into domestic law will be discussed later.

C. International vs. Non-International Armed Conflict

The problem of "indefinite detention may be limited to the prisoners at Guantánamo, at least during an Obama administration . . . including many whom the government concedes are not terrorists, complete a full decade of detention without charge. Current practices provide precedent for a continued system of preven-

[60] Hedges v. Obama, 724 F.3d 170, 193 (2d Cir. 2013).

[61] *Id.* at 204-5 (holding Plaintiffs' "do not have Article III standing to challenge the statute because Section 1021 simply says nothing about the government's authority to detain citizens.").

[62] *See Hedges,* 724 F.3d at 199 ("In these circumstances, we are faced with a somewhat peculiar situation. The government has invited us to resolve standing in this case by codifying, as a matter of law, the meaningful limits it has placed on itself in its interpretation of Section 1021. We decline the government's invitation to do so. Thus, we express no view regarding whether the laws of war inform and limit detention authority under Section 1021(b)(2) or whether such principles would foreclose the detention of individuals like Jonsdottir and Wargalla. This issue presents important questions about the scope of the government's detention authority under the AUMF, and we are wary of allowing a pre-enforcement standing inquiry to become the vehicle by which a court addresses these matters unless it is necessary. Because we conclude that standing is absent in any event, we will assume without deciding that Section 1021(b)(2) covers Jonsdottir and Wargalla in light of their stated activities.").

[63] *See* Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012).

[64] Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010).

tive detention well into the future."[65] Nonetheless, it is imperative that states party to an armed conflict release those detained *if* at some point during the hostilities, the reasons necessitating the detention of said persons no longer exists.[66] However, this does not mean that "such persons are combatants only for such time as they take part in the hostilities, but merely that their actual participation is what makes them combatants, and not their membership in a certain organization."[67] The Supreme Court in *Hamdi* accepted that the indefinite detention of Taliban members was a 'fundamental incident' of war in lieu of POW status.[68] The Conventions provide a model outlining who qualifies as a POW in times of an armed conflict.[69] POW status only occurs in warring states, which is not the case in the global War on Terror. Irrespective of the loaded terminology employed by the U.S. Government, the War on Terror not only is war with no end, but is also a war without territorial definition.

Nonetheless, "membership in a specific group is a necessary condition for POW status in five out of six scenarios, and for the most part, it is a sufficient condition as well. Associational status in that sense is the primary triggering condition for military detention during international armed conflict."[70]

While an international armed conflict consists of two 'High Contracting Parties,'[71] the non-international armed conflict dubbed the 'War on Terror' transcends the nation-state; analogously rectified as a Manichean fight between good and evil that should not be constricted to questions of sovereignty. However ironical the task and volition of the executive, it is rather to their benefit that we are not signatories to Protocol II of the Conventions, given that this would impede our ability to viably detain unprivileged belligerents.

III. Preventative Action and Right to Self-Defense within International Law

An important component of understanding why terrorism is currently being treated as 'war' and not crime revolves around the threat it poses to the state, not just individual persons. The indiscriminate nature of coercive force may be the differentiating factor in determining whether preventive action is justified. Before we address preventive action within the criminal justice system, it is essential to examine preventive action within international law.

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65 Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 621 (2013).

66 *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, at art. 3.

67 N. Rodley, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, 189 (2nd ed., 1999); Col. K.W. Watkin, Combatants, Unprivileged Belligerents and Conflicts in the 21st Century. HPCR Policy Brief. Jan. 2003, at 14.

68 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

69 *See* Geneva Convention Relative to the Treatment of Prisoners of War *supra* note 42, at art. 3.

70 *See* Chesney and Goldsmith, *supra* note 5 at 1085.

71 *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 42, at art. 2.

A. 'Armed Attack' and the 'Military Necessity' doctrine.

1. Self-Defense vs. Aggression

Many criticize the United States' response to the attacks of 9/11. While there was no international consensus on the 'laws of war' between state and non-state actors, the United States' approach was seemingly justified, but certainly not legal. The ambiguities inherent in this crisis stem from the discourse on international humanitarian law, or the 'laws of war.' Nonetheless, many of the Conventions codified since the end of the Second World War did not clearly give the United States the jurisdiction to proceed with the 'imminent right of self-defense' in combating those responsible months later. While both Congress and the President retain their innate powers in pursuing these aims, they were not internationally necessary. No nation, particularly members of the UN, would deny 9/11 was indeed an 'armed attack,'[72] which is a necessary predicate for the continuance of American's right to self-defense. Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[73]

In this, we see ambiguities with regards to definitional interpretation of 'armed attack' and 'peace.' In its rudimentary form, these words mean exactly what they encompass. However, under the growing paradigm of international law, which draws primarily on international customs, there remains what necessarily constitutes an 'armed attack' and what constitutes a maleficent disruption of 'peace.' As previously mentioned, there seems to be little conflict regarding the applicability of an 'armed conflict' applying to 9/11, despite its definitional entanglement.

2. Necessary and Imminence Standards

Regarding the legality of self-defense, customary international law affirms what Secretary of State Daniel Webster concluded regarding the infamous *Caroline* case. This case involved British, Canadian and American parties. Settlers within the Upper Province of Canada were rebelling against the British government and in doing so, had received aid from American supporters by way of the *Caroline*. The British forces responded by encroaching into U.S. territory at night

[72] Christopher Greenwood, *International Law and the 'war against terrorism,'* 78, INTERNATIONAL AFFAIRS 301-317 (2002).

[73] U.N. Charter art. 51 para. 1.

and destroying the ship and its supplies in an effort to circumvent an attack. The letter to the British ambassador maintained that in that showing a right to self-defense, a [state] must show:

> necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation . . ., and that the British force, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.[74]

The *Caroline* case has been lauded as the cornerstone for demonstrating the specific and necessary requirements that need to be evident *before* a preemptive attack of self-defense. It also shows that these matters can be viewed within the paradigm of the War on Terror like the *Caroline* case, as the 'necessary' and imminent nature of the situation originated from non-state actors. Furthermore, states may not have to show that the threat came from another sovereign nation.[75] However, the judiciary has shown that "It is the law of self-defense among nations. Like self-defense, it is a use of elemental force sanctioned by common law, initiated solely by stark necessity and vanishing when the necessity no longer exists."[76] In order for action to constitute a lawful avenue of self-defense, "any use of force in self-defense under the U.N. Charter requires that it meet the requirements of military necessity, distinctions between civilians and military targets, proportionality, and avoidance of unnecessary suffering."[77] To further this point, when one considers the use of targeted killings in the War on Terror, ". . .[u]nder International Humanitarian Law, use of force in self-defense by a victim state must conform to the requirements of imminence and proportionality—and hence military necessity—in order to be just."[78]

B. Just War Tradition

1. Development of International Law

The principles underlying the *Caroline* case are embedded in centuries of international law development within the Just War Tradition. For one, there must

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[74] Webster, Daniel, Letter to Henry Stephen Fox, in The Papers of Daniel Webster: Diplomatic Papers, 1841-43 (1983). Excerpt available at http://en.wikipedia.org/wiki/Caroline_test.

[75] Greenwood, *supra* note 72, at 308.

[76] U.S. vs. Minoru Yasui, 48 F. Supp. 40, 51-52 (D.C. Cir. 1942) (citing *Ex Parte Milligan* 71 U.S. 2 (1866)).

[77] David Weissbrodt, *Cyber-Conflict, Cyber-Crime, and Cyber-Espionage*, 22 MINN. J. INT'L L. 347, 386 (2013); *see also*, Alexander Melnitzky, *Defending America Against Cyber Espionage Through the Use of Active Defenses*, 20 CARDOZO J. INT'L AND COMP. L. 537, 560-61 (2012); David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT'L SECURITY L. & POL'Y 87, 98 (2010); International and Operational Law Dept., Judge Advocate General's Legal Center and School, Operational Law Handbook, at 12-14 (2008).

[78] Melanie J. Foreman, *When Targeted Killing is Not Permissible: An Evaluation of Targeted Killing Under the Laws of War and Morality*, 15 U. PA. J. CONST. L. 921, 936 (2013); *see generally* Helen Frowe, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION 103 (2011).

be an action that necessitates military action (just cause); the actions must be proportionate to the warranted armed attack; the intentions of the military is declared prior to actual action; the declaration came from the sovereign; that it is the last resort, and that it has a reasonable chance of the success in order for it to be a justifiable act of war.[79] While several arguments can be made regarding whether or not the Just War paradigm applies in state-non-state conflicts, and whether or not the War on Terror constitutes a war that has a 'reasonable chance of success,' it is nonetheless imperative to trace some of the historical conditions that exemplify the contemporary state of international law within this context.

Following World War II, the prosecution of Nazi Officers and officials were an example of 'universal moral truths' transcending national obligations.[80] The trials created principles concerning conduct in war and both the strict and vicarious liabilities of those both subordinate and super-ordinate actions, respectively. Similar to much of the legislation after 9/11, claims that the trials were *ex post facto* were not persuasive. Even if individuals being tried for both crimes against humanity and war crimes, both of which were new legal definitions under the auspices of international humanitarian law and the laws of war, hadn't violated laws, which they had.[81] the International Military Tribunal (IMT) chose to bring existing law to bear by enforcing both international law and moral truths. The convergence of natural justice and international humanitarian law was set in motion by making the implicit law explicitly applied.[82] This played a part in making the laws of war less 'fuzzy' due to the newly systematic enforcement concerning the conduct of war.[83]

The War on Terror marks the first global war that transcends both the nation-state and the state as the sole actor in the theatre of war in history. While terrorism is not a new condition, the legal teeth utilized in its submission face a penumbra of issues. Nonetheless, while Geneva Conventions III and IV do not explicitly authorize the use of force against non-state actors within the current context, the additional Protocols (I-III) do cover many of the legal issues that are evident in the enemy combatant-military detention debate. Examining the foundation of the legality of our concentrated efforts is paramount in understanding and determining both the legality and viability of indefinite detention in combating terrorism.

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[79] *See* PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 82-3 (Pearson-Prentice Hall 2004) (concerning conditions of Just War in alignment with Hugo Grotius).

[80] *Id.* at 135.

[81] *See generally* Hague Rules of 1907 *available at* https://www.icrc.org/ihl/INTRO/195, Treaty of Versailles *available at* http://avalon.law.yale.edu/subject_menus/versailles_menu.asp, Kellogg-Briand Pact *available at* http://www.yale.edu/lawweb/avalon/imt/kbpact.htm, and the Cocarno Pact *available at* http://avalon.law.yale.edu/20th_century/locarno_001.asp.

[82] CHRISTOPHER, *supra* note 79, at 245.

[83] MALHAM D. WAKIN, WAR, MORALITY AND THE MILITARY PROFESSION 373-74 (Westview Press, 1986).

Hugo Grotius has been deemed the father of international law,[84] namely through his work *The Law of War and Peace*. Even though this is not a philosophical analysis, it is imperative to briefly examine his main points that are relevant to indefinite detention as a response to 'preemptive' attacks by terrorists. His primary point relevant to this analysis was that wars are just if done with regards to self-defense or when a state has experienced injury at the hands of another.[85] Arguments using the aforementioned framework can be made for both. For one, the United States operates under the assumption that the hostilities against it will continue (irrespective of the aggressor), and that those hostilities necessitate self-defense. Also, the United States experienced injury at the hands of another, especially during the 9/11 attacks and the 'failed' attempt at the World Trade Center that occurred in 1993, both exhibited by foreign non-state actors. This necessitated a response. In *Ex Parte Milligan*, the Court maintains that:

> An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.[86]

2. Just Response in Just War

A just response is one where the executive determines the scope and conditions of warfare with Congressional approval.[87] Nonetheless, war and its character should never constitute more than what its necessary.[88] Furthermore, the Court also ruled that the establishment and prosecution of unlawful belligerents is warranted and constitutional in times of war.[89] This coincides with the legal necessity that validates our attempt to not only condemn and punish unlawful hostilities, whereupon, much has been directly at noncombatants outside the thea-

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[84] *See* CHRISTOPHER, *supra* note 79.

[85] *See generally* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (Kessinger Publishing, LLC, 2004) *available at* http://www.constitution.org/gro/djbp.htm.

[86] *Ex Parte* Quirin, 317 U.S. 1, 28 (1942) ("Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.").

[87] *See* Hirabayashi v. U.S., 320 U.S. 81, 93 (1943) ("Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.").

[88] *See* Raymond v. Thomas 91 U.S. 712, 716 (1875) ("The exercise of military power, where the rights of citizens are concerned, should never be pushed beyond what the exigency requires.").

[89] *Quirin*, 317 U.S. at 31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

tre of war, but to also see to that those we are combating are afforded attenuated protections.[90]

Nonetheless, many could argue that the U.S. toed the line of the incursion being a legitimate response, within the scope of self-defense, and it being a reprisal. A reprisal does not fall strictly within the bounds of the Just War Tradition. While states have a legitimate right to self-defense, outlined in the UN Charter, they are not justified in responding with actions that qualifies as a reprisal. Reprisals are only legitimate when they follow the traditionally lawful form of self-defense. Legality begins to blur when actions of a state begin to target citizens and property of other states or specific groups within states. Reprisals against prisoners of war have been deemed unlawful by the Conventions.[91] General Telford Taylor, primary prosecutor during the Nuremberg Trials maintains that "reprisals . . . are not much used today, partly because they are generally ineffective, and partly because the resort to crime in order to reform the criminal is an unappetizing method."[92] It is, however, difficult to distinguish the legal separation of 'self-defense' and 'reprisal,' seeing as the former is a lawful form of the latter, and the primary precedent within the international legal community is the Nuremberg trials themselves. The trials resulted in the seven primary principles that outline what constitute war crimes and crimes against humanity.

While this piece is not about the Just War Tradition, it is essential to understand the principles inherent in customary international law; the origination of much of the precedent on the laws of war, treatment of POW, and *jus in bello* concerning both combatants and non-combatants. The primary objective of lawful reprisals has been to force the enemy back into accordance with the law; thus ending violations of the laws of war.[93] This last concept is relative to the War on Terror because our attempts at curbing terrorism fall within the constructs of a lawful reprisal with regards to lawful self-defense. Our attempts, however, begin

[90] *In re* Yamashita, 327 U.S. 1, 46-47 (1946) ("Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased . . . . Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects.").

[91] Geneva Convention Relative to the Treatment of Prisoners War, art. 2, Jul. 27, 1929, 6 U.S.T. 3316, 75 U.N.T.S., 132 ("Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited."). *See also*, Convention III ("Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.").

[92] *See* CHRISTOPHER, *supra* note 79, at 175 (citing TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 54 (Quadrangle Books, 1970).

[93] *See* CHRISTOPHER, *supra* note 79, at 171 ("In the parlance of contemporary international law, reprisals are acts that would normally be violations of the laws of war but that are exceptionally permitted as a means of compelling a lawless enemy back into conformity with the law.").

to get muddled once we try to decipher the intent. The surface intent of the War on Terror and correlated legislation such as AUMF and the MCA screams for the defeat of evil and upholding of established interstate order. Nonetheless, the means by which we have conducted ourselves on many of the fronts within the war can be criticized for reasons such as: 1) failing to abide by customary international law (irrespective of the fact that we *are not* signatories to Protocols I or II), 2) failure to follow procedural and substantive due process regimes, 3) failing to adequately construct a system that includes other state actors in the adjudication of unlawful belligerents, and 4) undermining the advancement of international law.

IV. Divergence into a Criminal Justice Model

The utilization of the American criminal justice system may serve as a more fundamental and efficient means of adjudicating terrorists. This avenue may lead to increased legitimacy of government, greater transparency, strengthening of the rule of law, more consistent and equitable legal provisions and remedies, and decreases in motivated offenders. Through the 'criminalization' of terrorism, we can depart from the debate between whether terrorism is a criminal act, or an act of war.[94] Some language used by the courts would suggest that in many respects, it is 'war.'[95] The section below delineates many of the current issues we face in adjudicating terrorism, and how, shifting to the criminal justice system will increase the efficacy of terrorism prevention and dissolution.

A. Sentencing and Detention Issues

Despite the prosecution of civilian terrorists within the United States, the introduction of a more 'global' prosecution has yet to enter into fruition. The aforementioned discussions about legislative history, federal precedent, military law, and the moral and ethical issues concerning the *jus in bello* doctrine all exhibit how the United States developed and responded to the War on Terror. What more can be done to ensure that we are not perpetuating a cyclical conundrum? Some argue that indefinite detention serves our political objectives of reducing hostilities at home and abroad, while others maintain that it reduces terrorist recidivism. This is illogical because in order for there to be recidivism, there has to be a sentence levied. Nonetheless, there has not been much guidance under the current laws and U.S. sentencing guidelines as to *how* we might properly adjudicate 'unlawful enemy combatants.'[96]

[94] J. Harvey Wilkinson, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1171-72 (2014) (explaining the difficulty in choosing what side terrorism falls under "This is no place to explore the complicated question of whether alleged terrorism is more aptly regarded as a criminal offense or as an act of war.").

[95] *See* United States v. Bin Laden, 92 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (holding that Usama Bin Laden had declared a 'jihad', meaning holy war, against the United States).

[96] Christina P. Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 309, 373-374 (2013).

If we are to create a sentencing framework for terrorist subjects, we need to explicate a viable model that transcends punishing only actions and determining 'combatant status ' abroad. For example, in an article within the *Yale Law and Policy Review* on sentencing guidelines, the author states:

> Neither the Sentencing Guidelines nor the terrorism statutes employ military necessity reasoning in setting out the maximum or minimum penalties proscribed for crimes of international terrorism. Some of the federal terrorism statutes provide for maximum terms of life in prison, but again, only in limited circumstances, such as where a death results. Otherwise, the maximum terms of imprisonments are less—the material support statutes, for instance, carry only fifteen-year maximums.[97]

Furthermore, in construing a more effective mode of adjudication, one that relies *not* solely on military discretion, the Government needs to incorporate, at a minimum, the same procedural and substantive due process rights and evidentiary process applications that our current criminal penal model employs. Furthermore, "[by] leaving the rules of evidence, burdens of proof, and related procedural safeguards associated with POW and security internee decisions to the discretion of the detaining power (armed forces) . . . [the United States] place[s] little pressure on militaries to engage in law enforcement-style methods of collecting and preserving evidence."[98] While this comports with intuitive measures of security, the lack of uniform guiding evidentiary and 'procedural' protections during investigative- and detention-related components of the 'laws of war' or IHL is problematic.[99]

The aforementioned attempts to incorporate the laws of war into detention policy[100] have proved extremely problematic. Nonetheless, courts have entertained avenues for how citizens and lawful resident aliens may challenge indefi-

[97] 18 U.S.C. § 2332a-b, 2332d, 2339A-B, 2339D (2012). *See also* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 202-203, 116 Stat. 724, 724-28; *See generally Bin Laden*, 93 F. Supp. 2d at 484; and United States v. Reid, 206 F. Supp. 2d 132 (D. Mass. 2002) giving examples of federal cases pertaining to 2332b (C)(1)). *See also* Skinner, *supra* note 91, at 340-352.

[98] Chesney & Goldsmith, *supra* note 5, at 562.

[99] *See* 10 U.S.C. § 949(a); *see also* Andy Worthington, *Obama Brings Guantanamo and Rendition (Not Geneva Conventions) to Bagram,* THE WORLD CAN'T WAIT (April 9, 2009) http://www.worldcantwait.net/index.php/96-voices-of-resistance/andy-worthington/5849-obama-brings-guantanamo-and-rendition-not-geneva-conventions-to-bagram; *see also*, Lindsey Goldwert, *Gitmo Panel Slams Hearing Process*, ASSOCIATED PRESS (Jun. 23 2007) http://www.cbsnews.com/news/gitmo-panelist-slams-hearing-process/; *cf.* Andy Worthington, *The Guantanamo Whistleblower, A Libyan Shopkeeper, Some Chinese Muslims, and a Desperate Government*. HUFFINGTON POST (Jul. 26 2007) http://www.huffingtonpost.com/andy-worthington/the-guantanamo-whistleblo_b_57857.html; *cf.* 10 U.S.C. § 948r(b), § 948 r(c). Garcia et al., *supra* note 13, at 15 (concerning the prosecution of Guantanamo Detainees in federal criminal courts, quoting "the use of any such evidence in the criminal trial of a detainee would likely be subject to legal challenge under the Fifth Amendment on the ground that the statement was gained through undue coercion. As a general rule, statements made in response to coercive interrogation methods are inadmissible in U.S. courts.").

[100] *See supra* notes 48-55.

nite detention policies via Supreme Court precedent.[101] Furthermore, a problem that could persist is the stigma that attaches to individuals who are indefinitely detained. This is more than evident in conventional criminal justice. The plurality in *Hamdi* examined some of the varying reasons for detention in war:

> The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." (citation omitted). The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner–of–War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'" (citation omitted) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure.'") (citation omitted) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released." . . .).[102]

The debate between processing terrorists through the criminal justice system or military tribunals is 'contentious.'[103] One scholar furthers this in stating that:

> Characterizing terrorism as a military issue, rather than a law enforcement problem, has the inexorable consequence of expanding the scope of executive discretion, unfettered from the judicial oversight inherent in the criminal justice system and the need to prove guilt beyond a reasonable doubt. For reasons grounded in separation of powers and institutional competency, courts are apt to be more deferential to the President when he acts as Commander-in-Chief, than when he acts as a prosecutor.[104]

[101] *Hedges*, *supra* note 60, at 200 ("The Supreme Court's recognition that a pre-enforcement challenge is justiciable when enforcement is a 'realistic danger' when there is a "credible threat of prosecution, when a plaintiff has an "actual and well-founded fear.").

[102] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

[103] Charlie Savage, *G.O.P. Takes Hard Line in Pushing Military Trials for All Terrorism Suspects*, N.Y. TIMES, Oct. 28, 2011, at A4, *available at* http://www.nytimes.com/2011/10/28/us/politics/republicans-push-military-trials-for-terrorism-suspects.html?_r=0.

[104] Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 369 (2005).

B. Macro-Explanations

1. State Legitimacy

One of the many predictors of terrorism is the perception of state legitimacy, or a state's ability to retain both citizen and non-citizen trust in state institutions and governance. An argument that the United States poses significant hegemonic predispositions towards 'inferior' nations or groups, and the 'War on Terror' is really the war of ideologies.[105] This leaves the question: where do terrorist's motives stem from?

Within the macro context, there are several explanations. The legitimacy of governments serves as a fundamental predictor of many forms of domestic and international terrorism.[106] In a survey of citizens within Muslim nations, researchers discovered that citizens were less supportive of terrorist attacks against Americans when they had higher perceptions of U.S. legitimacy and culture, and were also less supportive of domestic terrorism within their own countries when perceptions of state legitimacy were higher.[107] Researchers also have found that weak democratic societies and transitioning societies experience higher terrorism rates.[108] Other research supports the idea that terrorism occurs more often in weak or failed states.[109]

Another factor is religious fanaticism. Juergensmeyer maintains that terrorism is a form of symbolic terrorism rather than strategic or anti-western platforms.[110] Stern contends that both alienation and separation from society create increases in religious forms of terrorism.[111] Counter-intuitively, some refute that suicide bombers commit acts of terrorism as modes of religious sentiment and creed.[112]

Many researchers maintain that focusing on "strategies aimed at decreasing the benefits of terrorism through improving the legitimacy of government, solving widespread grievances that produce strain, or attending to situational features

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[105] Bruce Hoffman, *Rethinking Terrorism and Counterterrorism Since 9/11*, 25 STUDIES IN CONFLICT AND TERRORISM, 303, 303-16 (2005).

[106] Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 THE ANNUAL REVIEW OF LAW AND SCIENCE 347, 347-374 (Dec. 2009); Gary LaFree, & Nancy A. Morris, *Does Legitimacy Matter? Attitudes toward Anti-American Violence in Egypt, Morocco, and Indonesia*, 58 J. RES. CRIME & DELINQUENCY. 689, 689-719 (Sept. 10 2012). *See generally* Martha Crenshaw, *Terrorism, Legitimacy, and Power*: *Consequences of Political Violence*, WESLEYAN UNIV. PRESS (1983).

[107] *See* LaFree & Morris, *supra* note 106.

[108] *See* Krisztina Kis-Katos et al., *On the Origin of Domestic and International Terrorism,* 28 EUROPEAN JOURNAL OF POLITICAL ECONOMY S17, S17-S36 (2011) (claiming that experiences of instability-domestic conflict, anarchy and regime transitions-increase likelihood of terror originating from that nation).

[109] *See* LaFree et al, *Global Terrorism And Failed States*, *in* PEACE AND CONFLICT 39 (JJ Hewitt, J Wilkenfeld, TR Gurr, ed., 2008); *see also* Lafree and Ackerman, *supra* note 107, at 363 ("There is also evidence that democratization exhibits a curvilinear relationship with terrorism—the highest rates of terrorist attacks are in countries that are in democratic transition.").

[110] MARK JUERGENSMEYER, TERROR IN THE MIND OF GOD: THE GLOBAL RISE OF RELIGIOUS VIOLENCE (2003).

[111] *See also* JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL (2003).

[112] RA PAPE, DYING TO WIN (2005).

that increase the costs of terrorism might be more effective."[113] Nonetheless, significant reviews of literature exist to exemplify the influence that state institutions and legitimacy have on terrorism fruition.[114] It is not surprising that "perceived legitimacy [is] especially important in predicting terrorism because, compared with most ordinary crime, terrorism is an especially public type of deviance."[115] LaFree also writes:

> Legitimacy explanations assume that terrorism represents a struggle over who has the power to define terrorism. Thus, governments may have many reasons, not all just, for defining particular groups or individuals as terrorists. And as we have already seen, despite the abhorrent nature of terrorist violence, disagreement regarding its definition is more widespread and contentious than the classification of any other type of crime.[116]

2. The Third War

The 'War on Terror' marks the third assault on a form of deviance at the national level using the 'war' allegory to symbolize our nation's unyielding attempt to stymie acts of terror.[117] The first two assaults, the War on Crime, and the War on Drugs, are similar in entitlement but quite dissimilar in nature. The first two 'wars' focused on national pandemics of crime, but we know that terrorism is much more complex than either of those forms of deviance. For example, consider the following excerpt:

> Compared with ordinary crime and drug crime, terrorism is far less common and is affected by much more than single extraordinary events like the September 11 attacks. Ordinary crime is to a large extent local; drug trafficking and terrorism are more likely to cross national borders. But while drug trafficking and terrorism can involve crossing national borders, the scope of border crossing is far greater for drug crimes than terrorism. And given the poor record of border security in stopping drug trafficking, the probability of success of border control for stopping the much less common problem of terrorism is correspondingly diminished.[118]

Our response, in collaboration with other nations, is a justified and sound response within the confines of international law. From a policy perspective, however, how do our means of adjudications fit within the model for combating

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[113] Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism,* 38 CRIME AND JUST. 413, 416 (2009).

[114] *Id.*; *see also* Lafree & Ackerman, *supra* note 106.

[115] LaFree & Ackerman, *supra* note 106, at 361.

[116] *Id.* at 362 (citing BRUCE HOFFMAN, INSIDE TERRORISM (Columbia Univ. Press 1998); SCHMID & JONGMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATABASES, THEORIES AND LITERATURE (North-Holland 1988)).

[117] *See* Gary LaFree, *Criminology's Third War*, 8 AMERICAN SOCIETY OF CRIMINOLOGY 431 (2009).

[118] *Id.* at 441.

terrorism? In traditional approaches, incarceration's sole purpose to thwart and deter future crime by relying on both individual specific deterrence and collective general deterrence for various deviances. It seems indefinite detention may be undermining deterrence.[119] While terrorism is not like any other crime and there is not a significant and widely-accepted theoretical foundations for its occurrence, how should we proceed in ensuring both swift and consistent punishment, while also adhering to international norms and law? This comports with the 'evolving standards of decency' doctrine.[120] While it seems that the overall strategic modality of national defense has shifted from deterrence toward both preemptive and preventive strategies, it is yet to be seen which of the three is most effective in the New World Order.[121] The overall utility of discrete and irreconcilable incarceration methods, on the other hand, cannot amount to serve either *just desserts* or a retributivist model.

To an extent there will always be national security interests that must outweigh the balancing interest of a state being whole-heartedly forthcoming. This issue is no longer discrete and deserves to be reformed. Some scholars maintain that the lack of transparency is due to a shift away from the Freedom of Information Act, Federal Advisory Committee Act, and the Critical Infrastructure Information Act models and towards greater government secrecy.[122]

3. Counter-productivity of Military Model

From a criminological perspective, if we are to deter terrorism, or even preempt it, we cannot do so behind a veil of secrecy. Soldiers often commit 'war crimes' due to their lack of knowledge on the classification of such and the promulgation of the just war doctrine would improve the efficacy of international law.[123] It cannot be argued that terrorists do not know their activities are illegal. However, due to the lack of celerity and inconsistent adjudication methods, terrorists are, to an extent, 'winning' the War on Terror. This is due in part by purveying our response at Guantanamo and other detention centers abroad as equally unjust and barbaric. In essence, our actions only further delegitimize our objectives in the War on Terror. Our policies may actually be counterproductive.[124]

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[119] *See generally* Brad Roberts, *Deterrence and WMD Terrorism: Calibrating Its Potential Contributions to Risk Reduction* (Institute for Defense Analysis IDA Paper no. P-4231 2007); Pedahzur & Perliger . *The changing nature of suicide attacks: a social network perspective*. Soc. Forces 84:1983–2000 (2006).

[120] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[121] *See* Damon Coletta, *Unipolarity, Globalization and the War on Terror: Why Security Studies Should Refocus on Comparative Defense*, 9 INT'L STUD. REV. 385, 397 (2007).

[122] Sidney A. Shapiro & Rena I Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism,* 69-SUM LAW & CONTEMP. PROBS. 99, 113-14 (2005).

[123] *See* CHRISTOPHER, *supra* note 79, at 113-114.

[124] *See* LaFree & Dugan, *supra* note 113, at 424 ("According to Donohue, as a liberal democracy, the United States must appear to respond immediately to attacks against its citizens. However, others . . . claim that by aggressively countering terrorism, the United States and other countries may also be undermining their legitimacy and increasing popular support for those who use terrorist methods."). *See generally* Ethan Bueno de Mesquita & Eric S. Dickson, *The Propaganda of the Deed: Terrorism,*

Many find the court systems encompass both "fair, impartial, and effective judicial systems and a non-arbitrary basis according to which laws and the legal system as a whole can be viewed as legitimate."[125] Herein lies one of the issues with our use of indefinite detention regarding the War on Terror. First and foremost, if the United States creates the image that we are a 'leading nation, one whose democratic ideals should be followed by other countries,'[126] we are undermining our own legitimacy by acting in both arbitrary and variant forms of adjudication, according to the aforementioned model. Secondly, if terrorism is to be curtailed by advancing a myriad of democratic norms while simultaneously increasing the level of perceived legitimacy of our nation, wouldn't indefinite detention, or the threat of it, seemingly violate these notions?

Scholars call for reducing both opportunities for terrorists and the vulnerabilities of our security by decreasing the benefits of terrorism to the perpetrators through increasing the legitimacy of the government.[127] This is primarily due to the complex social, cultural and psychological elements of terrorism that are both hard to elucidate and target with a single policy.[128] Put another way, the policies and means of adjudicating terrorism may be the real enemy and only further perpetuating the 'war.'[129] Researchers studying the relationship between physical integrity rights of terrorists and aggregate effects on both international and domestic terrorism have found that:

> Governments that refrain from imprisoning citizens for political reasons and avoid engaging in disappearances and extrajudicial killings experience less domestic and international terrorism . . . . By a significant margin, improvement in respect for rights against political imprisonment and

Counterterrorism, and Mobilization, 51 AM. J. OF POL. SCI. 364 (2007); Kevin Siqueira, & Todd Sandler, *Terrorist Backlash, Terrorism Mitigation, and Policy Delegation*, 9 J. OF PUB. ECON. 91 (2007); Audrey K Cronin, *How al-Qaida Ends*, 31 INT'L SECURITY 7, (2007).

125 Seung-Whan Choi, *Fighting Terrorism Through the Rule of Law?*, 54 J. OF CONFLICT RESOL. 940, 944 (2010).

126 *See* Foreman, *supra* note 78, at 936.

127 *See* LaFree & Dugan, *supra* note 113, at 416 ("It would be very beneficial for future research on terrorism to expand beyond traditional deterrence perspectives to include theories that incorporate legitimacy, strain, and situational variables. This strategy is supported by some recent research suggesting that strategies aimed at decreasing the benefits of terrorism through improving the legitimacy of government, solving widespread grievances that produce strain, or attending to situational features that increase the costs of terrorism might be more effective than strategies based only on increasing punishment. In general, despite the enormous resources devoted to countering terrorism, we have surprisingly little empirical information about which strategies are most effective. One conclusion seems certain: the divergent reactions by terrorists across differing contexts strongly suggest that selecting an appropriate counterterrorism strategy is not a task that should be taken lightly."). *See generally* John Braithwaite, *Pre-empting Terrorism*, 17 CURRENT ISSUES IN CRIMINAL JUSTICE 96 (2005).

128 *See generally* LaFree & Ackerman, *supra* note 106 (citing generally RONALD V. CLARKE, AND GRAEME R. NEWMAN, OUTSMARTING THE TERRORISTS (2006)).

129 *Id.* (citing Clark McCauley, *Psychological Issues in Understanding Terrorism and the Response to Terrorism*, *in* THE PSYCHOLOGY OF TERRORISM (C. Stout ed., Praeger 2003); Clark McCauley, *Psychological Issues in Understanding Terrorism and the Response to Terrorism*, *in* THE PSYCHOLOGY OF TERRORISM (B. Bongar, L. M. Brown, L. E. Beutler, J. N. Breckenridge, and P. G. Zimbardo eds., Oxford University Press 2006)).

> extrajudicial killings yield the most dramatic reduction in terrorist attacks.[130]

Put bluntly, "it must be recognized that terrorism is fundamentally a form of psychological warfare . . . designed to undermine confidence in government and leadership and to rent the fabric of trust that bonds society."[131] While responses to our counterterrorism policies can successfully curb both international and domestic terrorism, they can also do the reverse, as evident from some of the aforementioned empirical studies. In essence, we need to fight fire with fire, or as Jerald Post suggests, "counter psychological warfare with psychological warfare."[132] How is this best done? Destabilizing the network of terrorists would be a viable form of preventive warfare. This can be done by 1) reducing the flow of communication within the terrorist organization; 2) hampering decision-making and consensus formation; and 3) intensifying collective-action problems and security vulnerability.[133] Post adds supplemental factors: 1) inhibiting potential recruits from joining; 2) producing tension within groups; 3) facilitating exits from groups; and 4) reducing external support for groups and their leaders would serve to thwart the growth of terrorism.[134] While it should remain obvious that we cannot fight the War on Terror using conventional methods, we need an adjudication process that subverts the overall objectives of terrorists in conjunction with adaptive and technologically superior methods as well.

Despite the numerous definitions for terrorism,[135] if acts of terror are meant to coerce another state into politically capitulating to their demands, or instilling fear within a population of people in hopes of undermining government legitimacy, then how can our judiciary best help subvert those aims? Terrorism is not a new phenomenon, but is what many see as acts of violence by the weak.[136] If the intention of terrorists is to achieve some form of ideological, religious, or political goal, then the bulwark of how we diffuse and 'destabilize' those attempts begin with the rule of law. Military and political ambitions aside, if we lack a strong and decisive rule of law in adjudicating both domestic and international acts of terror that target the United States, then we can never fully quell this continuing generation of terror. For one, there is no inherent 'glory' or purpose that be achieved if an individual or group is in prison. The way we regain

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130 James A. Piazza & James I. Walsh, *Physical Integrity Rights and Terrorism*, 43 PS: POL. SCI. & POLITICS 411, 412 (2010); *see also* James Walsh & James A. Piazza, *Why Respecting Physical Integrity Rights Reduces Terrorism*, 43 COMPARATIVE POL. STUD. 551 (2010).

131 *See* Hoffman, *supra* note 105, at 313.

132 JERROLD M. POST, LEADERS AND THEIR FOLLOWERS IN A DANGEROUS WORLD: THE PSYCHOLOGY OF POLITICAL BEHAVIOR 161 (2004).

133 Mette Eilstrup-Sangiovanni & Calvert Jones, *Assessing the Dangers of Illicit Networks: Why al-Qaida May Be Less Threatening Than You Think*, 33 INT'L SECURITY 7, 43 (2008).

134 POST, *supra* note 132, at 160. *See generally* Jerrald Post, *Terrorist Psycho-Logic: Terrorist Behaviour as a Product of Psychological Forces, in* ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 25 (Walter Reich ed.,1990). *See also* Jerrold Post, *The New Face Of Terrorism: Socio-Cultural Foundations Of Contemporary Terrorism*, 23 BEHAV. SCI. LAW 451 (2005).

135 *See generally* SCHMID & JONGMAN, POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATABASES, THEORIES AND LITERATURE. (1988). *See also* LaFree, *supra* note 109.

136 *See generally* TARAK BARKAWI, GLOBALIZATION AND WAR (2006).

our moral high ground, which has been under criticism throughout the War on Terror, is by 'reducing acts of terror to common criminality.'[137] In essence, the military alone cannot win this war.[138] While the scope of this article is not to analyze all of the law enforcement strategies in both assessing and enforcing state and federal laws against various acts of terror, it goes without saying how important the criminal justice system will be in operationalizing the national effort against terrorism. Preventive measures should always be employed, as they are with regards to 'normal' criminal activity like burglary, larceny, arson, and drug trafficking. This can even include preventive modes of detention, as the "Department of Justice officials have used preventative methods of detention, whether on the groups of inchoate crimes or material witness applications, with regards to protecting intelligence assets while at the same preventing terrorists from acting on United States soil."[139] Again however, the responsibility of both deterring and razing acts of terror needs to reside within the legal system because our Constitution is the final, albeit necessary, check on authority.[140]

It could be argued that both Guantanamo and prisons throughout the Middle East utilized during the War on Terror serve these aforementioned purposes. They incarcerate individuals who are both suspected and confirmed terrorists and provide both specific and general deterrence to the remaining members of their respective terrorist organizations. Furthermore, penal facilities operate within the bounds of legal authority. They have been authorized, vetted and deemed constitutional by all three branches during their evolution. Lastly, penal facilities contribute to the overall objective of 'incarcerating our way out of terrorism' by placing individuals who are either terrorists, or exhibit the potential to be future recruits and inevitable recidivists in prison.

C. Why Indefinite Detention?

The logical reasoning behind indefinitely detaining or incarcerating an individual stems from the determination that the individual still poses a significant threat to society. This determination is not particular to just international or military law, but has roots in both civil and criminal law within the United States. One example is the continued and involuntary civil commitments of sex offenders upon completion of their sentences.[141] Another is the indefinite detention meth-

[137] *See generally* Marc Sageman, *The Next Generation of Terror*, March/April, FOREIGN POLICY, 37 (2008).

[138] *See generally* Bruce Hoffman, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters,* May/June, FOREIGN AFFAIRS, 133 (2008).

[139] *See generally* Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J.LEGIS 1 (2001).

[140] *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[141] Meaghan Kelly, *Lock Them Up and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT'L L. 551, 553 (2007) ("In general, SVP laws provide for the post-incarceration involuntary civil commitment of sex offenders after a finding that the individual: (1) committed a sexually violent act; (2) suffers from a mental abnormality or a personality disorder; and (3) is likely to pose a future danger as a result of his mental abnormality. These criteria are relatively vague, but if they are deemed satisfied, the sex offender will remain in civil commitment indefinitely until he is determined no longer to be dangerous as a result of his mental abnormality. Civil

ods utilized during the removal period of an alien by INS "until it has been determined that there is no significant likelihood of removal in the 'reasonably foreseeable future."[142] This seemingly constituted a period of six months, after which, the constitutionality would be called into question.[143] This removal period is also affected by whether the individual still poses a risk to society.[144] However, the discretion to indefinitely detain is not unbounded[145] because deportation and removal proceedings are civil and not under the 'panoply' of protections that criminal trials are privy to.[146] Furthermore, the U.S. has a history of preventively detaining mentally ill persons[147] and those who pose a significant health risk to other citizens.[148]

The decision to indefinitely detain may be more political than punitive. The attachment of terrorism as an international security issue enables the Executive to deem the 'right' response to be our Armed Forces. Furthermore, if the threat itself is 'imminent,' the government will care less about substantive or procedural due process measures that would promote and ensure consistency in processing terrorists. When such a threat is imminent, the courts are more likely to defer to government authority.[149] Former Secretary of Defense Donald Rumsfeld stated numerous reasons for pushing terrorists through the military detention instead of the criminal justice system.[150] Regarding Jose Padilla, an individual who was found to have had the intent of gathering radioactive materials in an attempt to construct a 'dirty bomb,' and whom had ties to al-Qaeda, Rumsfeld placed a premium of gathering information first, before processing Padilla.[151] Rumsfeld maintained that:

commitment need not be imposed at the time of the original sentencing but can be imposed at the end of the prison sentence.").

142 Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1099 (9th Cir. 2001). *See also* 8 U.S.C.A. § 1231.

143 *Kim Ho Ma*, 257 F.3d at 1099 (citing *U.S. v. Witkovich* 353 U.S. 194 (1957)); *see also* 8 U.S.C.A. § 1252).

144 Arango Marquez v. INS, 346 F.3d. 892, 898 (9th Cir. 2002) ("Authorized indefinite detention of an excluded alien convicted of an aggravated felony beyond the statutory removal period codified in § 1252(c)); *see* Alvarez–Mendez v. Stock, 941 F.2d 956, 961 (9th Cir.1991) ("When read in the context of the whole 1990 Act, it is clear that [former § 1226(e)] is part of a scheme requiring the Attorney General to detain all aliens convicted of aggravated felonies whose release would pose a threat to society.").

145 *See* Clark v. Martinez, 543 U.S. 371, 377 (2005).

146 *See* Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004) ("Since deportation and removal proceedings are civil, they are 'not subject to the full panoply of procedural safeguards accompanying criminal trials' including the right to counsel under the Sixth Amendment.").

147 *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

148 *See* A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1269-71 (2006).

149 *See* Avidan Y. Cover, *Presumed Innocence: Judicial Risk Assessment in the Post-9/11 World,* 35 CARDOZO L. REV. 415, 1452 (2014) (arguing that Padilla v. Rumsfeld depicted the Judiciary as deferring to government authority, so as to decline jurisdiction, in cases whether the threat is perceived as imminent).

150 Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 573-74 (S.D.N.Y. 2002) (citing News Briefing, Department of Defense (June 12, 2002), 2002 WL 22026773).

151 *Padilla*, 233 F. Supp. 2d at 573-74.

> It seems to me that the problem in the United States is that we have—we are in a certain mode. Our normal procedure is that if somebody does something unlawful, illegal against our system of government, that the first thing we want to do is apprehend them, then try them in a court and then punish them. In this case that is not our first interest.
>
> Our interest is to—we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Qaeda. Now our job, as responsible government officials, is to do everything possible to find out what that person knows, and see if we can't help our country or other countries.[152]

He later offered more evidence supporting why differentiating between criminal procedure and the processing of terrorists should remain:

> If you think about it, we found some material in Kandahar that within a week was used—information, intelligence information—that was used to prevent a[t] least three terrorist attacks in Singapore—against a U.S. ship, against a U.S. facility and against a Singaporean facility. Now if someone had said when we found that information or person, well now let's us arrest the person and let's start the process of punishing that person for having done what he had did, we never would have gotten that information. People would have died.
>
> So I think what our country and other countries have to think of is, what is your priority today? And given the power of weapons and given the number of terrorists that exist in the world, our approach has to [be] to try to protect the American people, and provide information to friendly countries and allies, and protect deployed forces from those kind of attacks . . . I think the American people understand that.[153]

D. Applying International Law and Treaties to U.S. Courts

1. Can Domestic Criminal Law Alone Deter Terrorism?

Many contend that the Charming Betsy canon ought to apply in situations where vague legislation requires that judges look to international treaties and customary law for insight on how to construct an amiable interpretation[154] histor-

[152] *Id.* at 574.

[153] *Id.*

[154] *See generally* Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804); *see also* Talbot v. Seeman, 5 U.S. 1, 43 (1801) ("The laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); *see also* Restatement (Third) of Foreign Relations Law of the United States § 111(3) (1986) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation."); *see also* Rebecca Crootof,

ically relating to prescriptive jurisdiction.[155] Nonetheless, the Supreme Court ruled in *Al-Bahani v. Obama* that "international-law principles found in non-self-executing treaties and customary international law, but not incorporated into statutes or self-executing treaties, are not part of domestic U.S. law."[156] Furthermore, the Court held that customary international law is:

> a kind of international common law. It does not result from any of the mechanisms specified in the U.S. Constitution for the creation of U.S. law. For that reason, although norms of customary international law may obligate the United States internationally, they are not part of domestic U.S. law. Customary-international-law norms become part of domestic U.S. law only if the norms are incorporated into a statute or self-executing treaty.[157]

Thus, if legislation or international multilateral agreements are ratified within the United States and made 'self-executing,' then the informal tacit of incorporating principles into domestic law would be less difficult to achieve. This, in turn, relates to aforementioned propensity of the United States to abstain from ratifying Protocols I and II of the Geneva Convention. Even though it was seemingly convenient during times where, absent certain domestic law, the United States relied on international customary law to discern its proper stance on an issue. Nonetheless, now that we are more 'fortified' in both our legal prowess and stance within the international system, it seems both trivial and counterproductive for us to rely on other ambient nations laws. The *Medellin* decision by the United States Supreme Court surprised many nations because of its ban on private litigants applying international customs and law in court.[158] Also, even though we were signatories to the Vienna Convention on Consular Relations, it was not clear when international treaties and law are domestically equivalent or enforceable in court, and when they are only binding after Congress has enacted appropriate legislation.[159]

Another conundrum is whether U.S. criminal law can be efficiently applied to preventive forms of terrorist threat. In a case surrounding the potential negative impact drug trafficking has on both national security and well-being, the Ninth Circuit ruled in *U.S. v. Patterson* that "there was more than a sufficient nexus with the United States to allow the exercise of jurisdiction [and that] drug traf-

Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon. 120 YALE L. J. 1784, 1789 (2011).

155 *See* Zachary D. Clopton. *Replacing the Presumption Against Extraterritoriality,* 94 B.U. L. REV. 1, 24-25 (2013) ("By applying the Charming Betsy canon to prescriptive jurisdiction, courts can interpret geoambiguous statutes to apply only as far as international law permits."). The Charming Betsy canon has also been used by the Supreme Court with regards to prescriptive justice in Hartford Fire Ins. v. California, 509 U.S. 764, 815 (1993) and McCulloch v. Sociedad Nacional, 372 U.S. 10, 21-22 (1963).

156 Al-Bihani v. Obama, 619 F.3d 1, 16 (D.C. Cir. 2010) ("Responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.").

157 *Id.* at 17.

158 *See* Oona Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 52 (2012). *See generally* Medellín v. Texas, 552 U.S. 491 (2008).

159 *Id.* at 52.

ficking may be prevented under the protective principle of jurisdiction, without any showing of an actual effect on the United States."[160] Thus, "if the activity threatens the security or governmental functions of the United States" the United States can apply jurisdictional claims.[161] Furthermore, the Fifth Circuit also stated that "a foreign vessel on the high seas becomes subject to the operation of the laws of the United States within the meaning of [14 U.S.C.] section 89(a) when those aboard are engaged in a conspiracy to violate federal narcotics statutes."[162] The court drew off a similar Fifth Circuit case just two years prior: *United States v. Cadena*.[163] The court held that despite possible legal issues surrounding Government apprehension and detention that "the violation of international law . . . may be redressed by other remedies and does not depend upon the granting of what amounts to an effective immunity from criminal prosecution to safeguard individuals against police or armed forces misconduct."[164] Even if the government plausibly commits illegal acts, it does not mean that the individual can gain standing in a case against the government's initial motivation for apprehension. The court in Cadena further claimed that "[e]ven if individuals have standing to raise treaty violations, their personal rights are derived from the rights of a signatory state. Article 32 of the Convention[165] provides that it is subject to ratification."[166] This seems to limit the ability of detainees to question whether or not their rights were violated within Protocols I and II. To acquiesce this point, the Second Circuit has also stated that only signatory nations to a treaty can protest its violation.[167] This calls into question the applicability of non-citizens rights in exigent circumstances, which in our current state of affairs, is the War on Terror. In *Eyde v. Robertson* (1884), the Supreme Court stated:

> And such is, in fact, the case in a declaration of war, which must be made by congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war. In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.[168]

Even if international law was binding on the United States, the Government retains the authority to change the direction of such law's utility within the judicial system. Put another way, the government in times of declared war can sus-

160 U.S. v. Peterson, 812 F.2d 486, 493-94 (9th Cir. 1987).

161 *Id.* at 494.

162 United States v. Postal, 589 F.2d 862, 884 (5th Circ. 1979); *see also* 14 U.S.C.A. § 89 (2006).

163 United States v. Cadena-Sanchez, 68 F.3d. 466, 466 (5th Cir. 1995) (per curiam).

164 United States v. Cadena, 585 F.2d 1252, 1261 (5th Cir. 1978), *overruled by* United States v. Michelena-Orovio, 719 F.2d 738 (1983).

165 Law of the Sea: Convention on the High Seas art. 32, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

166 *Id.*

167 United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir. 1975).

168 Edye v. Robertson, 112 U.S. 580, 599 (1884).

pend treaties between warring nations. However, the War on Terror does not fall under the paradigm of conventional war and there are no treaties or laws directly between the United States and non-state actors, despite laws between nations applying indirectly in this manner. Furthermore, Afghanistan is a signatory to all of the Geneva Conventions and Protocols, while Iraq is subject to the Conventions but only to Protocol I. Since the U.S. does have the signatory relationship with those states, due to differences in both being parties to, and ratifying all of the Protocols, it makes it easier for the U.S. to distance itself from having to abide by international law with regards to the laws of war principles discussed earlier, and detention procedures and rights for those in an armed conflict. Put simply, the U.S. is not buying in to the global application of alien detention practices, so is it less likely that the United States will think alien detention could be done better domestically.

2. The Debate of 'Self-Executing' Treaties

International law and treaties between nations can be contractual in nature.[169] Nonetheless, the lack of explicit applicability to national laws renders many laws non-self-executing. Determining whether international law is self-executing or not, however, is a vibrant double standard. Traditionally, "there should be a strong presumption that a treaty is self-executing unless the contrary is clearly indicated,' because if the treaty has been in effect and has not been implemented by legislation 'a finding that it is not self-executing in effect puts the United States in default on its international obligations.' "[170] Consider the following excerpt from *Sosa v. Alvarez-Machain* (2004):

> We assume, too, that no development in the two centuries from the enactment of [28 U.S.C.A] § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena–Irala,* 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a

[169] *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) ("As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning as understood in the public law of nations."); *Edye,* 112 U.S. at 598.

[170] Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 376 (2004) (quoting Louis Henkin, Richard Crawford Pugh, Oscar Schachter & Hans Smit, INTERNATIONAL LAW 215 (Louis Henkin ed., 3d ed. 1993).

> specificity comparable to the features of the 18th-century paradigms we have recognized.[171]

Balancing the interests of foreign policy and the evolving landscape of international norms integration into law is something that may prove difficult for federal judges to accomplish. This is why interpretations of national interests are primarily the duties of Congress and the Executive. Nonetheless, there remains a place, however restricted, for judges to make international law a formidable part of domestic law. This is important in the evolution of the War on Terror and its subsequent impact on how to adjudicate terrorists. Differentiating between self-executing and non-self-executing determines how far international law will permeate our substantive and procedural measures regarding our national response to terrorism. It is no secret that many nations have called for Guantanamo Bay to be closed due to the litany of humanitarian and ethical concerns that have been cast into the limelight, furthered only by the questionable legality of the detention itself. Within criminal justice, only capital punishment is debated as often as the detention and legal methods we have employed in the War on Terror. Courts' involvement in the international specter of customary law will provide the criminal justice system a way to partake in adjudicating terrorists and their respective organizations. This engagement has shifted over time:

> Between 1790 and 1947, the Court found a treaty self-executing on the basis that a private right was secured by the treaty in at least twenty-two cases. In each case, the Court held not only that the treaty was self-executing, but also that it created a private right of action. The treaties from which the Court inferred this right to private enforcement fell into four areas: (1) contract matters; (2) property and inheritance law matters; (3) the right to challenge the legality of detention through a writ of habeas corpus; and (4) rights to carry on a trade.[172]

3. International Transparency

Even though local law enforcement and federal agencies monitor and process individuals within our criminal justice system, the viability of the assault on terrorism following the 9/11-attacks can only be increased with greater transparency, cooperation, intelligence gathering, consistent procedural and substantive due process measures, and moral appeasement to the world. Cutting off the Judiciary from this process, as both the Executive and Congress have done, only further undermines our ability to thwart the scope of terrorism's reach because it conveys a weak rule of law not only to the rest of the world but most importantly to those non-state actors we fear the most. Multiple times, the Senate "has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the Interna-

[171] Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).

[172] Hathaway, *supra* note 158, at 57-58.

tional Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing."[173]

Courts will not always interpret claims or assertions in the favor of the international community. This should not weaken their ability to utilize international customs or explicit international law in domestic situations. Courts need to retain the ability to determine the efficacy of an international law in light of domestic situations. Though an international terrorist attack requires an international response, it also requires national policies that delineate various constraints or legal obstacles. Simply, while individual assertions concerning what policies will be most effective in thwarting terrorism at the national and global levels may be determined at the national level, it is important for all nations taking part in this assault to maintain transparent and analogous principles that create and uphold fundamental natural rights. In *Saleh v. Titan Corp* (2006), the District Court of the District of Columbia heard numerous Iraqi nationals' complaints that they were tortured by the same private government contractors who provided interrogators and interpreters to the U.S. Armed forces. The court ruled that "the conduct of private parties described by plaintiffs' allegations was not actionable under the ATS's grant of jurisdiction as violative of the law of nations," even if was under the 'color of law.'[174]

In sum, courts can chose to either defer to government authority and ignore international law or decide to incorporate international law domestically. The latter provides more collaborative strength and preserves the rule of law within and across nations. Furthermore, domestic criminal law may have some gaps in addressing terrorism. Only time will tell if those gaps will be filled by international law and transnational response.

V. Criminalizing Terrorism

The debate continues between civilian and military models as modes of adjudicating terrorists. Some experts claim that the military model offers less procedural and substantive hurdles while maintaining flexibility, but the criminal model poses the most significant barriers to easily processing terrorists.[175] Consider the following except from Chesney and Goldsmith:

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[173] *Sosa*, 542 U.S. at 728.

[174] Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57 (D.D.C. 2006); *see also* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (holding alleged actions by executive officials, in their private capacity, of supporting forces bearing arms against government of Nicaragua did not violate any treaty or "customary international law" so as to confer original jurisdiction upon district court over suit by citizens and residents of Nicaragua against federal officials pursuant to the alien tort statute, 28 U.S.C.A. § 1350, which provides that district court shall have jurisdiction of action by alien for tort committed in violation of law of nations or treaty of the United States); Ibrahim v. Titan Corp., 391 F.Supp.2d 10, 20 (D.D.C. 2005) (noting district court did not have diversity jurisdiction over claims by Iraqi nationals who were detained in Iraqi prison against a private governmental contractor incorporated in The Netherlands, who provided interrogators to United States military in Iraq); cf. 28 U.S.C.A. § 1350 (stating the district courts are vested with original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States).

[175] Chesney & Goldsmith, *supra* note 5, at 1080-1081 ("These detention models have traditionally differed along two dimensions: detention criteria (i.e., what the government must prove to detain someone) and procedural safeguards (i.e., the rights and procedures employed to reduce the risk of error in

> Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.[176]

Where do we go from here? If neither one is adequate, how can our nation delegitimize terrorism as a form of politically or religiously coercive violence and abstain from capitulating to terrorist demands and goals while maintaining and strengthening a rule of law? The previous section explains why the criminal justice model is both necessary and sufficient to address the terrorist threat. This section explains in greater detail how *further* 'criminalizing' terrorism may be the way to adopt the criminal justice model.[177]

A. Is criminalization necessary?

How does using the criminal justice system to adjudicate all forms of terrorism come to fruition? Prosecuting terrorists is not a novel concept in the American criminal justice system. However, over the last two decades, it has partially subverted to military and executive oversight. We treat terrorism as an act of war, rather than as a crime.[178] Nonetheless, there is a fundamental legal reason for treating terrorists as criminals.[179] Before U.S. involvement in the War on Terror, "the conventional mindset was that acts of terrorism were a criminal matter to be adjudicated within our criminal justice system along with crimes committed by

making detention determinations). The military detention model is the least demanding, traditionally requiring a showing of mere group membership in the enemy armed forces and providing alleged detainees with relatively trivial procedural protections. At the other extreme, the civilian criminal model is the most demanding, tending to require a showing of specific criminal conduct and providing defendants with a panoply of rights designed to reduce the risk of erroneous convictions.").

176 *Id.* at 1081.

177 While terrorism itself is already criminalized within U.S. Code, focusing on terrorism as a criminal act rather than stigmatizing it as a religious, social, or political act alone may serve both America's vital interests while also circumventing terrorism more efficiently.

178 *See* David T. Hartmann, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 GEO. MASON. U. CIV. RTS. L. J. 217, 235 (2012) (discussing President Obama's shift away from his predecessor's policy to treat terrorism as war rather than as crime).

179 David Glazier, *Playing by the Rules: Combating Al Qaeda within the Law of War*, 51 WM. & MARY L. REV. 957, 967 (2009) (noting that there is an indisputable basis for the treatment of terrorists as criminals).

bank robbers, car thieves, and drug dealers."[180] Many times we have "successfully tried and convicted in federal criminal court, including the Oklahoma City bombers Timothy McVeigh and Terry Nichols, the Unabomber Theodore Kaczynski, and the 1993 World Trade Center bomber Ramzi Yousef."[181] Nonetheless, the prosecution of terrorists in the criminal justice system poses significant hurdles because it consumes an extreme amount of time and resources-[182] as was evident in the *Moussaoui* trial.[183] Additionally, law enforcement agencies will have to balance intelligence and evidence gathering.[184]

In the debate over Miranda warnings for terrorism suspects, the Executive Branch's continued commitment to prosecuting terrorists in Article III courts and the military system makes the question of admissibility of evidence pressing and relevant.[185] Many believe that trying terrorists in military commissions is preferable because they remove several procedural safeguards present in the criminal justice system to protect the constitutional rights of criminal defendants. However, the federal criminal justice system is no less effective in prosecuting terrorists.[186]

It is time, then, for a new approach to counterterrorism detention that recognizes the advantages that the criminal justice system offers for defendants and counterterrorism efforts. The criminal justice system is highly effective at detaining and prosecuting terrorists and provides a level of predictability, legitimacy, and flexibility that is missing in current wartime prosecution and detention practice. The well-established procedural protections within the criminal justice system can reduce the risk of error and provide more legitimate results than those in the military commission process. A more fair and flexible detention regime will also effectively contribute to counterterrorism operations.[187]

Adherence to the Fifth Amendment is not as stringent in military tribunals as it is in criminal courts.[188] Along with the Fifth Amendment, both the Fourth and Sixth Amendments were purposely left as 'uncertain at best.'[189] Furthermore, while prosecution of terrorism follows a nationalist guideline and citizens are

[180] Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH. L. REV. 843, 861 (2010).

[181] Hartmann, *supra* note 178, at 236-37.

[182] Gonzales, *supra* note 180, at 865-66.

[183] *See generally* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); Harry Samit, *An Account of the Arrest and Interview of Zacarias Moussaoui*, 37 WM. MITCHELL L. REV. 5191 (2011) (discussing the details of Moussaoui's detainment).

[184] M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 353-54 (2003).

[185] Savage, *supra* note 103.

[186] Christie Tomm, *The United States Criminal Justice System: Protecting Constitutional Rights and National Security*, 26 J. CIV. RTS. & ECON. DEV. 1051, 1054-58 (2009).

[187] Hathaway, *supra* note 158, at 77.

[188] *See* 10 U.S.C. § 948c (2009).

[189] Hartmann, *supra* note 178, at 235.

processed through the criminal justice system smoothly,[190] if you are not a citizen, it is much different. Processing terrorists through the criminal justice system helps in "disrupt[ing] terrorist plots by taking conspirators into custody; incapacitating convicted terrorists through incarceration; and providing a vehicle for gathering intelligence through interrogations."[191]

B. What would it look like?

1. Addressing the Disjunction Between Domestic and Military Policing

Setting aside legal, theoretical and idealist arguments, what would this full integration of terrorism into the criminal justice system look like? One obvious difference would be the problematic component of 'policing abroad.' It would be extremely difficult to uphold procedural safeguards throughout the broad spectrum of how we are currently policing the War on Terror. The litany of the United States and other nations' arresting powers to combat terrorism only enflames this problem. To put in perspective, current criminal procedure in the American criminal justice system adheres to specific due process standards, which enable constitutional rights to be upheld throughout the immensely fragmented criminal justice system. Whether or not these safeguards and rights are upheld 'uniformly' is not the argument here, it is the complete disjunction that has occurred between police and military adjudication standards. This includes, but is not limited to: evidentiary standards, due process rights, detention procedures, policing practices, administrative policies, and overall adherences to system-specific law (i.e. criminal law vs. UCMJ, International Treaties, Executive Orders, etc).

A much simpler answer involves existing laws that govern terrorism. The United States Code defines international terrorism as activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State, appear to be intended—to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.[192]

This operates on a broad spectrum regarding territoriality. Crimes committed, or inchoate crimes may be criminalized as terrorist acts irrespective of where the act or premonition originates from. The major differentiation between this definition from that of 'domestic terrorism' is where the act occurs, or if it would have violated United States law.[193] Furthermore, punishments for terrorism under fed-

[190] *See* Kim D. Chanbonpin, Ditching "The Disposal Plan:" Revisiting Miranda in an Age of Terror, 20 St. Thomas L. Rev. 155, 174-75 (2008).

[191] Tomm, *supra* note 186, at 1055.

[192] 18 U.S.C. § 2331(1) (2001).

[193] Regarding the territorial differentiation, international terrorism, under 18 U.S.C. § 2331(1)(C) is defined as activities that "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;" while

eral criminal law cover a myriad of different terrorist acts.[194] Important components in assessing the viability of indefinite detention within the War on Terror are criminal procedure, sentencing guidelines and detention practices in comparison to conventional criminal adjudication. Put another way, looking at our current criminal justice system ought to offer a better method to employ in lieu of indefinite detention.

2. Addressing Punishment

One way to look at indefinite detention of terrorists in comparison to conventional incarceration practices and length of sentencing in the criminal justice system is to look at the United States Sentencing Guidelines (USSG). Mandatory minimums and enhancement provisions in subsequent legislation since 2001 increased the overall penalties for terrorism perpetrators and accomplices. This has been evident in the use of immigration law as both a law enforcement tool and adjunct to criminal law in the War on Terror.[195] While procedures under the

domestic terrorism, under 18 U.S.C. § 2331(5)(C) is defined as activities that "occur primarily within the territorial jurisdiction of the United States." Regarding the potential of criminal law violation, 18 U.S.C § 2331(1) dictates that international terrorism encompasses "activities that . . . would be a criminal violation if committed within the jurisdiction of the United States or of any State." This opens up the broad range of activities that can be construed to seemingly violate U.S. criminal law.

194 The enormous amount of crimes that fall under the 'terrorism' penumbra that transcend national boundaries includes all of the following under 18 U.S.C § 2332b(g)(5)(B)(i): "section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title."

195 Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1061-73 (2002) (discussing immigration law as a tool of the criminal justice system).

current indefinite detention protocol call for the re-certification of enemy combatant status every six months by the U.S. Attorney General,[196] the USSG seemingly offers a more consistent and robust mode of determining sentence length.[197] Stringent enhancement levels in sentencing and an upward departure provision enable the courts to assess what the appropriate punishment should be according to both enumerated and unenumerated acts of terror. These constructions of domestic terrorism sentencing are promulgated from both the Antiterrorism and Effective Death Penalty Act of 1996 and the Violent Crime Control and Law Enforcement Act of 1994.[198]

In *U.S. v. Meskini*, the court held that "the wording of § 3A1.4 could not be clearer: It directs courts to increase both the offense level and the criminal history category based on a single crime involving terrorism."[199] The court also held that so long as Congress has a rational basis for establishing certain penalties, due process challenges will have no merit.[200] The adherence to federal sentencing standards will increase the strength of the rule of law.

However, sentencing terrorists has changed significantly since 1996. The politicization of terrorism may have followed the same trends of the War on Crime, and the War on Drugs. The decision-making by judges surrounding the sentencing of terrorists used to be treated as a typical violent-crime, not one where the political or religious motivations were the primary concern.[201] In conventional armed conflicts of an international nature, POW status is given to terrorists solely to prevent them from returning to active hostilities. This is a preventive measure used to reduce the risks inherent in soldiers returning to their respective theatres of war.[202] As mentioned earlier, conduct in war follows the *jus ad bellum* and *jus in bello* principles, and thus conventional use of force in legitimate warfare is exempt from criminal liability. The War on Terror, despite its inherent moral and ethical concerns, precludes terrorists from being designated as POWs. Enabling terrorists to return to their respective countries or transferring them to different nations increases the risk of them returning to active

196 *See* 8 U.S.C. § 1226(a)(6) (2001).

197 *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2014).

198 *See generally* Deborah F. Buckman, *Construction and Application of Federal Domestic Terrorism Sentencing Enhancement, U.S.S.G. § 3A1.4*, 186 A.L.R. FED. 147 (2003).

199 United States v. Meskini, 319 F.3d 88, 91-92 (2d Cir. 2003).

200 *Id.* at 91.

201 Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 493-494 (2014) (stating that prior to the shift in legislation in 1996, "sentencing for crimes involving terrorism was relatively straightforward, since defendants usually faced charges of carrying out violent criminal activity, rendering their political motivations irrelevant. It followed logically that given the criminal law's capacity for dealing easily with a violent attack-regardless of what motivated it-the type of sentence courts handed down was relatively unremarkable. Even where a court pointed out the political context of a given incident, such details did not affect the nature of the sentence on their own, but the more sensational or violent the conduct the more severe the resulting sentence.").

202 Walen, *supra* note 47, at 872-873 (stating "in war, the risks associated with giving members of the enemy's forces their liberty are large, and therefore prisoners of war ("POWs") can be detained without having been convicted of a crime.").

hostilities. This is one of the prime reasons all of aforementioned legislation was constructed.

While some contend that short-term preventive detention is justified,[203] discerning what constitutes short-term preventive detention for purposes of thwarting terrorist activities is problematic.[204] The aforementioned re-certification process, which enables unlawful enemy combatants to be held for additional periods of six months, would seemingly be labeled as a long-term preventive strategy.[205] Nonetheless, determining how to subvert risks posed by terrorism while maintaining adequate due process measures remains pragmatic in this sense. Universally criminalizing acts of terror under federal domestic law creates consistency in how terrorists are processed, irrespective of their status as aliens or citizens. Furthermore, dynamic laws, such as those which enhance sentencing and offender levels, may serve to better marginalize terrorists' ability to escape certain modes of criminal prosecution. For example, inchoate crimes, such as threats with intent or conspiracy, or financial crimes associated with terrorism can either be prosecuted or indefinitely detained under current conditions; the latter being the subject of controversy. If we were to realign both inchoate and financial crimes associated with terrorism with current criminal adjudication and sentencing models, we would not only avert ethical and moral controversy, but could also serve to delegitimize the acts themselves. Consider the following passage:

> If these people cannot be prosecuted for crimes such as conspiring or attempting to commit terrorist acts (or ancillary crimes), then they must be either preventively detained or released and policed. The first of these options is indefensible in a liberal society; and the latter seems to provide inadequate security . . . . [However], they can be prosecuted for the ultimate inchoate crime: stating the intention to commit unlawful, violent acts.
>
> This is not legally controversial, but it is nonetheless philosophically problematic. The doctrine concerning threat law is a mess, and has failed to clearly distinguish the crime that concerns causing fear and disruption from the crime that concerns stating that one has the intention to commit a particular violent crime. But the distinction can be made and defended. Forming the intention to commit a criminal act is the essence of inchoate crimes. And while the crime of stating the intention to commit unlawful, violent acts pushes the outer limits of the idea of an inchoate crime, it does not surpass those limits. As long as the crime itself is sufficiently serious, and the prospects for deterrence sufficiently low, there is reason

[203] *Id.* at 913-16.

[204] *Id.* at 915 ("It is hard to put a number on what would count as 'short-term' detention. Benjamin Wittes and Colleen Peppard suggest that the executive should have 'broad short-term detention authority' to detain STs for up to fourteen days, a time they think is sufficient to disrupt terrorist plots.").

[205] Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why it Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 807 (2011).

> to have such a crime. Further, those conditions are met when dealing with politically or religiously motivated terrorist crime.[206]

The last part is the most significant declaration on criminalizing terrorism. Our enhancements and upward departure provisions exemplify how we as a society view terrorism: a direct threat to liberty. Yet, the incursion of military detention, rather than conventional incarceration in the criminal justice system, prevents the criminalization of terrorism. Yes, it is true we tried, convicted and even executed domestic terrorists like Timothy McVeigh. It is also true that local and federal law enforcement agencies subdued and circumvented both individual terrorists and organizations within the United States, all the while prosecuting them in conventional criminal courts. The argument and scope of this piece is not that we have shifted all policing and prosecution powers to the military. It is that the current state of affairs in which we indefinitely incarcerate individuals whose guilt or innocence has not yet been determined in a court of law is seemingly out of line in with bringing those responsible of terrorism to justice. This includes those who planned to commit acts of terror, have done so, or are parties before or after the fact to terrorism. Using criminal law to undermine terrorist efforts better addresses the question of how we should combat terrorism, "particularly when dealing with the threat to commit terrorist acts, with their potentially devastating results, there is good reason to want the criminal law to step in and prevent the act from occurring as soon as a culpable act based on that intention has been performed."[207]

Have we used all of these tools, or are they still subject to inquiry and theoretical debate? This is the essential question to be answered. According to research, these enhancements were used 197 times between 1996 and 2012.[208] Most of these did not occur until after *Blakely v. Washington* and *United States v. Booker* were resolved.[209] Nonetheless, this shift gives sentencing judges even more latitude in adjudicating terrorists, which should be seen as an ability for criminal courts to impose a sentence that reflects the full nature of the offense. It was during the 1990's that "the law would shift to allow individuals to be sanctioned criminally for providing material support to a proscribed foreign terrorist organization where the support was not directly linked to violence of any kind,"[210] but it was not for over a decade until the shift ended when courts received more power to determine what punishments for terrorism could be imposed. While our criminal court system was capable of handling terrorism as a crime in the wake

206 *Id.* at 853.

207 *Id.*

208 Said, *supra* note 201, at 502.

209 *Id.* at 502-03 (explaining the constitutional debate, sparked by both Blakely v. Washington and Booker v. United States, over imposing sentences that exceeded that maximum threshold under the Sentencing Guidelines. Subsequent cases such as Kimbrough v. United States, Gall v. United States, and Rita v. United States enabled judges to see sentencing guidelines as 'advisory'. In Kimbrough, the court held "[t]he Government acknowledges that the Guidelines 'are now advisory' and that, as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.").

210 *Id.* at 498.

of 9/11, shifts in legislation gave increased deference to judicial sentencing practices. Wider definitional scope was created so that terrorism could be fully adjudicated by the criminal justice system. However, this has not come to fruition despite some positive activity. In the post-Booker world, it seems that trial courts will rely on appellate courts to determine whether sentences handed down encompass these special enhancements or departures, or whether courts will adhere to 18 U.S.C.A. § 3553 in treating terrorists like ordinary violent criminals.[211] However, in the broader context of treating terrorism as conventional crime, "harsh sentences seem to be a fair trade-off" given that Congress has dictated a national policy goal via the enhancement provisions.[212]

VI. Conclusion

Why are examinations of the legislative history surrounding the War on Terror, the laws of war and the just war doctrine, application of international law to domestic courts, and current criminal justice processes important to the debate on indefinite detention? First, they depict how both sidestep and abide by various domestic and international legal hurdles. Second, they show where current models originate, and more specifically, how the military justice system and criminal justice system began to converge, and where global principles and law fit into each system. Third, while one could examine indefinite detention from a philosophical, namely utilitarian perspective, analyzing the ethical conundrums is not independent of all of the aforementioned sections. Put another way, to examine how we adjudicate and combat terrorism in a post-9/11 world, we need to understand our current framework.[213] However, it seems that while the military and criminal justice models each have inadequacies, the traditional military model is the most problematic due to higher risks of erroneous errors occurring, the indefinite nature of the war itself, and the associational "triggers of detention."[214]

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[211] George D. Brown, *Punishing Terrorists: Congress, The Sentencing Commission, The Guidelines and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517, 540 (2014) ("To some extent, judges will look to appellate courts for answers. The appellate opinions appear to tilt in favor of the enhancement and the approach it embodies. However, the value of any message that appellate courts might send is inevitably bound up with broader questions about the sentencing relationship between trial and appellate courts in the post-Booker era.").

[212] *Id.* at 546.

[213] *See* Chesney & Goldsmith, *supra* note 5, at 1092-1096 (arguing that the three pre-9/11 developments that created the convergence of military detention and criminal justice were: criminal justice preventive methods, the laws of war and human rights, and terrorism and the crime versus war debate. Collectively, these three developments enabled military detention of terrorists to be seen as viable. The authors state, "these three pre-9/11 trends—the rise of prevention in the criminal law system, the importation of human rights law standards into the laws of war, and the growing realization that modern terrorism warranted military responses based on military authorities—were the seeds of the post-9/11 convergence of the criminal and military detention models."); *see also* Chesney & Goldsmith, *supra* note 5, at 1133 (illustrating a more robust comparison of various models of procedural safeguards, in Appendix A).

[214] Chesney & Goldsmith, *supra* note 5, at 1100 (concerning how the traditional military model was perceived to be inadequate following 9/11: "All of these factors make it much more likely that the traditional military detention process will result in erroneous detentions. The costs of such erroneous detentions are also higher in this war. The war against al Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an

Nonetheless, while indefinite detention may serve specific short-term goals within the military model, the use of the criminal justice system afford individuals more robust procedural protections. Specific problems associated with the legality of such detention under the laws of war and international humanitarian law can be averted. The criminalization of terrorism is not without its problems. The largest controversy is the protection of sensitive information that could otherwise be kept from public awareness if terrorists are dealt with in the current military model. However, while military detention is more flexible than civilian detention, because of the safeguards it must provide, its usage seemingly undermines the rule of law and our attempt to legitimize a unified and effective stance against terrorism. Furthermore, this creates pressure on the criminal justice system to 'prove' it can handle prosecuting terrorists. This pressure that might sacrifice integrity in lieu of fairness.[215] The "national security interests implicated by the prosecution of Zacarias Moussaoui, indicted as the so-called 'twentieth hijacker,' would not be different were he a citizen."[216] The following passage conveniently sums up the viability of adjudicating terrorism through the criminal justice system. Ressam was an individual caught smuggling weapons into Washington State from the Canadian border in an attempt to set them off at the Los Angeles International Airport (LAX). The majority held that:

> I would suggest that the message to the world from today's sentencing is that our courts have not abandoned our commitment to the ideals that set our nation apart. We can deal with the threats to our national security without denying the accused fundamental constitutional protections.
>
> Despite the fact that Mr. Ressam is not an American citizen and despite the fact that he entered this country intent upon killing American citizens, he received an effective, vigorous defense, and the opportunity to have his guilt or innocence determined by a jury of 12 ordinary citizens. Most importantly, all of this occurred in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel.
>
> The tragedy of September 11th shook our sense of security and made us realize that we, too, are vulnerable to acts of terrorism. Unfortunately, some believe that this threat renders our Constitution obsolete. This is a Constitution for which men and women have died and continue to die and

unconditional surrender. Even if the conflict can be terminated in practical terms through the suppression or elimination of al Qaeda, moreover, there is reason to believe the conflict could span generations. The same seemed theoretically possible in the midst of traditional conflicts, of course, but in this war there is an unusually high risk that preventive detention may prove indefinite.").

[215] Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 44-45 ("Conversely, maintaining this alternative military detention system forces the civilian criminal justice system to demonstrate its capacity to prosecute terrorism cases successfully— with success measured in terms of convictions obtained rather than in the fairness and integrity of the procedures. This creates pressure to limit criminal defendants' rights—a trend reflected by recent proposals to expand the 'public safety' exception to *Miranda v. Arizona* to deflect criticisms of prosecuting terrorism suspects in federal court.").

[216] David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 378 (2003).

> which has made us a model among nations. If that view is allowed to prevail, the terrorists will have won.[217]

A few things are of note in this case. First, the individual was known to be a member of al-Qaeda-which has been the prime focus of much of our legislation. Second, the incident occurred prior to 9/11. This reflects aforementioned statements about our criminal justice already being capable of processing terrorists prior to the onslaught of legislation following 9/11. Third, this case poses a significant amount of physical danger due to the intended lethality of his actions. Nonetheless, our criminal justice system disposed of the individual without resorting to arbitrary or clandestine means. Thus, terrorism enhancements and the upward departure provision enacted in the PATRIOT Act ought to further the strength of courts ability to prosecute terrorists. Utilizing our federal court system instead of relying on military commissions that are modeled on the laws of war, international law, and treaties should serve as a symbol that crime is crime, and should deflect the politicization of terrorism and worldviews. Even if we attempt to undermine the political nature of terrorism, it still proves difficult because political motivations may serve as the prime basis of terrorism definitions.[218] To preserve the rule of law and the principles that guided the bulwark of our nation's due process development, it is essential to uphold democratic safeguards to all who are subject to punishment in the War on Terror.[219] We need to divert terrorist proceedings and status determinations to the criminal justice system. This will ensure that international law and norms are upheld, domestic procedural due process safeguards are met, terrorists receive definitive punishment, and the resolve of our rule of law goes unfettered.

[217] United States v. Ressam, 679 F.3d. 1069, 1078 (9th Cir. 2012).

[218] *See* Marny A. Requa, *Considering Just-World Thinking in Counterterrorism Cases: Miscarriages of Justice in Northern Ireland*, 27 HARV. HUM. RTS. J. 7, 17 (2014) (discussing the attempts of British leaders to thwart IRA terrorism by undermining their political motivations through 'criminalizing' terrorism; thus depriving it of its weight. However, the author concludes that this is problematic given that politics lies at the root of the definition of terrorism).

[219] Report to the House of Delegates, Am. Bar Ass'n, Task Force on Treatment of Enemy Combatants (February 10, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations03/109.authcheckdam.pdf.

PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AND THE SANCTITY OF CONTRACTS, FROM THE ANGLE OF LUCRUM CESSANS

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I. Introduction

In the aftermath of the Second World War, many resource rich-nations began to attain their political independence from their colonial masters. However, in addition to political independence these resource-rich nations also demanded economic independence. Included within this abstraction was the ability to exploit their natural resources for the purposes of economic development. To attain this goal, resource-rich nations saw the need to assert themselves on issues such as the control of their natural resources. Within the parameters of this goal was the need to reconsider the concession agreements formalized prior to their independence, a plethora of which were perceived as "inequitable and onerous."[1] This was certainly the case in *Kuwait v. American Independent Oil Co. (AMINOIL)*, in which the concession was granted to American Independent Oil before Kuwait had obtained its independence from Great Britain. This was by no means an isolated case. The need of developing countries to assert authority over natural resources led to the birth of the international law principle of permanent sovereignty over natural resources.

The principle of permanent sovereignty over natural resources evolved through various United Nations General Assembly Resolutions.[2] However, the "landmark resolution" is arguably the United Nations General Assembly Resolu-

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[1] Subrata Roy Chowdhury, *Permanent Sovereignty Over Natural Resources: Substratum of the Seoul Declaration*, *in* INTERNATIONAL LAW AND DEVELOPMENT 59, 61 (Paul de Wart et al. eds., 1988).

[2] *See* G.A. Res. 523 (VI), at 20, U.N. Doc. A/2052 (Jan. 12, 1952).

tion 1803 (XVII).[3] The evolution of the principle eventually culminated in the Charter of Economic Rights and Duties of States (CERDS), which, as the name suggests, highlights the rights and duties of states. As Burns H. Weston notes, the Charter signaled "the end of complete Northern hegemony and the emergence of a new interdependence of power and wealth."[4]

The principle of permanent sovereignty is often cited as a justification for the state's unilateral abrogation of a concession agreement, regardless of the fact that it contains a stabilization clause. It is thus essential to discuss this principle so that the reader has a sound grasp of this defense, for want of a better word, that resource-rich states typically invoke. The overall aim of this chapter is to demonstrate that the principle of permanent sovereignty over natural resources does indeed exist and is supported by various international sources. In addition, I aim to demonstrate that whilst rights do exist under this doctrine, they are not absolute and are accompanied by duties.

The aim of this article is to discuss the principle of permanent sovereignty in light of compensation to foreign investors in the event of expropriation. I intend to show that while permanent sovereignty is a legitimate concept under international law, it can be surrendered by host states through concessions. Once this happens, the sanctity of contracts becomes overriding policy. If a state breaches its contract with a foreign investor, there are consequences. This is particularly reflected in the fact that not only does the state have to pay compensation to the investor, the award for compensation may also include the payment of lost future profits or *lucrum cessans*. The next section discusses permanent sovereignty and the sanctity of contracts including relevant case law. The third section will discuss compensation standards and will incorporate a discussion of *lucrum cessans*. The fourth section will consist of a conclusion.

II. Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts

The principle of permanent sovereignty over natural resources essentially advances the argument that resource-rich nations should have control over their natural resources. Such an exertion of control entails the following: (1) the right to freely dispose of natural resources; (2) the right to explore and exploit natural resources freely; (3) the right to use natural resources for development; (4) the right to regulate foreign investment; and (5) the right to settle disputes on the basis of national law. Such control is contingent upon a state utilizing the resources for national development. In addition, in exercising the rights attached to this principle a state must act within the parameters of international law. Moreover, a degree of international cooperation is required.[5] The first part of this sec-

[3] PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 2 (Kamal Hossain & Subrata Roy Chowdhury eds., 1984).

[4] *See* Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437 (1981).

[5] Chowdhury, *supra* note 1, at 62 ("[T]he principle of permanent sovereignty is not an expression of national chauvinism nor a manifestation of an absolutist concept of State sovereignty which is incompati-

tion will discuss the general evolution of the principle of permanent sovereignty over natural resources. The second part will discuss the legal status of the General Assembly resolutions.

A. The Evolution of the Doctrine

The principle of permanent sovereignty over natural resources evolved over four phases.[6] The first phase took place between 1952 and the adoption of resolution 1803 (XVII) in 1962. The second phase, which was a reaffirmation of the principles propounded in Resolution 1803, took place between 1962 and 1973.[7] The third phase occurred during the Sixth Special Session in May 1974, which eventually led to the adoption of the Charter on December 12, 1974. Subrata Roy Chowdhury argues that the fourth phase began in the aftermath of 1974 – subsequent to the adoption of the Charter. Implicitly, the fourth phase is still a work in progress as the principle continues to evolve.

During the first phase, various resolutions had been passed relating to the principle of permanent sovereignty over natural resources. The focus was on the right of mineral-rich countries to utilize their natural resources as part of their sovereignty, which in turn was a facet of self-determination.[8] The first of these was General Assembly Resolution 523 (VI),[9] which recognized the right of underdeveloped countries "to determine freely the use of their natural resources." The condition attached to this, however, was that the state must "utilize such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests." This represented the recognition that although the state could utilize and exploit its natural resources, this had to be done for the purposes of national development.[10]

Following this was the General Assembly Resolution 1314 (XIII);[11] here the General Assembly stated that in view of the fact that the right to self-determination, as affirmed by two covenants drafted by the Human Rights Commission, included "permanent sovereignty over their wealth and natural resources," they needed to be fully informed about the doctrine. For this reason they decided to establish a commission comprised of both developed and developing countries which was charged with conducting a "full survey of the status of the permanent sovereignty of people and nations over their natural wealth."[12] They were to pay particular regard to "the rights and duties of States under international law and to

ble with the concept of supremacy of international law. It is a principle which represents the progressive development of international law in response to the felt need for a legal principle by reference to which traditional concessions or similar arrangement for exploitation for natural resources could be replaced by more equitable arrangements.").

6 PERMANENT SOVEREIGNTY, *supra* note 3, at 3-6.

7 *Id.* at 3.

8 *Id.*

9 G.A. Res. 523 (VI), *supra* note 2.

10 *See also* G.A. Res. 626 (VII), at 20, U.N. Doc. A/2332 (Dec. 21, 1952); G.A. Res. 837 (IX), at 21, U.N. Doc. A/2829 (Dec. 14, 1954).

11 G.A. Res. 1314 (XIII), at 27, U.N. Doc. A/4019 (Dec. 12, 1958).

12 *Id.*

the importance of encouraging international co-operation in the economic development of under-developed countries."[13]

Thereafter came landmark Resolution 1803 (XVII). It recognised "[t]he right of peoples and nations to permanent sovereignty over their wealth and resources must be exercised in the interest of their national development and the well-being of the people of the State concerned."[14] This resolution also recognized the right to nationalize foreign assets, provided that appropriate compensation was paid.[15]

The second phase, which took place between 1962 and 1973, consisted entirely of affirmations of Resolution 1803.[16] The next process in the evolution of the doctrine occurred during the Sixth Special Session of the General Assembly, which took place on May 1, 1974. General Assembly Resolution 3021 (S-VI) constituted a Declaration on the Establishment of a New International Economic Order.[17] This new economic order was to be based on "sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations."[18] This position was reaffirmed in General Assembly Resolution 3202 (S-VI), which was the Programme of Action on the Establishment of a New International Economic Order.[19]

The General Assembly resolutions culminated in the Charter of Economic Rights and Duties of States (CERDS). Article 2 of the said Charter states that, "[e]very State has and shall freely exercise full permanent sovereignty, including

[13] *See also* G.A. Res. 1515 (XV), at 9, U.N. Doc. A/4648 (Dec. 15, 1960) (The "sovereign right of every State to dispose of its wealth and natural resources.").

[14] G.A. Res. 1803 (XVII), at 15, U.N. Doc. A/5344 (Dec. 14, 1962).

[15] *Id.* ("Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases, the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.").

[16] *See* G.A. Res. 2158 (XXI), at 29, U.N. Doc. A/6518 (Nov. 25, 1966); G.A. Res. 2386 (XXIII), at 24, U.N. Doc. A/7324 (Dec. 19, 1968); G.A. Res. 2692 (XXV), at 63, U.N. Doc. A/8221 (Dec. 11, 1970); UNCTAD Res. 88 (XII), U.N. Doc. TD/B/421 (Oct. 19, 1972) (In which the right of all sovereign countries to freely dispose of their natural resources for the benefit of national development was recognized. It further stated that "in the application of this principle, such measures of nationalization as States may adopt in order to recover their natural resources, are the expression of a sovereign power in virtue of which it is for each State to fix the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts, without prejudice to what is set forth in the General Assembly resolution 1803 (XVII)."); *see also* G.A. Res. 3016 (XXVII), at 48, U.N. Doc. A/8963 (Dec. 18, 1972); G.A. Res. 3037 (XXVII), at 53, U.N. Doc. A/8824 (Dec. 19, 1972); G.A. Res. 3082 (XXVIII), at 40, U.N. Doc. A/9379 (Dec. 6, 1973); G.A. Res. 3171 (XXVIII), at 52, U.N. Doc. A/9400 (Dec. 17, 1973).

[17] *See* G.A. Res. 3021, U.N. Doc. A/RES/ S-6 (May 1, 1974).

[18] *Id.*

[19] *See* G.A. Res. 3202, U.N. Doc. A/RES/ S-6 (May 1, 1974).

possession, use and disposal, over all its wealth, natural resources and economic activities."[20] In addition, Article 2(a) mentions that states have the right to "regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities."[21] Article 2(b) states that the host state has the right to "regulate and supervise the activities of transnational corporations."[22] Another key feature is Article 2(c), which mentions that States have the right:

> To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[23]

The fourth phase occurred in the aftermath of the adoption of the Charter. There is need to examine the treaties that were concluded after 1974. This is in order to examine the general direction that states have taken the principle.[24]

B. Legal Status of the Principle of Permanent Sovereignty Over Natural Resources

Since the principle of permanent sovereignty over natural resources stems from General Assembly resolutions, there are questions as to whether the principle itself is binding. On the one hand, it is contended that general assembly resolutions are not binding.[25] While one cannot reasonably disregard the quasi-legislative functions of the General Assembly, whether it is a legislative organ is questionable.[26] There is an objection to two-thirds majority binding the minority, and binding a state to these resolutions may circumvent the traditional treaty-making process that, under some constitutions, prescribes that states ratify a treaty before they can be bound.[27]

On the other hand, it would be insalubrious, erroneous and ultimately dogmatic to completely disregard the principles espoused in General Assembly resolutions. The General Assembly is a vehicle through which the "formulation and

[20] G.A. Res. 3281 (XXIV), at art 2, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] PERMANENT SOVEREIGNTY, *supra* note 3, at 5-6.

[25] *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 113 (2d ed. 2006).

[26] PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 28 (6th ed. 2009).

[27] *Id.*

expression of the practice of states in matters pertaining to international law" are manifested.[28] Its procedures include voting and the eventual adoption of a resolution. It therefore follows that these resolutions constitute evidence of customary international law.[29]

Various arbitral tribunals have supported this view. The tribunal in *Libyan American Oil Co. ("LIAMCO") v Libya,* for example, opined that, "the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over natural resources."[30] This position was reaffirmed in *Texaco v Libya*, where the tribunal held that Resolution 1803 reflected the tenets of customary international law.[31] Their rationale was based on the said Resolution's reference to international law when it addresses nationalization.[32] The tribunal endorsed Resolution 1803, because it received the universal assent of both developed and developing nations. The tribunal in *Texaco* however, did not accept the Charter on Economic Rights and Duties of States, which it argued "must be analyzed as a political rather than as a legal declaration concerned with the ideological strategy of development and, as such, supported only by non-industrialized States."[33]

It has also been recognized that the resolutions pertaining to permanent sovereignty over natural resources are a reflection of rights and duties that already existed under international law.[34] This is further evidence that the principle of permanent sovereignty over natural resources is a legitimate one even if one would choose to dispute whether General Assembly resolutions are binding. Moreover, the principle has been accepted by the International Court of Justice ("ICJ"), as is clearly reflected in the *East Timor Case*[35] and, in more recent times, *Congo v Uganda*.[36] In the latter case, the ICJ explicitly recognized the

[28] Ian Brownlie, *Legal Status of Natural Resources in International Law (some aspects)*, 162 Recueil des Cours, 245, 260 (1979); *see also* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENTS 446 (3d ed. 2010).

[29] Brownlie, *supra* note 28; *see also* A. Akinsanya, *Permanent Sovereignty Over Natural Resources and the Future of Foreign Investment*, 7 J. INT'L STUD. 124, 125 (1978); Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969); *compare* Gregory J. Kerwin, *The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts* 32 DUKE L. J. 876, 899 (1983) ("General Assembly resolutions remain too unreliable to regard as definitive sources of international law.").

[30] Libyan Am. Oil Co. (LIAMCO) v. Gov't of Libyan Arab Republic, 20 I.L.M. 1, 53 (1981).

[31] *Id*. at 29-30.

[32] *Id*. at 29; *see also* Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463, 469 (1963).

[33] *See* Andreas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 124 (2003).

[34] Karol N. Gess, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis*, 13 INT'L & COMP. L.Q. 398, 411 (1964); *see also* R. R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549, 564 (1980).

[35] East Timor (Port. v Austrl.), 1995 I.C.J. 90 (June 30) (dissenting opinion of Judge Weeramantry).

[36] Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Report of Judgment, 2005 I.C.J. 168 (Dec. 19).

principle permanent sovereignty over natural resources as "a principle of customary international law."[37]

It can therefore be argued that the principle of permanent sovereignty over natural resources is firmly recognized under international law.[38] It is by the exercise of this sovereignty that states can enter into concession agreements with foreign investors. However, it is also this principle that is typically invoked when states wish to unilaterally abrogate a concession agreement. This is due to the presence of the word "permanent" in the principle, which has the effect of allowing a state, at any given time, to exit these agreements, regardless of a promise not to do so.[39] Clearly, there is a clash between this principle and the sanctity of contracts epitomized by the maxim, *pacta sunt servanda*. This next section of this article discusses this principle.

C. Sanctity of Contracts

The conceptual basis for the sanctity of contracts is rooted in a classical doctrine of contract law. This doctrine is premised on the theory of "freedom of contract." This essentially means that the parties are free to enter into contracts on terms that are freely determined by those parties.[40] In theory, once the state establishes that the agreement was indeed freely entered into, it has no choice but to enforce it.[41] The aim of this section is to give an overview of this concept. This classical doctrine of contract law was propounded in the nineteenth century.[42] It is encapsulated in the phrase "freedom of contract," which entails that the parties are free to enter into whatever agreements they wish, with minimal state interference.[43] Provided that there is a "meeting of the minds,"[44] the parties can enter

[37] *Id.* at ¶ 244. Note however that it does not apply in situations of "looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State," *id*. Judge Koroma, in his declaration, contends that the ICJ's acknowledgement of the principle as a customary norm implies that the rights and duties emanating from it "remain in effect at all times, including *during armed conflict and occupation*." *Id*. at ¶ 229. *Compare* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Dissent, 2005 I.C.J. 361, §56 (Dec. 19) (contending that, "[t]he PSNR was adopted in the era of decolonization and the assertion of the rights of newly independent States. It thus would be inappropriate to invoke this concept in a case involving two African countries. This remark is made without prejudice to the right of States to own and or dispose of their natural resources as they wish.").

[38] Robert Dufrense, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L L. & POL. 331, 354 (2004). PERMANENT SOVEREIGNTY, *supra* note 3, at 1, ix; AFM Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT'L L.J. 1, 23 (2001); *see also* Nico Schrijver, *Natural Resources, Permanent Sovereignty Over*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC. INTERNATIONAL LAW 8 (2010), *available at* http://ilmc.univie.ac.at/uploads/media/PSNR_empil.pdf.

[39] *See* Jimenez de Arechaga, *General Course in Public International Law*, 159 Recueil des Cours 307-09 (1978).

[40] Daniel P. O'Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases,* 65 SMU L. REV. 145, 165 (2012).

[41] Spencer Nathan Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J.LEGAL STUD. 17, 21 (1988).

[42] James Gordley, *The Moral Foundations of Private Law,* 47 AM. JURIS. 1, 16-17 (2002).

[43] JILL POOLE, TEXTBOOK ON CONTRACT LAW 5 (11th ed. 2012). *See also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV 553, 575 (1933) ("[A]ccording to the classical view, the law of

into any agreement they wish, and the only obligation of the state is to uphold said agreement.[45]

The doctrine was developed at a time when economic and political thought was rooted in liberalism.[46] This theory was based on the concept that individuals had absolute autonomy and the state only had the right to intervene in order to protect others from harm.[47] As alluded to earlier, this theory also extended to economics under the auspices of laissez-faire economics, a theory that propounded that the economy works better if the state simply allows events to take their own course.[48] A core feature of classical theory is party autonomy.

The doctrine did lose some traction in the late nineteenth century, with the emergence of the reliance theory, which sought to conjoin contract obligations with tortious ones.[49] The classic theory, however, was resurrected by Fried in 1981.[50] Under his promise principle, contract law imposes a moral basis upon which the parties impose rights and obligations upon themselves where none had previously existed.[51] It is argued under this theory that the social utility is advanced where there is a regime of "trust and confidence in promises and truthfulness."[52] Furthermore, it is argued that once an individual has intentionally given the other party grounds to expect performance, there is a moral duty to keep that promise.[53] Failure to do so is a breach of trust and tantamount to lying, which is immoral.[54]

I hasten to add at this point that morality is not rooted in what people think, believe or feel; rather, it is guided by the principle that "the gratuitous infliction of pain is wrong."[55] The central concern is for how people should lead their lives and how they should treat each other.[56] Indeed, it is recognized that all people

contract gives expression to and protects the will of the parties, for the will is something worthy of respect.").

[44] Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 300 (1986).

[45] Thal, *supra* note 41, at 21.

[46] MICHAEL FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 22–25 (2012).

[47] JOHN STUART MILL, ON LIBERTY 27 (Bedford/St. Martin's 2008) (1859).

[48] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (40th anniversary ed. 2002). *But cf.* JOHN M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY (1936).

[49] Charles Fried, *Contract as Promise Thirty Years On*, 45 SUFFOLK U. L. REV. 961 (2012); *see also* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 771 (1979); Thal, *supra* note 41, at 28-29 (for a discussion on inequality and fairness); Patrick S. Atiyah *Contracts, Promises and the Law of Obligations*, 94 L. Q. REV. 193, 199, 221 (1978); GRANT GILMORE, THE DEATH OF CONTRACT 15-17, 79-81 (1974); *but cf.* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 656 (2009).

[50] *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); Curtis Bridgeman & John C.P. Goldberg, *Do Promises Distinguish Contract from Tort?*, 45 SUFFOLK U. L. REV. 873 (2012).

[51] FRIED, *supra* note 49, at 1.

[52] *Id.* at 17

[53] *Id.* at 16.

[54] *Id.*; *see also* Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1619 (2009).

[55] Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 2 (2007).

[56] *Id.*

have goals, aspirations and projects, which in turn have some sort of effect on people. Whilst it is perfectly permissible to pursue these goals, morality does condemn "a way of life indifferent to the well-being of others, and even more strongly condemns pursuits that are constituted by the frustration, humiliation or destruction of others."[57]

The only difficulty with the morality argument is that it does not adequately explain the reason behind the enforcement of contracts.[58] The morality element fails to distinguish between what the promisor ought to do and what he or she is legally bound to do.[59] As Gould notes:

> This is not an easy distinction to make on promise-based principles. Unfortunately, Fried's promissory theory does not adequately explain why a moral duty of the promisor should translate into a legal right held by the promisee. Invoking the convention of promising, even in conjunction with values of autonomy and trust, does not bridge this conceptual gap.[60]

In my view, a party is bound to a contract not because they are morally obligated but because they have consented to be bound.[61] This is owing to the fact that contract law is concerned with the alienation or transfer of rights and the law is designed to protect against the wrongful interference with this process. One of the elements required under the law of contracts is the intention to be legally bound.[62] The actual promise or even acceptance of that promise is in itself inadequate for creating contractual obligations.[63] Although the promise is a manifestation of the intention to be legally bound, it is the intention itself that renders a contract binding.[64] For this reason, morality and the promise principle are a useful starting point, but do not adequately explain why contracts are binding.

The sanctity of contracts is well recognized under international investment law. Earlier cases such as *Lena Goldfields v. USSR*, for example, recognized that when a state unilaterally cancels a contract, despite an agreement not to do so, then the state must compensate the investor.[65] Similarly, in the case of *Sapphire International Petroleum Ltd. v National Iranian Oil Co ("NIOC")*, the government of Iran had nationalized assets belonging to Sapphire International. This was contrary to a stabilization clause in their concession agreement, which spe-

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[57] *Id.* at 3; *see also* Fried, *supra* note 49, at 977-78.

[58] Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 20 (2009).

[59] *Id.*

[60] *Id.* at 21.

[61] *See,* Barnett, *supra* note 44, at 304-05; *see also* Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).

[62] Barnett, *supra* note 44, at 304.

[63] *Id.* at 305.

[64] *Id.*; *see also* Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647 (2012).

[65] Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. And the Soviet Government*, 36 CORNELL L. REV. 31, 51 (1950) (the original version of this award has been lost so this is a reproduction); *see* Marguerita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 227 (2002).

cifically stated that the government would not take any administrative or legislative action that would adversely affect the investor.[66] The arbitral tribunal opined that the unilateral termination of the contract rendered the state susceptible to pay compensation to Sapphire International. In arriving at their decision, the tribunal primarily relied upon the principle of *pacta sunt servanda*. This principle, based on the sanctity of contracts, entails that once a state enters into an agreement, it is bound by it. Failure to uphold that agreement amounts to a breach of contract.[67] The tribunal stated:

> This rule is simply a direct deduction from the principle *pacta sunt servanda*, since its only effect is substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes loss suffered (*damnum emergens*), for example expenses incurred in performing the contract, and the profit lost (lucrum cessans), for example the net profit which the contract would have produced. The award of compensation for lost profit or the loss of a possible benefit has been frequently allowed by international tribunals.[68]

Questions undoubtedly arise as to whether such a position leads to a clash between the principle of permanent sovereignty over natural resources and the principle of the sanctity of contracts. This is due to the fact that binding the state to concessions entered into will undoubtedly mean the stifling of the prerogatives at their disposal. However, it is through these very prerogatives that the state has the right, jurisdiction and authority to enter into concessions in the first place. Because a state chooses to bind itself and therefore temporarily surrender its sovereign prerogatives, it can be said that the principle of permanent sovereignty is accentuated and complimented by the principle of the sanctity of contracts.

Such a position clearly conflicts with the principle of permanent sovereignty over natural resources. This is because it effectively prevents the state from utilizing its prerogatives. Although arbitral tribunals have considered this, they have ultimately rejected it.[69] In *Saudi Arabia v Aramco*, the tribunal opined that:

> [b]y reason of its very sovereignty within its territorial domain, the State possess the legal powers to grant rights [by] which it forbids itself to withdraw before the end of the concession, with the reservation of the Clauses of the Concession Agreement relating to its revocation. Nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the

[66] Sapphire International Petroleums Ltd. v. National Iranian Oil Company, 35 I.L.R. 136 (1967) (where no general or statutory measure or decree of any kind, made either by the government or by any government authority in Iran (central or local), including NIOC, can cancel the agreement or affect or change its provisions, or prevent or hinder its performance. No cancellation, amendment or modification can take place except with the agreement of the two parties).

[67] *Id*. at 181.

[68] *Id*. at 186.

[69] Saudi Arabia v. Arabian American Oil Company (Aramco), 27 I.L.R. 117, 227 (1963).

> concessionaire irretractable rights. Such rights have the character of acquired rights.[70]

As far as the tribunals were concerned, once a state has entered into a contract it is bound by it. This is because it gives the investor a "legitimate expectation" which the state cannot renege on.[71]

This line of reasoning has also been taken in other leading cases. The tribunal in *Texaco v. Libya* was particularly vociferous in this respect. In that case, the government of Libya had nationalized assets belonging to Texaco. The concession earlier granted to the aforementioned oil company had contained a stabilization clause.[72] The government of Libya contended that upholding this clause would militate against the principle of permanent sovereignty over natural resources. The arbitrator disagreed, and contended that it is in fact possible for a sovereign to bind itself through a concession agreement with a foreign investor. The arbitrator focused primarily on the principle of *pacta sunt servanda*. He further explored the principles of Islamic and Shari'a law, which were sources of the Libyan law that was applicable as per Clause 28(7) of the concession agreement.[73] The arbitrator observed that the sanctity of contracts was well recognized under Shari'a law.[74] In fact, the rule was applied more rigidly to a sovereign than it was to an ordinary citizen because of the wide discretionary powers available to the former.[75]

Moreover, the arbitrator observed that General Assembly Resolution 1803 required states to observe all foreign investment agreements in good faith. This requirement was also recognized under the Charter on Economic Rights and Duties of States.[76] The arbitrator thus disagreed with the contention that upholding the stabilization clause within the contract was incongruous with the principle of permanent sovereignty over natural resources. As far as the arbitrator was concerned, Libya's sovereign powers remained intact. However, they could not be

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[70] *Id.* at 168; *see also* AGIP Company v. Popular Republic of the Congo, 21 I.L.M. 726 (1982) (The arbitral tribunal here also rejected the sovereignty argument, on the basis that the Congolese government had freely entered into and accepted these agreements. Furthermore, the arbitral tribunal held that the host State still possessed its legislative and regulatory powers, they simply could not invoke these against an investor with whom they had a prior agreement).

[71] CHARLES ROUSSEAU, LES MELANGUES OFFERTS A CHARLES ROUSSEAU (LA COMMUNAUTE INTERNATIONAL) 326 (1974).

[72] Clause 16 of the concession, which was the stabilization clause read as follows: "(1) The Government of Libya, the Commission and the appropriate provincial authorities will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties. (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the Agreement of Amendment by which this paragraph was incorporated in this Concession Agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent." Texaco Overseas Petroleum Co. v. the Government of the Libyan Arab Republic, Award (Jan. 19, 1977), 17 I.L.M. 1, 4 (1978) (citation omitted).

[73] *Id.* at 18, 23.

[74] *Id.* at 23.

[75] *Id.*

[76] *Id.* at 30–31.

used against citizens with whom they had pre-existing contractual obligations. He further stated:

> "a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty, and cannot through measures belonging to its internal order make null and void the rights of the contracting party which has performed its various obligations under the contract."[77]

The arbitrator further stated that contracts must be respected for to rule otherwise would undermine the credibility of states. It would do so by creating an imbalance between the parties by creating a situation whereby the investor is bound by the contract but the state is not. Such a position would militate against the principle of good faith.[78] A similar reasoning is echoed in *LETCO v. Liberia*.[79] The tribunal in this case held that stabilization clauses "must be respected," otherwise the state would be allowed to avoid fulfilling their contractual obligations by abusing the legislative process to override them.[80]

Thus far, it has been understood that the principle of permanent sovereignty over natural resources is a legitimate one under international law. It is firmly recognized by the academic community, international arbitral tribunals and the ICJ as a customary norm. However, it has also demonstrated that the right to permanent sovereignty over natural resources can be surrendered for a limited time when a state grants a concession to the investor. It cannot be said that there is a clash between the sanctity of contracts and permanent sovereignty over natural resources, because entering into contracts is a facet of the latter principle. Upholding the sanctity of contracts therefore does not militate against the principle of permanent sovereignty over natural resources; it accentuates it. Once a state enters into a contract, it gives the investor a legitimate expectation to make a profit from the concession. Once a state unilaterally breaches the contract, it must pay compensation to the investor including *lucrum cessans*. The issue of compensation is discussed in the next section.

III. A Reflection of the Sanctity of Contracts Under Compensation Standards

It is axiomatic that where a state breaches a contract, there is an obligation to compensate the other party to the contract.[81] The issue of compensation is a controversial one, and this is demonstrated in the fact that there are two divergent

[77] *Id.* at 23–24.

[78] *Id.* at 31.

[79] Liberian Eastern Timber Company v. Republic of Liberia, ICSID Case No. ARB/83/2, Award (Mar. 31, 1986), 2 ICSID Rep. 368 (1989).

[80] *Id.*

[81] Muna Ndulo, *The Nationalization of the Zambian Copper Industry*, 6 Zambia L.J. 55, 65 (1974); *see also* the *Upton Case* (1903) Ven. Arb., 173. *But see* Francesco Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity* 24 INT'L & COMP. L. Q. 255, 266–269 (1975) (notes instances in which the State has refused outright to pay compensation).

standards propounded under international law: (1) the Hull principle;[82] and (2) the appropriate compensation principle.[83] Under the latter principle, compensation should be determined on a case-by-case basis, taking into account all the relevant circumstances, and arriving at a figure that might be deemed appropriate.[84] This can be contrasted with the Hull principle, which states that compensation ought to be "prompt, adequate and effective." The term "adequate" is of particular importance because it prescribes that lost profits ("*lucrum cessans*") have to be paid.[85] The first part of this section will give an overview of the two standards. The second part will discuss *lucrum cessans*.

A. Full or Appropriate Compensation

The Hull Principle prescribes that compensation be "prompt, adequate and effective."[86] "Prompt" means that payment should be made to the investor within a reasonable time frame. Therefore, this connotes that there should be no unwarranted delays in compensating the investor for expropriated property.[87] "Effective" simply means that the currency of the compensation should be freely convertible and that there should be no restriction on its repatriation.[88]

Most important is the term "adequate." The requirement here is that the nationalizing state must put the investor in the same position they would have been in if the former had not expropriated the property of the latter in the first instance. This will usually mean paying full market value for the expropriated assets, including future profits.[89] This was elaborated upon by the United States State Department, which took the position that once American-owned property had been expropriated, the investor must be compensated for the fair market value of said property.[90] This would entail restoring the investor to the same position they would have been in had the expropriatory act not occurred. The means of ascertaining this is by way of three methods of valuation: the going concern approach,

[82] *See* Tippets, Abbett, McCarthy, Stratton v. TAMS AFFA, 6 Iran–US Cl. Trib. Rep. 219, 225 (1984); Amoco Int'l Fin. Corp. v. Iran, Award, ¶ 207 (July 14, 1987), 15 Iran-U.S. Cl. Trib. Rep. 189, 254 (1988); GREEN HACKWORTH, DIGEST OF INTERNATIONAL LAW 660-665 (3d ed.1942).

[83] *See generally* G.A. Res. 1803, *supra* note 14; G.A. Res. 29/3281 (XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974); *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, 840 F.2d 72 (D.C. Cir. 1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

[84] Shahin Shan Ebrahimi v. the Government of the Islamic Republic of Iran, AWD 560-44/46/47-3, Award 38–39, 44 (1994).

[85] See AGIP, 21 I.L.M. at 737; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 775 (Jul. 24, 2008); Richard J. Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 517, 518 (1976) (what compensation qualifies as "adequate" is one that the Council on International Economic Policy's ("CIEP") Inter-Agency Expropriation Group "must wrestle with" regularly).

[86] *See* Francioni, *supra* note 81, at 263–264.

[87] Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLUM. J.TRANSNAT'L L., 615, 620 (1984-85).

[88] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §712 (Tentative Draft No. 3, 1982).

[89] Smith, *supra* note 85, at 519.

[90] *Id.*

the replacement cost, and the book value approach. These are listed in order of the State Department's preference.

The going concern approach essentially examines the earning power of the asset that has been expropriated.[91] It therefore means arriving at a figure that incorporates loss of future profits by looking at the past earnings of the expropriated asset or estimates of future earnings.[92] This can be contrasted with the second approach highlighted, which evaluates damages by looking at the "replacement cost of the property at the time of the expropriation less actual depreciation."[93] The amount will typically be substantially greater than the book value of the company, however, it does not take into account loss of future profits. The book value approach looks at "values assets at acquisition cost less depreciation." Because this approach bears no relationship to the actual value of the asset, it is the State Department's least preferred method of valuation.[94]

The Hull Formula can be contrasted with the "appropriate compensation" standard, which provides that the amount of compensation payable to the investor should be determined on a case-by-case basis.[95] There is no precise definition of appropriate compensation nor are there any prescriptive requirements under this standard.[96] Of course, the advantage of this is that it provides arbitrators with the necessary flexibility needed to accommodate all the prevailing circumstances of the case when determining the amount of compensation payable to the investor.[97]

The standard is certainly endorsed in the General Assembly Resolution 1803 and the Charter on the Rights and Duties of States.[98] It is also endorsed by the European Court of Human Rights ("ECHR"), the United Kingdom House of Lords, and the United States Court of Appeals for the Second Circuit. In the case of *Lithgow v United Kingdom*,[99] the ECHR held that the right to nationalize is inextricably linked to the determination of the amount of compensation that ought to be paid to the investor.[100] Only the state has the right to determine this

[91] *See generally* American Int'l Group, Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983) (where the tribunal valued the nationalized company as a going concern and took into account "not only the net book value of its assets but also such elements as good will and likely future profitability").

[92] Smith, *supra* note 85, at 519; *see also* Edith Penrose et al, *Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation*, 55 MODERN L. REV. 351, 365 (1992).

[93] Smith, *supra* note 85, at 519.

[94] *Id*.; *see also* Maarten H Muller, *Compensation for Nationalization: A North-South Dialogue* 19 COLUM. J. TRANSNAT'L L. 35, 44–46 (1981) (where it is noted that this method of valuation is supported by Least Developed Countries).

[95] Ebrahimi AWD 560-44/46/47-3, Award 38-39, 44; *see also* Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 185 (1979).

[96] Rudolf Dolzer, *Expropriation for Nationalization*, 8 ENCYCLOPEDIA PUB. INT'L L. 214, 219 (1989); Andra Eisenberg, *Different Constitutional Formulations of Compensation Clauses*, 9 S. AFR. J. HUM. RIGHTS 412, 418 (1993).

[97] M. Sornarajah, *Compensation for Expropriation. The Emergence of New Standards*, 13 J. WORLD TRADE L. 108, 127–128 (1979).

[98] *Id*.

[99] Lithgow v. U.K., [1986] 8 EHRR 329, 373 (U.K.).

[100] *Id*.

because they are best placed to analyze the needs of the society and its resources.[101] They cannot question this right unless there are legitimate reasons to do so.[102] Similarly, in *Williams & Humbert v. W & T Trademarks*,[103] the U.K. House of Lords stated that the correct standard of compensation was "appropriate compensation."[104] In the case of *Banco Nacional de Cuba v. Chase Manhattan Bank*[105] the United States Court of Appeals for the Second Circuit adopted the "appropriate compensation standard." However, it did acknowledge that appropriate could mean "full." The Second Circuit's opinion stated:

> It may well be the consensus of nations that full compensation need not be paid "in all circumstances," and that requiring an expropriating state to pay "appropriate compensation," — even considering the lack of precise definition of that term — would come closest to reflecting what international law requires. But the adoption of an "appropriate compensation" requirement would not exclude the possibility that in some cases full compensation would be appropriate. We see no reason why the two standards may not overlap, and indeed on the facts of the present case we conclude that we need not choose between a standard of full compensation and that of appropriate compensation. Although the award we approve for Chase is less than it seeks and more than Banco Nacional would wish, we nevertheless view it as full compensation for Chase's loss, and neither more nor less than is appropriate in the circumstances.[106]

Similar views are expressed in the World Bank Guidelines on the Treatment of Foreign Direct Investment.[107] Although the standard endorsed is appropriate compensation, it is stated that compensation can only be deemed appropriate if it is "adequate, effective and prompt."[108] Thus, although the World Bank appears to explicitly endorse the "appropriate compensation" standard, it really is effectively applying the Hull Principle. This seems to be the trend in the case law dealing with the issue of compensation for expropriation. The Hull Principle, although not universally accepted,[109] seems to be reflected in the decisions of arbitral tribunals. Although they do not explicitly endorse it, the effect of these

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[101] *Id.*

[102] *Id.*

[103] *See* Williams and Humbert v. W. & H. Trademarks (Jersey) Ltd., [1986] A.C. 368 (H.L.) (U.K.).

[104] *Id.* at 430–441.

[105] *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981).

[106] *Id.* at 892–93.

[107] *See also,* World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, 31 I.L.M. 1366, 1382 (1992).

[108] *Id.*

[109] *See* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984); Frank G. Dawson and Burns H. Weston, *Prompt, Adequate and Effective: A Universal Standard of Compensation?* 30 FORDHAM L. REV. 727, 728–58 (1962).

decisions reflects a standard that resembles the Hull Principle.[110] This is particularly due to the willingness of tribunals to award *lucrum cessans*.

B. Awards of *Lucrum Cessans*

As was highlighted by the Permanent Court of International Justice in the *Case Concerning German Interests in Upper Silesia* ("*Chorzow Factory case*"),[111] the purpose of compensating the investor is to wipe out all the consequences of the expropriatory act and to re-establish the situation that would have existed if the host government had not taken the action it did.[112] This entails an award of compensation that includes lost future profits.[113] In determining lost profits, the method typically utilized is the discounted cash flow ("DCF") method. The purpose of this method is to determine the "value of the business by projecting the net cash flow for a certain time period into the future and then discounting it back to the present value as of the date of the breach."[114] The method values the asset on the basis of its ability to generate an income, and therefore the amount awarded to the claimant will reflect both the loss incurred including future profits.[115]

Lost future profits were certainly awarded in *Lena Goldfields Ltd v USSR*.[116] When the Soviet government had nationalized assets belonging to Lena Goldfields despite an express undertaking not to do so, the Court of Arbitration recognized that the unilateral repudiation of the contract was illegal.[117] The Court further held that the host government had unjustly enriched itself as a result of their repudiation.[118] Lena was thus awarded a sum of just under £13 million.[119] Implicitly, lost future profits were included in this future profits because it far exceeded their initial investment of $20 million.[120]

Further evidence that the sanctity of contracts is respected lies in the fact that arbitral tribunals make no distinction between whether the taking is legal or illegal. There is recognition that once a state breaches a contract in the exercise of its

110 Gann, *supra* note 87, at 616. *See also* M.H. Mendelson, *Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414, 415–20 (1985).

111 *See* Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) Nos. 7, 9, 17, 19 (May 25).

112 *Id*.

113 *Id*. at 52; *see also* Starret Housing Corp v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 112, 196–201 (1987).

114 John Y. Gotanda, *Recovering Lost Profits in International Disputes*, 36 GEO. J. INT'L L. 61, 62-112 (2005).

115 *Id*. at 90.

116 Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L. Q. 31, 42 (1951).

117 Jason W. Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth or Reality*, 32 FORDHAM INT'L L.J. 1550, 1575 (2009). Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217, 227 (2001-2002). *See also* Ruler of Qatar v. Int'l Marine Oil Co. Ltd., 20 I.L.R. 534 (1953).

118 *Id*. at 51.

119 *Id*. at 52.

120 Yackee, *supra* note 117, at 1575.

sovereign right to nationalize, it automatically triggers the duty to pay compensation to the investor. This figure will still include loss of future profits. This position is clearly illustrated in *LIAMCO v. Libya*. The arbitrator clearly stated that the taking was not illegal per se and to rule otherwise would be an unwarranted encroachment upon the sovereignty of the state. However, the premature termination of contract did render the state susceptible to the duty of pay compensation to the concessionaire in such instances[121] and this would include the payment of future profits.[122] The arbitrator went on to say that:

> In such confused state of international law, . . . it appears clearly that there is no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization in lieu of specific performance, and in particular concerning the problem whether or not all or part of the loss of profits (*lucrum cessans*) should be included in that compensation in addition to the damage incurred (*damnum emergens*).[123]

Thus, despite the fact that the taking was legal, Libya still had to be compensated for lost future profits. The tribunal determined the amounts by looking at the revenue that LIAMCO would have generated between the time that the government had expropriated their asset and the time that the contract would have lapsed. From this, they arrived at a gross figure. They then deducted any operating costs and any taxes and royalties payable to the government of Libya upon which they arrived at a net figure. They then applied a 12 percent discount to this net figure and their valuation came to $186,270,000.[124]

LIAMCO v. Libya is by no means an isolated case. *Kuwait v. AMINOIL*[125] is yet another example of an arbitral tribunal deeming the nationalization legal, but ultimately awarding compensation reflecting *lucrum cessans*. In 1948, the Sheikh of Kuwait had entered into an agreement with AMINOIL for the latter to explore and exploit oil fields belonging to Kuwait. This concession was to last for a period of sixty years. This agreement was amended after Kuwaiti independence, and once again in 1973 to reflect the Abu Dhabi formula that effectively raised taxes and royalties payable to Kuwait.[126]

When determining compensation therefore, the arbitral tribunal held that the changes the contract had undergone and the AMINOIL's acquiescence to these changes meant that the character of the concession, on the whole, had changed.[127] This fact was reflected in the tribunal's calculation of the compensation award. When determining lost future profits, the tribunal took the gross pro-

[121] LIAMCO, 20 I.L.M. at 60.

[122] *Id.* at 81.

[123] *Id.* at 76.

[124] Gann, *supra* note 87, at 630–31.

[125] *See* Kuwait v. Am. Indep. Oil, 21 I.L.M. 976 (1982).

[126] *Id.* at 1035.

[127] *Id.* at 1023.

jected earnings and then deducted tax and royalties based on figures prescribed by the 1973 agreement as opposed to the lower rates based on the earlier agreement.[128] Once again, in this way, they were reflecting the principle of *pacta sunt servanda* and thus respecting the sanctity of contracts.

International Centre for Settlement of Investment Disputes (ICSID) tribunals have been equally as willing to offer lost future profits.[129] However, they have been unwilling to award lost future profits in instances where it is impossible to determine lost future profits because there is no profit history to base it on.[130] The right to lost future profits must also be read in conjunction with the abuse of rights doctrine. This doctrine has been invoked in recent years to deny the claimant-investor lost profits. The case of Himpurna California *Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara*[131] is illustrative in this regard. In this case, Himpurna had entered into an agreement with Perushaan Listruik Negara (PLN), which was an Indonesian electricity company that was owned by the Indonesian government. Himpurna, under this agreement, was to generate electricity and then sell it to PLN. The latter was then to supply electricity to the Indonesian public. Due to adverse economic circumstances in Indonesia at the time, PLN failed to purchase the electricity generated by Himpurna. The latter thus initiated arbitral proceedings.

Himpurna was essentially claiming $2.3 billion in damages. This figure not only included *damnum emergens*, which consisted of their initial investment plus interest, it also included *lucrum cessans*, which consisted of their expected future earnings. The arbitral tribunal, pursuant to Article 1217 of the Indonesian Civil Code, did pay *damnum emergens* because Himpurna was entitled to reimbursement for the money they spent in reliance on the contract.[132] Although the tribunal recognized that *lucrum cessans* were recognized under Indonesian law, they should not be calculated in such a way that would effectively impoverish the host state. Such an action would, in their view, militate against the abuse of rights

[128] *Id.* at 1037–38.

[129] *See* AGIP, 21 I.L.M. at 739 (The host government had taken over assets belonging to the claimants. The applicable law here was the Congolese Law which incorporated the French Civil Code. Under the aforementioned legal regime, lost future profits were recoverable and for this reason the Arbitral Tribunal Awarded lost future profits to AGIP).

[130] *See* Benevuti en Bonfant v. People's Republic of Congo, 21 I.L.M. 740, 760 (1982); *see however* Société Ouest Africaine des Bétons Industriels v. State of Senegal, ICSID Case No. ARB/82/1, Award, (Feb. 25, 1988) 2 ICSID Rep. 190 (1994) (future profits were granted despite the company having no profit-making history). This case is by no means an isolated one and is consistent with the *Delagoa Bay and East African Railway Co. case* (1900) in 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, at 1694, 1697 (1943) (where *lucrum cessans* were payable, despite the fact that the annulment was effected before the railroad had begun to operate). *See also* Sapphire International, 35 I.L.R., at 187–-88 (The arbitral tribunal awarded lost profits to a claimant despite the fact that the area in question had not yet been prospected. Here the tribunal held that "It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behavior of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.").

[131] *See* Himpurna California Energy Ltd., v. PT. (Persero) Perusahaan Listruik Negara, Final Award of 4 May 1999, 25 Y.B. COM. ARB. 13 (2000).

[132] *Id.* at 78-79, 83. (as damnnum emergens, Himpurna was thus awarded a sum of $273,757,306, which consisted of $254,502,586 in historical costs and $19,254,720 in order to reflect the current value).

doctrine. Under this principle, parties have an obligation to observe good faith as they exercise their rights. Therefore, as a result of this doctrine, Himpurna was barred from its right to a bargain. The tribunal further opined:

> This is a case where the doctrine of abuse of right must be applied in favour of PLN to prevent the claimant's undoubtedly legitimate rights from being extended beyond tolerable norms, on the ground that it would be intolerable in the present case to uphold claims for lost profits from investment not yet incurred.[133]

The tribunal thus refused to calculate lost profits "as though the claimant had an unfettered right to create ever-increasing losses for the State of Indonesia (and its people) by generating energy without any regard to whether or not PLN had any use for it."[134] Interestingly, the tribunal stated that it would have come to the same conclusion even if this right had been derived from an explicit term of the contract.[135] This case therefore represents a limitation on the sanctity of contracts. Himpurna was awarded a sum of $117,244,000 in lost profits, a figure that constituted less than 10 percent of the amount initially claimed by Himpurna.[136] The tribunal arrived at this figure by determining their net cash flow projections and then capping this figure at 36 percent, before discounting it to the present value rate of 19 percent.[137]

This case can be contrasted with *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara ("Pertamina")*.[138] In similar circumstances to the ones described in the preceding case, Pertamina was unable to purchase energy from Karaha Bodas as per an agreement between the two. The latter thus initiated arbitral proceedings for breach of contract. The tribunal awarded Karaha Bodas a sum of $111.1 million for lost expenditures and an additional $150 million for lost profits.[139] At this point the abuse of rights doctrine was not discussed.[140] Pertamina only raised it as an issue when Karaha Bodas sought recognition and enforcement of the award in the United States, on the basis that construction on the project was not yet complete and that the Indonesian economy was in ruins. Awarding lost future profits would thus amount to an abuse of rights, which Pertamina argued contravened U.S. public policy.[141] The abuse of rights doctrine was rejected both by the U.S. District Court for the Southern District of Texas and the U.S. Court of Appeals for the Fifth Circuit.

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[133] *Id*. at 93.

[134] *Id*. at 90.

[135] *Id.*

[136] *Id*. at 103.

[137] *Id*.

[138] Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak, 364 F.3d 274, 306 (5th Cir. 2004).

[139] Louis T. Wells, *Double Dipping in the Arbitration Awards? An Economist Questions Damages Awarded to Karaha Boadas Company in Indonesia*, 19 ARB. INT'L 471, 472 (2003).

[140] *Id*.

[141] *Karaha Bodas v. Perusahaan Pertambangan Minyak*, 190 F. Supp. 2d 936, 955 (S.D. Tex. 2001).

The Fifth Circuit noted that the abuse of rights doctrine was not firmly established under American law and therefore was inapplicable.[142]

IV. Conclusion

It can be concluded that the principle of permanent sovereignty over natural resources is a legitimate one. A facet of this principle is the ability to enter into agreements with foreign investors for the exploration and exploitation of natural resources. Once these agreements are entered into, it activates another fundamental principle: the sanctity of contracts. This principle prescribes that once a party enters into a contract, it bound by that contract, regardless of whether one of the parties is a sovereign state.

Although it may be argued that there is a conflict between the principle of permanent sovereignty over natural resources and the sanctity of contracts, this contention is misplaced. This is owing to the fact that it is by a state's very sovereignty that it enters into an agreement. Once it does so, it elicits legitimate expectations on the part of the investor. Thus, once a state unilaterally breaches a contract, it must compensate the investor and this includes *lucrum cessans*. The sanctity of contracts does not trump the doctrine of permanent sovereignty over natural resources. It simply accentuates it and reflects the legitimate expectations of the investor.

[142] Karaha Bodas, 364 F.3d at 306 (The court noted that the principle is only applicable in three particular circumstances. These are where: (1) the overriding motive for the action is to cause harm, (2) the action is unreasonable, that is to say there is no legitimate interest in the exercise of the right and this exercise harms another or (3) the right is exercised for a reason other than for which it exists. They were satisfied that none of these conditions applied in this instance.).

Relevant Aspects of the New Mexican Competition Law: Agencies, Legal Institutions and Proceedings.

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I. Introduction

The new Mexican Competition Act, officially called the *Federal Law of Economic Competition* (hereinafter "FLEC"), was published in the *Official Gazette*

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of the Federation (hereinafter "OGF") on May 23, 2014.[1] This new law introduces several new features to update the competition law institutions, but above all it is the development of the constitutional amendment on competition and telecommunications published in the OGF on June 11, 2013 (hereinafter "the constitutional amendment"). Thus, this new law is also part of a complex political process committed to a series of profound reforms[2] aimed not only to initiate the potential of the Mexican economy but also to notably improve the legal system as a whole.

The constitutional amendment is perhaps the most significant constitutional change concerning competition and telecommunications affairs during the life of our Constitution (enacted and in force since 1917). Hence, although enacted together, the constitutional amendment has two parts: (i) one part devoted to competition law institutions, and (ii) a second part devoted specifically to regulation on telecommunications and broadcasting.[3] Of course, the second part deserves a specific essay by itself, but this article will not focus on that part. It will focus only on the competition law part.

The constitutional amendment has been questioned because of the excessive volume of rules introduced into the Constitutional text,[4] as the rules could have been introduced into secondary legislation. However, the explanation is legal and political: a rule introduced into the Constitution eliminates the risk of being challenged before the courts alleging that the rule is unconstitutional, facilitating the enforcement of the antitrust law by the agencies and reducing the volume of litigation.

Article 28 of the Constitution was the most affected provision.[5] That provision was extended in a surprising way mainly due to the text devoted to regulating the new federal competition agencies: the *Federal Economic Competition Commission* (hereinafter "FECC") and the *Federal Telecommunications Institute* (hereinafter "FTI").[6] Both of them, as federal autonomous agencies of the *United Mexican States*, are not part of the Administration under the President of the Republic.[7] More importantly, the extended article 28 of the Constitution also includes new competition law institutions as "barriers to competition," an adapta-

[1] In force since July 7 2014.

[2] Since December 2012, i.e. the beginning of the presidency of Enrique Peña Nieto, the Federal Congress has approved the reform on competition and telecommunications, the energetic reform, the financial reform, the educative reform, the tax reform and the political reform. For instance, as result of that, we have 5 new federal autonomous agencies and enforcers.

[3] It includes for instance: regulation on interconnection services, the "must carry" and "must offer" obligations in open and restricted TV, the "market power" declaration (i.e. dominance declaration) and the new institution called "preponderance" declaration and its associated asymmetric regulation, licenses and permits to use radio spectrum, and other issues specific to the regulation of telecommunications and broadcasting.

[4] For instance, the whole text of the competition and telecommunications reform is longer than the American Constitution.

[5] Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Article 28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

[6] *Id*

[7] *Id.*

tion of the "essential facilities" doctrine, and a new design of legal proceeding before the FECC.[8]

In essence, the aims of the constitutional amendment were: (i) to update the competition law institutions as a mean to improve the efficiency and detonate the innovation in the Mexican economy, (ii) to improve the enforcement of competition law in favor of public interest (especially in telecommunications and broadcasting sectors) by creating two new enforcement agencies and (iii) to accelerate the enforcement of the remedies imposed by the agencies by reducing the litigations against its decisions.

II. The "Expanded" Purpose of the FLEC

The new FLEC purpose declaration[9] is: "promote, protect and ensure free concurrence and economic competition, as well as prevent, investigate, combat, effectively chase, severely punish and eliminate monopolies, monopolistic practices, unlawful mergers, barriers to free competition, and other restrictions on the efficient functioning of markets."

A first point to note is the conceptual precision. The former Competition Law spoke of *free competition*, but now the FLEC establishes along itself the terms: *free concurrence* and *economic competition*, which is a more logical and accurate sequence.[10] Indeed, first, a firm tries to *enter* the market (market access, concurrence) and once the firm has entered, one can speak of *economic competition* and displacement practices.

III. The New Competition Authority: The FECC and the IFT

A. Legal Status and Structure

There is an inclination of lawmakers in Mexico to what we may call "Mexican fever of creating autonomous agencies." This "fever" is based on the idea that this so-called solution remedies public policy problems and ensures a better law enforcement (despite being only an institutional design shift).[11] The autonomous agencies are part of the Mexican State at federal level but they are not part of the Administration under the President.[12] The autonomy can only be established by the Constitution.[13]

The former *Federal Competition Commission* was an agency under the structure of the Ministry of Economy, which is part of the Administration under the President (as well as the former *Federal Telecommunications Commission*).[14]

[8] *Id.*

[9] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 2, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[10] *Id.*

[11] XAVIER GINEBRA SERRABOU & VICTOR MANUEL CASTRILLON, La Nueva Ley Federal de Competencia Económica 45 (2014).

[12] *Id.*

[13] *Id.*

[14] Former Telecommunications Law (1995), section 1.

Now the FECC and the FIT, both with powers to enforce competition law (referred jointly as "competition authority"), are autonomous agencies only subjected to the Constitution, the Laws, and the Federal Courts' judicial control.[15] This also means that the handling of competition policy in Mexico is not the responsibility of the President of the Republic or the agencies under him; it is responsibility of the two new agencies: the FECC and the FTI.[16]

The FTI has the power to enforce the FLEC only in telecommunications and broadcasting sectors and markets, so the procedural and substantive issues referred to here are completely applicable to its enforcement activities.[17] If there were a conflict between the FECC and FTI on competence to hear a case, a Federal Collegiate Court of Circuit specializing in Competition and Telecommunications will ultimately resolve the conflict.[18]

The following bodies comprise the institutional design of the new FECC:[19]:

1. The Plenum
2. The Investigation Authority
3. Internal Comptroller

Herein we provide description of said bodies.

1. The Plenum[20]

The plenum is the decision-making body of the FECC.[21] Its makeup consists of seven Commissioners supposedly extremely trained in the application of competition law.[22] The FLEC clarifies various Plenum operating issues and obligations of Commissioners.[23] That is very important because under the life of the previous law these issues were interpreted by the Commissioners and other officials and therefore generated controversial decisions and doubtful transparency practices.[24]

Regarding the Plenum decisions, all Commissioners must vote, so that no Commissioner may abstain from voting; the decisions are taken by majority un-

[15] Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Article 28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

[16] *Id.*

[17] *Id.*

[18] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 5, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[19] A parallel structure is designed within the FTI.

[20] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18 - 21, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[21] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 3-XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[22] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 10, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[23] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18 – 21, 51, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[24] Ref. Original decision ruled an administrative liability of Telcel case (Commission vs Telcel 2011).

less the specific assumptions stated in article 18 of the FLEC;[25] if a Commissioner is not present during the session, he must issue his vote in writing.[26] It is very positive for transparency purposes the provision in FLEC regarding the publicity of the Plenum sessions and its decisions (except those parts containing confidential information).[27] The Plenum also has to issue a stenographic version of its meetings.[28]

The objection to the Commissioners cannot be granted on the basis of an expression of a technical review, public explanation of the rationale of a decision, or issuing a separate opinion to the decision.[29] The causes of impediment for hearing a case (for a Commissioner) are grounded on the basis of the existence of a direct or indirect interest on the case[30].

Another novel aspect of Plenum regulation is the so-called "interview" between commissioners and economic agents' representatives. In fact, these "interviews" are legal, *ex parte* meetings (parallels to the official hearings of the proceeding).[31] Although totally unregulated, these *ex parte* meetings had been performing since 1993.[32]

Unlike American legal practice, *ex parte* meetings in Mexico are not completely frowned upon in legal proceedings, whether before Courts or administrative agencies.[33] Because the characteristic of the proceeding before the former *Federal Competition Commission* was not of an adversarial one but of an inquisitorial one,[34]

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[25] According to article 18 of the FLEC, such assumptions are meant to be measures to determine the existence of "barriers to competition" and essential inputs, the decisions on divestiture, as well as the approval of regulatory provisions, shall be taken at least by 5 Commissioners.

[26] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 18, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[27] *Id.*

[28] *Id.*

[29] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 33, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[30] According to Article 24 of the FLEC, by direct or indirect interest it shall be understood: (i) The Commissioner has family relationship with one of the interested parties or their representatives; (ii) The Commissioner has interest (personal, family or business) in the case, including those that may be of some benefit for himself, his spouse or relatives; (iii) The Commissioner, his spouse or any of his relatives are heir, legatee, donee or guarantor of any of the interested parties or their representatives; (iv) The Commissioner has been witness or expert witness, attorney or representative in the case in question, or has previously managed the case in favor or against any of the interested parties, and (v) The Commissioner has publicly and unequivocally set the direction of his vote before the Plenum decides the case.

[31] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 83, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[32] The authors conclude said statement from personal observations during their own performances at the former Competition Commission during said period of time

[33] This statement does not necessarily include the legal practice in commercial arbitration.

[34] By inquisitorial we understand a legal proceeding where the Court or Agency or a part of it is actively involved in investigating the facts of the case, as opposed to an adversarial proceeding where the role of the Court/Agency is primarily that of an impartial referee between the prosecution and the defense. The new proceeding before the FECC is closer to an adversarial one it was thought the regulation of *ex parte* meetings was completely unnecessary .

In a proceeding more similar to an adversarial one, there are clearly identified parties (the Investigation Authority and the respondent), so that the figure of *ex parte* meeting is fully applicable. However, the legalization of the *ex parte* meetings leaves out the rights of: (i) the petitioners because they are not recognized as a party in the proceeding but as an assistant of the Investigation Authority, and (ii) the consumers not officially recognized as a party in the proceeding.[35] Neither of them will be represented during the *ex parte* meetings.

Hence, the FLEC provides that to the legalized *ex parte* meetings called "interviews," all Commissioners must be summoned.[36] However, the "interviews" can be held with the presence of only one of them.[37] The FECC must form a record at least containing the place, date, start time and end time of the interview, as well as the full names of all persons who were present for the interview and the issues covered during it.[38]

2. *The Investigation Authority (hereinafter "IA")*[39]

Since investigation and the decision-making functions are completely separated in the FLEC, the IA is the FECC's body responsible for conducting the investigations (a "public antitrust prosecutor") acting as a party to the proceeding.[40] In exercising its powers, the IA is endowed with technical and managerial autonomy to decide on its operation and decisions.[41]

The head of the IA is appointed and removed by the Plenum, by a majority of 5 commissioners (4 years in office and can be re-elected).[42] According to the FLEC,[43] the head of the IA should be "independent in his decisions and performance, professional and impartial in his actions", and is subjected to legal principles of lawfulness, objectivity, honesty, exhaustiveness and transparency, as well as to the "contact rules."[44]

It is problematic that the FLEC requires "impartiality" to the head of the IA, given that the IA is officially a party to the proceeding as the complainant. The requirement of impartiality for the Plenum can be understood, because it is the

[35] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 83, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[36] *Id.*

[37] *Id.*

[38] This information should be published on the website of the CFCE. Article 25.

[39] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 - 36, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[40] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 - 27, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[41] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26 – 29, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[42] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 33, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[43] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 26, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[44] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 34 - 35, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

decision-making body of the FECC, but the requirement is not logical for the IA. The role of the IA should be clearly partial since its function is to file a formal accusation against the respondent grounded in the gathered evidence. It is assumed that the head of the IA represents a public-interest position because the whole society is interested in the existence of markets where competition conditions exist. Thus, it is not appropriate to require impartiality to the complainant inasmuch as its logical behavior is to argue in favor of its own interests (public-interest in the case of IA).

3. Internal Comptroller[45]

The Internal Comptroller is a body of supervision and administrative control headed by a chief appointed by the Chamber of Representatives.[46] The chief is appointed to terms of 4 years in office and can be reelected.[47] The functions of this body are: (i) the control of income and expenditure of the FECC and (ii) the enforcement of the regulations on administrative liability of public officials.[48] These functions are not relevant regarding the substantive application of competition law. Therefore, the Internal Comptroller is not discussed in detail in this Article.

B. Powers[49]

Beyond its classics powers of prosecuting and sanctioning monopolistic practices and the powers related to control of mergers, the powers of the FLEC that should be highlighted for its relevance and novelty are:

- Regarding "barriers to competition" and essential inputs[50]: (i) order the necessary measures aimed to eliminate "barriers to concurrence and free competition" and (ii) determine the existence and regulate access to essential inputs such as divestiture of assets, shares, rights or company parts in the necessary proportions to eliminate anticompetitive effects.
- "Formal-opinion" and "General Guidance" on competition affairs[51]: (i) resolve a specific issue placed under its consideration through the "Formal-opinion requests" and (ii) provide "General guidance" on competition law affairs as requested by any person.

[45] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37 - 46, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[46] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37 - 40, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[47] *Id.*

[48] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 37, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[49] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[50] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-II, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[51] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XVI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

- Regulatory provisions[52]: issue and publish (after public consultation) regulatory provisions on: (a) Imposition of sanctions, (b) Monopolistic practices, (c) Market power determination (dominance), (d) Relevant market determination, (e) Barriers to competition, (f) Essential inputs and (g) Measures on divestiture of assets, shares, rights or company parts.
- Directives, Guidelines, and Technical Criteria[53]: issue and publish (after public consultation) soft-law provisions on: (a) Mergers, (b) Investigations, (c) Commitment decisions (settlement agreements), Leniency program and reduction of fines; (d) Suspension of acts constituting probable monopolistic practices or unlawful mergers, (e) Bail to suspend the application of interim and precautionary measures, (f) Requests for dismissal of criminal proceedings in cases referred by the *Federal Criminal Code*, and (g) The ones necessary for the effective competition law enforcement.
- Class actions[54]: according to the *Federal Civil Procedures Code*, the FECC has standing to file class actions before Federal Courts in order to claim antitrust damages as class representative.

IV. Anti-Competitive Practices

A. Absolute Monopolistic Practices (Horizontal Restraints)

Since the former 1993 competition Law was passed, the cartels or horizontal restraints to competition have received in Mexico the name of "absolute monopolistic practices" (AMPs).[55] Parties are not permitted to plead the efficiency defense against allegations raised under the law, so they are illegal *per se*.[56] The AMPs are: (i) price fixing and exchange of information with the purpose or effect of price fixing, (ii) supply manipulation, (iii) market allocation/segmentation and (iv) bid rigging between competitors.[57]

The new FLEC makes a shift regarding the exchange of information between competitors. The FLEC establishes as an autonomous AMP "the exchange of information with any of the purposes or effects"[58] referred to above, such as price fixing, supply manipulation, market allocation and bid rigging.[59] Thus, the scope and consequences of the exchange of information between competitors are broad-

[52] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XVII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[53] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XXII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[54] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 12-XXVIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[55] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 8 - 10, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[56] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[57] *Id.*

[58] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53-V, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[59] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

ened. So, economic agents exploring mergers should be careful not to incur this new AMP during the negotiations of their operations.

B. Relative Monopolistic Practices (Vertical Restraints)

Vertical restraints to competition, or abuses of dominance, are known in Mexico as relative monopolistic practices (RMPs).[60] They are not illegal *per se* since it is possible to plead the efficiency defense.[61] Although the new FLEC preserves the fundamental system on RMPs of the former Law, the following changes are worthy to be highlighted.

1. Related Markets

What had been only a logical deduction of the analysis under the force of the former Law now is explicitly recognized by the FLEC.[62] The market power should be held over the relevant market in which the RMPs take place, and not in any other market (even though there can be any inferred relationship given by any similarity, i.e. product similarity).

However, unlike the former Law, it is now clearly recognized that the RMPs may affect not only the relevant market but also related markets.[63] This effect is seen in unlawful displacements of competitors, impairment of market access or establishment of exclusive advantages favoring only some economic agents.[64]

Due to Mexico's very formalistic legal tradition and strict application of the written law, this explicit recognition of related markets is very important. As the former Law did not explicitly refer to related markets as potentially affected by anti-competitive behavior, the decisions of the former *Federal Competition Commission* referring to those effects were criticized due to lack of legal certainty.[65]

2. Efficiency Gains

Grounded in the economic rationale, a vertical restraint to competition is acceptable if the resulting efficiency gains outweigh its anticompetitive effects. According to the new FLEC[66], the efficiency gains must: (i) favorably affect

[60] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[61] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[62] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 54, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[63] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[64] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 54, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[65] The only reference to related markets was established in Article 16 of the former law but it was only applicable to mergers and acquisitions. Art 16 of former Competition Law.

[66] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 55, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

competition process, (ii) clearly outweigh the anticompetitive effects, and (iii) lead to an improvement of consumer welfare.

Additionally, the former Law required the efficiency gains should not result in: (i) a significant increase in the price, (ii) a significant reduction in the available choices to consumers, or (iii) an important deterrence of innovation in the relevant market.[67] However, these three clear and specific controls over the efficiency gains are now excluded from the FLEC.[68]

One might think such exclusion is not significant as the above controls should be included within the concept "improvement of consumer welfare."[69] Nevertheless, a wider interpretation allows the practitioners to allege the existence of an improvement of consumer welfare despite evident and significant: (i) price increases, (ii) reduction of choices to consumers or (iii) innovation deterrence.[70] So, the changes on the efficiency gains standard are likely to favor the interests of the economic agents rather than the public interest.

3. Changes in the Description of RMPs

Tying[71]

Slight change in wording, the word "additional" is eliminated.	
Former Law	**New FLEC**
Sale or transaction conditional on purchase, acquire, sell or supply another **additional** good or service, usually different or distinguishable, on reciprocity basis.	Sale or transaction conditional on purchase, acquire, sell or supply another good or service, usually different or distinguishable, on reciprocity basis.

[67] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 11 - 13, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[68] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 53, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[69] *Id.*

[70] *Id.*

[71] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-III, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

Relevant Aspects of the New Mexican Competition Law

Predatory pricing[72]

Change of reference cost, the words "systematic" and "occasional" are eliminated.	
Former Law	**New FLEC**
The *systematic* selling of goods or services at prices below its average total cost or *occasional* below its average variable cost when there are grounds for believing that these losses will be recovered through future price increases. In the case of goods and services produced jointly or that are indivisible for marketing, the average total cost and average variable cost shall be distributed among all co-products.	Selling below its **average variable cost or its average total costs but above its average variable cost,** if there are elements to presume that will allow the economic agent recover its losses by future price increases [...].

The consequence of such change is that selling below average total cost shall be predatory. Probably, the change might facilitate the investigation of the prosecutor but also might inhibit discounts to consumers; the words "systematic" and "occasional" were not only ornaments on the former Law but were part of a well-accepted standard.[73]

Discriminatory treatment[74]

"Equality of conditions" is replaced by "equivalent conditions".	
Former Law	**New FLEC**
The establishment of different prices or conditions of sale or purchase for different buyers or sellers situated in the same conditions.	The establishment of different prices or conditions of sale or purchase for different buyers or sellers situated in **equivalent** conditions**.**

Such change is positive, and its adoption into Law was probably encouraged due to *Radiomovil Dipsa (Telcel-America Movil)—Interconnection Service for call termination on mobile phones* (DE-037-2006). While a *Telcel* user produced

[72] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-VII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[73] *Id.*

[74] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-X, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

his call on-net and paid a rate *x*, a mobile operator (competitor) produced the call off-net and paid a rate *x+1* (with the repercussions on the rates to competitors users).[75] So, it was clearly convenient being a *Telcel* user if most of the calls were ended on-net. The former *Federal Competition Commission* held that *Telcel* was charging different rates to buyers situated in the *same conditions*.[76]

Indeed, this case involved what in other jurisdictions is known as *margin squeeze*.[77] Inasmuch as the rate charged to a competing operator (x+1) is higher than the rate charged to an internal user, the competing operator cannot match the final rate charged by *Telcel* to its users.[78] Notwithstanding, as the margin squeeze practice was not provided in the former law, the former *Federal Competition Commission* had to frame the conduct of *Telcel* as a discriminatory treatment.

Telcel, inter alia, held that: (i) *Telcel* users and mobile operators requesting interconnection were not in equal circumstances and (ii) it was natural that *Telcel* users paid better rates than competing operators, precisely because their conditions were different.[79] Certainly the change on the wording "equivalent conditions" by the FLEC, expands the scope of the legal hypothesis and allows a broader legal interpretation in favor of the prosecutor.

Increasing costs to rivals / impeding production process to rivals / reducing demand to rivals[80]

Rewording	
Former Law	**New FLEC**
The action of one or more economic agents, whose object or effect, direct or indirect, is to increase costs or obstruct the production process or reduce the demand faced by their competitors.	The action of one or more economic agents, whose object or effect, direct or indirect, is to increase costs or obstruct the production process or reduce the demand faced by **other economic agents**.

The economic rationale of the rewording is to anticipate the conduct of firms preventing the entry of new firms, and by doing so, eliminating potential competition. The new firms that are not yet participating in the market cannot yet be

[75] *Id.*

[76] *Id.*

[77] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[78] *Id.*

[79] This is one of the problems to which is addressed the asymmetric regulation over "preponderant" economic agents in telecommunications and broadcasting sector. This asymmetric regulation is grounded in the constitutional amendment, the new Federal Law of Telecommunications and Broadcasting (published in the OGF the July 14, 2014) and the regulatory decisions of the FIT against America Movil and Grupo Televisa, both of them issued on May, 2014.

[80] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-XI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

considered as "competitors" or "rivals," but they can be obviously considered as "other economic agents."[81]

Under the force of the former Law, it was required the conduct was directed against competitors. However, the rewording ("other economic agents") also matches with the recognition of related markets (and its participants) as potentially affected by a RMP. So, not only rivals in the relevant market might be affected, but also economic agents participating in related markets.

C. New RMPs: The Essential Input and the Margin Squeeze[82]

Perhaps one of the most important things in the new FLEC is the incorporation of two new RMPs.

On essential input, the FLEC provides that "denial, access restriction or access on discriminatory terms and conditions to an essential input by one or more economic agents" is a RMP.[83] Of course, the essential input institution has its origin in the essential facilities doctrine.[84]

Regarding the margin squeeze, the FLEC defines it as: "reducing the margin between the access price to an essential input supplied by one or more economic agents and the price of the good or service supplied to the final consumer by the same economic agents using to its production the essential input."[85]

As provided above, the lawmaker produced this legal wording of margin squeeze from the facts of the *Telcel* case. However, the wording, as approved, involves a mix between a refusal to deal and the essential input. The refusal to deal or the discriminatory treatment was already covered by the former Law, and in our view, the change in its wording ("equivalent conditions" instead of "equality of conditions") could have solved the interpretation problem raised in *Telcel*.

The mix between refusal to deal and essential input will become a very complex issue to handle for both the IA and the firms.

V. "Barriers to Competition," Essential Inputs and Regulatory Remedies

A. "Barriers to Competition"[86]

The FLEC orders the competition authority to assure "the prevention and removal of barriers to free concurrence and economic competition in the necessary

[81] *Id.*

[82] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56-XII, XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[83] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56 Fraction XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[84] *See* Genebra-Serrabou and Castrillon, *supra* note 11 at 65 – 66.

[85] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 56 Fraction XI, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[86] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 57, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

proportions to eliminate its anticompetitive effects."[87] This new concept in the Mexican law, as far as we are concerned, is unparalleled in the international antitrust practice. At least not as a legal institution as defined by the FLEC: "any structural feature of the market, that is: fact or action of the economic agents with the purpose or effect of: (i) preventing access of competitors or limiting their ability to compete in markets, (ii) preventing or distorting the process of free competition, (iii) as well as the enactment of legal provisions issued by any level of government that unduly impede or distort the process of free competition.[88]

This new legal institution is highly questionable and its careless application would be dangerous. First, a "structural feature of the market" is an abstraction by itself, not a conduct. A purpose is pursued by a subject, and a cause or effect is also pursued by a subject. A purpose is not pursued by an abstraction.

What is a "structural feature of the market"? It basically has to do with 3 things: (i) number of players on the market and their market share, (ii) degree of differentiation of the good or service, and (iii) the existence of barriers to entry and exit.[89] In this way, we speak of monopoly, oligopoly, monopolistic competition, monopsony and so on. However, these structures are not always a result of the behavior of firms or the regulatory framework.

There are markets that hold only one or few players, either by large investments needed, scarcity of inputs (e.g. radio spectrum), the minimum efficient scale to be profitable (e.g. refineries) or because of natural monopolies (operation of an airport or a highway).[90] Moreover, there is already sectorial regulation focused precisely to the concern of lack of competition in certain markets due to structural features (ports, airports, telecommunications, and so on).[91]

Second, defining the "barriers to competition" as any fact or action of economic agents, without describing precisely what is the unlawful conduct, makes this institution likely to be unconstitutional. This construction is most likely contrary to legal certainty, an important feature and requirement in our formalistic legal system.

Perhaps, the only positive aspect of this institution is that it alludes to public regulation as a barrier to competition (attributable to the government).[92] At least in Mexico, many markets with problems on competition may be explained due to an erroneous design of regulation, such as telecommunications, which is expected to improve its functioning due to new regulation.[93]

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[87] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Fraction IV, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[88] *Id*.

[89] Luque de la Torre María de los Ángeles, et al. Curso Prácticos de Economía de la Empresa, un Enfoque de Organización. Editorial Pirámide, Madrid, 2001.Parte V, Capìtulos 17 y 20.

[90] *Id.*

[91] For instance, Mexican Telecommunications Law.

[92] Comision Federal de la Competencia (1997), In-Depth Examination of Competition Policy in Mexico (1995-96), submitted to OECD Competition Law and Policy Committee, 21 January 1997.

[93] *Id*.

B. Essential Input[94]

As provided above, the essential input has its origin in the essential facility doctrine. Rather than a monopolistic practice by itself, the essential facility doctrine has been used, in the United States and in Europe, as a special or exceptional circumstance in determining the relevant market and market power.[95] Thus, it can be used as a refusal to deal or as a discriminatory treatment by denying access to the facility previously determined as essential.[96] Thus, essential facility/essential input is a circumstantial element rather than a behavioral one.

From the perspective of the civil law tradition, the essential facility doctrine means that an imposition to negotiate contracts is pursued to compensate a weak competitive market structure attributed to the existence of an essential facility.[97] Despite not being a solution to the market structure, essential facility is pursued to keep or create competition through the forced contractual instruments.[98] So, the competition principle prevails over the contractual freedom principle.

According to the FLEC, in order to determine the existence of an essential input, the FECC should consider:

> i. If the essential input is controlled by one or more economic agents holding market power or they have been declared as "preponderant" economic agents by the FTI;
>
> ii. If its reproduction by another economic agent is not viable from a technical, legal or economic viewpoint;
>
> iii. If the input is indispensable to the provision of goods or services in one or more markets, and has no close substitutes;
>
> iv. The circumstances under which the economic agent came to control the input; and
>
> v. Other criteria, if any, established in the FECC Regulatory Provisions.

The first thing that stands out is that the declaration of essential input implies an *ex ante* market power determination. This and the other characteristics reveal a clear influence of the European jurisprudence rather than the American one.[99]

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[94] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 60, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[95] *See* Ginebra-Serrabou and Castrillon, *supra* note 11, at 68 – 70.

[96] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Fractions XII - XIII, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[97] *See* Ginebra-Serrabou and Castrillon, *supra* note 11, at 68 – 70.

[98] *Id.*

[99] Though the essential facility doctrine originated in American jurisprudence, it has not been confirmed by the U.S. Supreme Court and its scope is far from having been definitely set. Maybe, the most important U.S. Supreme Court case is *Verizon Communications v. Law Offices of Curtis v. Trinko*, [540 U.S. 398 (2004)], where the Court rejected the doctrine as established Law and refused to invoke it as long as there is specific regulation providing the proper remedy, normally access.

In Europe, the essential facility doctrine has been invoked since the 90s by the European Commission).[100] There are 4 leading cases worthy to be reviewed as they have been inspirational for the Mexican lawmaker.

In *Magill*,[101] the *European Court of Justice* (hereinafter "ECJ") ruled that under exceptional circumstances it should be given access to goods/services even though they are protected by intellectual property rights.[102] This would occur when a refusal to deal is accompanied by 3 factors decreasing competition: (a) the firm reserves to itself a secondary market excluding any potential competition; (b) the firm precludes the emergence of a new product for which there is demand in the market; and (c) the firm refuses to deal without objective justification.[103]

In *Oscar Bronner*,[104] the ECJ added that the exceptional circumstances required in *Magill* mean: (a) the refusal to deal is likely to eliminate all competition in the relevant market (in which participates the firm requiring access) and (b) the facility is essential for the business inasmuch as there is no actual or potential substitute and there is no substitute. Having no substitute means that i) there is no plausible alternative to the facility, including a poor quality alternative, and ii) the inability to duplicate the facility is objective, and is due to *technical, economic or legal obstacles*, not to the limited capabilities of the competitor requiring access.[105]

In *IMS Health*,[106] the ECJ confirmed the standard used in the *Magill Oscar* and *Bronner* rulings that a refusal to deal is abusive inasmuch as the essential facility controlled by the dominant firm is indispensable for competitors to have effective access to the market.

In *European Night Services*[107] the *European Court of First Instance* held two important points: (i) the doctrine cannot be invoked by a company that has a strong presence in the relevant market and it is just trying to strengthen it, and (ii) the doctrine cannot be enforced against a company that does not have a dominant position in the relevant market.

C. Proceeding and Regulatory Remedies

According to the FLEC,[108] the proceeding to determine the existence of "barriers to competition" and essential facility has regulatory purposes whose impor-

[100] Calvo Alfonso-Luis, et al. La Doctrina de las Infraestructuras Esenciales en Derecho Antitrust Europeo. Madrid, 2012.

[101] Case C-241 & 242/91 P, Radio Telefis Erieann v. Commission, 1995 E.C.R. I-743.

[102] *Id.*

[103] *See* Alfonso-Luis, et al. *supra* note 100.

[104] Case C-7/97, Oscar Bronner Gmbh & Co. v. Mediaprint Zeinungs-und Zeitscrhiftenverlag Gmbh & Co., 1998 E.C.R. I-779.

[105] *Id.*

[106] Case C-418/01, IMS Health v. NDC Health, 2004 E.C.R. I-05039.

[107] Accumulated cases T-374/94, T-375/94, T-384-94 & T-388/94 [1998] ECR-II-3141.

[108] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 94, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

tance is hard to ignore due to its implications over the markets. This regulatory proceeding seems to be a key turning point of a Mexican "devotion," apparent over the last three decades, to deregulation and acclamation of the minimal government intervention in markets.

The proceeding is initiated *ex officio* or by the request of the President of the Republic if there are elements suggesting a lack of effective competition in a market.[109] In concluding the investigation, the IA shall propose to the Plenum: (i) a preliminary decision containing proposals of corrective actions to remove restrictions to the efficient functioning of the market under investigation or (ii) the closure of the case.[110]

After the preliminary ruling, the IA must notify the economic agents who may be affected by regulatory remedies likely to be issued with the final decision.[111] According to the FLEC, only economic agents with legal interest, a highly restricted procedural standing, may make statements, present memorials and evidence, and if appropriate, also propose suitable and economically feasible measures to eliminate the identified competition concerns.[112]

Notwithstanding, its our opinion, economic agents operating in related markets and consumer associations are excluded from participating in the proceeding, despite having legitimate interest in the proceeding, because they can also be affected indirectly by the regulatory measures imposed by the FECC. It is worth mentioning that Mexican courts have ruled that there is a constitutional right to participate in markets where there is effective competition, which is applicable to both firms and consumers.[113] Additionally, the legitimate interest, a less restricted procedural standing, whether individual or collective, is also protected by the Constitution; indeed, in constitutional litigation ("writ of amparo") and other administrative proceedings the legitimate interest is fully recognized as procedural standing.[114]

The final decision is adopted by the Plenum, and might contain the following remedies:

> (a) Recommendations for public authorities when there is regulation restricting competition;
>
> (b) Regarding "barriers to competition," an order to economic agents to remove a barrier that unduly restricts the competition process;

[109] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 68 Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[110] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 68 – 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[111] *Id.*

[112] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law],], Article 94, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[113] *See* Ginebra-Serrabou and Castrillon, *supra* note 11, at 116 – 118.

[114] Constitucion Politica de los Estados Unidos Mexicanos [C.P.], Article 103 – 107, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

(c) Regarding essential inputs, the determination of essential input and the issuance of regulation on access mode, prices or rates, technical and quality conditions, and the implementation schedule; or

(d) Divestiture of assets, rights, shares, or company parts in the necessary proportions to eliminate anticompetitive effects. This is done only when corrective measures are not sufficient to solve the competition concerns, and is not a sanction.[115]

Implied authorities and economic agents must be notified of the final decision.[116] In this part, the FLEC alludes to the *affected* economic agents without making reference to the procedural standing, legal interest or legitimate interest, and it leads to reinforce the point made ??earlier about the need to notify economic agents participating in related markets and consumer associations that may be indirectly affected by the final decision.[117] This is done *indirectly* because the remedies are not directly addressed to them, but they are related by circumstances of fact or law with those economic agents directly affected.

The FLEC provides that the economic agents might request the review of the final ruling through new investigation when they consider the conditions no longer exist for the setting of "barriers to competition" or an essential facility.[118] We shall recall that in the case of an essential facility, whether it is determined through this regulatory proceeding or as a result of a RMP case, necessarily implies the *ex-ante* market power determination.

VI. Merger Review

Regarding mergers likely to reduce competition, called "unlawful mergers," the FLEC provides that the competition authority "shall not authorize and, if the event, shall punish the mergers whose purpose or effect is lessen, harm or impair the competition and free concurrence regarding equal, similar or substantially related goods or services."[119]

The former competition Law obliged economic agents to notify mergers to the *former Federal Competition Commission* who should "challenge and punish" or undue said mergers.[120] Under the new FLEC, the mergers should be "approved"[121] by the competition authority, which is more precise wording.

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[115] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[116] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 79, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[117] *Id.*

[118] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 96 - 97, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[119] Ley Federal de Competencia Económica [LFCE] [Federal Antritrust Law], Article 61 – 62, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[120] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 16 - 22, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[121] *Id.*

According to the FLEC,[122] when considering if the merger is unlawful, the FECC should note if the merger or intent of a merger:

> i. Confers or is likely to confer to the merging party, acquiring company or the resulting economic agent, market power in the terms of the Law, or increases or is likely to increase such market power, in order to obstruct, lessen, harm or impede competition;[123]
>
> ii. Has or may have the purpose to establish barriers to entry, impede to others the access to the relevant market, related markets or essential inputs, or displace other economic agents;[124] or
>
> iii. Has or may have the effect to substantially facilitate to the merger participants the performing of monopolistic practices as defined in the Law.

With regard to the above, first, the increase of market power is a new element aimed to eradicate an old legal use. In the past, an argument of attorneys representing merging parties was that only the emergence of market power resulting from the merger was considered by the Law, and not the increase of an existing market power, as an inkling that the merger might reduce competition.[125]

Second, it is a shame that the potential coordinated effects of the merger have not been included in the relevant provision. The rationale of coordinated effects argument in order to block or condition a merger is to prevent horizontal mergers reducing the quantity of firms in the market facilitating future cartels. Under this argument, commonly used in other jurisdictions, it would have prevented or conditioned mergers as *Cinemex/Cinemark—Exhibition of films* (CNT-010-2013, RA-029-2013), a FECC's decision that allowed the concentration of approximately 95% of exhibition market (nationally considered) Such a concentration substantially facilitates future coordinated conducts (implicit or explicit).

Third, on one hand, the reference to prevent access to related markets is very positive, as it was not mentioned under the former Law and it was source of discussion about legal certainty. On the other hand, the reference to "barriers to competition" will be cause of interpretation problems due to the dangerous broadness of the concept, as discussed above. The reference to essential inputs is a very positive inclusion inasmuch as it coincides with the essential facilities institutions: (i) the RMP and (ii) the regulatory proceeding to the determination of essential input.

Additionally, according to the FLEC, when the FECC considers there are potential risks to competition process, it must notify the merging parties at least 10

[122] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 64, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[123] The increase of market power is a new element with respect the former Competition Law.

[124] Related markets, barriers to entry and essential inputs are also new elements with respect the former Competition Law.

[125] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 86 - 92, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

days before the case is brought into the consideration of the Plenum.[126] Thus the merging parties can propose remedies or conditions to correct the risks and competition concerns. The remedies or conditions[127] the FECC can impose or accept, might consist of:

1. Performing an action or refrain from doing so;
2. Divesting certain assets, rights, shares or company parts;
3. Modifying or eliminating certain terms and conditions from the projected operations;
4. Performing actions aimed to encourage the participation of competitors in the market, as well as give access or sell goods and services to them; or
5. Other remedies to prevent damages to competition as result of the merger.

VII. Proceedings

Although there are several changes dealing with proceedings in comparison to the former Law, we will only stress out the most important parts.

A. Investigation Proceeding[128]

Any person can file a complaint or report an AMP, a RMP, or an unlawful merger to the IA.[129] The complaints filed by the President of the Republic and by the *Federal Consumer Attorney* shall receive preferential treatment.[130]

Unlike the former Law, the FLEC eliminates the FECC's duty of publishing the beginning of investigation notice in the OGF.[131] During the investigation, the FECC has the power to request information to any person including authorities.[132] In doing so, the FECC should explicitly specify if the required person is the complained party or only an assistant/informant of the IA.[133]

[126] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 86 - 92, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[127] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 91, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[128] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 79, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[129] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 70, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[130] *Id.*

[131] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 30 - 31, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[132] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 119, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[133] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 66 - 82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

B. Adversarial Proceeding[134]

As noted above, the redesign of the proceeding turns it into an adversarial proceeding. It implies that the parties to the proceeding are: the IA as complainant on one side, and the respondent on the other. The respondent can be one or several economic agents. Both parties litigate the case before the Plenum.

The petitioners, firms or persons reporting the monopolistic practices or unlawful mergers, have only the character of assistant/informants of the AI.[135] They are not parties to the proceeding.

C. Proceedings to Challenge the FECC's Decisions

According to the constitutional amendment, the FECC's decisions might only be challenged through the *writ of amparo* before the Federal Courts specializing in Competition and Telecommunications.[136] In compliance with that provision, the FLEC eliminated the former proceeding of appeal existing under the force of the former Law.

D. Proceeding to Enforce the FECC's Decisions[137]

Under the former Law, in the matter of monopolistic practices and unlawful mergers, the verification of the authority decisions was not adequately regulated since the authority had to resort to the *Federal Civil Procedures Code* in order to implement the verification of its decisions. Thus, this new proceeding provided by the FLEC is very positive.[138]

The proceeding can be initiated *ex officio* or by the request of any person having legal interest, a very restricted procedural standing.[139] The Plenum shall decide in a term up to 20 days once the case file has been integrated.[140]

It is important to highlight once more that it is a shame that only persons having legal interest can request the initiation of this proceeding. This is due to the same reasoning made above about the legitimate interest as a less restricted legal standing for consumers and economic agents participating in related markets inasmuch as they might also be affected by the decision.[141]

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134 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 81 - 85, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

135 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 80 - 82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

136 Constitucion Politica de los Estados Unidos Mexicanos [C.P.], Article 28, 103, and 107, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

137 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 132 – 133, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

138 *Id.*

139 *Id.*

140 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 78 -82, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

141 Constitucion Politica de los Estados Unidos Mexicanos [C.P.], Article 103 and 107, *as amended*, Diario Oficial de la Federacion [DO], 5 de Febrero de 1917 (Mex.); Ley Federal de Competencia

VIII. Commitment Decisions, Leniency and Reduction of Fines

On the matter of RMPs and unlawful mergers[142], the respondent can present its proposed commitments only up to the time that the IA issues the OPR. The respondent must accept in writing the benefit of reduction of fines by proving: (i) its commitment to suspend, finish or correct the practice or merger in order to restore the competition process and (ii) the proposed measures are legally and economically viable and suitable in order to stop the effects of the RMP or merger under investigation, noting the terms to its compliance.[143]

Despite seeming that the respondents must accept the administrative liability as established by the FECC's decision, such an issue is not clear at all. The FLEC does not clearly provide that the decision emitted by the FECC should contain the declaration on the respondents' liability.

This was very clear in *Telcel* (referred to above). In that case, the former *Federal Competition Commission* accepted the commitments proposed by *Telcel* during the appeal,[144] and such authority did not require the acceptance of liability inasmuch as the commitments were supposedly beneficial for competition and consumers.

The ideal design would have been that the proposal of commitments by the respondents might be examined and possibly accepted by the FECC, even during the adversarial stage, meaning up to the time the case was listed for the Plenum's decision.

On the other hand, the cases ending without liability declaration over the respondent would impair people willing to claim antitrust damages before the civil Courts inasmuch as the *Federal Civil Procedures Code* (for class actions) and the article 134 of the FLEC (for individual claims) requires a previous FECC's decision on the respondent's antitrust liability.

Regarding the leniency mechanism for reduction of fines,[145] there are not substantial changes in respect to the former competition Law. This mechanism is devoted to deactivate cartels or AMPs. And, the earlier the cartelist reveals to the FECC the existence of the cartel, the greater the fine reduction.[146]

It is important to stress that in the cases of the revealed cartels to the FEEC, this procedure is clear that the respondent's administrative liability will always

Económica [LFCE] [Federal Antitrust Law], Article 66 – 70, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

142 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

143 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100 - 103, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

144 The original decision ruled an administrative liability of Telcel and a fine USD 1,000 million.

145 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 102, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

146 Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

be established by the Plenum's decision, so the procedure on civil liability before civil Courts is more likely to be initiated by the affected people.[147]

IX. Sanctions[148]

It is worthy to note the new sanctions provided by the FLEC[149]:

- Measures aimed to regulate the access to essential inputs controlled by one or more economic agents, in the case of a RMP related to an essential facility);
- Fines up to 5% of the economic agent's income for not reporting a merger;
- Fines up to 10% of the economic agent's income for non-compliance of the conditions imposed to the merger, without prejudice the divestiture;
- Ineligibility to act as board member, manager, officer, director or representative of a legal entity up to a period of 5 years and a fine up to 200,000 times the minimum daily wage in Mexico City (approximately 1 million dollar) to whomever participates directly or indirectly in the performance of monopolistic practices or unlawful mergers as representatives or on behalf of legal entities;
- Fines up to 8% of the economic agent's income for non-compliance of: (i) the commitment decisions, (ii) the order of stop the practice or unlawful merger or (iii) the order of divestiture;
- Fines up to 18,000 times the minimum daily wage in Mexico City (approximately 90,000 dollars) to public notaries intervening in not authorized mergers by the FECC;
- Fines up to 10% of the economic agent's income to the firm controlling an essential input for non-compliance of the regulation regarding the input or non-compliance of the order to eliminate a barrier to competition; and
- Fines up to 10% of the economic agent's income for non-compliance of an interim measure.

X. Legal Term to Initiate Investigations

Unlike under the former Law, the FECC can now initiate investigations even after 10 years the anticompetitive practices or unlawful mergers had being performed.[150] Under the force of the former Law, the period was 5 years.[151]

[147] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 100-103, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[148] The fines for monopolistic practices remain the same: 10% of the economic agents' income in the case of AMPs (cartels), and 8% in the case of RMPs (vertical restraints) and unlawful mergers.

[149] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 127, Fractions VI – XV, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[150] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 137, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[151] *Id.*

XI. Civil Liability for Antitrust Damages

As provided before, the claim for antitrust damages is a matter that comes under the jurisdiction of Civil Courts. However, both the *Federal Civil Procedures Code* and the FLEC[152] provides that in order to file a formal complaint for damages it is essential that a FECC decision previously declares the existence of a monopolistic practice or an unlawful merger (in *res judicata*).[153]

The FECC's decision shall prove the unlawful conduct as required by Civil Law in order to claim damages.[154] The complainant in the civil procedure must prove before the Court the existence of a cause-effect link between the unlawful conduct and the harm.[155]

Article 134 of the FLEC also provides that the antitrust damages shall be litigated before the Federal Courts specializing in Antitrust and Telecommunications.[156] There is a problem with that provision because the Constitution clearly provides for jurisdiction by the Federal Courts only in the case of class actions.[157] Thus, as long as the Constitution does not provide the civil liability as a matter under the jurisdiction of the Federal Courts but a matter under the jurisdiction of the State Courts, the individual claims for antitrust damages must be litigated before the State Courts at least until the *Supreme Court of Justice* or the Federal Collegiate Circuit Courts provides otherwise.

XII. Criminal Liability

According to the articles 254 and 254 bis 1 of the *Federal Criminal Code*, there is criminal liability for those who: (i) participate in an AMP (cartel) and (ii) obstruct the investigation procedure of the FECC or alter or destroy information.

XIII. Final Comments

The FLEC introduces to Mexican Law several new antitrust institutions on which both the authority and practitioners have little experience. The work of the specialized courts and the experience of national and foreign scholars and practitioners will be essential to the process of enriching the scope of such concepts and its application.

There is also a very important pending task. Mexico must develop an adequate system to claim antitrust damages, an essential part of the antitrust enforcement that has proven to be very effective in many jurisdictions.

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[152] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[153] *Id.*

[154] *Id.*

[155] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[156] Ley Federal de Competencia Económica [LFCE] [Federal Antitrust Law], Article 134, Diario Oficial de la Federación [DO], 24 de Julio de 2014 (Mex.).

[157] Constitucion Politica de los Estados Unidos Mexicanos [C.P.], Article 16, *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

THE TANGLED WEB: CROSS-BORDER CONFLICTS OF COPYRIGHT LAW IN THE AGE OF INTERNET SHARING

Elisabeth Fiordalisi*

I. Introduction

In today's day and age of social media and constant information sharing, the Internet has become the world's most powerful information expressway. Across the globe, people of all ages are uploading photographs, publishing songs, posting poetry, live-streaming concerts and displaying art all over the Internet. Even the world's foremost art museums, such as Paris' Louvre and New York's Museum of Modern Art, offer virtual visits to their art exhibits.[1] Such universal access to published works permits Internet users to view artwork or listen to music being exhibited on the other side of the world. In fact, the quick and easy accessibility of newspapers, radio shows, and magazines via the web has displaced television viewership.[2]

However, such far-reaching Internet access comes with a price. One major disadvantage of the web's reach is the lack of global harmony in copyright laws. The following hypothetical illustrates the legal dilemma that results from the lack of international copyright law:

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[1] *See e.g., Le Louvre – Virtual Visit,* http://www.louvre.fr/en/visites-en-ligne (last visited Jan. 14, 2014) (offering a virtual tour of select art collections); *MoMa – The Collection*, http://www.moma.org/collection/browse (last visited Jan. 14, 2014) (offering over 46,000 photographs of the museum's art collection, accompanied by written commentary as well as an audio tour).

[2] Marty Beard, *Study: TV Losing Viewers to Web,* MEDIA LIFE MAGAZINE, (JAN. 14, 2014), http://www.medialifemagazine.com:8080/news2001/dec01/dec03/2_tues/news4tuesday.html.

> Jorge, a Netizen[3] and Mexican citizen who resides in Spain, uploads digitalized copies of Pierre's photograph from his residence in Madrid to a server in Spain. Pierre, a French citizen who lives in Switzerland, has published his work only in France and is the owner of a valid French copyright. The infringing material is then downloaded by Netizens in the United States, Italy, and Australia. Pierre takes legal action against Jorge by filing a lawsuit in Switzerland.

Which law applies? What jurisdiction governs? The answers to these questions are about as infinite as the Internet itself. International copyright law does not provide a consistent and satisfactory resolution for such issues. This is largely due to the fact that the main facet of intellectual property law – territoriality – limits application of copyright law to national law. Thus, the rights afforded to a copyright owner can only be implemented within the confines of the country of registry.[4] Further, only said country's laws may be applied to the conflict.[5] In reference to the above-mentioned hypothetical, if a judge were only to apply the law of the transmitting country, Spain, then Jorge could market Pierre's work throughout any other country with impunity. If the law of each of the other receiving countries applied to the distribution and publicity of the photograph, it would force Pierre to obtain protectionary rights to market the work, country by country.

In order to bring some clarity to the above-mentioned hypothetical, judges throughout the world will need to take into consideration not only intellectual property law, but also conflict-of-laws methods. To date, there is very little guidance on the reconciliation of conflict-of-laws issues pertaining to intellectual property.[6] However, given the rapid rate at which copyrighted work is being distributed through the Internet, intellectual property attorneys and judges are increasingly faced with conflict-of-laws issues.

The goal of this article is to investigate the most effective approach to harmonizing the law in order to best address the ever-increasing problem of choice-of-law conflicts resulting from trans-national copyright infringement by means of the Internet. The lack of international copyright law creates a grey area allowing for cross-border copyright infringement to flourish with no legal recourse. Section II will examine the history of copyright law and compare the European and American approaches to copyright infringement. Section III will examine the current state of copyright on the Internet and how different areas of the world are grappling with new mediums. Section IV will analyze various choice-of-law regimes and examine several recent proposals for harmonization of multinational intellectual property law in cyberspace. Section V endorses a modification of the

[3] Netizen Definition, *Merriam-Webster Dictionary*, *available at* http://www.merriam-webster.com/dictionary/Netizen.

[4] *See* RICHARD FENTIMEN, INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW; HEADING FOR THE FUTURE 137 (Josef Drexl & Annette Kur eds., 2005).

[5] *Id.*

[6] *See* Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM J. COMP. L. 429, 429 (2001).

ALI Principles of choice-of-law for determining the legal consequences of Internet infringement. Section VI will conclude the comment.

II. History of Copyright Law in United States vs. Europe

Historically, Europe and the United States have taken divergent approaches to conflicts-of-law issues resulting from copyright disputes. Setting aside the fact that the United States has adopted common law while Europe has adopted civil law, there exist multiple approaches within Europe alone. This portion of the article will outline the various approaches between Europe and the United States.

A. Copyright Law in Europe

First and foremost, it is of great importance to note that the states of the European Union do not themselves have harmonized copyright law.[7] They apply their respective national conflict-of-laws rules to resolve issues of copyright infringement.[8] A few countries in particular – Germany, France, and Belgium – have implemented unique legislation in order to regulate conflicts of law that result from copyright infringement.

1. German Copyright Law

German law stands out in a particular way because German Copyright Law only contains substantive regulations on copyrights and related rights.[9] German law does not, however, include and choice-of-law regulations.[10] Although German law does have choice-of-law regulations to govern other conflicts, no such law may be applied to issues relative to intellectual property.[11] The Bundesgerichtshof (the German Federal Court of Justice) has ruled that in cases of intellectual property infringement, the conflict-of-laws regulations are superseded by the *Schutzlandsprinzip* (law of the country in which protection is sought).[12]

Accordingly, much like American law, German law requires attorneys and judges to turn to German case law for answers. German courts, relying on their interpretation of Article 5(2) of the Berne Convention,[13] have stipulated that the

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[7] This situation is bound to change: The Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("Rome II") will be applied after January 11, 2009 to cases that have arisen after August 20, 2007.

[8] *Id.*

[9] Anita B. Froblich, *Copyright Infringement in the Internet Age - Primetime for Harmonized Conflict-of-laws Rules*, 24 BERKELEY TECH. L.J. 851, 853 (2009).

[10] *Id.*

[11] Bundesgerichtschof [BGH][Federal Court of Justice] Nov. 7 2002, 152 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 315 (F.R.G.).

[12] BTDrucks 14/343, at 10, available at http://dip21.bundestag.de/dip21/btd/14/003/1400343.pdf.

[13] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217, as last revised at the Paris Universal Copyright Convention, July 24, 1971, S. Treat Doc. No. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention]. Article 5(2) of the convention states:

[A]part from the provision of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

appropriate law to govern disputes of copyright infringement is the *lex protectionis* i.e. the law of the country in which protection is sought.[14] If one were to apply German law to the Jorge-Pierre example in the introduction of the article, that means that if Pierre brought a copyright infringement suit against Jorge in a German Court for the infringement of a German copyright, the German court would apply *lex protectionis* i.e. German law, the law in the court of the country of protection.[15] German law has, however, very broadly and inconsistently applied *lex protectionis*.

The German application is problematic because such a broad interpretation of Article 5(2) of the Berne Convention creates major discrepancy between the *lex protectionis*, and more restrictive law, such as *lex loci delicti* (the law of the place where the wrong was committed), a more limiting law that only applies to torts.[16] Due to such discrepancy, the only consistent and appropriate way for a German court to address an issue of Internet copyright infringement would be to apply the national law of each country where the protected work was downloaded. Such a lawsuit would be incredibly expensive and drawn out. German courts would benefit greatly from more streamlined and straight-forward laws, such as those implemented in France.

2. French Copyright Law

French law relies on a culture of placing the author's rights on a more elevated level of intellectual property protection.[17] France offers its copyright authors rights pertaining to the integrity and acknowledgment of their works.[18] Such rights are commonly referred to as the *droit moral*.[19] The 1985 Amendment to France's Copyright Act of 1957 allowed for protection of audiovisual works and computer software.[20] It also implemented criminal penalties for copyright infringement.[21] Today, the *Code de la Propriété Intellectuelle* ("I.P. Code"), in effect as of July 1, 1992, is the basis for French copyright law as a whole.[22] The I.P. Code grants not only moral rights, but also economic and intellectual rights

[14] Bundesgerichtschof [BGH][Federal Court of Justice] June 17, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 394 (F.R.G.).

[15] *See* K. Lipstein, *Intellectual Property: Parallel Choice of Law Rules,* 64(3) CAMBRIDGE L.J. 593, 607 (2005).

[16] *See* SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND 1299 (2d. ed. 2006).

[17] Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370 (1998).

[18] RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 944-49 (2d. ed. 1998) (analyzing the effects of *droit moral* on the laws of various European countries).

[19] ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 477 (4th ed. 1993).

[20] Law No. 85-660 of July 3, 1985 J.O., July 4, 1985, p. 7495; 1985 D.S.L. 357.

[21] *Id.* at tit. I, art. 1, V.

[22] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD, France (Supp. 1991-1995) [hereinafter I.P. CODE].

to "work[s] of the mind . . . by the mere fact of the creation."[23] The I.P. Code does not explicitly define a 'work of the mind;' however, French courts have accepted any work produced as a result of individual intellectual efforts as qualified for copyright protection.[24] Sculptures, architecture, paintings, sermons, books, dramatic works, musical compositions, drawings, lectures, creative titles, and choreographic works are all copyrightable works pursuant to the French I.P. Code.[25]

The I.P. Code interpretation of copyright boasts two main forms of protection, personal and economic.[26] The personal rights, *droit moral*, are what have drawn much attention and fame to French copyright law. Pursuant to the *droit moral*, authors of copyrightable works are afforded rights of disclosure (*droit de divulgation*), rights of authorship (*droit à la paternité*), rights of integrity (*droit au respect de l'oeuvre*), and the right to withdraw a work from publication or modify it (*droit de retrait ou de repentir*).[27] Such rights extend to all copyrightable works and are referred to in the code as "perpetual, inalienable and imprescriptible."[28] French economic rights, on the other hand, afford authors the protection of public performance, display and reproduction.[29] The duration of economic rights is the author's life plus 70 years.[30]

French courts acknowledge and endorse the principle of reciprocity — meaning that copyright protection of foreign works in France is contingent upon the protection of French works abroad.[31] French judges have leaned towards exclusive use of the *lex loci delicti* in determining choice-of-law issues applicable to cross-border copyright infringement.[32] Such verdicts can impose both civil and criminal penalties for copyright infringement, ranging from the confiscation of works to two years of imprisonment and a fine of 1,000,000 Euro.[33] While this method has been applied consistently to conflict-of-laws issues in France, the country has not yet resolved how *lex loci delicti* will be enforced in the challenges posed by Internet copyright infringement cases.

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[23] *Id.* at art L. 111-1.

[24] Paul Edward Geller & Melville B. Nimmer, International Copyright Law and Practice § 2[1][b] at FRA-16 (1998).

[25] *See* I.P. CODE, *supra* note 22, at art. L. 112-2.

[26] *See* GELLER & NIMMER, *supra* note 24, at § 1[2] at FRA-13.

[27] *See* I.P. CODE, *supra* note 22, at. arts L. 121-1, L. 121-2, L. 121-4.

[28] *Id.* at art. L. 111-1, 121-1.

[29] *Id.* at art, L. 122-2 to 122-3.

[30] Law No. 97-283 of Mar. 27, 1997, J.O., Mar. 28 1997 p. 4813; 1997 D.S.L. 213 (implementing Council Directive No. 93/83 of Sept. 27, 1993, J.O., (L 248/15) and Council Directive No. 93/98 of Oct. 29, 1993, J.O., (L 290/9)).

[31] A. Lucas & H.-L. Lucas, Traite de la Propriete Intellectuelle 788 (2006).

[32] *See id.* at 813.

[33] See I.P. CODE, supra note 22, at arts L. 332-1, 335-4 to 5.

3. Belgian Copyright Law

Belgian copyright law has many similarities to French law, but seems to have become somewhat of a road between the French and German approaches. In 2004, Belgium enacted legislation identifying the *lex protectionis* approach as the designated method to resolve choice-of-law issues.[34] Belgian law has not, however, determined a way to apply *lex protectionis* legislation to the challenges posed by Internet copyright infringement cases. Due to the fact that Belgian law is founded on the Napoleonic Code - which also forms the basis for the current version of the French Code - Belgium's conflict-of-laws approach closely mirrored France's for quite some time.[35]

However, the new 2004 *Code de droit international privé* (Code on Private International Law), abolished article 3 of the Code Civil, the provision of the code closely resembling France's conflict-of-laws legislation.[36] The 2004 code filled the gaps where the previous codification had not regulated conflicts-of-law issues of private international law in Belgium.[37] The drafters of the 2004 Code took into consideration conflict-of-laws codifications from various countries throughout Europe, and included a provision on the regulations applicable to intellectual property issues.[38] Article 93 of the Code on Private International Law designated the *lex protectionis* as the primary approach to infringement cases pertinent to intellectual property.[39] However, the legislation is laden with exceptions such as in the case of forum selection clauses[40] or *order public*, where a judge can override the application of a foreign law if it is contrary to the fundamental provisions of Belgian intellectual property law.[41] The most important exception of the Code on Private International Law is found in article 19, which provides that the law most closely connected to the case at issue prevails over the law applicable according to the Code.[42] Thus, as it pertains to the Jorge-Pierre hypothetical, the most relevant issue in Belgium would be which country's law is more closely connected to the case than the *lex protectionis*? Would it be French law because the work was created and protected in France? Swiss law because Pierre lives in Switzerland? Or Spanish law because Jorge uploaded the infringing photograph from Spain? The current state of Belgian law does not provide a clear answer.

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[34] Loi portant le Code de droit international privé [CDIP] [Law establishing the Code of private international law], Moniteur Belge [Official Gazette of Belgium], July 27, 2004, p. 57344.

[35] Dominique d'Ambra, *La Fonction Politique du Code Civil pour la France, in* LE CODE CIVIL FRANÇAIS EN ALSACE, EN ALLEMAGNE ET EN BELGIQUE: REFLEXIONS SUR LA CIRCULATION DES MODELES JURIDIQUES 9, 10 (Dominique d'Ambra et al. eds., 2006).

[36] *Id.* at 18; CODE CIVIL [C. CIV] art. 3 (Belg.).

[37] *See* François Rigaux & Marc Fallon, Droit International Privé 71 (2005).

[38] *See id.* at 71-72; *see also* CDIP, Moniteur Belge [Official Gazette of Belgium], July 27, 2004, p. 57363, art. 93.

[39] *See* Moniteur Belge, *supra* note 38, at art. 93.

[40] *Id.*

[41] *See Proposition de loi portant le Code de droit international privé,*[Draft law on the Code of private international law], 3-27/1 SE (2003) (submitted by Ledouc et al.), p. 120 (Belg.).

[42] Moniteur Belge *supra* note 38, at art. 19.

B. Copyright Law in the United States of America

Despite the fact that protection of copyrighted works was originally enacted by the U.S. Congress "not primarily for the benefit of the author, but primarily for the benefits to the public,"[43] the monopolistic rights of copyright are considered to be a necessary evil.[44] Originally, the Copyright Act of 1909 governed the protection of copyrightable works in American jurisprudence.[45] It applies to works created earlier than January 1978.[46] The 1909 Act was replaced by the Copyright Act of 1976, which is the current body of law presiding over federal copyright protection.[47] The Copyright Act of 1976 controls all works created on or after January 1, 1978.[48]

Pursuant to the Copyright Act of 1976, U.S. law protects any and all "original works of authorship fixed in any tangible medium of expression, now known or later developed."[49] All literary, pictorial, graphic, sculptural and sound recording works are offered protection under the federal statute.[50] However, the fixation requirement differentiates those works that are suitable to receive federal statutory protection from those which are only afforded state common law copyright protection.[51] Conversely, the Copyright Act of 1909 listed fourteen categories under which a work had to fall in order to be deemed eligible for copyright protection.[52]

Unlike in Europe, the United States places a strong emphasis on economic rights afforded to a copyright owner. Section 106 of the 1976 Copyright Act provides authors with the exclusive rights to reproduce, distribute, publicly perform, publicly display, and prepare derivative works of any copyrighted work.[53] Still, the rights of distribution, public display and public performance are contingent on certain categories of the copyrighted work – the work must be literary, pictorial, graphic, musical or dramatic in nature.[54] Economic rights last for the life of the author plus seventy years.[55]

The greatest difference between European and U.S. copyright law, however, comes in the implementation of moral rights. Although the United States has, by technicality, enacted moral rights by signing onto the Berne Convention, moral

43 H.R. REP. NO. 60-2222, at 7 (1909).

44 *See* GORMAN & GINSBURG, *supra* note 19, at 477.

45 17 U.S.C. §§1-32 (superseded 1976).

46 *Id.*

47 17 U.S.C. §101-1111 (2012).

48 *Id.* at §302.

49 17 U.S.C. §102 (2012).

50 *See Id.*

51 H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

52 17 U.S.C. §4 (superseded 1976).

53 *See* 17 U.S.C. §106(1)-(6) (2012).

54 *Id.*

55 *See* Sonny Bono Term Extension Act § 102 (amending 17 U.S.C. §§ 301-304).

rights are nowhere featured in U.S. law.[56] The most similar legislation available in the United States is the Visual Artists Rights Act of 1990 ("VARA").[57] VARA does not encompass all the rights provided by, for example, the French moral rights. VARA does not provide a right of disclosure, a right to withdraw a copyrighted work, or a right to reconsider, as does the European I.P. Code.[58] VARA prohibits the "intentional distortion, mutilation or other modification" of any visual art.[59] Works of visual art are defined, however, by the Copyright Act of 1976, as single or limited edition works of 200 copies or less of a sculpture, print, drawing, or painting.[60] VARA only extends protection to the author of a work of visual art and excludes works made for hire from any type of moral rights.[61] Despite its existence, courts have very cautiously and reluctantly enforced VARA rights.[62]

A copyright owner in the United States is afforded a variety of options for taking legal action against anyone who violates his or her rights to a work. Any violation of a § 106 right qualifies as copyright infringement.[63] The forms of recourse include obtaining an injunction against the infringer, obtaining damages, or a combination of both.[64] Damages are awarded based on how willful, commercially driven and fraudulent the infringement is — all parameters set forth by the Copyright Act of 1976.[65] If a judge determines that an infringing party acted willfully, the court may enforce punitive damages of up to $150,000.[66] Finally, if the court determines that willful infringement was driven by commercial purposes or based in fraudulent misrepresentation, criminal penalties may be appropriate.[67]

III. Copyright Infringement on the Internet – How Europe & the USA Have Tackled the Issue

The infinite, global and instantaneous nature of the Internet has altered the nature of international copyright law. Today, Netizens can access copyrightable works uploaded to the Internet from all corners of the globe.[68] The very same qualities that make the Internet so unique and cutting-edge also act to foster the Internet copyright infringement epidemic. Once an image or drawing is uploaded

[56] *See* Berne Convention *supra* note 13.

[57] 17 U.S.C. §§ 106, *supra* note 53, *at* A(a)(3)(A) (2012).

[58] *See* I.P. CODE, *supra* note 22.

[59] 17 U.S.C. §§ 106, *supra* note 53, at A(a)(3)(A).

[60] *See* 17 U.S.C. § 101 (2012).

[61] 17 U.S.C. §106A(a) (2012).

[62] *See e.g.*, English v. BFC & R. E. 11th St. LLC, No. 97 Civ. 7446 (HB), 1997 WL 7464444, at *4 (S.D.N.Y. Dec. 3 1997).

[63] 17 U.S.C. § 115(c)(4) (2012).

[64] *Id.* at §§ 502, 504.

[65] 17 U.S.C. § 504(a) (2012).

[66] *Id.* at § 504(c)(2) (2012).

[67] *Id.* at § 506.

[68] LERNER & BRESLER, *supra* note 18, at 1501.

to the web, it can be infringed upon in several different countries simultaneously with just a couple quick clicks.[69] Further, the issue remains that due to the virtual and anonymous nature of the Internet, infringers can usually go about their illegal business with impunity.[70] In fact, many Netizens have a strongly misguided idea that posting copyrighted material to the Internet is admissible, and that they have implied license to do so as web users.[71] Accordingly, it is imperative that copyright laws worldwide become harmonized and increasingly stringent in order to protect authors and publishers while prosecuting online infringement.

A. European Steps to Combat Online Infringement

The most significant step Europe has taken to combat online copyright infringement came in the form of a directive issued by the European Council, called the Commission of European Communities Green Paper "Copyright And Related Rights in the Information Society" ("Green Paper"). The Green Paper advocates for the free movement of goods while also addressing numerous legal issues affected by new technology.[72] The Green Paper underscores the vital importance of harmonizing world copyright laws, but acknowledges that no such solution is impending.[73] Until then, the Green Papers encouraged Member States to harmonize their own copyright laws.[74]

The Commission noted the ease with which piracy has become a systemic online copyright issue, and the need to introduce new techniques to limit and combat copying.[75] To increase copyright author protection on the Internet, the Green Paper proposed the option of realizing one multi-purpose body that could educate copyright holders in regards to licensing fees and agreements while also assisting them in managing any works integrated into multimedia designs.[76] The Commission also insisted that all copyrighted works on the Internet be compiled and merged in a "digital catalogue" complete with identification numbers to foster quick and easy royalty distribution to copyright holders.[77]

The Green Paper has received both accolade and strong critique.[78] Regardless, the Green Paper served as the stimulus for the Florence Conference of 1996. Over 250 authors, artists, performers and international organizations came to-

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69 *See* Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 155 (1997).

70 *See* BRUCE A. LEHMAN, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 131 (1995) *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ [hereinafter WHITE PAPER].

71 ONLINE LAW 171 (Thomas J. Smedinghoff ed., Addison-Wesley Publishing Co. 1996).

72 *See Copyright and Related Rights in the Information Society: Green Paper from the Commission to the European Council*, at 10, COM (1995) 381 final (July 1995) [hereinafter GREEN PAPER].

73 *Id.* at 42.

74 *Id.* at 52, 54, 58.

75 *Id.* at 28.

76 *Id.* at 76-77.

77 *See id.* at 79.

78 *See* Patrick F. McGowan, *The Internet and Intellectual Property Issues,* 455 PRACTICING L. INST./PAT. 303, 349 (1996), *available in* WESTLAW, 455 PLI/Pat 303 (concluding that the Green Paper exhib-

gether to discuss the Green Paper's propositions.[79] While the delegates concluded that member state harmonization has no legal merit if not complemented by legal harmonization at the global level, they did discuss the advantages and disadvantages of all the paper's proposed initiatives.[80] To date, unfortunately, the European Community has not implemented any of the proposals set forth in the Green Paper.

B. Steps to Combat Online Infringement in the United States

Conversely, the United States has been very steadfast and effective in the implementation of legislation to combat online copyright infringement. Under President Clinton in 1993, the Information Infrastructure Task Force ("IITF") developed and published a study called the White Paper to analyze whether the Copyright Act of 1976 provided adequate copyright protection to online artists in light of the new "information superhighway."[81] The White Paper concluded that the current copyright law was, with a few minor adjustments, equipped to handle conflicts resulting from Internet infringement.[82] The IITF made a few proposals aimed at improving the scope of protection afforded to copyright owners in the United States. Said proposals included criminalizing unauthorized transmissions as violating both the rights of reproduction and rights of public distribution,[83] expanding the legislative definition of publication to include the distribution of copies of the work to the public by means of online transmission,[84] extending the right of public performance to performers and copyright owners of sound recordings,[85] and asking Congress to implement laws prohibiting technological systems that circumvent the unauthorized use of digital media so that it can be uploaded to the Internet.[86] The White Paper acknowledged the French *droit moral* and concluded that such rights were not desirable in the American legal system; however, the IITF acknowledged that it may be essential to harmonize copyright laws and create a uniform level of protection for copyrights among various different legal systems worldwide.[87] Congress, online users and artists alike reacted ner-

its "a certain amount of naiveté regarding the technical implications of how information is carried over the Internet").

[79] *Id.*

[80] *See id.*

[81] *See* WHITE PAPER, *supra* note 70, at 1.

[82] *Id.* at 64 ("For the most part, the provisions of current copyright law serve the needs of creators, owners, distributors, users and consumers of copyrighted works in the [current Internet] environment. In certain instances, small changes in the law may be necessary to ensure public access to copyrighted works while protecting the rights of the intellectual property owner").

[83] *Id.* at 215.

[84] *Id.* at 219.

[85] *Id.* at 221-26.

[86] *See* WHITE PAPER, *supra* note 70, at 230.

[87] *Id.* at 54 ("Careful thought must be given to the scope extent and especially the waivability of moral rights in respect of digitally fixed works, sound recordings and other information."); *See also id.* at 148.

vously and critically to the White Paper; consequently only few proposals have been enacted to date.[88]

Perhaps the most powerful and legitimate expression of Congress's validation of the White Paper is the Digital Millennium Copyright Act of 1998 ("DMCA"). The DMCA criminalized both manufacturing and importing any devices used to override encryption shields.[89] Exceptions to the legislation include any decoding used in libraries or schools or in any works of "criticism, comment, news reporting, teaching, scholarship or research."[90] Accordingly, the DMCA provided more stringent protection to copyright owners while still ensuring scholarly secondary users that the fair use defense would remain unharmed. The DMCA also shielded Internet Service Providers from being held liable for the transmission of any information that could be associated with copyright infringement.[91] Under the DMCA, Internet Service Providers are also absolved of any liability in connection with users' infringing postings, or sharing and storage of infringing copyrighted material.[92] The DMCA serves as a first step in the effort to attack online copyright infringement in the United States.

IV. Choice of Law Regimes & Underlying Theory

The analysis of various legal systems and their choice-of-law legislation makes it clear that online copyright infringement prompts questions of private international law.[93] Due to the fact that both the United States and most European countries are signatories to the Berne Convention, it follows that countries must first and foremost look to the treaty in order to determine which national law should control in a cross-border copyright infringement case. Unfortunately, however, the Berne Convention provides little to no guidance, as it provides only that a copyright owner shall receive the full extent of protection and recourse of the laws of the country in which protection is claimed.[94] The lack of clarity in the language of article 5(2) of the Berne Convention, referencing the "laws of the country where protection is claimed,"[95] is flawed and creates too much room for differing interpretations on how to approach conflict-of-laws issues in cases of

[88] *See* Julie C. Smith, Comment, *The NII Copyright Act of 1995: A Roadblock Along the Information Superhighway,* 8 SETON HALL CONST. L.J. 891, 913 (1998) ("The White Paper focused almost entirely on the protection of owners' proprietary interests, and neglected to discuss the public benefit portion. . ."); *see also* Naoi Abe Voegtli, *Rethinking Derivative Rights,* 63 BROOK. L. REV. 1213, 1237 n.139 (1997) (stating that "[m]any copyright owners argue that even the NII White Paper did not go far enough in terms of protecting interests of copyright owners").

[89] *See* 17 U.S.C. § 103, 112 Stat. 2863, 2864.

[90] *Id.*

[91] *Id.* at § 202, 112 Stat. 2877-80.

[92] *Id.*

[93] GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 17 (3d. ed. 1996) (defining private international law as a "body of national law applicable to disputes between private persons . . . arising from activities having connections to two or more nations").

[94] *See* Berne Convention, *supra* note 13, at art. 5(2).

[95] *Id.*

multinational copyright infringement. It follows that other regimes could possibly be useful in harmonizing conflict-of-laws regulations.

The Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") is one possible choice-of-law regime that provides for cases of intellectual property infringement.[96] Because Rome II is a European Union regulation, it acts as binding law on all the member states.[97] After much discussion and revision, a separate provision for intellectual property infringements has been added to Rome II.[98]

Article 8(1) of Rome II provides that the *lex loci protectionis* (law of the country in which protection is sought) is the law applicable to cases relative to the infringement of intellectual property rights.[99] Article 8(3) explicitly excludes party autonomy for cases of intellectual property right infringement, slightly altering the language used in Article 5(2) of the Berne Convention to read:

> The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country *for which* protection is claimed.[100]

To be clear, while the Berne Convention reads "*where* protection is claimed," Rome II reads "*for which* protection is claimed." This difference is noteworthy because in changing the wording, the Council of the European Union intended to avoid the previously mentioned confusion resulting from the Berne Convention's choice-of-law clause in article 5(2). A literal reading of article 5(2) would suggest the use of the *lex fori* (the law of the country where the plaintiff has filed his complaint) to govern choice-of-law issues.[101] However, such logic is flawed because often the country of forum may not be related to the copyright at issue; a court may have been selected by one of the parties simply because the copyright owner has assets in said state, despite the fact that the copyright infringement occurred elsewhere.[102] There is absolutely no reason to apply the law of the forum state in such circumstances.[103] It is for this reason that Article 5(2) of the Berne Convention was cast aside and interpreted as suggesting the application of the *lex protectionis*.[104] It follows that by implementing Article 8 of Rome II, some European Member States will need to reassess their approach to choice-of-law issues in intellectual property infringement cases, as their national law may

96 *See* Commission Regulation 864/2007, 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II].

97 *Id.* at 48 (stating that Rome II is "binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community").

98 *See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")*, at art. 8, COM (2003) (July 22, 2003), *available at* http://eur-lex.europa.eu/procedure/EN/184392.

99 *Id.*

100 *Id.* at art. 8(1) (emphasis added).

101 *See, e.g.,* MIRIELLE VAN EECHOUD, CHOICE OF LAW IN COPYRIGHT AND RELATED RIGHTS 103-05 (2003).

102 *Id.*

103 *Id.*

104 *See* Berne Convention, *supra* note 13, at art. 5(2).

conflict with the provisions of Article 8. However, use of the *lex protectionis* is heavily defective as mentioned above, and Article 8 provides a more clear cut answer than the *lex protectionis* in regards to Internet copyright infringement cases.[105]

Article 8 of Rome II is also flawed because it does not provide a deliberate choice-of-law rule in regards to Internet copyright infringement cases. Enforcement of Article 8 will force Member States to change their laws, in direct contrast with the harmonization goal of the European Council in writing Rome II.[106] The lack of designation of either *lex fori* or *lex protectionis* will likely result in Member States choosing which law they deem most appropriate, which only reinforces the splintered European legal approach to online copyright infringement that existed prior to Rome II's drafting.[107] Under the current Article 8 of Rome II, the *lex fori, lex protectionis,* and *lex loci delicti* interpretations are all plausible. In fact, states could even make the argument that application of the law in the state which the infringing content was eventually uploaded is the most effective approach because it only implicates the law of one country and is financially efficient for the party bringing the copyright infringement action.[108] However, the vast nature of the Internet debunks this too – within seconds, content can make its way to all four corners of the globe, leaving courts world-wide with the same daunting dilemma of forum selection.

Finally, Rome II cannot effectively be applied in the United States, as the Second Circuit has ruled that it was not bound by any law stemming from the Berne Convention.[109] Thus, the court implemented the application of the *lex loci delicti* (place where the wrong was committed).[110] Such divergence between Europe and the United States makes Rome II an unfit choice-of-law theory as it does not assist in promoting harmonization of conflicts-of-law legislation pertinent to online copyright infringement.

While neither the Berne Convention nor Rome II are suitable choice-of-law regimes, the United States has developed a choice-of-law regime that, with some further development, could serve to align worldwide approaches to online copyright infringement. The following section will discuss and analyze the American Law Institute Principles and propose amending them in order to find harmonization of online copyright infringement laws between Europe and the United States.

105 *See* Anita B. Frohlich, *Copyright Infringement In the Internet Age —Primetime For Harmonized Conflict-of-laws Rules?,* 24 BERKELEY TECH. L.J. 852, 885 (2009).

106 *See supra* Section IV.

107 *See supra* Section II(a)(i-iii).

108 *See* Frohlich, *supra* note 105, at 886.

109 *See Itar-Tass Russian News Agency v. Russian Kurier, Inc*., 153 F.3d 82, 90-91 (2d. Cir. 1988).

110 *Id.*

V. A Proposal for Global Harmonization: The ALI Principles

Global implementation of the American Law Institute ("ALI") principles would bring harmony between the European and American approaches.[111] Although the ALI principles are not binding, they are aimed at supplementing, rather than supplanting, existing national law.[112] Further, the ALI principles were drafted with the goal of multi-national judicial cooperation in mind.[113] The ALI principles are an appropriate band-aid for the wound of assorted global online copyright infringement regulations, because they provide a uniform approach without interfering with national law.

The ALI principles clearly refer to the substantive law of a state, leaving behind choice-of-law regulations.[114] Such clarification is vital as it creates certainty about what law to use and avoids issues of *renvoi*, i.e. the bouncing of an issue back and forth between various choice-of-law regulations.[115] In fact, the ALI principles have gone so far as to designate separate sections to jurisdiction and choice-of-law issues.[116] Section 301 of the ALI principles provides the same "for which" language, rather than "where,"[117] reflecting to the principles of Rome II.[118] Moreover, the ALI drafters' notes make clear that international regulation will not designate a choice-of-law rule.[119] The ALI principles provide a much wider lens through which to view the *lex protectionis.* They expand their view beyond intellectual property infringement, dealing also with issues of validity, duration, infringement, and existence.[120] While Section 301 sets forth a general approach to interpreting such issues, there remain multiple exceptions outlined in the remainder of the ALI principles.

Section 302 of the ALI principles outlines a party autonomy exception, stipulating that parties to a dispute may choose the law that will apply to the action, even after it has arisen.[121] The only stipulation is that such a choice may not

111 *See* THE AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (PROPOSED FINAL DRAFT 2007) [hereinafter ALI].

112 *See* François Dessemontet, *A European Point of View on the ALI Principles –Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes,* 30 BROOK. J. INT'L L. 849, 855 (2005).

113 *See* ALI, *supra* note 111, at 7.

114 *Id.* at 196.

115 *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 37 (2006).

116 *See* ALI, *supra* note 111 (Part II regulates jurisdiction issues and Part III addresses rules for conflicts-of-law).

117 *See* Rome II, *supra* note 96 (the language of article 8(1) reflects the wording here); *see also supra* Section IV.

118 *See* ALI, *supra* note 111, at 26.

119 *Id.* at 208.

120 *Id.*at § 301.

121 ALI, *supra* note 111, at § 302 (*stipulating that* "(1) subject to the other provisions of this Section, the parties may agree at any time, including after a dispute arises, to designate a law that will govern all or part of their dispute").

adversely affect the rights of third parties.[122] Such a method could prove incredibly useful as it provides parties to multi-national copyright infringement cases the opportunity to uniformly agree upon one body of law together. However, such autonomy could simultaneously be detrimental, as in most circumstances the selection of one body of law benefits one party much more than the other. For example, one country's copyright law could be much more lenient than the others, or perhaps one party is a resident and therefore has assets in one country, while the other party resides and has assets in the other. Due to the inherent fact that inherently parties to a lawsuit have conflicting interests, party autonomy in choice-of-law issues afforded by §302 could result as both a blessing and a curse.

Section 321 of the ALI principles, however, provides what is referred to as "Ubiquitous Infringement Exception."[123] This exception explicitly stipulates that in cases of ubiquitous infringement, the court may choose to apply the laws of the state with the closest connections to the dispute, keeping in consideration the residence, relationship, extent of activity and principal markets of the parties and the infringement.[124] This exception will likely lead to courts applying either the law of the country where the infringement originated (i.e., where the infringing material was uploaded), as §321 will not likely be an exception to the principle of territoriality.[125] However, if the location of the infringement origination is undeterminable, courts are likely to apply their own national choice-of-law legislation i.e. *lex fori.*[126] This is problematic because application of *lex fori* will usually favor the copyright holder because that party will likely have chosen the court.

Although far from perfect, the ALI principles prove most sufficient to address copyright infringement on the Internet. It would be sensible to provide a level of specificity to the ubiquitous infringement exception, so as to at least provide a roadmap approach for cases where it is abundantly evident that there has been copyright infringement. It appears that the ALI principles are aimed at setting a broad framework that can evolve alongside the field of intellectual property and its technological demands and developments.[127]

One other possible approach could be to combine the ALI principles with the *lex loci rei sitae approach.* This approach refers to the law of the place where a property is situated.[128] Under this theory, a court would implement whichever body of law provided the most protection to the author, analyzing: "(1) the coun-

[122] *Id.* ("Any choice-of-law agreement under subsection (1) may not adversely affect the rights of third parties . . . .").

[123] *Id.* at § 321.

[124] *Id.* ("(1) When the alleged infringing activity is ubiquitous and the laws of multiple states are pleaded the court may choose to apply . . . the law or laws of the State or States with close connection to the dispute, as evidenced . . . by: (a) where the parties reside; (b) where the parties relationship, if any, is centered; (3) the extent of the activities and the investment of the parties; and (d) the principal markets toward which the parties directed their activities.").

[125] Rochelle Dreyfus, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?,* 30 BROOK. J. INT'L L. 819, 843-44 (2005).

[126] ALI, *supra* note 111, at 195.

[127] *Id.*

[128] BLACK'S LAW DICTIONARY 923, 924 (9th ed. 2009).

try from which the infringing act or acts originated; or (2) the country in which the alleged [infringer] resides; or (3) the country in which the alleged [infringer] maintains an effective business establishment"; or (4) the location of the server from which infringer is uploading his illegal content.[129] The final consideration confines the infringing conduct to one forum location, by zooming in on the location of the server the infringer is utilizing.[130]

These considerations, when coupled with the ALI principles could heavily simplify the choice-of-law analysis posed by multi-national copyright infringement issues. If the American Legal Institute could incorporate the *lex loci rei sitae* approach into the ALI principles, it could streamline choice-of-law harmonization. However, indisputably, the issue of global harmonization in choice-of-law regulations remains. Ideally, Europe would adopt the ALI principles in some form, bringing at least some semblance of harmonization to choice-of-law issues worldwide. Only the future of intellectual property law and the advances of technology will show whether such principles can be effectively implemented across the globe.

VI. Conclusion: The Challenge That Remains

Coupling the ALI Principles with the *lex loci rei sitae* approach harmonizes the importance of protecting both the copyright owner as well as the rights of the alleged infringer. The law that would apply would depend on a series of considerations, based on both the copyright owner and the infringer's residence, business and conduct. Accordingly, whatever law the courts choose, both the right holder and the defendant will be afforded the maximum protection of the law.

Currently, there is no harmonized or uniform set of copyright regulations. Thus, infringement on the Internet will continue to create crippling conflicts, permitting infringers to rampantly distribute illegal content with impunity. Until countries around the world decide to work together to implement a satisfactory body of laws, the infinite reach and perpetual sharing of the Internet era will continue to pillage the essence of intellectual property protection. While the current proposals have considered and attempted to give some shape to resolving conflict-of-laws disputes, most proposed regulations benefit the interests of one group more than another. Further, due to the lack of harmony in global law, most proposed approaches to conflict-of-laws issues in online copyright infringement are either too broad, or far too stringent.

The ALI principles seek to provide a spectrum within which to form harmonized regulation. The *lex loci rei sitae* approach combined with the ALI principles would create a stable and effective framework from which multi-national online copyright infringement laws could be based. Although it is not a one-size-fits all solution, and would likely force many nations to amend their national laws, it is a good start in the direction of global harmonization in intellectual property protection. Today, the solutions on the table have become a web of

[129] Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure,* 42 J. CORP SOC'Y 318, 330 (1995).

[130] *Id.*

sorts, with many tangled ideas that stop short of an effective resolution to the ever-growing online copyright infringement epidemic. Only through compromise and global cooperation will scholars, authors and attorneys worldwide be able to untangle the web.

Recognizing "Access to Information" as a Basic Human Right: A Necessary Step in Enforcing Human Rights Provisions Within Free Trade Agreements

Brittany Grasmick*

I. Introduction

Since December 2010, the Arab world has experienced a constant eruption of civil, social, and political disorder.[1] These events have been coined "The Arab Spring."[2] Rulers have been forced from power in Tunisia, Libya, Yemen, and twice in Egypt.[3] Thirteen Arab nations, including Syria, have faced unprece-

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[1] Gary Blight, Sheila Pulham & Paul Torpey, *Arab Spring: An Interactive Timeline of Middle East Protests*, The Guardian, http://www.theguardian.com/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline (last visited Mar. 29, 2015) (showing a timeline of protests, regime changes, international and domestic responses, responses in the Arab region since 2010).

[2] *Id.*

[3] *Id.*

dented unrest.[4] Arab Spring uprisings have consisted largely of predictable strategies: violent and non-violent strikes, demonstrations, marches, rallies, and protests.[5] However, Arab Spring protesters have employed one particularly novel tool of civil resistance that has only recently become available: social media and the Internet.[6] Egyptian President Hosni Mubarak's overthrow can largely be attributed to his opponents' use of Internet and social media.[7] Despite State repression and Internet censorship, protestors in Egypt and Libya used digital platforms to communicate, organize protests, and raise awareness among fellow citizens.[8] While Twitter and Facebook were certainly not the *reason* for the coup d'états, they were undeniably an effective mechanism in achieving the desired outcome.[9] In general, citizens gained access to otherwise inaccessible information thanks to the presence of the Internet and social media.[10] Today, nearly 2.9 billion of the world's 7 billion people use the Internet.[11] This number will continue to rise due to the prominence of the Internet as a means to quickly and effectively exchange information worldwide.[12] Moreover, the rate at which information travels will be faster than ever before.[13]

Concurrently, human rights have increasingly become an important part of worldwide trade and democracy.[14] Today, most free trade agreements promote notions of governmental protection of human rights.[15] However, codifying human rights provisions in a free trade agreement ("FTA") does not lead directly to their enforcement.[16] For example, citizens may be covertly imprisoned for speaking out against their government, despite their right to free speech—a right ensured to them through their country's FTA free speech provisions. A violation may never be discovered, not even by trading partners who are parties to the

4 *Id.*

5 Stephan Rosiny, *The Arab Spring: Triggers, Dynamics, and Prospects*, GERMAN INST. OF GLOBAL & AREA STUD. 1, 2 (2012), http://www.giga-hamburg.de/de/system/files/publications/gf_international_1201.pdf.

6 *Id.* at 4.

7 *See* Rosiny, *supra* note 5.

8 Dr. Natana J. Delong-Bas, *The New Social Media and the Arab Spring*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/Public/focus/essay0611_social_media.html (last visited Mar. 29, 2015).

9 *Id.*

10 *Id.*

11 Stan Schroeder, Zuckerberg Wants To Bring The Whole Planet Internet Access, Mashable (Aug. 21, 2013), http://mashable.com/2013/08/21/mark-zuckerberg-Internet-org/.

12 *See generally* Information Technology, Globalization 101: A Project of SUNY Levin Inst., http://www.globalization101.org/information-technology/ (last visited Mar. 21, 2014).

13 *Id.*

14 *See generally* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

15 More than seventy percent of the world's governments now participate in free trade agreements with human rights requirements. Susan Ariel Aaronson, *Human Rights*, THE WORLD BANK, http://siteresources.worldbank.org/INTRANETTRADE/Resources/C21.pdf (last visited Apr. 25, 2015).

16 *See* Lisa Haugaard, *The U.S.-Columbia FTA: Still a Bad Deal for Human Rights*, THE HUFFINGTON POST (Dec. 4, 2011, 5:12 AM), http://www.huffingtonpost.com/lisa-haugaard/the-uscolombia-fta-bad-deal_b_983780.html.

agreement. Often, the country in violation will not receive any negative repercussions for its actions, effectively rendering these FTA human rights provisions useless. However, the difficulties in holding governments accountable for FTA human rights violations could be significantly ameliorated if (1) access to information is considered a human right, and (2) access to a device providing such information is available to everyone. In fact, some countries have already declared access to information a human right.[17] Moreover, tech and communication trailblazers (e.g., Google, Facebook, and Yahoo) are combining efforts to achieve what they believe to be a very attainable goal: provide Internet access to everyone worldwide.[18]

Overall, this article highlights the importance of declaring access to information a human right, and specifically, how such a declaration would increase the effectiveness of human rights provisions in free trade agreements. The article begins by providing general background information about human rights provisions in free trade agreements, detailed in Part II. Additionally, Part II describes the "Global Digital Divide" and the importance of closing said divide. Part III discusses the provisional shortcomings within free trade agreements with regard to human rights, as well as the global importance of having access to information. Part IV analyzes the debate behind declaring access to information a human right, as well as the link between Internet and human rights. Finally, Part V proposes that access to information should be declared a human right, and by doing so, the human rights provisions within free trade agreements will be much more effective and successful.

II. Background

A. Human Rights Provisions in Free Trade Agreements

For centuries, people and governments have "used trade as an incentive to lock in the habit of protecting human rights."[19] Gradually, policymakers began to develop trade agreements that would be beneficial, not only in terms of trade, but also for human rights.[20] For example, England signed treaties with the United States, Denmark, and Sweden in the early nineteenth century banning slave trade.[21] In the late nineteenth century, countries such as the United States, England, Australia, and Canada began to ban goods resulting from conflicts of la-

[17] Finland declared access to Internet a legal right. Saeed Ahmed, *Fast Internet Access Becomes Legal Right in Finland*, CNN (Oct. 15, 2009, 8:01 AM), http://www.cnn.com/2009/TECH/10/15/finland.internet.rights/index.html ("Finland has become the first country in the world to declare broadband Internet access a legal right.").

[18] *See* Schroeder, *supra* note 11.

[19] Susan Aaronson, *A Human Rights Argument for the Columbia Free Trade Agreement*, CARNEGIE COUNCIL (Dec. 4, 2007), https://www.carnegiecouncil.org/publications/ethics_online/0016.html.

[20] Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?,* WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm (last visited Mar. 29, 2015).

[21] *Id.*

bor.[22] Stimulated by international cooperation, countries' preferential trade agreements ("PTAs") began to incorporate loose, non-binding human rights provisions.[23] The United States, Canada, and Mexico were the first to explicitly include human rights provisions in a free trade agreement—the 1993 North American Free Trade Agreement ("NAFTA") includes labor, public participation, and access to information rights in its body and side agreements.[24]

Today, over seventy-five percent of the world's governments participate in trade agreements that include human rights provisions.[25] The European Communities made human rights improvements a condition of membership in external and internal trade agreements.[26] The European Union ("EU") encouraged member nations like Spain and Portugal, as well as candidate countries Croatia and Turkey, to improve their human rights performance by providing resources and expertise.[27] The United States uses its thriving market to incentivize developing countries such as Morocco and Oman to improve governance.[28] These countries have been successful in including human rights provisions into FTAs, but the enforcement of those provisions is directly affected by access to information.

B. The "Global Digital Divide"

Despite rapidly falling costs of telecommunications services, a wide gap persists between rich and poor nations in their citizens' capabilities of accessing, distributing, and exchanging digital information.[29] Policy makers and advocacy groups coined this social issue the "Digital Divide" or the "Digital Split" in the late 1990s.[30] Often discussed in an international context, the divide indicates that certain developed nations are far more equipped than developing nations to exploit the benefits from the rapidly expanding Internet.[31] However, the idea that information and technology is important to society is not new.[32] It is widely accepted that the Internet has the ability to transform cultures, improve understanding, eliminate authority gaps, and develop a truly free and democratic world.[33] For example, some governmental bodies believe that access to a tele-

[22] *Id*.

[23] *Id.*

[24] *Id*.

[25] Aaronson & Chauffour, *supra* note 20.

[26] Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, ACADEMIA 1, 2, http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements (last visited Mar. 29, 2015).

[27] Aaronson, *supra* note 19.

[28] *Id*.

[29] Nir Kshetri & Nikhilesh Dholakia, *Global Digital Divide*, ENCYCLOPEDIA OF INFO. SCI. & TECH. (2nd ed. 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1286203.

[30] *The Digital Divide, ICT and the 50x15 Initiative*, INTERNET WORLD STATS, http://www.Internetworldstats.com/links10.htm (last visited Mar. 29, 2015) [hereinafter *The Digital Divide*].

[31] *Id*.

[32] *Id*.

[33] *Id*.

phone system is such an important element that the governments themselves have started to implement various programs granting access to affordable telephone services.[34] There are many reasons why governments and countries strive to close the global digital divide. The main reasons include: (1) economic equality, (2) social mobility, (3) democracy, and (4) economic growth.[35]

1. Economic Equality

Access to information and communication is fundamentally one of the most important human rights.[36] Many countries guarantee their citizens this right because they believe that access to information is a basic component of civil life, which contributes to economic equality overall.[37] For instance, a telephone is often considered important for security reasons because certain types of emergencies (health, safety, etc.) will likely be handled more efficiently if the injured person can access a telephone.[38] In the United States, the newly implemented Affordable Care Act requires participants to purchase health insurance through an online marketplace—illustrating the importance of having access to Internet.[39] A variety of government services specifically offered to low income individuals (e.g., social welfare services) are administered and offered electronically.[40] However, having access to Internet or information is not only vital for someone's health and safety, but also for their career. Many companies now receive applications through a company website and conduct interviews over the phone or via Skype.[41] Clearly, many services ensuring a person's most basic human rights are primarily obtained via the Internet. Therefore, having access to the Internet and information is going to be the first step in ensuring those basic human rights.

2. Social Mobility

Computers and access to Internet play an increasingly important role in a person's ability to learn.[42] Educational institutions' inclusion of computers and Internet into curriculum is an illustration of the idea that Internet access should be customary and required.[43] The ratio of students to instructional computers in United States public schools was 5:1 in 2000 (down from 6:1 in 1999), which

[34] *Id.*

[35] *Id.*

[36] Toby Mendel, *Freedom of Information as an Internationally Protected Human Right*, ARTICLE 19, http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf (last visited Apr. 28, 2015).

[37] *The Digital Divide, supra* note 30.

[38] *Id.*

[39] *See generally* HEALTH.GOV, http://www.health.gov (last visited Mar. 29, 2015).

[40] *The Digital Divide*, *supra* note 30; *see also* U.S. WELFARE SYSTEM, http://www.welfareinfo.org/ (last visited Mar. 29, 2015).

[41] Ben Davies, *Job Interviews by Skype*, JOBS.AC.UK, http://www.jobs.ac.uk/careers-advice/interview-tips/1252/job-interviews-by-skype/ (last visited Apr. 25, 2015).

[42] *The Digital Divide*, *supra* note 30.

[43] *Id.*

was a dramatic change from 125:1 in 1983.[44] Without such access, the existing digital divide widens and children in higher socioeconomic classes are unfairly favored—poorly funded schools cannot afford computers and other digital learning tools, whereas properly funded schools can.[45] In order to provide equal opportunities socially, governments might offer some form of support in providing access to computers, Internet, and technology within schools.

3. Democracy

Abid Hussain's 1995 report to the UN Commission on Human Rights stated that, "Freedom will be bereft of all effectiveness if the people have no access to information. . .[it's] basic to the democratic way of life."[46] Proponents of eliminating the digital divide suggest that there may be a correlation between increased Internet usage and healthier democracies—primarily, that increased Internet usage leads to stronger public participation in elections and decision-making processes.[47] As this article later discusses, Arab nations have already demonstrated that online presence and the ability to access and share information via the Internet are extremely important assets in achieving democratic status.[48]

4. Economic Growth

Experts believe that the development of information infrastructure and its active use would be a shortcut to economic growth for less developed nations.[49] Countries utilizing certain technological advances usually gain a competitive advantage against less advanced countries.[50] For example, India's Internet economy growth was the second fastest among G-20 countries.[51] Also, developing markets contributed seventy-six percent of the G-20's Internet economy in 2010.[52] Generally, productivity improvement is associated with increases in information technology.[53]

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[44] *Elementary and Secondary Education: IT in Schools,* NAT'L SCI. FOUND., http://www.nsf.gov/statistics/seind02/c1/c1s8.htm (last visited Apr. 25, 2015).

[45] *The Digital Divide*, *supra* note 30.

[46] Mendel, *supra* note 36.

[47] *The Digital Divide, supra* note 30.

[48] *See* Rosiny, *supra* note 5, at 5.

[49] *The Digital Divide*, *supra* note 30.

[50] *Id.*

[51] The G-20 (or "Group of Twenty") is a block of 20 member nations that developed a forum to discuss economic development and growth across the world. *See generally, About G-20*, G20, https://g20.org/about-g20/ (last visited Mar. 29, 2015).

[52] *India's Internet Economy Growth Second Fastest Among G20 Countries,* THE HINDU (Mar. 19, 2012), http://www.thehindu.com/sci-tech/technology/Internet/indias-Internet-economy-growth-second-fastest-among-g20-countries/article3013087.ece.

[53] *Id.*

III. Discussion

A. The European Union's Human Rights Provisions

For decades, the European Union has insisted that member nations comply with human rights and democratic principles.[54] However, within the last forty years the EU made this type of compliance a necessary condition under external agreements and relations with non-member countries.[55] One particular event was the driving force behind the heightened importance placed on human rights provisions by the EU.[56] In 1977, the EU discovered Ugandan human rights violations and tried to terminate Stabex payments to Uganda.[57] The EU realized this was not officially possible because no human rights provisions existed under the then African, Caribbean, Pacific ("ACP")-EU Lomé Convention.[58] Therefore, the EU tried to persuade its ACP partners to introduce a clause into the Lomé Convention agreement that would suspend or terminate the agreement in the event of human rights abuses.[59] These efforts were unsuccessful, but a human rights clause was later introduced into the agreement in 1989.[60]

The initial clause incorporated into the Lomé Convention was inadequate. However, the 1990 Argentine-EU Cooperation Agreement contained a human rights provision that was effective.[61] Thereafter, the EU included human rights provisions in their new cooperation agreements with countries worldwide.[62] Finally in 1995, after two decades of negotiation, an operative and elaborative human rights clause was added to the Lomé IV Convention agreement, labeled as Articles 9 and 96 of the 2000 Contonou Agreement.[63] Since 1995, the EU Council has adopted the position that all future agreements the EU enters into will include human rights provisions, which the Council has adhered to ever since.[64]

Human rights provisions found within various agreements largely convey similar ideas. The most central and common element of human rights provisions is called the "essential elements" clause.[65] The 2012 EU-Central America agree-

54 *See,* Bartels, *supra* note 26.

55 *Id*.

56 *Id*.

57 *Id.* at 2. For more information on Stabex payments, *see generally Stabex Beneficiaries' Handbook*, FOURTH ACP-EEC CONVENTION OF LOMÉ (Dec. 1990), http://aei.pitt.edu/33866/1/A568_3.pdf.

58 *From Lomé I to IV*, EUROPEAN CONVENTION, http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/lomeitoiv_en.htm (last visited Mar. 21, 2014).

59 Bartels, *supra* note 26, at 2.

60 *Id.*

61 *Id.*

62 *Id.*

63 The first Lomé Convention agreement ("Lomé I") was signed into effect in 1975. Lomé I evolved into Lomé II, III, and eventually IV (essentially adding signatory countries, as well as investment and aid commitments). Lomé IV was enacted in 1989, with its trade provisions covering from 1990-1999. Seventy ACP countries are party to Lomé IV, as opposed to forty-six ACP countries who were party to Lomé I. EUROPEAN CONVENTION, *supra* note 58.

64 Bartels, *supra* note 26, at 3.

65 *Id.* at 4.

ment's essential elements clause states that the "[r]espect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both parties and constitutes an essential element of this Agreement."[66]

The 1993 EU-India cooperation agreement produced another common element called the "implementation" clause.[67] This clause states that "[t]he Parties shall adopt any general or specific measures required for them to fulfill their obligations under this Agreement."[68] Generally speaking, this provision has been interpreted as imposing a variety of additional obligations on EU member nations.[69] These additional obligations include proactively taking steps to ensure, not only that "human rights and democratic principles are *respected,* but also a positive duty to ensure that these norms are *ensured* and *fulfilled*."[70] Over the last fifty years, the EU has made attempts at advancing human rights through provisions located within their free trade agreements.[71] However, although the EU has codified these human rights, the provisional enforcement of them is far from perfect.

B. Provisional Shortcomings

To date, no specific governmental bodies have been developed to focus solely on ensuring the implementation and adherence to human rights provisions within free trade agreements.[72] Instead, governmental bodies have dealt with provisional issues on an ad hoc basis.[73] This runs contrary to other types of governmental bodies that have been created to ensure adherence to free trade agreement provisions, such as the sustainable development mandate.[74] Overall, the EU's efforts to implement ethical foreign policies have been successful, specifically with regard to its respect for social equality in free trade agreements.[75] However, room for improvement exists with regard to compliance and enforcement, especially because they are legally required.[76]

C. Importance of Having Access To Information

Greater access to information creates a viable ability to improve our lives, careers, education, governmental bodies, etc. Studies demonstrate benefits from

66 EU-Central America Association Agreement art. 1, June 29, 2012, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=689 [hereinafter EU-CAA].

67 Bartels, *supra* note 26, at 4.

68 EU-CAA, *supra* note 66; *see also* Bartels, *supra* note 26.

69 *See* Bartels, *supra* note 26.

70 *Id.*

71 *Id.*

72 *See id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

increased information and Internet technology, including educational advancement, access to government services, health information, and increased community participation.[77] More generally, increased Internet use may contribute to more democratic and involved elections.[78] Recent events in Egypt illustrate this—Egyptian citizens used Internet and social media to educate themselves about their rights or lack thereof, shared this information with each other, and organized gatherings and protests to effectively end a thirty-year dictatorship.[79] Additionally, e-commerce and market productivity increases with the development of technology skills, which have been found to positively affect wages.[80] Lastly, the Internet can be helpful for not only making important decisions (e.g., purchasing a home or health insurance), but also for lesser, everyday decisions (e.g., a farmer checking weather patterns as they pertain to his crops, applying for jobs, or shopping for the best product value at the supermarket).[81]

Another argument supporting the importance of access to information is the advancement of less developed nations.[82] The development of information infrastructure and its active use could act as an economic catalyst for such nations.[83] Generally, information technologies are associated with productivity improvements.[84] The exploitation of the latest technologies may give industries of certain countries a competitive advantage.[85] Overall, the possibilities that having access to the Internet and information provide seem endless.

D. Bridging The Gap

As previously mentioned, alleviating information and technology disparities amongst populations (i.e., eliminating the Digital Divide) is incredibly important. One main reason this gap exists is because rural areas and less developed nations cannot access the Internet due to location and lack of infrastructure.[86] According to studies, however, inaccessible telephone lines will not single-handedly limit access to the Internet.[87] New technology, such as satellite and power line technology, is being developed everyday that will help remote areas or countries without the necessary infrastructure gain access to the Internet.[88] However, these techno-

[77] *See* Samantha Becker, et al., *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries*, INST. OF MUSEUM & LIBR. SERV. (Mar. 2010), *available at* http://www.imls.gov/assets/1/assetmanager/opportunityforall.pdf.

[78] *The Digital Divide*, *supra* note 30.

[79] Delong-Bas, *supra* note 8.

[80] *Id.*

[81] Becker, *supra* note 77.

[82] *The Digital Divide*, *supra* note 30.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

logical advancements are useless if access prices are not lowered, which is another key factor in eliminating the Divide.[89]

Moreover, assistance from governments will prove extremely helpful in bridging the Divide. Governmental bodies are beginning to implement legislation initiatives aimed at eliminating this issue. To eliminate the Digital Divide in Illinois, the Illinois General Assembly enacted the "Eliminate the Digital Divide" law to create a fund to help develop information technology infrastructure by purchasing IT goods and services.[90] Not only are domestic governmental bodies enacting legislation to end the Divide, but countries and governments worldwide are as well.[91] While governments are moving towards bridging the information divide, they should go a step further and recognize a right to this information.

IV. Analysis

A. Recognition of "Access to Information" as a Basic Human Right

1. Opposition to Right Recognition

While access to information is clearly valuable, it is highly debated whether it can meet the standard to be recognized as a fundamental human right. Many experts argue that, although access to information may be an important means to improving the human condition, it is not an inherent human right.[92] Despite the fact that some countries have already declared Internet access a human right, opponents of such declarations feel that a particular distinction is being missed—namely, "[t]echnology is an enabler of rights and not a right itself."[93] The Universal Declaration of Human Rights—which ensures many fundamental human rights such as the right to free speech, movement, privacy, education, and a standard of living—supports the proposition that access to information is not a human right by failing to ensure it.[94] Moreover, even the United Nations reports that declare Internet access a human right go on to undermine such a declaration by stating that access to information is a means to an end, and not an end itself.[95] According to those reports, there is a high threshold for classifying something as

[89] *See* Eliminate the Digital Divide Law, 30 ILCS 780/ art. 5, (July 1, 2000), *available at* http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=574&ChapterID=7.

[90] ELIMINATE THE DIGITAL DIVIDE LAW, *supra* note 89. The program seeks to provide disadvantaged communities access to computers, telecommunication technologies, and related training. "Under this program, the Illinois Department of Commerce and Economic Opportunity (DCEO) is authorized to award grants of up to $75,000 to plan, establish, administer and expand Community Technology Centers (CTC's) and to support basic computer literacy training programs." *Eliminate the Digital Divide 2014-2015 Grant Program*, ILL. DEPT. OF COM. & ECON. OPPORTUNITY, http://www.illinois.gov/dceo/whyillinois/TechnologyServices/Pages/EliminatetheDigitalDivide.aspx (last visited Mar. 29, 2015).

[91] Finland was the first country to declare Internet access a legal right. *See* Ahmed, *supra* note 17.

[92] Vinton G. Cerf, *Internet Access Is Not A Human Right*, THE NEW YORK TIMES (Jan. 4, 2012), http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=0.

[93] Cerf, *supra* note 92

[94] Universal Declaration of Human Rights, *supra* note 14.

[95] Cerf, *supra* note 92.

a human right.[96] Consequently, questions have been raised about whether having access to information and the Internet should be considered, if anything, a human or civil right.[97]

Opponents of declaring access to information a human right maintain strong convictions about what constitutes a human right. They argue that "human rights" consists of values we need as humans to live meaningful lives, such as freedom from torture or freedom of conscience.[98] Thus, not only is it inconsiderate to place the need for technology in the sacred category of "human rights," but it is a mistake.[99] Furthermore, if access to information were labeled as a human right, over time, society would place value on the wrong things.[100] These opponents suggest that the best way for people to discern whether something is a human right or not is by looking at the outcome that is trying to be ensured (e.g., freedom of speech, right to assemble).[101] And although those outcomes are assisted with the use of technology and information, they are not dependent on it.[102] "For example, at one time if you didn't have a horse it was hard to make a living. But the important right in that case was the right to make a living, not the right to a horse."[103]

Additionally, opponents utilize similar arguments to conversely argue that access to information and the Internet should be a civil right, not a human right.[104] They reason that civil rights are those that are conferred to the people using governmental legislation—different from human rights, which are innate to humans sans governmental intervention.[105] While the United States has never passed legislation stating every citizen has the right to a telephone, there appears to be an increasing notion to the right of "universal service."[106] Universal service is the idea that services (i.e. telephone, electricity, and now broadband) must be available to everyone in the country, even in the most remote areas.[107] Therefore, opponents argue that Internet access is an instrument for obtaining something more important, and the closer we edge towards accepting the idea that everyone deserves universal service, the closer we come to making Internet access a civil right and not a human right.[108]

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96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

2. *Support for Right Recognition*

While opposition to recognizing access to information as a basic human right exists, an increasing number of countries and organizations have recently demonstrated their support for such a right. Critics of this right recognition point to the level of responsibility placed upon technology creators themselves to support human and civil rights as a reason for not declaring it a human right.[109] However, Finland is one particular country that will soon feel the impact of supporting these rights because it was the first country in the world to declare broadband Internet access a legal human right.[110] As of July 2010, Finnish telecom companies were required to provide all 5.2 million citizens with Internet connection.[111] The law requires that the connection must run at speeds of at least one megabit per second.[112] The legislative counselor for Finland's Ministry of Transport and Communications explained, "We think it's something you cannot live without in modern society. Like banking services or water or electricity, you need Internet connection. . .[u]niversal service is every citizen's subjective human right."[113] Even though France's highest court in June 2009 declared access to Internet a human right, Finland was the first to legally mandate Internet speed.[114] Finland's goal to provide Internet access to everyone is complicated by geographic challenges, especially in rural areas where access is limited.[115] However, this law mandating a certain minimum Internet speed seeks to ameliorate such a digital divide.[116] Ninety-five percent of Finland's population has Internet access, making it one of the most "wired" nations in the world.[117]

Even the United States, which in 2010 remained the only industrialized nation without a national high-speed broadband policy with only fifty-four percent of rural households subscribed to broadband Internet, is making strides similar to those of Finland and France.[118] In 2012, the United States Congress passed the Federal Communications Commission's ("FCC") broadband policy called the "National Broadband Plan" with hopes of improving Internet access in the United States.[119] In its first year, the FCC reached eighty-seven percent of its

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109 *Id.*

110 *See* Ahmed, *supra* note 17.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* In June 2009, France's highest court declared access to Internet to be basic human right and ruled that, "free access to public communication services online is a right laid down in the Declaration of Human Rights, which is in the preamble to the French Constitution." *Top French Court Declares Internet Access 'Basic Human Right'*, THE LONDON TIMES (June 12, 2009), http://www.foxnews.com/story/2009/06/12/top-french-court-declares-internet-access-basic-human-right/.

115 *See* Ahmed, *supra* note 17.

116 *Id.*

117 *Id.*

118 *See id.* (citing a study released in August 2010 by the Communications Workers of America, the country's largest media union).

119 *See generally Executive Summary*, NAT'L BROADBAND PLAN-CONNECTING AMERICA, http://www.broadband.gov/plan/executive-summary/ (last visited Mar. 29, 2015).

agenda goals, including the creation of different governmental bureaus responsible for launching various Internet services provided to the public.[120]

Finally, the Arab Spring protests that occurred within the last few years were highly successful because they utilized information technology, such as the Internet, cell phones, and social media platforms.[121] As previously mentioned, the rallies' success can mostly be credited to the shared views of protesters and their collective turnout, not the Internet alone.[122] However, the protestors' ability to instantaneously communicate, organize, and publicize everywhere could not have been possible without the Internet; therefore, it was a very important component of the Arab Spring. In June 2011, a UN special reporter covering the Middle East and North African uprisings went so far as to pronounce that the Internet had "become an indispensable tool for realizing a range of human rights."[123]

Regardless of the controversy surrounding the declaration of Internet access as a human right, many people, if not all, may in the near future be able to access the Internet from anywhere in the world, notwithstanding economic status. Mark Zuckerberg, Facebook founder and CEO, recently entered into a venture aimed at bringing Internet access to everyone in the world.[124] Today, only 2.9 billion people in the world have Internet access—meaning two-thirds of the world cannot get online.[125] Furthermore, Internet adoption is growing by less than nine percent annually.[126] With those statistics in mind, Zuckerberg formed a global partnership with media and technology titans Ericsson, MediaTek, Nokia, Opera, Qualcomm, and Samsung to launch an initiative called Internet.org.[127] The organization's goals include the efficient use of data, making Internet access affordable, and driving Internet access by helping businesses create new business models and services.[128] In terms of profit, this venture's founders will likely not see any profits at least in the short term—possibly not even in the long-term.[129] The unfair economic reality is that Facebook users already have more money than the total world population without Internet.[130] So after removing any possibility of being profitable from the equation, it is clear why these tech-industry

120 *See generally National Broadband Plan: Year 1 Progress Report*, NAT'L BROADBAND PLAN-CONNECTING AMERICA, http://www.broadband.gov/plan/broadband-progress-report.html (last visited Mar. 21, 2014).

121 *See* Rosiny, *supra* note 5.

122 *See* Richard A. Lindsey, *What the Arab Spring Tells Us About the Future of Social Media in Revolution Movements*, SMALL WARS J. (July 29, 2013, 8:53 PM), http://smallwarsjournal.com/jrnl/art/what-the-arab-spring-tells-us-about-the-future-of-social-media-in-revolutionary-movements.

123 Cerf, *supra* note 92.

124 Schroeder, *supra* note 11.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

billionaires are pursuing Internet.org—they believe that everyone has the right to be connected.[131]

Internet.org's projects potentially include the development of lower-cost, higher-quality smart phones that could help direct Internet access to hard-to-reach areas of the world, as well as the localization of mobile devices.[132] Zuckerberg says that "[t]here are huge barriers in developing countries to connecting and joining the knowledge economy. Internet.org brings together a global partnership that will work to overcome these challenges, including making Internet access available to those who cannot currently afford it."[133] Thus, even if Internet access is not declared a universal human right, it may still be possible for everyone to achieve universal access.

B. The Relationship Between Internet Access and Human Rights

History demonstrates that having access to Internet in this day and age is a benefit,[134] so governments and corporations should illustrate this by placing emphasis on providing everyone Internet access.[135] Former Egyptian President Hosni Mubarak took the radical and unparalleled step of shutting off his nation's Internet for five days in 2011.[136] His goal was clear: he wanted to terminate his opponents' flow of communication and organized assembly occurring on social media outlets such as Facebook and Twitter.[137] This misstep cost Egypt $90 million and enraged the international community.[138] In the end however, the Egyptian youth's online and social media presence arguably single-handedly overthrew Mubarak's regime, demonstrating the power of social media and Internet access.[139]

On August 21, 2013, the world learned of Syria's chemical weapons use, not from the U.S. Central Intelligence Agency, but instead from cellphone video footage posted to YouTube.[140] Forums were created so that anyone capturing the Syrian atrocities on cellphones could upload the data to a centralized location.[141] Also, UN inspectors attempting to investigate Syria's use of chemical weapons were able to avoid areas with heavy fighting by using crowd-source mapping (cell-phone users are able to instantaneously report incidents of fighting, and that

131 *Id.*

132 *Id.*

133 *Id.*

134 *See The Digital Divide, supra* note 30.

135 *See* Ahmed, *supra* note 17; *see also* Schroeder, *supra* note 11.

136 Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 185 (2011).

137 *Id.*

138 *Id.*

139 *Id.* at 187.

140 Carol J. Williams, *Experts: Syrians Can Aid Chemical Weapons Hunt with Social Media*, LOS ANGELES TIMES (Sept. 12, 2013), http://articles.latimes.com/2013/sep/12/world/la-fg-wn-syria-chemical-weapons-hunt-social-media-20130912.

141 *Id.*

information is compiled into a usable crowd-source map).[142] This demonstrates the effect that social media, Internet, and more generally, access to information, have on disseminating information to the public and world. The tie between access to information and the advancement of human rights in Egypt and Syria is obvious. More importantly, these lessons can be applied to the advancement of human rights on a more global scale.

V. Proposal

Recognizing "access to information" as a basic human right within the Universal Declaration for Human Rights would operate as a vehicle for ensuring the most basic and established human rights. Moreover, declaring "access to information" a human right would increase the effectiveness of human rights provisions within free trade agreements. While trade agreements are not designed to advance human rights *per se*, they have an important effect on them. For example, trade agreements have inherently required legislators to make trade-related regulations transparent and allow for public remark when conditions are below what is stipulated in the agreement.[143] Furthermore, domestic economic participants are granted due process rights where they may seek relief related to trade by proposing comments to national agencies.[144] Because citizens are able to demand rights through trade, they will likely demand good governance habits in other policymaking events.[145] Also, dispute settlement mechanisms support these provisions.[146] If a government violates the provisions, it may lose its trade benefits.[147] Thus, governments have strong incentives to uphold human rights provisions in FTAs.[148]

Access to information is capable of affecting large social change. Due to improvements in technology and organizations like Internet.org, providing worldwide Internet access may soon be a viable reality. The benefits from worldwide Internet access are immense. As previously mentioned, worldwide Internet access could enable the poorest and most repressed populations of the world to share their story, read about what rights they have been conferred, and voice concern when those rights are violated. Just as quickly as the world learned of Syria's human rights violations, the world can be exposed to other types of atrocities at an even faster rate. If human rights violations were uncovered, awareness and public pressure would force governmental agencies to immediately address

142 William Potter, et al., *The CW Will Be Tweeted*, MONTEREY INST. OF INT'L STUD. (Sept. 13, 2013), http://cns.miis.edu/stories/130912_cw_revolution_tweeted.htm.

143 The Columbia Free Trade Agreement allows for public comment, grants due process rights, and citizens may submit comments to agency bodies with regard to human rights violations. Dispute settlement mechanisms are in place. If Columbia is found to have violated human rights, it may lose its trade benefits. *See* Aaronson, *supra* note 19.

144 *Id.*

145 *Id.*

146 *See id.*

147 *Id.*

148 *Id.*

their trading partner's violations—or even cease trade. The worldwide online presence Internet.org envisions would practically ensure that accounts of human rights violations would gain more attention, and at a faster rate, than ever before. Therefore, with free trade agreements being dependent on compliance with their human rights provisions, trading partners will be more likely to ensure they do not commit human rights violations because the risk of the world finding out is simply too high, if not certain.

VI. Conclusion

Today, many free trade agreements include human rights provisions, but they are neither efficient nor followed. However, human rights protection is fundamental to protecting the human condition. Free trade agreements containing human rights provisions would be much more efficient and effective if access to information and the Internet was declared a universal human right. The provisions are present, but monitoring and compliance is difficult or non-existent. However, citizens advocating on their own behalf through an online presence may alleviate this problem. Currently, organizations are attempting to provide Internet to everyone in the world. If attainable, millions (even billions) of people would have access to information that they otherwise did not have before. As we have seen, social media has provided citizens with a platform to come together, get educated, communicate, and affect social change.

The power of the Internet, coupled with an organization determined to bring this right to everyone in the world, could significantly alter the way and frequency with which human rights are protected. Free trade agreements' human rights provisions may no longer be only effective on an ad hoc basis. If access to information was recognized as a basic human right, it could be the enabler and protector of all other fundamental human rights. Therefore, declaring access to information as a human right is a necessary mechanism in the effectiveness of human rights provisions within free trade agreements.

The Global Economic Cost of Cancer: Improving Outcomes and Cost by Reducing International Barriers to Care

Alexandra Gross*

Abstract

The cost of cancer is vastly different across the globe, which inevitably results in decreased access to lifesaving medication and treatment for individuals who cannot afford the rising costs. This conflict poses a questionable violation of the international human right to health care when a patient in one country has access to a lifesaving drug, but a patient in another country is refused the same treatment. While several governments across the globe have refuted the ideology behind the right to health, governments that recognize a right to health should act as models for improved access to care and decreased direct costs for patients. Governments across the globe are called to look to their respective human rights treaties, modeled by the World Health Organization, to effectively analyze a possible human rights violation and come together to create equality in the access to cancer treatments across the world.

I. Introduction

"Of all the forms of inequality, injustice in health care is the most shocking and inhumane."

—Dr. Martin Luther King, Jr.

Economists have recently endeavored to measure and rank the best countries to be born in, using a quality-of-life index that measures the opportunities that each country provides for its children to live a healthy and prosperous life.[1] child born in the study's top ranked country is said to have "won the lottery of life"

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[1] *The Lottery of Life*, The Economist (Nov. 21, 2012), http://www.economist.com/news/21566430-where-be-born-2013-lottery-life.

because he or she will have the best opportunity for a healthy and prosperous life.[2] The same idea can be applied to those born in countries that guarantee access to lifesaving health care. If a child is born in a country that recognizes the right to health or the highest attainable standard of life, he will be guaranteed access to the best treatment and medicine despite inability to pay. He has "won the lottery." However, if a child is born in a country that does not recognize the right to health, he will not be guaranteed access to lifesaving medicine should he ever need it, he may be turned away from hospitals and medical providers, and he may not be given a chance to survive. He has lost.

It is difficult to define the right to health. Human rights activists often have a difficult time determining what the phrase encompasses, where the line is drawn between a right and a privilege, and who is entitled to the right. While international meetings to negotiate and draft documents defining the global right to health have made significant strides toward universal health care or a right to health for all individuals, not all countries have adopted the documents or fully accepted the ideology.[3] As a result, a significant portion of the world does not have a meaningful right to health. Ultimately, those living in countries that do not recognize a right to health pay exuberant amounts for lifesaving care. Approximately 150 million people across the world suffer from financial devastation following necessary medical care, and 100 million people are forced below the poverty level as a result of health care expenditure.[4] Specifically, the cost cancer patients incur for cancer treatment leaves many completely unable to meet their financial obligations or worse – left without care because they are unable to afford it.[5]

This article will first analyze several important international documents that have addressed the basic human right to health. Each one builds off the former and further defines the rights, services, and advancements in technology all humans are entitled to in order to sustain a healthy well-being.[6] Next, this article will determine what effect a right to health and increased access to cancer treatment can have on the global economic cost of cancer. Furthermore, the value of prevention and detection services will be addressed as a method for reversing the global economic cost of cancer. Third, this article will compare France's approach to the right to health and the resulting access to care and cost of treatments for cancer patients with the United States' approach, access, and cost for cancer treatment. Lastly, this article will propose heightened responsibilities for the United States to address its stance on the right to health in order to reduce or reverse the epidemiological and economic implications of cancer.

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[2] *Id.*

[3] *The Right to Health,* WORLD HEALTH ORG. (last updated Nov. 2013), www.who.int/mediacentre/factsheets/fs323/en/ (universal health care is a health system which provides health care and financial protection to all citizens).

[4] *Id.*

[5] *See* THE GLOBAL ECONOMIC COST OF CANCER, AM. CANCER SOC'Y & LIVESTRONG 2, 4-5 (2011), *available at* http://www.cancer.org/acs/groups/content/@internationalaffairs/documents/document/acspc-026203.pdf.

[6] *The Right to Health, supra* note 3. R

II. Background

Several key international treaties, reports, and documents have addressed the universal right to health–each defining the right differently, but with the same focus on the citizen's well-being. This section will first discuss the United Nation's ("UN") Universal Declaration of Human Rights, established in 1948, which was the first treaty to internationally recognize the right to health.[7] Second, this section will discuss the significant creation of the World Health Organization and its Constitution, which addresses an individual's standard of health.[8] Lastly, this section will look at the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), a human rights treaty passed by the UN in 1966 in order to set out goals for achieving the international right to health.[9]

The concept of an international right to health was introduced in what would become the Universal Declaration of Human Rights during the UN's inaugural meetings in 1946.[10] The UN was created immediately after World War II to promote peace between member states and to ensure that its citizens' basic human rights would be protected.[11] Among the drafters and member states were: China, the USSR, France, the United States, United Kingdom, Lebanon, Australia, Chile, and Canada as well as forty-one other developing nations.[12] In a time of international turmoil, the member states, all of which were comprised of different political, cultural, and religious backgrounds, agreed to draft the Universal Declaration of Human Rights to serve as an "International Bill of Human Rights."[13] The UN eventually adopted the Declaration on December 10, 1948.[14] Fundamental themes of the document are the equal rights of men and women across the world, as well as the promotion of social progress and a better standard of life.[15] Article 25 of the Declaration specifically addresses an individual's right to health.[16] The Declaration indicates that all individuals are entitled to an adequate standard of living in order to maintain their health and well-being.[17] An individual's standard of living is measured in terms of necessary food, clothing,

[7] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 25 (Dec. 10, 1948); *see also History of the Document*, UNITED NATIONS (last visited Apr. 8, 2014), http://www.un.org/en/documents/udhr/history/shtml.

[8] *The Right to Health, supra* note 3.

[9] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, at art. 12 (Dec. 16, 1966) [hereinafter Int'l Covenant on Econ., Soc. & Cultural Rts].

[10] Universal Declaration of Human Rights, *supra* note 7, at art. 5; *see also History of the Document*, *supra* note 7. R R

[11] Universal Declaration of Human Rights, *supra* note 7, at art. 5; *see also History of the Document*, *supra* note 7. R R

[12] United States human rights activist, Eleanor Roosevelt was the driving force for the Declaration's adoption. She produced a memoir about the drafting process, speaking about each nation's preferences and beliefs. *See History of the Document*, *supra* note 7.

[13] Universal Declaration of Human Rights, *supra* note 7, at art. 25. R

[14] *History of the Document*, *supra* note 7. R

[15] Universal Declaration of Human Rights, *supra* note 7, at art. 25. R

[16] *Id.*

[17] *Id.*

housing, and medical care, as well as the right to aid in the event of disability, unemployment, sickness, or old age.[18]

Possibly the most significant result of the UN's meetings throughout the 1940s and the development of the Universal Declaration of Human Rights was the creation of the World Health Organization ("WHO") in 1948.[19] All members of the UN could become members of the WHO by signing or otherwise accepting its Constitution.[20] Through drafting and the subsequent process by which member states signed the Constitution, all states effectively accepted that the highest attainable standard of health is one of the fundamental rights of every human being regardless of economic position.[21] In addition, contracting parties agreed to promote and protect the right to health for all people.[22] Substantively, the Constitution defines the right to health as "timely, acceptable, and affordable healthcare of appropriate quality."[23] The Constitution further clarifies that all member states must create conditions in their respective countries, in which everyone can be healthy, namely by ensuring the availability of health services.[24] Article 20 of the Constitution requires individual member states to take action toward acceptance of WHO conventions or agreements within eighteen months of enactment.[25] Those that do not accept such conventions or agreements are required to provide a written statement detailing their reasons.[26]

The WHO and its Constitution require member states to make access to health a priority at the national level, and yet several member states have signed and accepted the Constitution without ratifying such documents or implementing the components of a right to health at a national level.[27] Therefore, certain member states reap the benefits of membership in the WHO, such as technical and policy-based support, but only recognize a right to health as a progressive movement some sixty years after the Constitution's acceptance.[28] In 2011, at the Executive Board's 129th session, the WHO designed a method for reforming its structure and organization to facilitate uniformity in global health and enable all member

[18] *Id.*

[19] *History of WHO*, WORLD HEALTH ORG., http://www.who.int/about/history/en/ (last visited Apr. 10, 2014).

[20] *Countries*, WORLD HEALTH ORG., http://www.who.int/countries/en/ (last visited Apr. 10, 2014) (among the other 194 member states, France and the United States are members of the WHO and have accepted the WHO Constitution at an international level).

[21] Constitution of the World Health Organization ch. IV, July 22, 1946, 62 Stat. 6279, 14 U.N.T.S. 185, *available at* http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf.

[22] *Id.*

[23] *The Right to Health, supra* note 3; Constitution of the World Health Org., *supra* note 21, at art. I. **R**

[24] *The Right to Health, supra* note 3.

[25] Constitution of the World Health Org., *supra* note 21, at art. I. **R**

[26] *Id.*

[27] *See* Eleanor D. Kinney, *The International Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1464 (2001) (as will be touched on later in the article, the United States is among the member states who have not accepted the WHO Constitution at a national level).

[28] *See generally About WHO*, WORLD HEALTH ORG., http://www.who.int/about/en/ (last visited Apr. 12, 2014); *see also The Right to Health, supra* note 3; *see also Observations by the United States of America on "The Right to Health, Fact Sheet No. 31,"* U.S. STATE DEP'T 1,1 (Mar. 19, 2010).

states to take a more active stance on universal care to its citizens and a right to health for all people.[29]

As a result of the WHO's development of an international right to health, the UN passed the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") in 1966, a human rights treaty that further defines the right to health and creates steps for member states to realistically implement universal access to care.[30] The ICESCR indicates that, in order to realize the highest attainable standard of health, member states must take steps to ensure access to the prevention, treatment, and control of epidemics, as well as create conditions that allow all citizens to seek medical attention in the event of illness.[31] The UN Committee on Economic, Social, and Cultural Rights, which monitors member states' compliance with ICESCR, adopted General Comment 14 on the Right to Health in 2000 to provide clarity on Article 12 of the ICESCR and further define a right to health, which includes timely and appropriate health care.[32] General Comment 14 indicates that the right to health is comprised of the availability and accessibility of ethically acceptable health facilities, goods, and services.[33] The Committee defines accessibility in physical terms, or access within safe reach, but also in economic terms, meaning the requirement that health care is affordable for all.[34] General Comment 14 also indicates that all individuals are entitled to essential drugs that will help to maintain their well-being.[35]

While not all member states have fully realized their obligations under the ICESCR on a national level, they are required by General Comment 14 to make progression toward a national right to health; therefore, member states are called to expeditiously utilize maximum available resources and make calculated steps toward universal health care.[36] General Comment 14 also uses a three-tier approach to outline member states' obligations under the ICESCR.[37] It obligates member states to: (1) refrain from interfering with citizens' right to health or limiting equal access to care; (2) protect their citizens' from third party intervention with citizens' right to health by adopting legislation which ensures equal

[29] *WHO Reform*, WORLD HEALTH ORG., http://www.who.int/about/who_reform/en/ (last visited Apr. 12, 2014).

[30] *See generally* Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 9; *see also The Right to Health*, supra note 3.

[31] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 9, at art.12; *see also The Right to Health*, *supra* note 3.

[32] United Nations, Econ. & Soc. Council, Comm. on Substantive Issues Arising in the Implementation of the Int'l Covenant of Econ., Soc., & Cultural Rts.,¶ 11, E/C.12/2000/4 (2000); *see also The Right to Health*, *supra* note 3.

[33] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 12; *see also The Right to Health*, *supra* note 3. R

[34] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 12; *see also The Right to Health*, *supra* note 3. R

[35] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 12; *see also The Right to Health*, *supra* note 3. R

[36] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 30; *see also The Right to Health*, *supra* note 3. R

[37] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 33. R

access to care in a private health care system and controls the marketing of medicines by third parties; and (3) implement legislation to promote the right to health and ultimately adopt a national policy for realizing the full right to health.[38]

General Comment 14 also adopts the Alma-Ata Declaration of 1978, an international treaty, which indicates that governments have a responsibility to create access to health such that people are able to maintain a socially and economically productive lifestyle.[39] The Alma-Ata Declaration also calls for international cooperation to ensure primary care to all individuals because "the attainment of health by people in any one country directly concerns and benefits every other country."[40] Perhaps most significantly, General Comment 14 differentiates some member states' inability to progress toward universal health care from other states' unwillingness to do so.[41] General Comment 14 goes on to declare that a member state's unwillingness to use its maximum resources to realize a right to health for its citizens is in violation of its obligations under Article 12 of the WHO constitution.[42]

III. Discussion

The right to health and access to lifesaving care may play significant roles in the global economy due to cancer's affect on citizens' social and economic productivity and cancer treatments' impact on a citizen's financial standing. First, this section will discuss the global implications of cancer both in a social and economic capacity. Second, this section will discuss proposals for access to primary care, as well as prevention and detection mechanisms to reduce prevalence and costs. Third, this section will discuss the various world health organizations that are seeking reform in the treatment of cancer, in order to reduce the global economic burden. Lastly, this section will discuss a specific example of the cost of cancer drugs and the anomaly it presents.

It is arguably in a country's best interest to protect its citizens' right to health and adopt programs related to cancer prevention and treatment, in an effort to reduce the cost of cancer at a macroeconomic and microeconomic level. In developed nations, cancer is currently the leading cause of death, and it is the second leading cause of death in developing nations after heart disease. However, experts at the World Health Organization project that cancer could soon be the leading cause of death worldwide.[43] In 2008, there were approximately 4.8 mil-

[38] *Id.*

[39] *See generally* World Health Org., Declaration of Alma-Ata, International Conference on Primary Health Care, USSR, Sept. 6-12, 1978, U.N. Doc. A56/27 (1978) [hereinafter W.H.O., Declaration of Alma-Ata] (134 health ministries signed the Alma-Ata Declaration, which focused on the importance of universal primary care for all individuals).

[40] W.H.O., Declaration of Alma-Ata, *supra* note 39 at art. IX; *see also* United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 38.

[41] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 47; *The Right to Health*, *supra* note 3. R

[42] United Nations, Econ. & Soc. Council, *supra* note 32, ¶ 47. R

[43] *Global Cancer Facts & Figures*, AM. CANCER SOC'Y, 2d ed. 1, 1 (2008), http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-027766.pdf.

lion cancer deaths in developing countries, as well as 2.8 million in developed countries, with the number of deaths estimated to increase due to aging populations and western habits like smoking and physical inactivity.[44]

The American Cancer Society and LIVESTRONG published the first study quantifying the global economic cost of cancer in 2010, and the study showed that cancer has the greatest economic impact from premature death and disability of all causes of death worldwide. The economic cost of heart disease, the second leading global cause of death, trails cancer by nearly 20%.[45] Using data collected from the WHO, the study estimated the number of life years lost due to death and disability across seventeen types of cancer and the top fifteen leading causes of death–the variable would become known as the "DALY" (disability-adjusted life year).[46] In order to account for income disparities across the globe, the study grouped countries into four income brackets and measured the economic value of a year of healthy life in an attempt to measure the corresponding economic loss due to death and illness.[47] It was estimated that 83 million years of healthy life were lost due to death and disability from cancer in 2008.[48]

By measuring indirect costs due to cancer such as loss of economic output due to missed days at work and premature death, and without measuring direct costs like dollars spent on treatment and rehabilitation, it was estimated that the total cost of cancer worldwide was $895 billion in 2008.[49] In sum, the indirect cost of cancer was approximately 1.5% of the world's gross domestic product.[50] While the data focuses on the economic impact across the globe, low-to-middle income families are significantly burdened because loss of income due to disability or death in the family takes a more significant toll on their annual income and ability to meet other financial obligations than it does on wealthier families.[51]

Furthermore, evidence suggests that even though the technology exists to detect, prevent, and treat forms of cancer, the disease will not be successfully eradicated until access to preventative care is increased.[52] National policies focused on access to preventative measures, early detection, and quality treatment could significantly increase the proportion of cancer detection and decrease cancer deaths,

[44] *Id.*

[45] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 1; *see also* Zosia Chustecka, *Cancer Has Greater Impact Than All Other Diseases*, MEDSCAPE MED. NEWS (Aug. 25, 2010), http://www.medscape.com/viewarticle/727459.

[46] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 7. R

[47] *Id.*

[48] *Id.* at 6.

[49] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 2; *see also* Chustecka, *supra* note 45; R
see also Global Cancer Facts & Figures, *supra* note 43, at 9. R

[50] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 6; *see also* Chustecka, *supra* note 45. R

[51] *See generally* THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 1; *see also* Chustecka, R
supra note 45. R

[52] *Cancer Costs Projected to Reach At Least $158 Billion in 2020*, NAT'L CANCER INST. (Jan. 12, 2011), cancer.gov/newscenter/newsfromnci/2011/costcancer2020; *see also Cancer Health Disparities,* NAT'L CANCER INST, http://www.cancer.gov/newscenter/newsfromnci/2011/CostCancer2020 (last updated March 11, 2008) (the Center to Reduce Cancer Health Disparities is a National Cancer Institute initiative aimed at researching and reducing health disparities).

which will in effect reduce the global economic cost of cancer.[53] As a policy matter, primary prevention is the most cost effective strategy for controlling the spread of cancer, by identifying and eliminating exposure to cancer-causing factors such as tobacco use, poor nutrition, physical inactivity, occupational exposures, and chronic infections.[54] Monitoring preventable forms of cancer could make an especially noteworthy difference in low-to-middle income nations, as many do not currently have preventative resources, and therefore, have the highest rates of preventable cancers in the world.[55]

For instance, death due to cervical cancer, a form of cancer which can be diagnosed and treated with early detection, is significantly more prevalent in low-to-middle income nations due to lack of access to prevention and detection measures.[56] The access and incidence of pap testing, the detection mechanism for cervical cancer, was higher in the 1960s in the United States than the highest rates found today in Eastern Africa.[57] The lack of resources to treat cancer and the focus on communicable diseases in Africa creates a regulatory atmosphere where cancer is of low public health priority, and as a result, African cancer patients simply do not have access to preventative care.[58]

Several international organizations have recently gathered to call attention to the rising incidence of cancer and implement policies focused on improved treatment, prevention, early detection, and screening. The WHO addressed the global burden of cancer in its 58th World Health Assembly in 2005, where member states approved a resolution calling for improved cancer prevention and treatment.[59] Specifically, the resolution calls member states to increase access to care by forming national cancer programs, which will increase early detection and screenings, as well as improve palliative treatment.[60] In addition, at the World Cancer Congress in 2006, the global cancer community addressed the growing global cancer burden and launched the first World Cancer Declaration, which outlined the necessary steps to begin to reverse the global cancer crisis by 2020.[61] However, the World Health Assembly extended the timeline for cancer control from 2020 to 2025 at a meeting of member states in 2013.[62] The member states set out nine targets for cancer prevention and control in 2013, four of which

[53] *See Global Cancer Facts & Figures, supra* note 43, at 9; *see also* Chustecka, *supra* note 45. R

[54] *See Global Cancer Facts & Figures, supra* note 43, at 3-4, 9; *see also* Chustecka, *supra* note 45. R

[55] *See Global Cancer Facts & Figures, supra* note 43, at 9, 37-38. R

[56] *See id.* at 9, 38-40.

[57] *Id.* at 41.

[58] *Id.* at 37.

[59] World Health Assembly Res. 58.22/1, Cancer Prevention and Control, 58th Sess., May 25, 2005; *see also The 58th World Health Assembly Adopts Resolution on Cancer Prevention and Control*, WORLD HEALTH ORG., (May 25, 2005), http://www.who.int/mediacentre/news/releases/2005/pr_wha05/en/.

[60] World Health Assembly Res. 58.22/1, Cancer Prevention and Control, *supra* note 59; *see also The* R
58th World Health Assembly Adopts Resolution on Cancer Prevention and Control, *supra* note 59. R

[61] Cary Adams et al., *The World Cancer Declaration: From Resolution to Action*, 12 LANCET ONCOLOGY 1091-92 (2011); *see generally World Cancer Declaration*, UNION FOR INTERNATIONAL CANCER CONTROL, (2013), http://www.uicc.org/world-cancer-declaration.

[62] Adams et al., *supra* note 61; *see also World Cancer Declaration*, *supra* note 61. R

specifically address access to care including: (1) universal coverage of HPV vaccination, (2) universal access to screening and early detection, (3) improving access to diagnosis and treatment, and (4) universal availability to essential drugs and pain control.[63] The revised World Cancer Declaration of 2013 specifically addresses the need for international organizations to reinforce the human rights established by the ICESCR to expand access to cancer prevention, detection, and treatment methods.[64]

There is an argument that the high cost cancer patients must pay for treatment reflects the cost of developing cancer treatments, and thus, lowering costs will hinder cancer research and development–particularly in the pharmaceuticals industry.[65] Still, the rising costs seem unwarranted and continue to reduce access to lifesaving treatments. For example, the drug Gleevec, used to treat chronic myeloid leukemia ("CML"), entered the United States market in 2001 at approximately $30,000 a year, which was intended to reflect and cover the costs of research and development.[66] After ten years on the market and faced with competition from five newer drugs, the price has tripled.[67] The developer of Gleevec, Novartis, justifies its pricing by suggesting that few patients pay the full cost and the current price of the drug reflects the high cost of research, as well as the value of the drug to patients.[68] However, doctors and researchers specializing in myeloid leukemia are now speaking out against drug developers like Novartis.[69] In an article for *Blood*, the Journal for the American Society of Hematology, the CML specialists suggested that charging an unreasonable price for lifesaving medicine is essentially profiteering and similar to increasing prices of necessary supplies to isolated communities in times of natural disasters.[70] The majority of the CML experts indicated that the price of CML drugs might compromise patients' immediate access to treatment that is proven to be effective for their disease and may be their only option for remission.[71] The article indicates that the increasing cost of Gleevec reflects the rising cost of cancer drugs across the board.[72] In fact, of the twelve cancer drugs approved by the Food and Drug Administration for distribution in 2012, eleven cost more than $100,000 a year, which is twice the

[63] *Id.*

[64] *Id.*

[65] *See generally The Cost of Cancer,* NAT'L CANCER INST., http://www.cancer.gov/aboutnci/servingpeople/understanding-burden/costofcancer (last updated Nov. 2011); *see generally* Camille Abboud et al., *Price of Drugs for Chronic Myeloid Leukemia (CML), Reflection of the Unsustainable Cancer Drug Prices: Perspective of CML Experts*, 121 BLOOD J. AM. SOC'Y OF HEMATOLOGY 4439, 4439 (2013).

[66] Andrew Pollack, *Doctors Blast Cost of Cancer Treatment*, BOS. GLOBE, Apr. 26, 2013; *see also* Abboud et al., *supra* note 65, at 4439. R

[67] Pollack, *supra* note 66; *see also* Abboud et al., *supra* note 65, at 4440. R

[68] Pollack, *supra* note 66; *see also* Abboud et al., *supra* note 65, at 4440. R

[69] Pollack, *supra* note 66; *see generally* Abboud et al., *supra* note 65. R

[70] Pollack, *supra* note 66 (Profiteering is the act of making excessive profits on goods which are in short supply. Most types of profiteering is illegal; however, legalities differ from nation to nation.); *see also* Abboud et al., *supra* note 65, at 4440. R

[71] Abboud et al., *supra* note 65, at 4439. R

[72] *Id.*

figures for 2002.[73] The doctors and researchers are calling for dialogue on lowering pharmaceutical costs to increase access to care, which they say will save patient's lives.[74]

IV. Analysis

Instituting a right to health at a national level could lead to greater access to health care for individuals, including preventative services and increased treatment options for cancer patients, as well as better health outcomes.[75] At an individual patient level, instituting a right to health could mean access to lifesaving treatments for cancer patients. At a governmental and macroeconomic level, instituting a right to health and guaranteeing access to preventative services and treatment options for cancer patients could result in reducing the global economic cost of cancer.[76] till, the right to health is not implemented at a national level worldwide.[77] In a study performed by the Global Public Health Journal in 2013, researchers found that, out of 191 countries in the UN, only 36% guaranteed the right to overall health in their individual constitutions.[78] The French and American health care systems have different approaches to the right to health and the following section will discuss how such rights, or lack thereof, impact access to care and cancer costs in the respective countries.

A. France

By signing and accepting the WHO Constitution and further defining the right to health through ratification of the ICESCR, a treaty with one of the most developed definitions of the right to health, France recognizes that all of its citizens have the right to the highest attainable standard of health.[79] Accordingly, the French health care system has undertaken the obligation to use maximum resources to realize a right to health for all citizens.[80] In doing so, the French

[73] *Id.*

[74] Pollack, *supra* note 66 (the doctors have not studied other cancer drugs, but merely discuss the negative impact of the price of Gleevec on their patients.); *see also* Abboud et al., *supra* note 65, at 4441. R R

[75] *See* Joanna N. Erdman, *Human Rights in Health Equity: Cervical Cancer and HPV Vaccines,* 35 AM. J.L. & MED. 365, 386 (2009); *see generally* Kinney, *supra* note 27, at 1457; *see generally* Jody Heymann et al., *Constitutional Rights to Health, Public Health and Medical Care: The Status of Health Protections in 191 Countries*, 8 Global Pub. Health: An Int'l J. for Research, Policy and Practice 639, 651-52 (2013); *see generally* Claire Andre & Manuel Velasquez, *System Overload: Pondering the Ethics of America's Health Care System*, 3 ISSUES IN ETHICS 3, 3 (1990); *see also* Hiroaki Matsuura, *The Effect of a Constitutional Right to Health on Population Health in 157 Countries, 1970-2007: the Role of Democratic Governance* (Harvard School of Public Health Program on the Global Demography of Aging, Working Paper No. 106, 2013). R

[76] *Global Cancer Facts & Figures, supra* note 43, at 9; *see also* Chustecka, *supra* note 45. R

[77] *See* Jody Heymann et al., *supra* note 75, at 652. R

[78] *Id.* at 639.

[79] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, ¶ 17, U.N. Doc. A/63/435 (May 5, 2013). *See generally* Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 9. R

[80] *The Right to Health*, *supra* note 3.

government focuses its health care system on its patient.[81] As a result, citizens consider access to health an inherent right, and the public becomes defensive when that right is threatened.[82]

In 2000, the WHO performed a study on the world's health care systems and ranked each nation based on variables such as the number of years people lived in good health and whether everyone in the country had access to quality health care.[83] France ranked first among 191 countries, while the United States ranked thirty-seventh.[84] Arguably, France ranks higher than the United States because the French government has done a better job protecting liberty, equality, and human rights in its social programs including health care.[85] Every citizen in France has a right to care and every person is insured.[86] In fact, the sicker one is in France, the more his health care costs are covered; thus, the sickest patients in France, including cancer patients, are exempt from co-payments and need not worry about going bankrupt over medical bills.[87] Furthermore, the government pays for cancer patients' health care costs, surgeries, therapies, and drugs.[88]

In addition, French citizens can choose any doctor for treatment, and doctors can choose any drug or treatment they believe best fits the patient notwithstanding the cost.[89] Therefore, cancer patients rarely discuss costs of cancer treatments with their doctors.[90] Instead, according to Dr. Fabian Calvo, deputy director of France's National Cancer Institute, the French government has made all cancer drugs available to patients, including the most expensive and experimental.[91] Therefore, doctors can choose drugs that will prolong patients' lives without worrying about barriers like costs.[92]

In order to fund the single government-run health insurer, French taxpayers pay premiums based on a percentage of their salaries.[93] Therefore, costs for

[81] David Gauthier-Villars, *France Fights Universal Care's High Costs,* WALL ST. J., Aug. 7, 2009, http://online.wsj.com/news/articles/SB124958049241511735; *see also General National Patient Rights Protection,* CTR. FOR BIOMED. ETHICS & L., http://europatientrights.eu/countries/signed/france/france.html (last updated 2008).

[82] Gauthier-Villars, *supra* note 81; *General National Patient Rights Protection*, *supra* note 81. **R**

[83] Joseph Shapiro, *Health Care Lessons From France,* NAT'L PUB. RADIO (July 11, 2008), http://www.npr.org/templates/story/story.php?storyId=92419273; *Health Systems: Improving Performance*, The World Health Report 2000, WORLD HEALTH ORG., WA 540, 1, 152 (2000).

[84] Shapiro, *supra* note 83; *see also Health Systems: Improving Performance*, *supra* note 83, at 153, 155. **R**

[85] Shapiro, *supra* note 83; *see also Health Systems: Improving Performance*, *supra* note 83, at xiv. **R**

[86] Shapiro, *supra* note 83; *see also Health Systems: Improving Performance*, *supra* note 83, at xiv (French citizens pay taxes out of their income to fund the government health care system). **R**

[87] Shapiro, *supra* note 83. **R**

[88] *Id.*

[89] Timothy Stoltzfus Jost, Diane Dawson & Andre den Exter, *The Role of Competition in Health Care: A Western European Perspective*, 31 J. HEALTH POL. POL'Y & L. 687, 694 (2006).

[90] Fergus Walsh, *Why France is So Good at Cancer Care*, BBC NEWS (May 16, 2007), http://news.bbc.co.uk/2/hi/6660665.stm.

[91] *Id.*

[92] *Id.*

[93] Gauthier-Villars, *supra* note 81. **R**

health insurance are relative to citizens' income and are based on citizens' ability to pay.[94] It can be argued that the seemingly successful French health care system is not "cheap."[95] Still, it is not as expensive as the U.S. system, which is the most expensive in the world.[96] For example, in 2011, the total U.S. health care expenditure per capita was $8,608, while total French health care spending per capita was $4,086.[97] In addition, the United States spends $606 per person on administrative insurance costs, while France, through its government-run insurer pays only $277 per person.[98] The U.S. may argue that French citizens are required to pay much more than Americans because 21% of a citizen's income in France goes toward the national health care system, which is significantly higher than U.S. citizens' contribution.[99] However, U.S. citizens must consider what they are getting for their money. While they pay much less out of their paychecks for health insurance, the out-of-pocket expenses for medicine, doctors, and hospitals in the event of a serious ailment will quickly rise above what the French are paying.[100] In sum, the French government recognizes that its citizens have the right to the highest attainable standard of health and thus, ensures access to care and lifesaving care for cancer patients despite cost.

B. The United States

To the contrary, the United States does not recognize a right to health for its citizens.[101] In a report produced by the State Department, the U.S. explicitly categorized the obligations in the WHO Constitution and ICESCR as progressive goals, rather than present obligations.[102] In doing so, the U.S. has effectively accepted the WHO's Constitution at an international level, but has not implemented its standards of health care in U.S. policy, nor accepted or ratified the ICESCR.[103] Rather, the State Department argues that it has no obligation to enact any laws pertaining to the WHO Constitution and that the WHO Constitution has no authority in the U.S.[104] Furthermore, the State Department does not guarantee

[94] *Id.*

[95] Shapiro, *supra* note 83. **R**

[96] *Id.*

[97] *France*, WORLD HEALTH ORG., http://www.who.int/countries/fra/en/ (last visited Apr. 1, 2014); *United States*, WORLD HEALTH ORG., http://www.who.int/countries/usa/en (last visited Apr. 1, 2014); Shapiro, *supra* note 83; *see also Health Systems: Improving Performance*, *supra* note 83. **R**

[98] *U.S. Healthcare: Most Expensive, Longest Waits, Most Red Tape*, UNITED PRESS INT'L (Nov. 13, 2013), http://www.upi.com/Health_News/2013/11/13/US-healthcare-Most-expensive-longest-waits-most-red-tape/UPI-30501384398664/.

[99] Shapiro, *supra* note 83. **R**

[100] *Id.*

[101] *Observations by the United States of America on "The Right to Health, Fact Sheet No. 31," supra* note 28. **R**

[102] *Id.* at 2.

[103] *Id.*

[104] *Id.*

any specific right to health in the United States–a stance that is quite outdated and inefficient compared to the global community's stance.[105]

The American Cancer Society has indicated that "lack of health insurance and barriers to care prevent many Americans from getting good, basic [cancer treatment]."[106] In that regard, citizens in the US pay an exuberant amount for health insurance, which inevitably results in fewer insured citizens and decreased access to lifesaving care.[107] Contrary to the French health care system, before 2014, the United States did not require that individuals have health insurance and did not provide universally accessible public programs for citizens.[108] Rather, 62% of U.S. citizens received employer-sponsored health insurance, 15% were enrolled in public health insurance, and 18% were uninsured.[109] Furthermore, in the United States health care system, employers pay citizens' premiums, but citizens are required to pay all out-of-pocket costs like co-payments and direct costs to the provider for services, which can quickly rise to the tens or hundreds of thousands of dollars for cancer patients.[110] In the United States, 44% of health spending is funded by government revenue, which is well below the global average of 72% in developed nations.[111] Lastly, the United States is one of the most inefficient health care countries in the world. Despite being the richest nation in the world, the United States ranks 46th out of 48 for health care efficiency, while France ranks 19th out of 48.[112]

Moreover, private costs for serious ailments like cancer fall directly on the patient in the United States, and out-of-pocket costs add up quickly.[113] For instance, U.S. patients are typically required to pay a 25% co-payment for cancer drugs that cost thousands of dollars a month–all of which is due at the time the drugs are administered and cannot be paid on a monthly plan.[114] Furthermore, patients often feel unsure asking about costs and payment options upfront, as they are worried it will affect the type of care they receive.[115] This is significantly different from the ideology in France, where patients and doctors do not worry about the costs associated with treatment and only focus on the best out-

[105] *Id.* at 3-4.

[106] *Economic Impact of Cancer*, AM. CANCER SOC'Y, http://www.cancer.org/cancer/cancerbasics/economic-impact-of-cancer (last visited Apr. 3, 2014).

[107] Kao-Ping Chua, *Overview of the U.S. Health Care System,* AM. MED. STUDENT ASS'N 1, 1 (2006).

[108] *Id.*

[109] *Id.*

[110] Chua, *supra* note 107, at 2; *see also Aflac Real Cost Calculator Source Information*, AFLAC, (Jan. 15, 2013), *available at* http://www.aflac.com/individuals/realcost/source/. R

[111] Chua*, supra* note 107, at 5. R

[112] *Most Efficient Health Care: Countries*, BLOOMBERG, (Aug. 19, 2013), http://www.bloomberg.com/visual-data/best-and-worst/most-efficient-health-care-countries (data collected from the World Bank, the WHO, and the International Monetary Fund. The researchers considered life expectancy and per capita cost of health care).

[113] *The Cost of Cancer Treatment,* AM. CANCER SOC'Y, (Aug. 8, 2013), http://www.cancer.org/treatment/findingandpayingfortreatment/managinginsuranceissues/the-cost-of-cancer-treatment.

[114] *Id.*

[115] *Id.*

come.[116] Historically, U.S. patients have not had the flexibility that French patients have in choosing the best doctors, treatments, or drugs because patients in the U.S. are limited by costs and often settle for the cheaper, less recommended options.[117] In addition, uninsured patients and those from ethnic minorities have less access to preventative and diagnostic services related to cancer, leading to higher rates of diagnosis at a later stage in their cancer and, inevitably, a more costly treatment and poorer health results.[118]

Although the U.S. has largely refuted the global standard of a right to health, the recently adopted Patient Protection and Affordable Care Act ("ACA") shows a positive step in expanding access to care for cancer patients. With the United States' roll out of the ACA in late 2013 to early 2014, the government intends to increase coverage for those who are currently uninsured.[119] The ACA also strives to create a statutory right to health for American cancer patients and those at risk for cancer by ensuring coverage for pre-existing conditions like cancer, ensuring the right to choose a doctor, and enhancing access to preventative services.[120] However, recent reports have indicated that the top hospitals for cancer treatment are "off-limits" for newly insured cancer patients under the ACA, which expressly contradicts the right to treatment promised to such patients.[121] Whether or not the rights provided by the ACA will become a constitutional right to health remains to be determined as the ACA is implemented and cancer patients and those at risk begin to benefit from its rights.[122] There is arguably still a need for a greater push toward a right to health.[123]

V. Proposal

The right to health care, specifically access to cancer care, should not be compromised for the American people because of the costs and inefficiencies of the American health care system. From an international human rights perspective, it is difficult to understand why French cancer patients have a right to treatment at a reasonable price, but most American cancer patients do not realize the same cost

116 Walsh, *supra* note 90. R

117 *The Cost of Cancer Treatment, supra* note 113; *The Health Care Law, How it Can Help People with Cancer and Their Families*, AM. CANCER SOC'Y 1, 1 (2010), http://www.cancer.org/acs/groups/content/@editorial/documents/document/acspc-026864.pdf. R

118 *Economic Impact of Cancer, supra* note 106. R

119 Barry Furrow, *Health Reform and Ted Kennedy, The Art of Politics and Persistence*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 447 (2011).

120 *What Does the Affordable Care Act Mean for People with Cancer?,* AM. CANCER SOC'Y, https://www.cancer.org/myacs/eastern/areahighlights/cancernynj-news-aca-guide (last visited Apr. 3, 2014). *See generally How Does the Health Care Law Protect Me?*, CTR. FOR MEDICARE & MEDICAID SERV., https://www.healthcare.gov/how-does-the-health-care-law-protect-me/ (last visited Apr. 3, 2014).

121 *Nation's Elite Cancer Hospitals Off-Limits Under Obamacare*, N.Y. POST (Mar. 19, 2014), http://nypost.com/2014/03/19/nations-elite-cancer-hospitals-off-limits-under-obamacare/.

122 *See generally* Erin C. Fuse Brown, *Developing A Durable Right to Health Care*, 14 MINN. J.L. SCI. & TECH. 439, 480 (2013).

123 Mark Wheeler, *A Constitutional Right to Health Care,* UCLA NEWSROOM (July 18, 2013), http://newsroom.ucla.edu/portal/ucla/a-constitutional-right-to-health-247449.aspx.

for treatment or any treatment at all.[124] Dr. Nils Wilkin, a clinical oncologist at the Karolinska Institute in Stockholm, wrote a report on the disparities in cancer treatments based on geographic region and found that "where you live can determine whether you receive the best treatment or not."[125] The global right to health cannot be said to exist while people are denied equal access to existing, lifesaving technology simply because of their geographic location. There is an international human rights issue at stake, and global health leaders should be called to evaluate whether citizens in comparable countries are being treated equally in the administration of lifesaving treatments. Additionally, in an attempt to reduce the global economic cost of cancer, it is in the best interest of international leaders to put pressure on developed nations like the United States to institute a right to health nationally and increase access to lifesaving care.

While the United States has accepted the WHO Constitution, it has failed to implement a right to health on a national level and refuses to take on the heightened responsibilities created by the ICESCR.[126] The Constitution expressly states that, "governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures."[127] Furthermore, the ICESCR distinguishes a country's inability to institute a national right to health from a country's unwillingness.[128] If a country is simply unwilling to use its maximum resources to realize a right to health, the country is in violation of Article 12 of the ICESCR.[129]

Yet, in the United States' response to the Right to Health Fact Sheet, No. 31 issued by the World Health Organization, the State Department firmly declares that, while the United States has accepted the WHO Constitution, it did so with the understanding that it is under no obligation to enact specific legislation based on the Constitution.[130] The State Department reiterates that it has no obligation to meet the requirements set forth in the ICESCR because the United States is not *forced* to ratify the document.[131] Thus, the State Department indicates that the United States has no international obligation to "respect, protect, and fulfill the 'right to health' to individuals."[132] By expressly dismissing its responsibility to meet the obligations set forth in the Constitution and the ICESCR, the United

[124] *The Cost of Cancer Treatment, supra* note 113; *see also* Walsh, *supra* note 90. R

[125] Nic Fleming, *Cancer Survival Rates Worst in Western Europe,* THE TELEGRAPH (May 10, 2007), http://www.telegraph.co.uk/news/uknews/1551098/Cancer-survival-rates-worst-in-western-Europe.html.

[126] *Observations by the United States of America on "The Right to Health, Fact Sheet No. 31"*, *supra* note 28, at 2-3. R

[127] Constitution of the World Health Org., *supra* note 21, pmbl. R

[128] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 9; *see also The Right to Health*, *supra* note 3. R

[129] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 9; *see also The Right to Health*, *supra* note 3. R

[130] *Observations by the United States of America on "The Right to Health, Fact Sheet No. 31," supra* note 28, at 2-3. R

[131] *Id.*

[132] *Id.*

States is allowing the gaps between the rich and the poor and the inequality in international human rights among classes to widen tremendously.[133]

UN treaty-monitoring committees like the Committee on Economic, Social and Cultural Rights, as well as international judicial institutions, should be called to discuss whether the United States' refusal to acknowledge the right to health directly correlates with its cancer patients' poor access and affordability of life-saving treatments.[134] In addition, such international leaders should question whether the United States, the wealthiest nation in the world, is in violation of its obligations under the WHO Constitution and the ICESCR.[135] By allowing hospitals to close their doors to cancer patients seeking lifesaving treatment, even though American hospitals have the technology and resources to treat patients, the United States is standing in the way of its citizens' international right to the highest attainable standard of health. In addition, among the likes of Cuba and Belize, the United States is one of only six countries that have yet to ratify the ICESCR on a national level some thirty years after signing it.[136] The Committee on Economic, Social and Cultural Rights should define the barriers that prohibit the United States from abiding by and ratifying the ICESCR obligations. Thereafter, the Committee must determine whether the potential social and economic benefits, including increased access to lifesaving treatment and the decreased economic burden of cancer, derived from obliging with the ICESCR outweigh the cost of eliminating such barriers.

Furthermore, the United States arguably has a heightened responsibility to care for cancer patients due to the agreements made in the World Cancer Declaration of 2006 and 2013.[137] Member states, including the U.S. and France, set out nine targets for cancer prevention and control, four of which focused on access to care issues.[138] The World Cancer Congress and the World Health Assembly were particularly concerned with the early detection and prevention of cancer.[139] However, in a country where medical care and health insurance is so costly, it is unlikely that all cancer patients will be able to access detection or prevention services. Thus, it could be argued that countries like the U.S., which have failed to cover multitudes of preventative medicine in its health insurance plans and

133 Anna M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 232 (2010).

134 *See generally* Erdman, *supra* note 75; *see generally* Kinney, *supra* note 27, at 1457; *see generally* Heymann, *supra* note 75, at 639-53; *see generally* Andre, *supra* note 75, at 3; *see also generally* Matsuura, *supra* note 75; Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States,* 97 AM J. PUB. HEALTH 1156, 1158 (2005). R R R

135 Yamin, *supra* note 134, at 1158. R

136 Piccard, *supra* note 133, at 232 (seventy countries in total have signed and ratified the ICESCR as of 2014). R

137 *World Cancer Declaration*, *supra* note 59.

138 *Id.*

139 *Id.*

have not significantly increased access to preventative measures, are in violation of the World Cancer Declaration.[140]

While the ACA aims to increase accessibility to preventative and detection services, it will take some time to determine whether cancer patients and those at risk of cancer are actually experiencing increased access to affordable services. There are already reports that hospitals are turning away cancer patients and those at risk of cancer, even after the 2014 ACA enrollment period, because they do not accept the patients' new health insurance.[141] Therefore, national and international leaders should be called to re-analyze countries' obligations under the World Cancer Declaration and enforce such obligations where necessary, in order to meet the World Cancer Congress' goal of reversing the burden of cancer by 2025.[142]

Through enforcement measures by treaty-monitoring committees and the World Cancer Congress, the social effects and the economic costs of cancer can be reversed. If the United States is not willing to consider its cancer patients' quality of life as the sole reason for improving access to lifesaving treatment, perhaps the potential money saved will sway the government in enforcing policies focused on the right to health. National policies focused on access to preventative measures, early detection, and quality treatment are the most cost-effective strategies and could significantly increase the proportion of cancer detection and decrease death due to cancer.[143] As a result, a right to health and increased access to cancer treatment will decrease low productivity levels due to death and disability, which will ultimately improve the United States' economy.[144]

VI. Conclusion

Based on economic and epidemiologic research, it is in the best interests of the international community to focus on global policy guaranteeing access to lifesaving treatments for cancer patients. Not only will the global economic cost of cancer be reduced or possibly reversed, but patients across the globe will finally have the right to health despite geographic location. On a nation-by-nation basis, the technology exists to detect, prevent, and treat cancer; however, the disease will not be eradicated until access to care is increased. International governments should put more pressure on resourceful nations across the globe to institute a national right to health modeling the rights in countries that already guarantee universal access to care and do not turn away cancer patients seeking access to lifesaving treatment.

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[140] *Preventative Care: A National Profile on Use, Disparities, and Health Benefits*, PARTNERSHIP FOR PREVENTION, http://www.rwjf.org/en/research-publications/find-rwjf-research/2007/08/preventive-care-national-profile-on-use.html (last updated Aug. 2007).

[141] *Nation's Elite Cancer Hospitals Off-Limits Under Obamacare*, *supra* note 121. R

[142] *World Cancer Declaration*, *supra* note 59.

[143] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 9; *see also* Chustecka, *supra* note 45. R

[144] THE GLOBAL ECONOMIC COST OF CANCER, *supra* note 5, at 9; *see also* Chustecka, *supra* note 45. R

VARIABLE INTEREST ENTITIES: ALIBABA'S REGULATORY WORK-AROUND TO CHINA'S FOREIGN INVESTMENT RESTRICTIONS

Kaitlyn Johnson*

I. Introduction

China's largest Internet companies are turning to the U.S. stock exchange to raise financial capital for expansion.[1] A company raises financial capital by selling shares of ownership of their company to investors on a stock exchange.[2] Typically, an investor buys shares and receives a piece of equity ownership in the company.[3] However, this is not the case for over half of the companies domiciled in the People's Republic of China ("PRC") that are listed on the U.S. stock exchange.[4] The PRC government restricts Foreign Direct Investment ("FDI") in

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1 U.S.-CHINA ECON. & SECURITY REV. COMMISSION STAFF REP., THE RISKS OF CHINA'S INTERNET COMPANIES ON U.S. STOCK EXCHANGES 2 (Kevin Rosier, June 18, 2014).

2 *See, e.g.*, Equity Market, INVESTOPEDIA, http://www.investopedia.com/terms/e/equitymarket.asp (last visited Dec. 19, 2013) (Equity market, "[a]lso known as the stock market, . . . gives companies access to capital and investors a slice of ownership in the company."); *Stock Exchange*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/stock%20exchange (last visited Dec. 19, 2013) (defining stock exchange as "a system or place where shares of various companies are bought and sold").

3 *See, e.g,.* Marty Schmidt, *Equity: Owner's Equity, Net Worth, and Book Value Explained*, BUILDING BUS. CASE (Jan. 10, 2015), https://www.business-case-analysis.com/owners-equity.html.

4 Paul Gillis, *Statistics on VIE Usage*, CHINA ACCT. BLOG (Apr. 11, 2011, 7:20 PM), www.chinaaccountingblog.com/weblog/statistics-on-vie-usage.html ("42% of U.S. listed Chinese companies use the VIE structure."); *see also Understanding the VIE Structure: Necessary Elements for Success and the Legal Risks Involved*, CADWALADER (Aug. 10, 2011) http://www.cadwalader.com/resources/clients-friends-memos/understanding-the-vie-structure-necessary-elements-for-success-and-the-legal-risks-involved ("As of April 2011, forty-two percent of Chinese companies listed in the United States have used the VIE.").

many of its economic sectors.[5] To work around these restrictions, China's Internet companies utilize a complicated and highly risky investment method known as a Variable Interest Entity ("VIE").[6]

In recent years, more than one hundred Chinese companies have adopted the VIE structure for their offshore listings to bypass PRC government restrictions.[7] Like many Chinese companies, China's e-commerce Internet giant, Alibaba, adopted the VIE structure to list on the U.S. stock exchange and circumvent PRC laws pertaining to foreign investments.[8] In September 2014, Alibaba became the largest initial public offering ("IPO") in U.S. history.[9] As Alibaba becomes synonymous with "Chinese Amazon," unsuspecting U.S. investors will continue to buy into Alibaba's precarious VIE structure and potentially expose themselves to great risk.[10]

Part II of this article discusses China's economic history that gave rise to the VIE structure as a regulatory loophole to PRC restrictions. China's FDI policy drastically changed under Deng Xiaoping's rule when he initiated economic reform with the Open-Door Policy to encourage foreign investment in China. Despite FDI encouragement, numerous restrictions remained to protect sensitive industries, including the Internet sector. To circumvent these restrictions, Chinese e-commerce giant Alibaba adopted the VIE structure. While VIEs currently permit FDI, the validity of the VIE structure under PRC law remains ambiguous.

Part III of this article examines the regulatory environments in which VIEs operate. Specifically, this section will discuss the modifications to PRC regulations over the years, highlighting blatant regulatory warnings against investment practices that are designed to avoid PRC regulatory scrutiny. PRC regulations and laws govern the contractual relationships on which foreign investors heavily rely in the VIE structure. An investor's understanding of China's regulatory environment is important to fully comprehend the potential risks they face. In the U.S., the Security Exchange Commission ("SEC") has taken limited action in providing ample disclosure of the potential risks involved when investing in VIEs.

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[5] Neil Gough, *In China, Concern about a Chill on Foreign Investments*, N.Y. TIMES (June 2, 2013, 2:15 PM), http://dealbook.nytimes.com/2013/06/02/in-china-concern-of-a-chill-on-foreign-investments/?_r=0.

[6] COMMISSION STAFF REPORT, *supra* note 1.

[7] Zeng Xianwu & Bai Lihui, *Variable Interest Entity Structure in China*, CHINA L. INSIGHT (Feb. 9, 2012), http://www.chinalawinsight.com/2012/02/articles/corporate/foreign-investment/variable-interest-entity-structure-in-china/.

[8] Charles Clover, *Alibaba IPO shows Foreign Investors Able to Skirt Restrictions*, FIN. TIMES (May 7, 2014, 2:46 PM), http://www.ft.com/intl/cms/s/0/7a8c4816-d5df-11e3-a017-00144feabdc0.html#axzz3OaRsL9dL.

[9] Elzio Barreto, *Alibaba IPO Ranks as World's Biggest After Additional Shares Sold*, REUTERS (Sept. 22, 2014, 12:46 PM), http://www.reuters.com/article/2014/09/22/us-alibaba-ipo-value-idUSKCN0HH0A620140922; *see also* ECON. TIMES, http://economictimes.indiatimes.com/definition/IPO, (defining IPO as "initial public offering or IPO is the first sale of stock by a company to the public").

[10] *See* Benjamin Pimentel, *Alibaba IPO Faces This U.S. Hurdle: What Is It?*, MARKET WATCH (May 5, 2014, 5:56 PM), http://marketwatch.com/story/alibaba-ipo-sparksexcitment-caution-2014-05-05/.

Part IV evaluates the risks foreign investors face when investing in a VIE. There are two types of legal risks inherent in the Alibaba VIE structure and furthermore, there is limited legal recourse available to foreign investors. First, foreign investors must assess the possibility of the PRC government declaring the VIE structure illegal. Second, foreign investors must consider the risk of underlying contracts being deemed unenforceable under PRC law. In either instance, U.S. investors will have limited recourse available under current law if they lose control over investment rights in the VIE structure. Furthermore, China recently proposed a Foreign Investment Law ("FIL") that will significantly impact foreign investment practices in China. While the new proposed law aims to solve issues inherit to the VIE structure, the ultimate validity of established VIE entities, such as Alibaba, remains uncertain.

Part V recommends supplementary actions that may help resolve the fundamental problems of the VIE structure and FDI practices in China. VIEs are currently the only reasonable mechanism to bring foreign investment into China's Internet sector. In an attempt to reduce the risk U.S. investors face when investing in VIEs, the U.S. must engage China to remedy the issues surrounding FDI so that China's Internet industry, and ultimately the Chinese economy, may continue to grow. Moreover, it is not the VIEs themselves, but rather the unclear Chinese government policies that are the true source of the problem. Despite China's recent steps to clarify FDI policies under the proposed FIL, the law lacks clear guidelines for the treatment of existing VIE structure under Chinese law. While FIL is pending further revisions, VIE entities, like Alibaba, should begin to prepare for the legislature's ultimate decision and final approval, and any subsequent effects that may impact their business structures. Once enacted, the proposed law will radically change China's foreign investment landscape.

II. Variable Interest Entities in China

A. History of Foreign Investments Restrictions

Since 1949, the PRC has operated under the unitary rule of the Chinese Communist Party ("CCP").[11] Mao Zedong, chairman of the CCP, strived to achieve a "socialist market economy" during his rule from 1949-1978.[12] During the Maoist-era, China maintained self-sufficiency in the country's trade and commerce and FDI was practically non-existent in the Chinese economy.[13] After the demise of Mao, trade barriers were removed and this change became a key factor

[11] *See* Daniel Chang, *Modernization of the Chinese Legal System: A Brief Historical Review*, N.Z. CHINA TRADE ASS'N, http://www.nzcta.co.nz/chinanow-commentary/1517/modernization-of-the-chinese-legal-system-a-brief-historical-review/#sthash.mjn6Em5Z.dpuf (last visited Feb. 13, 2015).

[12] Vivienne Bath, *Foreign Investment, the National Interest and National Security - Foreign Direct Investment in Australia and China*, 34 SYDNEY L. REV. 5, 6 (2012) ("China is a one-party unitary state . . . aiming to develop a 'socialist market economy.'").

[13] *See* Jinyan Li, *The Rise and Fall of Chinese Tax Incentives and Implications for International Tax Debates*, FLA. TAX REV. 669, 670 ("China had no foreign direct investment ("FDI") before 1979.").

in the modernization of the PRC under the rule of Deng Xiaoping.[14] In 1978, Deng Xiaoping led the PRC in economic reform, implementing the groundbreaking Open-Door Policy.[15] The new policy encouraged foreign resources, welcoming FDI to spur economic growth in China.[16]

Despite the progressive policy changes implemented under Xiaoping's rule, protectionism continued to persist in the form of restrictions on foreign investments in specific industries.[17]

FDI guidelines and restrictions are specified in the Catalogue for the Guidance of Foreign Investments Industries ("Catalogue").[18] The Catalogue classifies industry sectors into three categories, designating foreign investment as "encouraged," "restricted" or "prohibited" for each respective industry.[19] Foreign investments are "permitted" in those industries not expressly noted in the Catalogue.[20] Conversely, foreign investors are not permitted to invest in "prohibited" industries under any circumstance.[21] The prohibited industry sectors are typically those deemed by the Chinese government to be strategic and emerging industries, or otherwise those industries that are sensitive for political or national security reasons.[22] The Internet sector, where the VIE structure is prevalently used, is categorized as prohibited, disallowing foreign investments and forbidding foreign ownership in PRC-domiciled companies.[23]

B. Variable Interest Entities

VIE is an investment structure used by many Chinese companies and foreign investors to bypass Chinese government restrictions on FDI.[24] The VIE structure

[14] WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC CONDITIONS 1 n.1, 2-3.

[15] Shigeo Kobayashi et al., *The "Three Reforms" in China: Progress and Outlook*, 45 RIM (Sept. 1999), http://www.jri.co.jp/english/periodical/rim/1999/RIMe199904threereforms/.

[16] William I. Friedman, *One Country, Two Systems: The Inherent Conflict Between China's Communist Politics and Capitalist Securities Market*, 27 BROOK. J. INT'L L. 477, 478 (2002) ("Deng Xiaoping . . . adopted an 'open door' policy, centering on economic reforms utilizing market mechanisms and foreign resources to speed up the growth and modernization of the economy.").

[17] *See* Shen Wei, *Will the Door Open Wider in the Aftermath of Alibaba? —Placing (or Misplacing) Foreign Investment in a Chinese Public Law Frame*, 42 H.K.L.J. 275, 275 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320402 ("Recent years witnessed a rising chorus of complaints from the foreign business community concerning China's protectionist regulatory environment and increasing hostility to foreign multinationals.").

[18] Jane Bu et al., *China's New Foreign Investment Catalogue Comes into Effect*, MORRISON FOERSTER 1 (Jan. 30, 2012), *available at* http://media.mofo.com/files/Uploads/Images/120130-Foreign-Investment-Catalogue.pdf.

[19] *Id.*

[20] *Id.*

[21] Xianwu & Lihui, *supra* note 7.

[22] COMMISSION STAFF REPORT, *supra* note 1, at 4-5.

[23] *See* Sue-Lin Wong, *China Court Ruling Could Threaten Foreign Investments in Country*, N.Y. TIMES (June 17, 2013, 3:09 AM), http://rendezvous.blogs.nytimes.com/2013/06/17/china-court-ruling-could-threaten-some-foreign-invested-companies/?_php=true_type=blogs_r=0.

[24] COMMISSION STAFF REPORT, *supra* note 1.

is commonly referred to as the Sina-model structure.[25] Sina Corporation was the first PRC-domiciled company to acquire an offshore public listing through a VIE structure in 2000.[26] Since then, foreign investors have replicated the VIE structure in a variety of sectors in China's economy where FDI is either restricted or prohibited under PRC law.[27]

In its most basic form, a VIE is comprised of three entities: an offshore holding company that is listed on the U.S. exchange, a Wholly Foreign-Owned Entity ("WOFE") domiciled in the PRC and an operating business entity domiciled in the PRC.[28] A U.S. investor purchases shares in the offshore holding company, which is usually based in an offshore tax haven such as the Cayman Islands.[29] The offshore holding company owns one hundred percent of the PRC-domiciled WFOE.[30] In effect, the offshore holding company links foreign investors to the operating PRC-domiciled company through complex legal contracts set up by the WFOE.[31] These contractual agreements mimic equity ownership, however do not bestow actual equity ownership in the operating company.[32] Operating control remains within the PRC-domiciled company, presumably to comply with Chinese laws while foreign investors derive economic benefits solely from the contractual agreements.[33]

U.S. investors face major risks from the complexity of the VIE structure and the rudimentary regulatory environment in China.[34] The legal contracts that serve as the basis of the VIE structure are only enforceable in China, where rule of law remains undeveloped.[35] Thus, to an investor, a VIE investment is only as good as the validity of its underlying contractual agreements.[36] These contracts are only binding and enforceable if Chinese courts are willing to uphold them.[37] While

25 Xianwu & Lihui, *supra* note 7.

26 *Id.*

27 *See id.*

28 David Roberts & Thomas Hall, *VIE Structures in China: What You Need to Know*, TOPICS CHINESE L. 1–2 (Oct. 2011), available at http://iis-db.stanford.edu/evnts/6963/TICL_-_VIE_Structures_in_China.pdf (analyzing the components of a basic VIE structure).

29 Dune Lawrence, *China Companies Evading Owner Rule with US Listings Frustrate Regulators*, BLOOMBERG (Oct. 9, 2011, 4:00 PM), http://www.bloomberg.com/news/2011-10-09/china-companies-evading-rule-with-u-s-listings-stump-regulators.html.

30 Dan Harris, *VIEs in China. The End of a Flawed Strategy*, CHINA L. BLOG (Oct. 10, 2011), http://www.chinalawblog.com/2011/10/vies_in_china_the_end_of_a_flawed_strategy.html.

31 *See id.*; Lawrence, *supra* note 29.

32 *See* Lawrence, *supra* note 29.

33 *Id.*; *see also* Harris, *supra* note 30.

34 *See* Steven Davidoff, *Alibaba Investors Will Buy a Risky Corporate Structure*, N.Y. TIMES (May 6, 2014, 7:46 PM), http://dealbook.nytimes.com/2014/05/06/i-p-o-revives-debate-over-a-chinese-structure/?_r=0.

35 *Id.*

36 Dan Harris, *Crouching Tiger, Hidden Fraud. Clear Speaking On VIEs*, CHINA L. BLOG (July 16, 2011), http://www.chinalawblog.com/2011/07/crouching_tiger_hidden_fraud_clear_speaking_on_vies.html.

37 Paul Gillis, *Variable Interest Entites in China*, FORENSIC ASIA, (Sept. 18, 2012), http://www.chinaaccountingblog.com/vie-2012septaccountingmatte.pdf.

listing a company under a VIE structure on the U.S. exchanges is legal in the United States, they can still be considered illegal in China.[38] PRC authorities have yet to formally confirm the validity of the existing VIE structure under PRC law, leaving foreign investors' funds at risk.[39]

C. Alibaba: China's Internet Giant

Alibaba is China's largest online commerce company, hosting hundreds of millions of users and a wide variety of merchants and businesses.[40] Alibaba founder and CEO, Jack Ma, started Alibaba.com out of his apartment in 1999.[41] Today, Alibaba is in the world's fastest growing e-commerce market, handling more business than any other e-commerce company.[42] Last year, the value of all merchandise sold on Alibaba's online sites exceeded $248 billion, more than the volume on eBay and Amazon combined.[43]

Foreign investors flocked to purchase Alibaba stock in their recent IPO on the New York Stock Exchange to raise over $25 billion dollars, making it the largest IPO in U.S. history.[44] Like other Chinese Internet companies, Alibaba utilized the VIE structure to avoid PRC government restrictions.[45] Consequently, Alibaba's stock carries similar risks to other VIE-structured companies.[46]

Alibaba's SEC Form F-1 filing explicitly describes the legal ambiguity of it's VIE structure and the related risks.[47] A section entitled "Risks Related to Our Corporate Structure" bluntly forewarns foreign investors:

> If the PRC government deems that the contractual arrangements in relation to our variable interest entities do not comply with PRC governmental restrictions on foreign investment, or if these regulations or the interpretation of existing regulations changes in the future, we could be subject to penalties or be forced to relinquish our interest in those operations.[48]

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[38] *See generally id.*

[39] Xianwu & Lihui, *supra* note 7.

[40] Marc Lajoie & Nick Sherman, *What is Alibaba?*, WALL STREET J., http://projects.wsj.com/alibaba/ (last visited Feb. 14, 2015).

[41] Jillian D'Onfro, *How Jack Ma Went from Being a Poor School Teacher to Turning Alibaba into a $160 Billion Behemoth*, BUS. INSIDER (Sept. 14, 2014, 3:12 PM), http://www.businessinsider.com/the-story-of-jack-ma-founder-of-alibaba-2014-9.

[42] Lajoie & Sherman, *supra* note 40.

[43] *Id.*; *see also* Vindu Goel et al., *Chinese Giant Alibaba Will Go Public, Listing in U.S.*, N.Y. TIMES (May 6, 2014, 4:48 PM), http://dealbook.nytimes.com/2014/05/ 06/alibaba-files-to-go-public-in-the-u-s.

[44] Leslie Picker & Lulu Yilun Chen, *Alibaba's Banks Boost IPO Size to Record of $25 Billion*, BLOOMBERG (Sept. 22, 2014 8:05 AM), http://www.bloomberg.com/news/2014-09-22/alibaba-s-banks-said-to-increase-ipo-size-to-record-25-billion.html.

[45] Clover, *supra* note 8.

[46] Gregory J. Millman, *Alibaba's IPO Puts VIE Structure in the Spotlight*, WALL STREET J. (Sept. 22, 2014, 9:46 AM), http://blogs.wsj.com/riskandcompliance/2014/09/22/alibabas-ipo-puts-vie-structure-in-the-spotlight/.

[47] Alibaba Group Holding Ltd., Registration Statement (Form F-1) 47 (Sept. 15, 2014).

[48] *Id.* at 48.

In addition to a risky corporate structure, Alibaba uses a preferential stock structure that establishes all decision-making authority with the company's founders in China.[49] Under this particular stock structure, owning shares of the company does not equate to voting rights.[50] According to Alibaba's SEC filing, the preferential stock structure limits foreign investors' "ability to influence corporate matters, including any matters to be at the board of directors level."[51]

A recent controversy between Alibaba and its first major foreign investor, Yahoo, sheds further light on the risks U.S. investors face in buying into Chinese Internet companies under the VIE structure.[52] Yahoo, an American Internet company, became one of Alibaba's largest foreign investors back in 2005 purchasing roughly a 40% stake in the offshore holding company.[53] Through the VIE arrangement, Alibaba's offshore holding company developed Alipay, a Chinese payment-service similar to PayPal.[54] The payment service tool was expected to be a prosperous opportunity for Yahoo as a major investor and shareholder in Alibaba.[55] However, despite being a recognized board member, Yahoo did not have a say in Alibaba's recent decision to split Alipay into a separate entity controlled by solely by Jack Ma.[56]

Jack Ma made the bold, unilateral decision to terminate Alipay's VIE and transfer 70% equity of Alipay from the offshore holding company into a separate entity domiciled in China.[57] Ma defends this controversial decision as a necessary move in order for Alipay to acquire a proper operational license from the People's Bank of China.[58] The People's Bank of China requires that all payment service companies in the country obtain a license to operate.[59] Furthermore, the central bank limited license eligibility only to local entities, leaving rules pertaining to foreign invested-companies ambiguous.[60] Yahoo's foreign ownership in Alipay posed an issue on the company's ability to obtain the government-man-

[49] COMMISSION STAFF REPORT, *supra* note 1, at 6.

[50] *Id.*; *see generally Alibaba's IPO is Nothing to Celebrate*, BLOOMBERGVIEW (Mar. 18, 2014, 3:23 PM), http://bloombergview.com/articles/2014-03-18/alibaba-s-ipo-is-nothing-to-celebrate.

[51] Alibaba Group Holding Ltd., *supra* note 47.

[52] COMMISSION STAFF REPORT, *supra* note 1, at 5.

[53] Andrea Peterson, *An Alibaba IPO Means Lots of Cash for Yahoo to Spend on More Acquisition*, WASH. . POST (May 7, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/07/an-alibaba-ipo-means-lots-of-cash-for-yahoo-to-spend-on-more-acquisitions/.

[54] *See generally* Loretta Chao, *Alipay Receives China License*, WALL STREET J. (May 27, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052702304066504576347212434217054?autologin=ymg=id-wsj.

[55] *See id.*

[56] *Id.*

[57] *Variable Interest Entity (VIE) Structure for Foreign Investment in the PRC May Face Challenges*, KING & WOOD MALLESONS (Nov. 2001), http://www.kingandwood.com/article.aspx?id=china-bulletin-2011-11-02; *see also* Steven Millward, *Tough-Talking Jack Ma Admits Acting Unilaterally in Alipay Controversy*, TECHINASIA (July 7, 2011, 2:15 PM), https://www.techinasia.com/jack-ma-alipay/.

[58] Millward, *supra* note 57.

[59] Chao, *supra* note 54.

[60] *Id.*

dated online payment license.[61] However, Yahoo claims that it was not aware of the transfer for more than six months after the transaction was completed.[62]

After months of dispute, Alibaba and Yahoo announced that they settled the disagreement.[63] While the agreement reached allows Yahoo to share in the future gain of Alipay, analysts are not convinced the settlement is enough to compensate Yahoo for the loss of Alipay's value to the Alibaba portfolio.[64]

This recent controversy shows the potential risks foreign investors, such as Yahoo, face by investing in a VIE.[65] The VIE arrangement and preferential stock structure made Alipay's undisclosed transfer possible, leaving Yahoo in the dark about a key business decision.[66] Beyond the risks within the company structure, foreign investors must rely on China's judicial system to enforce the contractual agreements which are the foundation of the VIE structure.[67] The CCP-controlled judicial system combined with China's unreliable regulatory environment poses even greater risks when foreign investors seek to secure their rights in disputes with Chinese entities.[68]

III. Regulatory Environment

A. China's Regulatory Environment

Alibaba expressly acknowledges in its SEC filings "there are substantial uncertainties regarding the interpretation and application of the current and future PRC laws, rules, and regulations."[69] The PRC government has never formally confirmed the validity of the VIE structure under PRC law.[70] Moreover, a series of regulatory decisions over the years have left the validity of the VIE structure in question.[71]

Prior to the introduction of the VIE structure, China Unicom introduced another work-around joint venture – China-China Foreign Structure ("CCF structure") – in 1994 to circumvent FDI restrictions.[72] Four years later, the CCF

61 Millward, *supra* note 57.

62 Chao, *supra* note 54.

63 *Understanding the VIE Structure: Necessary Elements for Success and the Legal Risks Involved*, CADWALADER (Aug. 10, 2011) http://www.cadwalader.com/resources/clients-friends-memos/understanding-the-vie-structure-necessary-elements-for-success-and-the-legal-risks-involved.

64 *Id.*

65 *See id.*

66 *See id.*

67 *See* Gillis, *supra* note 37.

68 *See generally* Understanding the VIE Structure, supra note 4.

69 Solomon, *supra* note 34.

70 Xianwu & Lihui, *supra* note 7.

71 *Id.*

72 *MOFCOM's New Security Review Measures (Announcement No. 53),* CADWALADER, WICKERSHAM & TAFT LLP at 2; *see also* Gordon G. Chang, *China Can Expropriate Alibaba's Business — And It Just Might*, FORBES (May 11, 2014), http://www.forbes.com/sites/gordonchang/2014/05/11/china-can-expropriate-alibabas-business-and-it-just-might/.

structure was declared illegal by the Chinese government.[73] Unicom was forced to dissolve their corporate structure, triggering unfavorable consequences for Unicom's ejected foreign investors.[74] A similar situation could unfold for more foreign investors as FDI work-around structures continue to be monitored closely.[75]

Recent PRC regulations have increased both in the number and the complexity of requirements imposed on foreign investors looking to acquire enterprises or assets in China.[76] These new regulations raise questions regarding the validity of the VIE structure used by Chinese companies looking to evade FDI restrictions.[77]

In 2011, the State Counsel, PRC's highest administrative body, issued the Notice on Establishing a Security Review System for Acquisition of Domestic Enterprises by Foreign Investors ("Circular 6").[78] Circular 6 established an extensive government review process for foreign investors and Chinese companies that are susceptible to control of a non-PRC investor.[79]

To help implement Circular 6, China's Ministry of Commerce ("MOFCOM") promulgated *Measures on the Security Review System of Foreign Investors Merging and Acquiring Domestic Enterprises, Announcement No. 53* (the "M&A Rules").[80] MOFCOM is responsible for formulating policy on foreign trade, export and import regulations, consumer protection, as well as foreign direct investments.[81] Of particular importance to the VIE structure, Article 9 of the M&A Rules reads:

> With regard to the merger and acquisition of domestic enterprises undertaken by foreign investors, the authorities should judge whether such transaction is subject to the security review based on the essential content and actual impact of the transaction. Foreign investors shall not avoid M&A security review through any means, including but not limited to commissioned shareholdings, trusts, multi-level investments, leases, loans, contractual control, and overseas transactions.[82]

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[73] Chang, C*hina Can Expropriate Alibaba's Business — And It Just Might*, FORBES (May 11, 2014).

[74] *Id.* at 1.

[75] *Id.*

[76] Cadwalader, *supra* note 63, at 2.

[77] *Id.*

[78] *Id.*

[79] Robert Lewis, *Investors at the Gate*, 26 INT'L FIN. L. REV. 36, 36 (2007) (noting the "spectacular and well-publicized demise" of the CCF structure); Leontine D. Chuang, Comment, *Investing in China's Telecommunications Market: Reflections on the Rule of Laws and Foreign Investment in China*, 20 NW. J. INT'L. L. & BUS. 509, 510 (1999) (calling the birth, development, and demise of the CCF structure an ill-fated and a perfect example of the lack of clarity in the PRC's investment law).

[80] Cadwalader, *supra* note 63, at 2.

[81] Ministry of Commerce Peoples Republic of China, *Mission Statement*, MOFCOM (Dec. 7, 2010), http://english.mofcom.gov.cn/column/mission2010.shtml.

[82] Announcement No. 53 of 2011 of MOFCOM Concerning the Provisions of the MOFCOM for the Implementation of the Security Review System for M&A of Domestic Enterprises by Foreign Investors (promulgated by the Min. of Com., Aug. 25, 2011, effective Sept. 1, 2011) (China), *available at* http://english.mofcom.gov.cn/sys/print.shtml?/policyrelease/aaa/201112/20111207869355.

Arguably, the VIE structure is subject to foreign investors obtaining "actual control" of the PRC-domiciled company by engaging in "overseas transactions" and exercising "contractual control."[83] The PRC government, as a result, is free to interpret the M&A Rules as a clear indication that the VIE structure is designed to avoid the PRC regulatory restrictions.[84] Consequently, many people question how much longer the VIE structure can survive under these new regulations, which appear to target these types of investment structures.[85] The vague wording of the rules could give PRC regulators greater discretionary powers when determining the validity and legality of VIEs.[86] In 2013, the Supreme People's Court of China, China's top judicial body, ruled that contractual agreements in VIE arrangements were clearly intended to circumvent Chinese regulations and were equivalent to "concealing illegal intention with a lawful form."[87]

Foreign investment policy will continue to change as the VIE structure gains traction as China's economy continues to grow and more FDI restricted industries seek financial capital.[88] According to MOFCOM spokesman Shen Dayang, MOFCOM is considering new rules for VIEs.[89] Dayang acknowledged the absences of current laws or regulations in place to regulate VIEs, and stated that MOFCOM and other related government agencies are studying ways to regulate such investments.[90]

B. Role of the SEC in Regulating VIEs Listed in the US

U.S. regulatory authority on VIE structures and their validity is limited to warning investors of the potential risks.[91] All publicly-held companies in the U.S., including VIEs, are subject to the regulation of the SEC.[92] The SEC was

[83] Gough, *supra* note 5.

[84] *Id.*

[85] *See* Steve Dickinson, *VIEs in China. The End of a Flawed Strategy*, CHINA L. BLOG (Oct. 10, 2011), *available at* http://www.chinalawblog.com/2011/10/vies_in_china_the_end_of_a_flawed_strategy.html (stating that the contractual arrangements on which the various VIEs are based are in clear violation of Chinese law).

[86] Kathrin Hille, *Foreign Internet Presence in China to Face Scrutiny*, FIN. TIMES (Sept. 1, 2011, 5:23 PM), http://www.ft.com/intl/cms/s/2/7f8645e2-d493-11e0-a42b-00144feab49a.html#axzz1Wb8B6ceg (noting that the vague wording of the rules could give regulators greater discretionary powers).

[87] Gough, *supra* note 5.

[88] Roberts & Hall, *supra* note 28, at 7.

[89] Lawrence, *supra* note 29.

[90] *Id*.

[91] *See generally The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*' U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml#intro; Thomas B. Hatch et al., *China's Forbidden Investment: Emerging Legal Risks for Investors Who Deal with Chinese Variable Interest Entity (VIE) Structures*, ROBINS, KAPLAN, MILLER & CIRESI LLP (Mar. 1, 2012), http://www.rkmc.com/resources/articles/china-s-forbidden-investment (describing the claim in the Orient Paper lawsuit that while the VIE contractual arrangement is disclosed in the Form 10-K filing, the disclosure was so buried that it did not adequately inform the shareholders).

[92] *See US Securities and Exchange Commission (SEC),* DELOITTE, http://www.iasplus.com/en/resources/regional/sec (last visited Jan. 2, 2015), (discussing the role of the SEC, quoting "In the United States, the public capital markets are regulated primarily by the US Securities and Exchange Commission (SEC), a national government agency.").

created in the wake of the Great Depression and adopted the core mission of protecting investors, maintaining fair, orderly, and efficient markets and facilitating capital formation.[93] The SEC also carries the responsibility of informing the public about investments via corporate disclosure.[94]

The risks of investing in VIEs are described in detail in SEC filings.[95] Companies are required to disclose all material information in periodic filings with the SEC.[96] Information is considered material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[97] Risk factors are considered material and are typically disclosed under the section "risk factors" in the SEC filing.[98] However, disclosure of risk may still be considered inadequate for investor awareness in the complex and substantial risks pertaining to VIEs.[99]

The VIE structure poses controversial issues, and the SEC must sufficiently investigate companies such as Alibaba to ensure proper disclosure and compliance with securities regulations.[100] On the eve of the Alibaba IPO, US Senator Bob Casey, urged the SEC to look further into the risks of companies using the same VIE structure as Alibaba.[101] In his letter to the SEC, Casey called upon the SEC to redouble its efforts to investigate companies using the VIE structure.[102] Alibaba revealed its correspondence with the SEC after the IPO.[103] The federal regulators focused on questions pertaining to Alibaba's ownership structure and affiliations with outside companies.[104] Overall, the SEC asked eighty-six ques-

93 *See* Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 368 (2008).

94 Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984) (identifying the disclosure requirement as one of the two basic component of the US securities law); *see also* The Investor's Advocate, *supra* note 91, at 1 (explaining that the SEC "requires public companies to disclose meaningful financial and other information to the public" in order to make sure that "all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it").

95 Gillis, *supra* note 37.

96 Steven M. Davidoff, *In Corporate Disclosure, a Murky Definition of Material*, N.Y. TIMES (Apr. 5, 2011, 5:57 PM), http://dealbook.nytimes.com/2011/04/05/in-corporate-disclosure-a-murky-definition-of-material/ (explaining that public companies in the United States must periodically file reports disclosing all material information with the Securities and Exchange Commission).

97 *Id.*

98 Steve Dickinson, *VIEs in China. The End of a Flawed Strategy.*, CHINA L. BLOG (Oct. 10, 2011), http://www.chinalawblog.com/2011/10/vies_in_china_the_end_of_ a_flawed_strategy.html.

99 Hatch et al., *supra* note 91 (describing a situation where the VIE contractual arrangement is disclosed in the Form 10-K filing, but the disclosure was so buried that it did not adequately inform the shareholders).

100 Michael J. De La Merced, *On Eve of Alibaba's I.P.O., Senator Urges S.E.C. to Look at Risks in Some Chinese Offerings*, NEW YORK TIMES (Sept. 17, 2014), http://dealbook.nytimes.com/2014/09/17/on-eve-of-alibabas-i-p-o-senator-urges-s-e-c-to-look-at-risks-in-some-chinese-offerings/.

101 *Id.*

102 *Id.*

103 Telis Demos, *Five Questions SEC Posed to Alibaba*, WALL STREET JOURNAL (Oct. 17, 2014), http://blogs.wsj.com/moneybeat/2014/10/17/five-comments-about-structure-that-the-sec-had-for-alibaba/.

104 *Id.*

tions to Alibaba in its first round of examinations, twice the number of questions that a typical U.S. IPO received in 2013.[105]

The SEC could further improve corporate filing disclosures to fulfill its mission of helping the investing public to make informed investment decisions.[106] However, that may not be enough to adequately protect foreign investors from the major risks based in the complexity and purpose of the VIE structure, as acknowledged by the U.S.-China Economic and Security Review Commission (the "Commission").[107] The U.S. Congress created the Commission to study the national security implications of our economic relationship with China.[108] The Commission suggests that if the VIE system collapse and Chinese shareholders choose not to honor the VIE contractual agreements the consequences could result in a multi-billion dollar loss to U.S. investors.[109] To combat the possible damage, the SEC should engage in investigative work on the ground in China so it is better able to inform and educate U.S. investors of the risks involved with the VIE structure.[110]

IV. VIE Risk Assessment

A. Ambiguous Legal Status of the Alibaba VIE

While the VIE structure has been used to avoid the PRC's FDI restrictions for over a decade, experts and observes have called it the "single biggest time bomb" in the U.S. market.[111] There are two types of legal risks inherent in the Alibaba VIE structure and limited legal recourse available to foreign investors.[112] The two legal risks investors face in the Alibaba VIE are the validity of the corporate structure and the validity of the contracts that are the foundation of the VIE structure.[113]

While the VIE structure may eventually be declared valid, legal and enforceable by the PRC government, the currently presumed validity of the Alibaba VIE structure could prove contrived and U.S. investors' funds could become worth-

105 *Id.* (according to a study by law firm Proskauer Rose LLP).

106 De La Merced, *supra* note 100.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 Millman, *supra* note 46.

112 *See generally* Stan Abrams, *The VIE Meta-Narrative: Illegal vs. Invalid*, CHINA HEARSAY (Oct. 13, 2011), http://www.chinahearsay.com/the-vie-meta-narrative (distinguishing the concept of the VIE investment structure being declared illegal and that of particular VIE contracts being unenforceable); *see also* J. Gray Sasser, *China Risk Factor Hiding in Plain View: A Brief Analysis of Variable Interest Entities (VIEs) Under Chinese Law*, TENN. CORP. NEWSL. (Nov. 2012), *available at* http://www.frostbrowntodd.com/resources-1527.html (discussing the regulatory risk of the PRC government's outlawing the structure and the operational risk of bifurcating ownership and control).

113 Steven M. Davidoff, *Fraud Heightens Jeopardy of Investing in Chinese Companies*, NEW YORK TIMES (Apr. 24, 2012), http://dealbook.nytimes.com/2012/04/24/fraud-heightens-jeopardy-of-investing-in- chinese-companies (noting the two ways a VIE investment could go wrong).

less.[114] Experts have argued that the Chinese government is hesitant to make a definitive statement on the legality of the VIE structure as it continues to the benefit China's economy.[115] However, recent PRC regulatory actions on both the local and national level support the argument that a general nullification of the VIE structure is gradually more likely.[116]

At the local government level, certain provincial authorities have banned the creation of new VIEs. In March 2011, local authorities banned a company, Buddha Steel, from forming a VIE with a local steel plant, stating that the structure disobeyed current Chinese management policies related to foreign invested enterprises and went against public policy.[117] This ban implies that the VIE structure is of great concern to China's public policy and sheds light on future rulings on the legality of the structure.

At the national level, recent legal and regulatory decisions indicated VIE contacts might come under scrutiny if the Chinese government so chooses.[118] In 2013, the Supreme People's Court, the PRC's top judicial body, ruled that contractual agreements under consideration in the Chinachem case, similar in effect to VIE structures, to be illegal.[119] The court determined that the contractual agreements set up between Chinachem, a Hong Kong business, and China Minsheng Banking Corp., a PRC-domiciled company were clearly intended to circumvent Chinese regulations and were actions based on illegal intentions.[120] The ruling was an indication that complicated investment schemes will not be respected if they are structured to evade the clear intentions of Chinese law.[121] The court's ruling was the latest indication that China's long assumed tolerance of overseas capital finding its way into the economy's restricted sectors may be waning.[122] While the contracts in this particular situation were fundamentally different, the Court's holding raises the possibility of Chinese courts taking a similar position in Alibaba's VIE structure.[123]

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114 John Ford, *No One Who Bought Alibaba Stock Actually Owns Alibaba*, THE DIPLOMAT (Sept. 24, 2014), http://thediplomat.com/2014/09/no-one-who-bought-alibaba-stock-actually-owns-alibaba/.

115 Daniel Goodman, *Is China Really About To Clamp Down On The Corporate Structure Used For Big American IPOs?*, BUSINESS INSIDER (Sept. 21, 2011), http://www.businessinsider.com/will-china-really-clamp-down-on-vies-2011-9 (discussing how the PRC government has largely ignored the use of VIEs because it was either not aware, didn't care, or found the activity useful at the time).

116 Robert Lewis, *China Watch: A Foreign Lawyer's View from the Inside*, LAWYER (Oct. 19, 2011), http://www.thelawyer.com/china-watch-a-foreign-lawyers-view-from-the-inside/1009862.article ("The elephant in the room is that the relevant regulators could step back, look at the structure in the entirety, collapse it down to its essentials and declare it to be in violation of the applicable foreign investment restrictions and close it down.").

117 Thomas M. Shoesmith, *PRC Challenge to Variable Interest Entity Structures?*, PILLSBURY 2 (Mar. 31, 2011), http://www.pillsburylaw.com/siteFiles/Publications/ChinaAlertPRCChallenge toVIEStructures_03_31_11pdf.pdf.

118 *Id.*

119 Chang, *supra* note 72.

120 Gough, *supra* note 5.

121 *Id.*

122 *Id.*

123 *Id.*

Furthermore, arbitration rulings in Shanghai on VIE structures have come to the same result.[124] Since 2010, Shanghai's arbitration board has invalidated two variable interest entities that foreign companies initially adopted to control PRC-domiciled businesses.[125] One case involved an online game company in which the arbitration panel applied China's contract law to reach the same conclusion as the Supreme Court in the Chinachem case, stating that the VIEs were illegally and intentionally "concealing with a lawful form."[126] The PRC government is starting to attack the VIE structures and the other ways that people have used legal form to get around the substance of what Chinese law says you can't do.[127] China's civil law system gives the court's decision no binding legal precedent; however, these rulings are still symbolically significant for the foreign investors and the future of Alibaba.[128]

B. Proposed Foreign Investment Law

Recently, China took significant steps toward addressing the ambiguity surrounding the VIE structure. On January 19, 2015, MOFCOM published a draft of Foreign Investment Law ("FIL") for public comments.[129] The proposed law will govern all foreign investment activity in China, which includes entities controlled by foreign investors via contractual relationships.[130] Thus, VIE entities are included within the FIL scope.[131] The proposed FIL will tighten the administration of contractual arrangement between foreign investors and the PRC domiciled VIE entities.[132] When the new law becomes effective, ninety-five companies currently listed in the U.S. with VIE structures, including Alibaba, could face legal challenges.[133]

The draft FIL redefines "foreign investment" as any form of arrangement that exerts foreign "actual control" over the PRC domiciled business.[134] Therefore, if the PRC government determines that "actual control" of a company is in foreign

124 *Id.*

125 Gough, *supra* note 5.

126 *Id.*

127 *Id.*

128 Gough, *supra* note 5; *see also* Christopher Beddor, *The Alibaba IPO and How Chinese Companies Bypass Foreign Investment Decisions*, CKGSB KNOWLEDGE (Sept. 1, 2014), *available at* http://knowledge.ckgsb.edu.cn/2014/09/01/china/the-alibaba-ipo-and-how-chinese-companies-bypass-foreign-investment-restrictions/.

129 Elvin C. Ouyang, *China Redefines Its Foreign Investment Law,* GLOBAL RISK INSIGHTS (Feb. 15, 2015), http://globalriskinsights.com/2015/02/china-redefining-foreign-investment-laws/.

130 Woon-Wah Siu, Jenny Sheng, & David A. Livdahl, *China Issues Draft Foreign Investment Law*, PILLSBURY 1-2 (Feb. 12, 2015), *available at* http://www.pillsburylaw.com/siteFiles/Publications/AlertFeb2015ChinaChinaIssuesDraftForeignInvestmentLaw.pdf.

131 Dezan Shira, *China Releases Draft of Foreign Investment Law, Signaling Major Overhaul for Foreign Investment*, CHINA BRIEFING (Jan. 21, 2015), http://www.china-briefing.com/news/2015/01/21/breaking-news-china-releases-draft-foreign-investment-law-signaling-major-overhaul-foreign-investment.html.

132 Siu, *supra* note 130, at 4.

133 Ouyang, *supra* note 129.

134 *Id.*

hands, then the VIE contractual control will be recategorized as "foreign investment" and governed by the newly proposed law.[135] Consequently, for companies that can prove the VIE is in "actual control" under Chinese legal persons, the proposed law suggests legal recognition of the contractual control in VIEs.[136] This new change will bring peace of mind to foreign investors because regulatory risks associated with VIEs may be significantly reduced as a result of legal recognition.[137]

There is, however, slight hesitation on how FIL should deal with existing VIE entities.[138] A handful of suggestions are pending public comment.[139] In accordance with notes in the FIL draft, the legislatures will likely take one of the following suggested approaches: (i) An existing VIE entity can continue its operation as long as it files a statement of de facto control by Chinese investors with the Approving Authority after the Foreign Investment Law takes effect; (ii) an existing VIE can continue its operation only it if is acknowledged by the Approving Authority to be under de facto control by Chinese investors, or (iii) an existing VIE entity can continue its operation only if the foreign investors obtain approval from the Approving Authority after the Foreign Investment Law takes effect.[140]

If the legislature elects to move forward with suggestion (ii) or (iii), which requires either absolute de facto control by Chinese investors or foreign investor approval from Approving Authority, companies currently utilizing the VIE structure, like Alibaba, will essentially be inhibited and China's growing Internet industry will suffer as a result.[141] Alternatively, the Chinese economy could benefit from approving suggestion (i) or by implementing a middle-ground option that allows for a three to five year grace period for VIE entities to restructure their business models.[142]

Substantial uncertainties exist with regards to how the proposed law may impact foreign investments in China, corporate structures, corporate governance and business operations of PRC-domiciled companies.[143] The proposed FIL is an ambitious undertaking, and once enacted, the law will radically change the foreign investment landscape of China.[144]

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135 *Id.*

136 *Id.*

137 *See id.*

138 Siu, *supra* note 130, at 5.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 Christopher W. Betts, Will H. Cai, Z. Julie Gao, Gregory G.H. Miao, & Alexandra J. Yin, *China's MOFCOM Aims to Fundamentally Change the Legal Landscape on Foreign Investments*, SKADDEN (Feb. 2015), https://www.skadden.com/insights/chinas-mofcom-aims-to-fundamentally-change-the-legal-landscape-on-foreign-investments.

144 *See id.*

V. Suggestions Moving Forward to Mitigate Risk

While the status of the validity and legality of Alibaba's VIE structure still remains uncertain, the issue must be addressed. The Chinese economy will continue to grow at a rapid rate and China's Internet and technology sectors will become a substantial factor in the global economy. If the validity of foreign investment in the Internet and technology sectors remains questionable, it can develop into a larger problem for either side: the Chinese economy or U.S. foreign investors. If the PRC government moves forward to approve FIL, and ultimately rules the contractual relationships invalid or the structure entirely illegal, this could potentially result in a massive loss of U.S. investor funds. For those companies that have already adopted the VIE structure, their current business structure would presumably dissolve, and company ownership would remain with the Chinese partners, leaving the contractual agreements connecting U.S. investors to economic benefits in limbo or non-existent. This outcome could significantly impact the Chinese economy, as it would deter foreign investors from contributing financial capital to two of China's largest economic sectors, Internet and technology.

Despite the risks discussed, VIEs are the only current reasonable mechanism to bring foreign investment into China's Internet sector.[145] Likewise, it is not the VIEs themselves that are the true source of the problem, but instead the PRC government policies and legal system.[146] The regulatory policies and rudimentary legal system hinder potential economic growth within China, and are the root cause of the risk foreign investors face when subsidizing Chinese Internet companies.[147] The U.S. must engage China to remedy the fundamental problems pertaining to the validity and legality of the VIE structure.[148]

In response to the proposed FIL, companies and foreign investors must monitor the legislation process closely in order to mitigate regulatory risks that will result from FIL.[149] In the meantime, it is recommended that companies begin to examine and adjust their management structure, and prepare documentation to prove "actual control" by Chinese investors.[150]

In comparison, the U.S. has a global competitive advantage in services, especially in information and communication technology ("ITC") and digitally-distributable services.[151] According to a U.S. Department of Commerce study in 2011, ITC made up over 60% of U.S. service exports and 17% of overall exports, with demand stemming from European and East Asian markets.[152] Yet U.S. exports to China in the ITC sector have remained extremely low. In 2012, less than

145 COMMISSION STAFF REPORT, *supra* note 1, at 9.

146 *Id.*

147 *Id.*

148 *Id.*

149 Ouyang, *supra* note 129

150 *Id.*

151 *Id.*

152 COMMISSION STAFF REPORT, *supra* note 1, at 9.

3% of U.S. exports in digital services were bound for China.[153] This trade imbalance is in large part due to China's restriction on the free flow of information over the Internet.[154] Moreover, the PRC government requires that Internet companies' ownership majority remain with Chinese nationals, and that the company itself is domiciled in China.[155] These restrictions are in large part the reason VIEs exist so companies can list on the U.S. exchanges.[156] Eliminating these restrictions would reduce a Chinese company's need to establish a VIE.[157]

Furthermore, China's restricted financial markets make it difficult for Chinese firms to obtain necessary capital domestically.[158] As a result, Chinese Internet companies looking to expand and raise funds have little choice but to use the VIE structure to obtain foreign capital.[159] China's restricted financial markets not only create unnecessary risk for investors by driving Chinese companies to adopt the VIE structure, but it also limit the potential growth of Chinese Internet companies that could more efficiently access capital by listing domestically.[160] By loosening financial markets, China would make more domestic capital available, reducing the need for China's Internet companies to utilize the VIE structure.[161]

As discussed, China's legal system remains underdeveloped and often times corrupt under the rule of the CCP.[162] VIEs are inherently risky because the legal contract which are the foundation of the VIE structure are only determined binding and enforceable under Chinese law.[163] Foreign investors have difficulty seeking remedy for any grievance in the Chinese judicial system.[164] China taking action to improve its legal system and rule of law would give investors relief knowing that they would be able to fairly file complaints through the Chinese legal system.[165]

While China's regulatory policy and its supporting government agencies have implied the VIE structure to be illegal in China, the Chinese government in practice has allowed the VIE structure to endure.[166] The current legal ambiguity of the VIE structure continues inherent risks born unto foreign investors contributing financial capital to companies who have previously adopted the structure.[167] Future clarification from the Chinese government regarding the legal status of the

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 COMMISSION STAFF REPORT, *supra* note 1, at 10.

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 COMMISSION STAFF REPORT, *supra* note 1, at 10.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 COMMISSION STAFF REPORT, *supra* note 1, at 10.

VIE structure via FIL will significantly impact the foreign investment landscape in China.

VI. Conclusion

The VIE structure today remains a risky investment for U.S. investors and a precarious work-around tool for Chinese companies such as Alibaba. At this juncture, the VIE is the only viable tool for China's Internet and technology companies to raise sufficient financial capital in order to remain a competitive player in the global economy. For that reason, it is suspect that China would not declare the VIE structure illegal in its entirety, as it continues to contribute to and benefit its overall economy. However, the newly proposed law may suggest otherwise. FIL has the power to paralyze the VIE structure as it exists today, and many Chinese Internet companies, like Alibaba, that have gained traction in the fastest growing e-commerce market in the world will experience future ramifications as China's Foreign Investment Law materializes.

As VIEs continue to play a key feature of China's growing economy, the PRC must address the fundamental problems that directly impact the existence and continuation of the VIE structure. In turn, the U.S. and the SEC should instigate a more thorough disclosure of the risks involved when investing in a VIE to properly educate and inform the U.S. investors and general public. Alibaba and their foreign investors remain secure for the time being, but the Chinese government, VIE entities, and foreign investors must promptly take action before the VIE "time-bomb" runs out of time.