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Entrenched Emergencies and the "War on Terror": Time to Reform the Derogation Procedure in International Law?

Edel Hughes*

I. Introduction

The implementation of a civil state of emergency is a government's typical response to political violence. From Northern Ireland to Israel/Palestine to Southeast Turkey, the enactment of emergency powers is an archetypal reaction of the state when faced with a "terrorist" threat. This type of local and discrete conflict has been somewhat overshadowed in recent years, however, with the prevailing discussion now centered on the "war on terror" and all that it encompasses. Legislators would now have us believe that the type of threat we currently face is entirely different from that posed by political offenders acting on the domestic stage.[1] Accordingly, it is argued that the measures invoked to respond to this new threat need to be even more stringent and more repressive than those traditionally used to fight localized political conflicts.

Even if we are to accept the claim that the threat of "international terrorism" differs not just in degree but also in form from the kind traditionally experienced, a phenomenon of conventional style conflicts that has been entirely ignored in this debate is that of entrenched emergencies. We are told the "war on terror" requires (certain) states to derogate from their international legal responsibilities so that they may properly use all resources to capture those who pose a terrorist threat without fear that the methods used to do so may fall foul of international human rights standards.[2] We do not know who the enemy is, nor for how long the abrogation of human rights responsibilities must continue. Similarly, the threat posed by "terrorism" in Northern Ireland was deemed so grave that emergency powers were renewed in

1. *See* Associated Press, *We've Got to Be Fast on Our Feet, Quick to Detect and Prevent*, WASH. POST, Dec. 20, 2005, at A9 (quoting George W. Bush's news conference where the president reiterated that the war on terror is a different kind of war); *see* Tom Rivers, *Blair Announces New Deportation Measures*¸ VOICE OF AM. NEWS, Aug. 5, 2005, *available at* http://voanews.com/english/archive/index.cfm?month=8/1/2005 (accessing this article requires selecting the year 2005, the month August, and clicking on 1; next scroll down to 8/5 and the article is number 13) (reporting that Prime Minister Tony Blair has said that the "rules of the game are changing" in order to counter the new threat of Islamic terrorism). *See generally* BERTRAND G. RAMCHARAN, HUMAN RIGHTS AND HUMAN SECURITY 7 (2002) (discussing the challenge governments face in the post-9/11 world to balance the requirements for democracy with the requirements for security).

2. *E.g.*, Military Commissions Act of 2006, 10 U.S.C. § 948b(g) (2006) (prohibiting any person held as an unlawful enemy combatant from invoking his rights under the Geneva Conventions); *see* Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?* 36 GEO. J. INT'L L. 809, 879 (2005) (noting the Bush Administration's position, which tries to deny virtually all rights to all unlawful enemy combatants); Virginia Helen Henning, Note, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?* 17 AM. U. INT'L L. REV. 1263, 1265–66 (2002) (explaining that the United Kingdom's legislation that was enacted in response to the terrorist attacks of September 11 violates Article 5 of the European Convention on Human Rights).

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that jurisdiction for almost 80 years, despite the fact that national and international opinion disputed the need for such powers.[3]

This article will examine how international monitoring bodies, namely the European Court of Human Rights, the Human Rights Committee, and the supervisory machinery of the American Convention on Human Rights, have dealt with the phenomenon of entrenched emergencies and investigate their shared characteristics with the new permanent "emergency" of the "war on terror." The first section examines the relevant jurisprudence of the monitoring bodies, and an attempt to outline how their approach can now be reconciled and applied to the permanent emergency engendered by the "threat of international terrorism" is made in the second section. The third section outlines how the international derogation procedure is being used by proponents of the "war on terror" and examines whether the procedure needs to be reformed or simply strengthened.

A. International Monitoring Bodies

The notion that states may be relieved of certain human rights responsibilities during periods of exceptional internal turmoil is tempered by the expectancy that any such "state of emergency" should be temporary in nature. As Gross succinctly outlines:

> [I]n order to be able to talk about normalcy and emergency in any meaningful way, the concept of emergency must be informed by notions of temporariness and exception. For normalcy to be "normal," it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to that rule—it must last only a relatively short time and yield no substantial permanent effects. Whatever the definitional difficulties concerning the concept of "emergency," the elements of temporariness and exceptional nature are widely accepted as the common denominators that make a dialogue on the issue of emergency possible. Thus traditional discourse on emergency powers posits normalcy and exigency as two separate phenomena and assumes that emergency is the exception. Thus, the governing paradigm is that of the "normalcy-rule, emergency-exception.[4]

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3. *See* Brogan v. United Kingdom, 11 Eur. H.R. Rep. 117, 135–36 (1988) (holding that a four-day and six-hour detention in compliance with Northern Ireland's Prevention of Terrorism [Temporary Provisions] Act of 1989 was a violation of Article 5(3) of the European Convention on Human Rights); *No Emergency, No Emergency Law* (Committee on the Administration of Justice), 1995; Fionnuala Ni Ní Aoláin, Note, *Legal Developments: The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1357–58 (1996) (stating that there have been ongoing debates within the academic community in Northern Ireland questioning whether the political situation in Northern Ireland necessitates draconian emergency legislation).

4. Oren Gross, *"Once More Unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L. 437, 439–40 (1998) [hereinafter *Gross 1*]; *see* Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15—A Domestic Power of Derogation from Human Rights Obligations*, 11 MICH. ST. U.–DCL J. INT'L L. 261, 269 (2002) (opining on the need and difficulty to clearly define situations that warrant the use of emergency powers); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011, 1015–16 (2003) [hereinafter *Gross 2*] (noting that emergencies are conceptualized as aberrations from the ordinary state of affairs).

There are many examples of country situations where emergency rule becomes the general rule; some of the more obvious cases are in Northern Ireland, which experienced emergency rule for upwards of 80 years, and also southeast Turkey (15 years) and Israel (more than 50 years).[5] One of the less apparent dangers associated with entrenched emergencies is that even when the emergency is finally over, extraordinary legislation can become transposed into the ordinary domestic law.[6] The following section sets forth how the international monitoring bodies have adjudicated on the phenomenon of entrenched emergencies.

II. Supervisory Mechanisms of the European Convention on Human Rights

A. Article 15 of the European Convention on Human Rights

The European Convention on Human Rights (ECHR),[7] the American Convention on Human Rights (ACHR)[8] and the International Covenant on Civil and Political Rights (ICCPR)[9] allow for contracting parties to derogate from certain provisions of the treaties in times of emergency. Article 15 of the ECHR mirrors Article 4 of the ICCPR by referring to a public emergency "threatening the life of the nation" and allows only for derogations that are "strictly required by the exigencies of the situation."[10] Paragraph 2 of Article 15 prohibits derogation from a number of fundamental human rights, with a procedural obligation included under paragraph 3, which requires that the Secretary-General of the Council of Europe be informed of any derogation taken under the Article.[11]

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5. *See, e.g., Gross 1*, *supra* note 4, at 486 (revealing that between 1970 and 1987 Turkey invoked Article 15 of the European Convention for Human Rights more that 77% of the period of time); Ní Aoláin, *supra* note 3, at 1353 (reflecting that the use of emergency powers in Northern Ireland can be traced back to the 1920s); Ariel Zemach, *The Limits of International Criminal Law: House Demolitions in an Occupied Territory*, 30 CONN. J. INT'L L. 65, 67 (2004) (reporting on Israel's continued use of Regulation 119 of the Defense (Emergency) Regulations of 1945).

6. *See Gross 1*, *supra* note 4, at 476 (considering Northern Ireland's Prevention of Terrorism Act, which was originally enacted as a temporary provision in 1974 but became permanent legislation in 1989); Zemach, *supra* note 5 at 67 (discussing Israel's Regulation 119 of the Defense (Emergency) Regulations of 1945, the policy implemented to destroy over 450 Palestinian homes between 2002 and 2003).

7. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 221.

8. American Convention on Human Rights: "Pact of San Jose, Costa Rica," art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123, 152 (providing for derogations in prescribed circumstances).

9. International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171, 174.

10. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232 (providing States an option to derogate from human rights obligations under the treaty); El Zeidy, *supra* note 4, at 263 (revealing that the drafters of the ECHR borrowed the derogation clause from a draft of the ICCPR); *see also* International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171, 174 (allowing States to derogate from human rights obligations under the treaty during certain instances).

11. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232–34 (prohibiting the derogation of most of the human rights protected by Articles 2, 3, 4, and 7 of the ECHR); J.G. MERRILLS & A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 205 (4th ed. 2001) (providing an analysis of Article 15 and outlining some of the rights that may not be derogated). *See generally* Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights [Committee of the United Nations]*, 22 HARV. INT'L L.J. 1, 4–10 (1981) (summarizing the proceedings leading to the adoption of Article 15).

The text of Article 15 guarantees that certain requirements must be met and a number of procedures followed in order to legitimately derogate from provisions of the Convention:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.[12]

B. Textual and Procedural Requirements of Article 15

According to the wording of Article 15, there are three preconditions for a valid derogation.[13] Firstly, there must be "war or other public emergency threatening the life of the nation"; secondly, the derogation must not go further than is "strictly required by the exigencies of the situation"; and thirdly, the derogation must not be inconsistent with the state's "other obligations under international law."[14] Furthermore, the requirements of Article 15 dictate that certain rights are non-derogable even in time of emergency (Art. 15(2)) and notification of derogations must be sent to the Secretary-General of the Council of Europe (Art. 15(3)).[15]

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12. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232–34 (allowing for derogation from human rights obligations); *see* FRANCIS C. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 324 (Clarendon Press 1996) (considering the French reservation to Article 15); *see also* A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 183–84 (3d ed. 1993) (discussing further the three subsections of Article 15).

13. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232 (defining the requirements for valid derogation); El Zeidy, *supra* note 4, at 263 (extrapolating the three preconditions required under Article 15 for a valid derogation of human rights).

14. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221, 232–34 (defining the requirements for valid derogation); Dana Keith, Note, *In the Name of National Security or Insecurity? The Potential Indefinite Detention of Noncitizen*, 16 FLA. J. INT'L L. 405, 470–72 (2004) (reviewing the Court's application of the three preconditions for derogation in Brannigan & McBride v. United Kingdom). *See generally* Susan Marks, *Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights*, 15 O.J.L.S. 69, 74 (1995) (indicating that the European Court of Human Rights will give much deference to a State's determination that conditions exist for a valid derogation).

15. *See* JACOBS & WHITE, *supra* note 12, at 321 (analyzing the Court's findings in the *Lawless* case, which held that Irish government did not fulfill the notification requirements of Article 15(3)); El Zeidy, *supra* note 4, at 263 (providing an in-depth review of the notification process); Hartman, *supra* note 11, at 15 (discussing the four non-derogable rights that are common to the ECHR and the ICCPR).

The phrase "public emergency threatening the life of the nation" includes a situation of war and has been deemed to necessitate a number of criteria, as enunciated by the Commission in *Lawless v. Ireland*[16] and the *Greek Case*.[17] For the purposes of Article 15, a public emergency must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, that is, the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order must be inadequate.[18] The first criterion is an important one: the fact that the emergency must be actual or imminent means that states cannot derogate from the Convention where there is merely a *perceived* threat of an emergency situation.[19] However, the fact that the emergency is confined to a certain part of the territory does not mean that it will not reach the threshold of "public emergency threatening the life of the nation."[20] Thus, the United Kingdom has been permitted to derogate from the Convention, even though its disturbances were largely confined to Northern Ireland: ". . . the emergency must affect on the one hand, the whole of the population and, on the other, either the whole of the territory or certain parts thereof. . . . "[21]

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16. Lawless v. Ireland, 1 Eur. H.R. Rep 15, 15–17 (1961) (holding that Ireland's detention of an Irish citizen, who was a member of the Irish Republican Army, for five months without a trial was not a violation of the ECHR because there was a "public emergency threatening the life of the nation" as required by Article 15(1), the detention was strictly confined to the exigencies of the situation, and Ireland complied with the notification requirements of Article 15(3)).

17. Denmark, Norway, Sweden and the Netherlands v. Greece (the *Greek Case*), 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.); *see* JACOBS & WHITE, *supra* note 12, at 318 (noting the Court's decision in the *Greek Case* to follow the definition of public emergency that it had identified previously in *Lawless*); P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 552 (2d ed. 1990) (detailing the Court's findings and the Greek government's argument in the *Greek Case*).

18. *See* Carl Heymans-Verlag, 4 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS ART. 15, at 196–97 (quoting from the Court's decision in *Lawless*, where the Court discussed the level of discretion afforded to individual states to allow them to determine when an emergency has reached the threshold of "threatening the life of the nation").

19. *See* JACOBS & WHITE, *supra* note 12, at 319–20 (reviewing the commission's decision in the *Greek Case* where the commission focused on whether an emergency existed in fact rather than if the Greek government believed there was an emergency); JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 27 (1992) (reminding us that it is not permissible to derogate from human rights obligations under the ECHR to combat emergency situations that have not arisen); Hartman, *supra* note 11, at 16 (stating that by wording the derogation clause in the present tense, Article 15 requires that an actual emergency be present at the time of the derogation as opposed to a potential or speculative emergency).

20. *E.g.*, The Republic of Ireland v. The United Kingdom, 2 Eur. H.R. Rep. 25, 91 (1978) (holding that a "public emergency threatening the life of the nation" existed in Northern Ireland based on the intensity of the death and damage caused by the IRA); *see* Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS 72, 80 (Louis Henkin ed., Columbia Univ. Press 1981) (emphasizing the concept that a public emergency that threatens the entire nation need not engulf the nation as a whole).

21. Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, 15, U.N. Doc. E/CN.4/Sub.2/1982/15 (July 27, 1982) (justifying the view that the emergency must affect the whole of the population and either the whole or part of the territory).

Measures taken under Article 15 may not go further than those "strictly required by the exigencies of the situation."[22] Accordingly, three factors must be taken into account when deciding if measures are compatible with the article: the doctrine of *state necessity*, the *proportionality* of the measures in view of the threat, and the *duration* of the derogations.[23] The doctrine of state necessity balances the interest that other states have in the derogating state respecting human rights obligations and the interest of those under the jurisdiction of the state to have their human rights protected and respected, with the interest of the derogating state in safeguarding public security and the life of the nation.[24] It is generally agreed that the threat to the nation must be exceptionally grave and other legitimate remedies or means to deal with it must be exhausted.[25] Moreover, the burden of proof rests with the derogating state "pleading necessity that prior conditions have been met."[26] The principle of proportionality is implicit in consideration of Article 15; derogation will be acceptable only if it is a proportionate response to the imminent threat or danger.[27] In the *Lawless* case, the Commission was divided as to what

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22. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 4.1, U.N. Doc. A/6316 (Dec. 16, 1966) (mirroring the language of Article 15 of ECHR allowing derogation under certain circumstances); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.1, Nov. 4, 1950, 213 U.N.T.S. 222 (citing the language of Article 15 that strictly limits derogation from the Convention based upon the current situation).

23. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism—Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, ¶ 34, U.N. Doc. E/CN.4/Sub.2/2005/39 (June 22, 2005) (prepared by Kalliopi K. Koufa) (discussing the three exceptions of derogation in human rights law in strict conformance of international standards, in the context of counter-terrorism, to be (i) time limitation, (ii) necessity and (iii) oversight).

24. *See* El Zeidy, *supra* note 4, at 286–87 (discussing the Doctrine of Necessity as a justification for a state to breach international obligation if it can balance the need to safeguard vital interests while respecting the interest of another state); *see also Gross 1*, *supra* note 4, at 478–82 (analyzing the European Court's decisions regarding terrorism threat in Northern Ireland and the United Kingdom's needs to weigh the rights of Irish detainees and the rights of its population as a whole, which are seriously threatened by the terrorist activity).

25. *See* DIJK & HOOF, *supra* note 17, at 736 (citing the *Greek Case* Commission's report in defining the characteristics of a public emergency to involve exceptional crisis or danger in which normal measures to maintain public safety, health and order are not adequate); *see also* ORAÁ, *supra* note 19, at 27 (declaring that derogation is not acceptable for possible exceptional situations that have not yet arisen, and the emergency must be present or at least imminent); ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION WITH SPECIAL REFERENCE TO THE TRAVAUX PREPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS 301 (1998) (commenting on the Commission in the *Greek Case* which reaffirmed the court's definition in the *Lawless* case of public emergency to be a crisis or danger that must be exceptional and all normal measures must be exhausted and insufficient to deal with the threat).

26. *See* Brannigan & McBride v. United Kingdom, 17 E.H.R.R. 539, 570 (1993) (holding that the government has the burden of proof to show that an emergency really existed); *see also* Merrills & Robertson, *supra* note 11, at 211 (stating that the government has the burden to prove an emergency exists and has to justify the measures taken as a result of this emergency).

27. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ¶¶ 83–85, E/CN.4/Sub.2/1997/19 (June 23, 1997) (presented by Mr. Leandro Despouy) (discussing the requirement for a proportional relationship between the severity of the threat to the state and the measures implemented by the state to avert such threat); *see also* Hartman, *supra* note 11, at 17 (reiterating that derogation must be proportional to the degree and duration of danger, and the strict requirement indicates an implicit obligation to act in good faith). *See generally* Ronald St. J. Macdonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 243 (1997) (defining the principle of proportionality to include the elements of severity, duration, and scope in which the measures are necessary and sufficient to meet the threat and the measures are suitable to reduce the crisis).

the principle entails: some favored a strict interpretation—that measures should be "strictly required," whereas others felt that a wider interpretation of the Convention was the correct one—the government should be afforded a wide margin of appreciation when deciding what measures are appropriate as it is in the better position to determine the right course of action in dealing with the emergency.[28] While the majority of the Commission afforded the wider interpretation to Article 15, it is undoubtedly a strict tenet of international law that the response to the emergency must be proportionate to the aim of controlling and overcoming it.[29] The third principle requires that a state cease to derogate from the provisions of the Convention as soon as the exceptional circumstances have come to an end.[30]

If the derogating state provides that the conditions set out in Article 15 are satisfied, it must also ensure that measures taken are not inconsistent with its other obligations under international law, in accordance with paragraph 1.[31] It has been suggested that measures which are inconsistent with a state's other obligations are considered as being like measures which go beyond those "strictly required by the exigencies of the situation" in their legitimacy.[32] Further-

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28. *See* Lawless v. Ireland (No. 3), 1 Eur. H.R. Rep 15, 31 (1961) (indicating the Court upheld the Commission's finding of an emergency, without referring expressly to the expression of margin of appreciation and that the Court found the existence of a public emergency had been "reasonably deduced" by the Irish Government in view of a combination of factors); *see also* Questiaux, *supra* note 21, at 16 (discussing the holding in Ireland v. United Kingdom such that a state has a wide margin of discretion to determine the existence of the threat to the nation, but such discretion cannot be exempt from all control).

29. *See* Lawless v. Ireland (No. 3), 1 Eur. H. R. Rep 15, 32–34 (1961) (indicating the Court upheld the Commission's finding that the measures taken by the Irish Government were not disproportionate to the strict requirement of the situation); *see also Gross 1*, *supra* note 4, at 449–51 (describing the doctrine of proportionality to imply that the more severe and intense the threat to the life of the nation, the more extreme and prejudicial emergency measures may be to individual rights).

30. *See* Questiaux, *supra* note 21, at 22–23 (discussing various forms of time-limitations on the enforcement of state of emergency); Macdonald, *supra* note 27, at 241–42 (summarizing the concept of emergency to include the principle of temporariness in which derogation measures should be terminated as soon as the circumstances that brought it into existence are reasonably controlled or no longer exist); *cf.* SVENSSON-MCCARTHY, *supra* note 25, at 316 (discussing the dissenting opinion of Judge Makarczyk in Brannigan & McBride v. United Kingdom such that although it is almost impossible to set a precise time-limit for the derogation under Article 15, he still believed that the derogations should only be temporal).

31. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.1, Nov. 4, 1950, 213 U.N.T.S. 222 (specifiying that a state may take measures derogating from its obligations under the Convention, but that these measures cannot be inconsistent with its other obligations under international law); *see also* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 447 (4th ed. 2006) (asserting that Article 15 does not permit measures that are inconsistent or in conflict with other treaty obligation or obligations under customary international law).

32. *See* Brannigan & McBride v. United Kingdom, 17 E.H.R.R. 539, 580 n. 111 (1993) (stating that Article 15 implicitly requires derogation measures to be constantly reviewed and, if necessary, modified in order to meet the strict exigencies of an emergency situation that can recede or otherwise develop); *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, ¶ 52, E/CN.4/Sub.2/1997/19 (June 23, 1997) (presented by Leandro Despouy) (proposing that a state of emergency may be legitimized or extended only in accordance with the Constitution or Fundamental Law and relevant international law).

more, a state cannot invoke Article 15 as a reason for not honoring international obligations.[33] A state may never derogate from certain non-derogable rights set out in paragraph 2, and this principle of non-derogability of certain rights ranks as one of the most significant principles in the regulation of human rights in states of emergency.[34] Paragraph 2 prohibits derogation from the right to life except in respect of death resulting in lawful acts of war (Article 2);[35] the right to be free from torture or inhuman degrading treatment or punishment (Article 3);[36] the right to be free from slavery or servitude (Article 4(1));[37] and it prohibits retrospective criminal penalties (Article 7).[38] This minimum catechism of rights is supplemented by the fact that some of the other articles in the Convention are unqualified, by their very nature.[39]

Lastly, the derogating state must notify the Secretary-General of the Council of Europe of the derogation. Article 15(3) provides that the derogating state must keep the Secretary-General fully informed of the measures taken and the reasons for taking such measures, thus providing a safeguard against abuse of the article and also informing the other parties to the

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33. *See* JACOBS & WHITE, *supra* note 31, at 448 (asserting that a State cannot use Article 15 to release its obligations under other human rights and fundamental freedoms, or any other international agreement of which it is a party); *see also* J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 208 (2d ed. 1993) (stating that if a State adopts measures that are inconsistent and beyond the State's obligation, it cannot use Article 15 to release itself from the international laws and treaties). *But see Gross 1*, *supra* note 4, at 447–48 (discussing that under exceptional circumstances, countries may derogate from individual rights and take measures that may constitute violations of the state's international obligations but only if certain procedural and substantive conditions are met).

34. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.2, 232, Nov. 4, 1950, 213 U.N.T.S. 222 (describing non-derogable rights to include rights under Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture], 4.1 [prohibition of slavery and servitude], and 7 [no punishment without law]); *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency,* ¶¶ 102–3, E/CN.4/Sub.2/1997/19 (June 23, 1997) (presented by Leandro Despouy) (acknowledging the principle of non-derogability as one of the most important principles governing the legitimacy of the state of emergency, since it specifies absolute limits on the exercise of the powers during crisis); ORAÁ, *supra* note 19, at 87–88 (positing the principle of non-derogability of fundamental rights applies even in situations of public emergency that threaten the nation).

35. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15.2, 232, Nov. 4, 1950, 213 U.N.T.S. 222 (listing the non-derogable rights such as the right to life, the prohibition of torture and slavery, and the non-retroactive nature of criminal law).

36. *See id.* at art. 3, 224 (describing the non-derogable right of a person to be free from torture or inhuman, degrading treatment or punishment).

37. *See id.* at art. 4.1, 224 (describing the prohibition of slavery or servitude).

38. *See id.* at art. 7, 225 (describing the prohibition of retroactive nature of criminal law).

39. *See id*. at art. 14, 232 (describing the enjoyment of the rights and freedoms "without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"); *see also* MERRILLS & ROBERTSON, *supra* note 11, at 198–99 (stating that Article 14, a non-discrimination clause, is not a general guarantee effective remedy for violation of all rights, but for the protection of rights described in other articles).

Convention about the derogations taken.[40] It is generally accepted that the notice of derogation must be sent within a reasonable time frame.[41] Whereas Article 4 of the International Covenant on Civil and Political Rights requires that the Secretary-General of the UN be notified "immediately," Article 15 makes no such provision.[42] In the *Lawless* case, notification of derogation was sent 12 days after measures were taken and this was held to be acceptable.[43] Similarly, in *Ireland v. United Kingdom*,[44] a delay of 11 days was held to be reasonable. In the *Greek Case*, however, there was a four-month delay between the implementation of measures taken and notification. As a result, the Commission concluded that the late notification could not justify action taken before the actual notification.[45] The notification of derogation must state the provisions from which the state is derogating and the Secretary-General must be kept "fully informed" of the measures taken.[46] States must also indicate the reasons for the derogation to enable the other States Parties to consider and assess the need for derogation. In addition, states must make a further communication upon cessation of the measures, regarding when the provisions of the Convention can again be fully enforced.[47]

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40. *E.g.,* FRANCIS G. JACOBS & ROBIN C. A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 330 (2d ed. 1996) (discussing the Court's consideration of sufficient notification to enable the Secretary-General to understand the derogating state's position); El Zeidy, *supra* note 4, at 294–95 (discussing Article 15[3], which requires states to inform the Secretary-General of the derogative measures they have taken and their rationale for such action so that the other parties of the ECHR are put on notice of the situation, and this process of notification facilitates the monitoring of the derogation by the international bodies); *see* Hartman, *supra* note 11, at 18 (suggesting that a derogating state needs to make an emergency proclamation such that the appropriate parties can be notified).

41. *See* Macdonald, *supra* note 27, at 250 (stating that in absence of a time limit requirement in Article 15(3) "without delay" was to be determined on a case-by-case basis with 12 days in the *Lawless* case being acceptable and a four-month delay in the *Greek Case* being unacceptable).

42. *See* BRIAN DOOLAN, LAWLESS V IRELAND (1957–1961): THE FIRST CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS, AN INTERNATIONAL MISCARRIAGE OF JUSTICE, 214–15 (2001) (explaining that Article 15 does not expressly require timely notice of derogation).

43. Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) 15, 37 (1961) (stating that a 12-day delay in notifying the Secretary-General of derogation did not nullify the United Kingdom's derogation under Article 15 of the European Convention).

44. Ireland v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) 25, 51 (1978) (holding that the State's 11-day delay in submitting a notice of derogation was reasonable under Article 15 of the European Convention).

45. *See* El Zeidy, *supra* note 4, at 296 (concluding that the government in the *Greek Case* failed to meet its obligation to notify the Secretary-General of its administrative measures taken in regard to detention without a trial). *See generally* Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision,* 7 HUM. RTS. Q. 89, 101–2 (1985) (listing the requirements for derogation and discussing notification).

46. *See* M. BEDRI ERYILMAZ, ARREST AND DETENTION POWERS IN ENGLISH AND TURKISH LAW AND PRACTICE IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17, 17 (1999) (detailing the elements of a binding notice of derogation); *see also* Hartman, *supra* note 45, at 101 (emphasizing that, unlike Article 4 of the ICCPR, Article 15 of the European Convention merely requires an abstract of the direction a government intends to take in an emergency situation to sufficiently notify the Secretary-General of derogation). *See generally UK Terrorism Act Suspension of Detainee's Rights Justified*, TIMES (UK), May 28, 1993, at 40 (summarizing that the United Kingdom presented sufficient declaration of derogation in response to the emergency situation in Brannigan & McBride v. United Kingdom).

47. *See* Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) 15, 30 (1961) (restating the provision of Article 15 of the European Convention on Human Rights); *see* El Zeidy, *supra* note 4, at 298 (affirming that States are required to notify the Secretary-General when the emergency has subsided and the Convention provisions have been reinstated). *See generally* Amnesty Int'l, *Amnesty International Fair Trials Manual,* AI Index POL 30/02/98, Dec. 1998, *available at* http://www.amnesty.org/ailib/intcam/fairtrial (validating that the requirement of notification upon cessation of emergency powers is required under Article 4 of the ICCPR as well).

C. What Constitutes an "Entrenched Emergency" for the Purposes of the Convention?

The successful functioning of Article 15 is based on the premise that states will derogate from the Convention only when there is a public emergency that meets the required threshold, and the derogation, in accordance with the very nature of emergencies, will be a temporary one.[48] Both the European Commission and Court have generally based their decisions on the validity of this "normalcy-rule, emergency-exception" hypothesis and have thus avoided any form of pronouncement on the validity of states of emergency declared by Contracting States.[49] However, experience demonstrates that amongst some State governors, "there is an incurable tendency . . . to *misuse* the tool of emergency to maintain [their own] positions of power . . . In many States, emergency and other states of exception have in some respects become a 'normal' form of the exercise of State authority."[50] Thus, it has been asserted that an over-reliance on the basic normalcy-exception paradigm does not take account of the fact that States can and will diverge from this model, and fails to address the challenges posed by entrenched emergencies.[51]

The components required to meet the threshold of "public emergency threatening the life of the nation" for the purposes of Article 15, as outlined by the Court in *Lawless* and the Commission in the *Greek Case,* do not allude to the temporal element attached to emergencies.[52] The Court in its judgments relating to situations of entrenched emergencies has never referred to the phenomenon but rather has chosen to examine each application on a case-by-case basis,

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48. *See* Oren Gross & Fionnuala Ni Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625, 644 (2001) (noting that under the European Convention, derogation must only be used as a temporary resolution for extreme emergencies).

49. *See* Colm Campbell, *"Wars on Terror" and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict,* 54 INT'L & COMP. L.Q. 321, 334–35 (2005) (defining the conditions that create a "normalcy-rule, emergency-exception" situation); *see also* Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform*, 10 HUM. RTS. Q. 372, 375, 381 (1988) (explaining that the European Court and Commission gives deference to the States to determine the existence of a state of emergency).

50. MANFRED NOWAK, U.N. COVENANT ON CIV. & POL. RTS: CCPR COMMENT 73 (1993) (quoting that governments may abuse their emergency power to create a permanent state of emergency); *see* Hartman, *supra* note 45, at 131 (noting that governments are more inclined to conceal repressive policies during states of emergency). *But cf.* Henning, supra note 2, at 1285–86 (reaffirming that the *Lawless* court executed safeguards to prevent governments from abusing emergency power).

51. *See* SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY 57–62 (1989) (exemplifying the discretionary extent of judicial review when deciding matters concerning declarations of states of emergency and derogation); *Gross 1*, *supra* note 4, at 442–43 (stressing that many governments improperly implement the normalcy-rule, emergency-exception); *see also* Mark Neocleous, *The Problem with Normality: Taking Exception to "Permanent Emergency,"* 31 ALTERNATIVES: GLOBAL, LOCAL, POL. 191, 193 (2006) (criticizing the extent of latitude the European Commission and Court give governments to determine the use of emergency powers).

52. *See generally* NOWAK, *supra* note 50, at 73 (emphasizing the prolonged state of emergency during the incidents that led to the *Greek Case*). Christopher Michaelsen, *International Human Rights on Trial—The United Kingdom's and Australia's Legal Response to 9/11*, 25 SYDNEY L. REV., 275, 291 (2003) (contending that the practical application of derogation implies a "temporal limit" as it is used only in proportion to the degree of the emergency).

regardless of the prevailing country situation.[53] However, if Article 15 allows Contracting States to take only such action as is "*strictly required* by the exigencies of the situation," the suspicions of the Court should arguably be aroused where exigencies require derogation over a prolonged period of time.[54] Nonetheless, it is difficult to ascertain what constitutes an *entrenched* emergency: when does an emergency shift from being temporary to permanent—upon renewal of a derogation order or some time thereafter?

D. Jurisprudence of the Commission and Court

While numerous States Parties to the American Convention have had cause to resort to their derogation clause, declarations of states of emergency have been relatively rare under the European Convention.[55] In fact, the cases concerning situations of entrenched emergencies that have come before the Court have mainly centered on two jurisdictions, Northern Ireland and Turkey.[56] Both jurisdictions have been subjected to emergency rule as a result of political violence, causing the British and Turkish authorities to derogate from provisions of the Convention.[57] Nonetheless, the first case relating to Article 15 to come before the Strasbourg authorities concerned neither of these two countries.[58] Although not pertaining to a situation

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53. *See No Public Emergency Threat to Life of Nation; Law*, TIMES (UK), Dec. 17, 2004 at 79 (stating that existing case law was not adequate enough for the Court to fashion a general response to immediate threats).

54. *E.g.,* NOWAK, *supra* note 50, at 79 (noting the Commission scrutinized the prolonged state of emergency in the *Greek Case*); *see UK Terrorism Act Suspension of Detainee's Rights Justified*, *supra* note 46, at 40 (asserting that the court in *Brogan* criticized the government retention of an emergency power for nearly 20 years). *But see* Human Rights Watch*, Is Derogation Warranted?* http://hrw.org/backgrounder/eca/uk/4.htm (last visited Feb. 18, 2007) (suggesting that States are given great latitude to determine the duration of a public emergency, thus courts refrain from placing limits on the State's ability to protect itself).

55. *See* DOOLAN, *supra* note 42, at 62–63 (stating that only "a handful" of states have chosen derogation during emergency situations); Charles Hodgson & David Buchan, *Parliament and Politics: Government Feels Grip of a New Shackle in Battle Against IRA—Anti-Terrorism Ruling and the Ryan Affair*, FIN. TIMES (UK), Nov. 30, 1988 at 14 (averring that governments can choose derogation when the Court holds that the government breached a Convention, but derogation is rare). *But see* Neocleous, *supra* note 51, at 202–4 (asserting that many governments derogate from the provisions of the Convention and deliberately retain emergency powers for extended periods).

56. *See* Gross & Ní Aoláin, *supra* note 48, at 645 (acknowledging that the majority of cases involving entrenched emergencies involve either Turkey or the United Kingdom). *See generally* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INT'L REV. OF THE RED CROSS 513, 513 (1988), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPGG (acknowledging that the European Court has received many opportunities to review derogation from infractions occurring in Turkey). *But see* Human Rights Watch*, supra* note 54 (stating that no States have made a derogation since the attack on 9/11).

57. *See* DOOLAN, *supra* note 42, at 62–63 (establishing that the only states to successfully derogate from a provision under Article 15 have been the United Kingdom and Turkey); *see also* NOWAK, *supra* note 50, at 74 (stating that included among the countries who are derogating from provisions of the Convention are Turkey and the United Kingdom); Marks, *supra* note 14, at 70–71 (confirming that the United Kingdom has derogated from a Convention provision when compliance to that provision was impossible).

58. *See* DOOLAN, *supra* note 42, at 10 (affirming that Lawless v. Ireland was the first case to come before the European Court of Human Rights one year after the court was instituted); HUMAN RIGHTS AND THE EUROPEAN CONVENTION: THE EFFECTS OF THE CONVENTION ON THE UNITED KINGDOM AND IRELAND 185 (Brice Dickson ed., 1997) (stating that the first case to come before the European Court of Human Rights involved Ireland); *see also* Anthony Scrivener, *Don't Let the Superpowers Ride Roughshod over Democracy in the War Against Terror: Britain and the U.S. Are Jettisoning Prisoners' Rights, Says Anthony Scrivener QC*, IND. ON SUN. (UK), July 14, 2002 at 25 (confirming that Lawless v. Ireland was the first case that involved a human rights violation).

of entrenched emergency, *Lawless* is worth examining for the fact that it constituted the Court's first substantive interpretation of Article 15 and provided a good indicator of future interpretations of the Article by the Court.[59]

Lawless was alleged to have been a member of the Irish Republican Army (IRA) for the year 1956 and was arrested in October of that year and charged with unlawful possession of firearms and with membership in an illegal organization.[60] Subsequently, in May 1957 he was charged with a number of other offenses and re-arrested in July of that year.[61] The applicant's detention from July 13 to December 11, 1957 was facilitated by an Order made on July 12, 1957 by the Minister of Justice, in accordance with Section 4 of the Offences Against the State (Amendment Act) 1940, which deemed that he was engaged in activities prejudicial to the security of the State.[62] The special ministerial powers in question had entered into force on July 8, 1957 by a Government Proclamation published on July 5, 1957, and a notice of derogation was submitted to the Secretary-General of the Council of Europe by letter dated July 20, 1957.[63] The applicant claimed that the procedures and conditions of his detention constituted a violation of Articles 5 and 6 of the Convention, but also challenged the existence of a state of emergency in the Irish State at the time of the events. The Irish government had argued before the Commission that it was for a government alone to determine when a state of emergency existed and what measures were required by the exigencies of the situation. The government countered that if a government was acting in good faith and its appreciation was reasonable, then it should not be held in breach of its obligations under the Convention.[64] Neither the Commission nor the Court accepted this reasoning, the Court outlining that it was for it "to determine whether the conditions laid down in Article 15 (art. 15) for the exercise of the exceptional right of derogation have been fulfilled."[65] The margin of appreciation granted to the

59. *See* DOOLAN, *supra* note 42, at 223, 229, 231, 233, 243 (establishing the *Lawless* case as precedent); *see also* HUMAN RIGHTS AND THE EUROPEAN CONVENTION: THE EFFECTS OF THE CONVENTION ON THE UNITED KINGDOM AND IRELAND, *supra* note 58, at 144 (expressing that the *Lawless* court not only determined the substantive issues of the case, but established procedural rules as well); *World Law—The Lawless Case*, 1962 DUKE L.J. 249, 258 (1962) (asserting that *Lawless* created a solid foundation for future cases).

60. Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) 15, 17 (1961) (substantiating the basis of Lawless' arrest).

61. *Id.* at 19 (validating the dates of Lawless' detention and second arrest).

62. *Id.* at 19–20 (substantiating that Lawless was arrested for violating a State statute).

63. *See* DOOLAN, *supra* note 42, at 34 (providing the text of the official proclamation); *see also* ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION 291 (Martinus Nijhoff 1998); *see also* Henning, *supra* note 2, at 1275 (summarizing the *Lawless* case and comparing it to current British policies).

64. *See* ORAÁ, *supra* note 19, at 44 (recounting the Commission's decision that despite the good faith shown by the government, it would nonetheless review the substance of derogating measures); *see also* Macdonald, *supra* note 27, at 249 (citing Joan Hartman, who argued that the Commission considered the good faith of the government in assessing whether to allow derogation); Michaelsen, *supra* note 52, at 291 (explaining that good faith is necessary but not the only requirement for a government's reason for derogating).

65. Lawless v. Ireland, 1 Eur. H.R. Rep. 15, 31 (1961). *See* DOOLAN, *supra* note 42, at 144 (analyzing the decision of the Commission that the Commission had both the right and duty to examine whether a measure taken was strictly required by the exigencies of the particular situation); *see also* Fionnuala Ni Ní Aoláin, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L.J. 101, 110–12 (1995) (opining that the *Lawless* decision was similar to *Marbury v. Madison* in that the court established a "definitive right to scrutiny," despite the government's claim that the evaluation of an emergency rested solely with the government).

Irish government in its determination of whether the situation amounted to a public emergency was nonetheless wide.[66]

The wide margin of appreciation afforded to the state authorities in *Lawless* was refined somewhat by the Commission in the *Greek Case*.[67] In determining whether or not a "public emergency" existed in Greece on April 21, 1967 the Commission was of the opinion that a public emergency threatening the life of the nation would have the following four characteristics: (1) it must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organized life of the community must be threatened; and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[68] Svensson-McCarthy points out the strong wording adopted by the Commission in the fourth criterion implies that what is required in terms of proof as to the exceptional situation is "clear and reliable evidence regarding the insufficiency of normal restrictions on the exercise of human rights."[69] In its reasoning the Commission emphasized two elements of vital importance in this case: the time element and the security element.[70] Regarding the time element, the phrase "imminent" was interpreted as a time span of a few weeks or one month whereas,

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66. *See* Ní Aoláin, *supra* note 65, at 112 (criticizing the court for stating that it had the obligation to scrutinize the situation at hand but failing to do so through the unstated application of the margin of appreciation); *see also* Henning, *supra* note 2, at 1275-6 (describing the margin of appreciation and the court's analysis in *Lawless*); HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 16–17 (Kluwer Law International 1996).

67. *See* Denmark, Norway, Sweden and the Netherlands v. Greece (The *Greek Case*), 1969 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R.); *see also* Adam Mizock, Comment, *The Legality of the Fifty-Two Year State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y 223, 234 (2001) (arguing that the court's baseline analysis from the *Lawless* decision was affirmed and refined eight years later in the *Greek Case*).

68. *See* Denmark, Norway, Sweden and the Netherlands v. Greece (The *Greek Case*), 1969 Y.B. Eur. Conv. on H.R. 1, 72 (Eur. Comm'n on H.R.); *see also Gross I*, *supra* note 4, at 457–58 (listing the requirements for a public emergency and arguing that the court did not redefine or modify the formula); Mizock, *supra* note 67, at 234 (listing the criterion the Court in the *Greek Case* articulated based on a review of the *Lawless* judgment to determine if there was in fact a public emergency).

69. *See* SVENSSON-MCCARTHY, *supra* note 63, at 302 (reviewing the Court's deference to government's margin of appreciation); *see also* ORAÁ, *supra* note 19, at 29 (characterizing the declaration of an emergency under the fourth requirement as a last resort); Sara Stapleton, Note, *Ensuring a Fair Trial in the Int'l. Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L L. & POL. 535, 590 (1999) (stating that measures that limit rights can only be applied when ordinary measures are insufficient).

70. *See* Macdonald, *supra* note 27, at 250 (concluding that Article 15 includes a time element to be determined on a case-by-case basis because the court held that failure to give full notice by the Greek government of its reasons for emergency legislation until after four months had passed); *see also* Michaelsen*, supra* note 52, *at* 288–89 (highlighting the emphasis on imminence in Merits Judgment *in* the French version of the official record of the *Greek Case,* that is not present in the English version*). See generally* M. Teitgen, *in* 1 COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 266, 278 (1975) (arguing how the European Convention should construe the need for security and how it is permissible for a government to define, organize, regulate, and limit freedoms, for the general well-being).

regarding the security question, the Commission compared the situation in Greece with that in other European countries and adjudged that it was decidedly less serious.[71]

The approach adopted by the Commission in the *Greek Case* again evolved in *Ireland v. United Kingdom*[72] with the Court making an important pronouncement as to the limits of its powers of review, which it felt were particularly apparent where Article 15 was concerned, as it

> . . . falls in the first place to each Contracting State, with its responsibility for the "life of (its) nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Article 19) (art. 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis . . . The domestic margin of appreciation is thus accompanied by a European supervision.[73]

Although the discretion of the Contracting State is not unlimited, being tempered by the supervision of the European Court, "[o]n no previous occasion had the Court made such a generous interpretation of the terms of Art. 15(1)."[74] The fact that there was a "public emergency threatening the life of the nation" was not contested in this case but the Commission had made an independent assessment of the situation in Northern Ireland and ultimately agreed

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71. *See* RALPH BEDDARD, HUMAN RIGHTS AND EUROPE, 190–91 (1993) (summarizing the conclusion of the Commission regarding the *Greek Case*, and emphasizing that the Commission found that the overthrow of the government was not imminent and that the street demonstrations and strikes in 1967 did not attain the magnitude of a public emergency); *see also* DIJK & HOOF, *supra* note 17, at 552 (summarizing the finding of the Commission in the *Greek Case*, which concluded that the Greek government failed to demonstrate the events they used to support their claim for derogation had occurred at the decisive moment); Macdonald, *supra* note 27, at 250 (emphasizing that the Greek government's failure to notify the Commission within four months of its initial actions constituted a breach of the imminence requirement under Article 15).

72. The Republic of Ireland (Ireland) v. The United Kingdom, 2 Eur. H.R. Rep. 25 (1978) (holding that in light of the evolving situation in Northern Ireland, the United Kingdom had the right to derogate pursuant to Article 15 from its responsibilities under Article 5 of the European Convention on Human Rights).

73. Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 91 (1978). *See* Anthony Cullen, Comment, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT'L L.J. 29, 39–41 (2003) (defining margin of appreciation and explaining that in Ireland v. United Kingdom the Court made it quite clear that it was giving a wide margin of appreciation to the United Kingdom). *See generally* YOUROW, *supra* note 66, at 19–20 (1996) (analyzing the deference the Court has traditionally given to government decisions regarding human rights).

74. *See* SVENSSON-MCCARTHY, *supra* note 63, at 308 (reviewing the Court's deference to government's margin of appreciation); *see also* Ní Aoláin, *supra* note 65, at 115-16 (emphasizing that the Court's and Commission's failure to review whether a public emergency existed indicated a retreat from the "right to scrutiny" doctrine of *Lawless*); Hartman, *supra* note 11, at 34 (criticizing the Court's opinion in *Ireland v. United Kingdom* for utilizing a level of scrutiny that disturbingly disregards reality).

that there existed in Northern Ireland at that time an emergency within the meaning of Article 15.[75] It is the substance of this decision Gross finds "troubling":

> The circumstances of the Northern Irish conflict, so well depicted by the Commission in its report, strongly challenge the fundamental premises upon which the derogation system is based. The continuous crisis in that area stands in stark contrast to the notion that a state of "public emergency" is an exceptional phenomenon—a temporary deviation from the normal state of affairs—and that a government's use of emergency measures should seek to restore normalcy in as speedy a manner as possible. Emergency has not been the exception in Northern Ireland; it has been the norm.[76]

In *Ireland v. United Kingdom*, the Commission essentially recognized that the "emergency" had already been in place for more than ten years at that stage.[77] Rather than acknowledging that this situation of "permanent emergency" was not one envisaged by Article 15, thereby challenging the assumptions on which the derogation procedure is based, both the Commission and Court simply ignored "the strain that such a 'prolonged crisis' put on the derogation regime."[78]

On August 22, 1984, the British government notified the Secretary-General of the Council of Europe that it was withdrawing its derogation to the Convention, submitted in 1978.[79]

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75. *See* Ireland v. United Kingdom, 1976 Y.B. Eur. Conv. on H.R. 542–44 (Eur. Comm'n H.R.) (delineating the Commission's finding that both parties agree on the existence of an emergency situation within the meaning of Article 15 during the period material to the application); *see also* BEDDARD, *supra* note 71, at 191–92 (stating that the Court also had no problem determining that a public emergency existed in Ireland); Mizock, *supra* note 67, at 234 (stating that the Court and the parties all agreed that it was "perfectly clear" that an emergency situation existed in Northern Ireland during the period in question).

76. *See Gross 1*, *supra* note 4, at 472 (referencing the author's dissatisfaction with the substance of the Commission's decision on derogation). *See generally* Atlapedia.com, http://www.atlapedia.com/online/countries/ireland.htm (last visited Feb. 5, 2007) (describing the turbulent era of the 1960s and early 1970s in Ireland, during which religious feuds led to widespread violence throughout the country); *The Troubles*, Wikipedia.com, http://en.wikipedia.org/wiki/The_Troubles (last visited Feb. 5, 2007) (Characterizing the 30-year period from the 1960s to 1990s as "The Troubles" because of the constant state of violence and disorder that was present in Ireland throughout this era).

77. *See* Ireland v. United Kingdom, 1976 Y.B. Eur. Conv. on H.R. 584-86 (Eur. Comm'n on H.R.) (describing the conditions that led the Commission to conclude that an emergency situation had existed for years); *see also Gross 1*, *supra* note 4, at 472, n.164 (stating that the Commission affirmatively found that an emergency did exist); Hartman, *supra* note 11, at 32 (criticizing the Court's opinion in *Ireland v. U.K.* for utilizing a level of scrutiny that disturbingly disregards reality in determining that a public emergency existed).

78. *See Gross 1*, *supra* note 4, at 473 (criticizing the Commission and the Court for their decisions to characterize the constant violence in Ireland as the type limited-in-duration event to which the derogation system was intended to apply); *see also* Ní Aoláin, *supra* note 65, at 115-16 (emphasizing that the Court's and Commission's failure to review whether a public emergency existed indicated a retreat from the "right to scrutiny" doctrine of *Lawless*). *See generally* DIJK & HOOF, *supra* note 17, at 552–53 (stating that the court must first determine if a public emergency exists, and criticizing the Court's assessment of the situation in Ireland).

79. *See* BRICE DICKSON, HUMAN RIGHTS AND THE EUROPEAN CONVENTION 149 (1997) (providing the context of the *Brogan* case); *see also* Ní Aoláin, *supra* note 65, at 118–19 (contending that although the Court recognized that the United Kingdom had withdrawn its notice of derogation to the Commission, some aspects of the Court's decisions are problematic); *Gross 1*, *supra* note 4, at 477 (explaining that *Brogan* was not a derogation case, as the British government had withdrawn its notice of derogation on Aug. 22, 1984).

Brogan and Others v. United Kingdom[80] came before the Strasbourg authorities in 1988, and while it is not strictly an Article 15 case, as no derogation was in place, the decision of the Court led directly to the United Kingdom's derogation being reinstated. In the instant case, the four applicants had been arrested under the special powers of arrest and detention provided for in the Prevention of Terrorism Act of 1984. They were detained for periods from four days and six hours to six days and 16.5 hours, during which they were interrogated about various offenses ranging from membership in the IRA to participation in attacks on the police and army.[81] None of the four applicants were brought before a judge or subsequently charged.[82] The Court, "having taken notice of the growth of terrorism in modern society," recognized the need for a "proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights."[83] Additionally, the Court found that there had been a violation of Articles 5(3) and 5(5), as there was no judicial control over decisions to arrest and detain suspected terrorists and no enforceable right to compensation under Article 5(5) for the breach of Article 5(3).[84]

Despite the positive outcome for the applicants in the *Brogan* case, the Court and Commission did not take into account the "exceptional" nature of the situation in Northern Ireland regardless of the fact that the U.K. did not think it "exceptional" enough to warrant a continued derogation from Article 5.[85] This approach "enabled the British government to enjoy the

80. Brogan and Others v. United Kingdom, 11 Eur. H.R. Rep. 117, 129 (1988) (noting that there was no need for derogation in the case at hand).

81. *See* DICKSON, *supra* note 79, at 148 (providing the context of the *Brogan* case); *see also Gross 1*, *supra* note 4, at 477–79 (chronicling the facts of the case and positing that the Court's position in *Brogan* enabled the British government to enjoy the fruits of derogation without having to incur the legal and political costs of the formal act); Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 141 (2004) (detailing that the detainees in *Brogan* were held under anti-terrorism laws for periods of four to six days at a time).

82. *See* DICKSON, *supra* note 79, at 148 (presenting the arguments of the four ex-detainees stating that they had been detained in violation of Article 5 of the ECHR and that they were released without being charged); *see also* Emanual Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?* 18 ARIZ. J. INT'L & COMP. L. 721, 791 n.269 (2001) (describing the suspect in *Brogan* as detained for seven days without any possibility of the judicial system engaging in an examination of the ground for his detention).

83. Brogan and Others v. United Kingdom, 11 Eur. H.R. Rep. 117, 129 (1988); *see also* Hartman, *supra* note 11, at 2 (stating that derogation articles embody an uneasy compromise between the protection of individual rights and the protection of national needs in a time of crisis). *See generally* Stapleton, *supra* note 69, at 585–98 (citing articles that state that the purpose of allowing derogation in times of emergency is to balance the most vital needs of the state with the protections of human rights and providing arguments about why this is such a difficult task).

84. *See Brogan and Others*, 11 Eur. H.R. Rep. at 135–36, 137–38 (explaining that the detainees in this case were not brought before a judge and were not given compensation for their deprivation of liberty); *see also* Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57, 81 (1999) (stating that the law at issue in *Brogan* violated Article 5(3) of the European Convention on Human Rights). *See generally* Ní Aoláin, *supra* note 3, at 365–66 (emphasizing that the European Court of Human rights determined that a detention of four days and six hours violated Article 5(3)).

85. *See Gross 1*, *supra* note 4, at 478–79 (indicating that the British government withdrew its derogation notice because the situation in Northern Ireland was not exceptional enough to support the derogation); *see also* El Zeidy, *supra* note 4, at 309 (questioning why the British government withdrew its derogation notices while the "exceptional circumstances" that had prompted the derogation in the first place were still present in Northern Ireland). *See generally* Campbell, *supra* note 49, at 337 (explaining the circumstances under which the British government withdrew its derogations).

fruits of derogation, without having to incur the legal and political costs of such a formal act."[86] As a result of the decision in *Brogan,* the British government again notified the Secretary-General of the necessity of its derogation from Article 5 of the Convention in December 1988.[87] This was challenged in *Brannigan & McBride v. United Kingdom,*[88] the circumstances of which were factually similar to those in *Brogan.* The applicants had been arrested under Article 12 of the Prevention of Terrorism Act and held, one for six days and 14.5 hours and the other for four days, six hours and 25 minutes. They both were subsequently released without charge.[89] The British government admitted breaching the provisions of Article 5 but submitted that the failure to observe the requirements of the Article had been met by their derogation of 1988 under Article 15.[90] While the applicants did not dispute the existence of a public emergency threatening the life of the nation at the time of the events, they contended that it would be inconsistent with Article 15(2) "if, in derogating from safeguards recognized as essential for the protection of non-derogable rights . . . , the national authorities were to be afforded a wide margin of appreciation," and this "was especially so where the emergency was of a quasi-permanent nature such as that existing in Northern Ireland."[91] Accordingly, the derogation from Article 5 of the Convention was "not a necessary response to any new or altered state of affairs

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86. *See Gross 1*, *supra* note 4, at 479 (stating that the decision in *Brogan* allowed the British government to secure the benefits of derogation without being subject to the potential costs of the formal act). *But see* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law,* 75 S. CAL. L. REV. 1407, 1430 n.112 (2002) (noting that Court did not allow the U.K. government's continued departure from Article 5 because it did not formally derogate).

87. *See* Ní Aoláin, *supra* note 65, at 122 (arguing that the British government's derogation in 1988 was a "direct response" to the *Brogan* decision); *see also* El Zeidy, *supra* note 4, at 313 (claiming the 1988 derogation stemmed directly from the judgment in *Brogan*); Clive Walker, *Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts*, 35 COLUM. J. TRANSNAT'L L. 1, 48 n.230 (1997) (stating the U.K. government's derogation was imposed again in 1988 after being withdrawn in 1984).

88. *See* Brannigan & McBride v. United Kingdom, 17 Eur. Ct. H.R. 539, 567–68 (1993) (stating that the applicants in *Brannigan* were challenging the 1988 derogation from Article 5).

89. *See* Ana D. Bostan, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, 12 CARDOZO J. INT'L & COMP. L. 1, 38 n.177 (2004) (commenting that the applicants in *Brannigan* were held, without judicial review, for nearly seven days because they were suspected terrorists); *see also* Campbell, *supra* note 49, at 337 (emphasizing that the suspects were held in an interrogation center and that they were subsequently released without being charged); Keith, *supra* note 14, at 470–71 (stating that, similar to the detainees in *Brogan*, the suspects in *Brannigan* contested the length of their detention).

90. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 568 (stating that the British government argued that its breach of Article 5 of the European Convention on Human Rights was permissible under the government's derogation in 1988); *see also Gross 1*, *supra* note 4, at 481 (remarking that the government admitted that the detentions at issue breached Article 5, and that the government asserted as a justification for this violation its derogation notice). *See generally* Joseph, *supra* note 84, at 82 (emphasizing that the British government's obligations owed to detainees in *Brogan*, *Brannigan & McBride* under Article 5 were "reduced" because the U.K. had entered a relevant derogation).

91. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 569 (summarizing the applicants' arguments that the U.K. government's derogation was not proper); *see also* Campbell, *supra* note 49, at 337 (highlighting the concerns raised by the suspects, namely that granting the government too much leniency was not appropriate where the emergency was semi-permanent). *See generally* Michaelsen, *supra* note 52, at 292 (explaining that the emergency situation in Northern Ireland involved "terror campaigns of the Irish Republican Army and the Unionist counterparts").

but was the Government's reaction to the decision in *Brogan and Others* and was lodged merely to circumvent the consequences of . . . [that] judgment."[92]

Notwithstanding the contentions of the applicants, the Court was unwilling to depart from the wide margin of appreciation granted to Contracting States in Article 15 cases, since its decision in *Ireland v. United Kingdom.*[93] The Court, having regard to the "nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse" took the view that the government had not exceeded its margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.[94] The decision in *Brannigan* has been described as yet another example of the Court failing to apply its own criteria of giving "appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of the emergency situation"[95] by neither discussing the circumstances leading to the emergency nor the duration of the emergency.[96] The failure of the Commission and Court to engage with the phenomenon of entrenched emergencies and concomitant problems for Article 15, clearly elucidated by the applicants in *Brannigan*, is dis-

92. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 572 (stating the applicants' argument that the U.K. government's derogation did not arise out of any changed situation in Northern Ireland, and claiming that the derogation was simply a way for the government to circumvent the *Brogan* case); *see also* Ní Aoláin, *supra* note 65, at 121–22 (recognizing a "cogent argument" that the derogation was a response to the *Brogan* judgment and not a response to any new threat to the state); Molly R. Murphy, Note, *Northern Ireland Policing Reform and the Intimidation of Defense Lawyers*, 68 FORDHAM L. REV. 1877, 1885 n.58 (2000) (indicating that the United Kingdom's derogation was "not out of necessity but was rather in response to an adverse court decision.").

93. *See* Campbell, *supra* note 49, at 337 (indicating that the Court in *Brannigan* applied the "wide margin of appreciation" principle, originally granted in Ireland v. United Kingdom, without engaging in a meaningful discussion of whether its application would be appropriate in the *Brannigan* circumstances); *see also* Michaelsen, *supra* note 42, at 289–90 (stating that the Court in Ireland v. United Kingdom determined that the national authorities were in a better position to evaluate the existence of a public emergency and the Court therefore granted the national authorities a "wide margin of appreciation"); Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 260 (2005) (remarking that the Court was unwilling to hold that the government had "overstepped" its wide margin of appreciation applicable in emergency situations).

94. *See* Brannigan & McBride, 17 Eur. Ct. H.R. at 576 (asserting the Court's view that the government acted within the permitted margin of appreciation in light of the existing exigencies); *see also* Keith, *supra* note 14, at 453 (stating the Court's determination that the government in *Brannigan* was justified in derogating); Pati, *supra* note 93, at 259–60 (explaining that the government's derogation was a response to the "exigencies of the situation").

95. *See* Brannigan & McBride, 17 Eur. Ct. H.R. at 569–70 (stating the Court's position that the Contracting Parties' power of appreciation should be supervised by the court by means of giving consideration to the rights affected by derogation as well as the underlying circumstances and duration of the exigency).

96. *See* Ní Aoláin, *supra* note 65, at 121–22 (claiming that the Court glossed over the issues surrounding the duration of the emergency); *see also Gross 1*, *supra* note 4, at 482 (stressing that the Court did not address all the relevant questions concerning the state of emergency prompting the derogation); Marks, *supra* note 14, at 76 (suggesting that the Court recognized that the duration and circumstances surrounding the emergency were important factors and stating that the Court did not elaborate on those factors).

appointing at best.[97] Four of the judges proffered dissenting opinions;[98] that of Judge Pettiti was particularly forthright:

> It does not appear from the evidence that the terrorist phenomenon became more serious in Northern Ireland between the period of the arrest of Mr Brogan and the other three applicants and 29 November 1988 and 23 December 1988, which led Mr Brannigan and Mr McBride to maintain that the request for a derogation was a means of circumventing the consequences of the Brogan and Others judgment. In any event, the derogation cannot constitute a carte blanche accorded to the State for an unlimited duration, without its having to adopt the measures necessary to satisfy its obligations under the Convention.
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> . . .
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> The State was under a duty to implement mechanisms complying with the Brogan and Others judgment and making it possible to conform thereto without resorting to derogation.
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> . . .
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> The quid pro quo for a derogation based on a public emergency threatening a State must be the implementation by the State of means enabling it to overcome the obstacles, in particular when a decision of the European Court has found a violation of Article 5 (art. 5), and therefore to re-examine in an appropriately short time the reality of the emergency and the persistence of the threat.
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> . . .
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> [I]n my opinion, the Government's action fell outside the margin of appreciation which the Court is able to recognize.[99]

The second jurisdiction over which the European authorities have had reason to deal with a situation of entrenched emergency is that of Turkey. The continuing political violence in the southeastern region of Turkey has resulted in a large volume of cases being taken to Strasbourg

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97. *See* Ní Aoláin, *supra* note 65, at 124–25 (emphasizing the failure of the Court to directly address the relevant issues concerning derogation); *see also* Walker, *supra* note 87, at 48 (asserting that the Court relied on the "wide margin of appreciation" notion, which for the Court served as the answer to all the concerns raised by the applicants). *See generally* Marks, *supra* note 14, at 76–77 (suggesting that the Court in *Brannigan* recognized an emergency that justified derogation, without much inquiry).

98. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 539 (indicating there were dissenting opinions submitted by Pettiti, J., Walsh, J., De Meyer, J., and Makarczyk, J.).

99. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 580, 581, 583, 584 (Pettiti, J., dissenting) (positing that the government had an obligation to re-evaluate the state of emergency within a short period of the derogation and, additionally, had the duty to suspend individual rights only for the limited time it was necessary to do so in light of the emergency).

concerning allegations of human rights abuses during the 15-year state of emergency. While Turkey has been subject to martial law during various periods of its history, a civil state of emergency enacted in 10 provinces in 1987 and not lifted in its entirety until November 2002 was the justification for Turkey's derogation from Article 5 of the Convention for the greater part of that period.

Aksoy v. Turkey[100] was the first case concerning an Article 15 situation in Turkey to come before the Strasbourg authorities. In this instance, both the Commission and the Court were in agreement as to the existence of an emergency.[101] Although the Court found violations of Articles 3, 5(3) and 13, it did not engage in any meaningful examination of the situation; merely noting that "in light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a 'public emergency threatening the life of the nation.'"[102] In looking at whether the measures employed by the government were strictly required by the exigencies of the situation, the Court felt that the detention of the applicant for at least 14 days without being brought before a judge or other officer could not be deemed necessary and was, therefore, an arbitrary interference with his liberty.[103] The Court also pointed to the lack of safeguards available to the applicant. In contrast to the applicants in *Brannigan & McBride v. United Kingdom*, where effective safeguards were held to be in operation in Northern Ireland, such as the right of *habeas corpus* and the absolute right to consult a solicitor 48 hours after arrest, no such safeguards were found to be in place in Turkish law.[104]

The Court's practice of finding Turkey in violation of the Convention without delving into the substance of the pertaining "emergency" situation is one that has been oft-repeated in

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100. *See* Aksoy v. Turkey, 23 Eur. Ct. H.R. 553 (1996).

101. *See Aksoy*, 23 Eur. Ct. H.R. at 587 (illustrating that the Commission and Court both recognized the public emergency in southeast Turkey); *see also* Michaelsen, *supra* note 52, at 296 (referring to the emergency present in *Aksoy* as being "undoubted"); Zemach, *supra* note 5, at 107 (explaining that the Commission and Court were in agreement that the violence between the Turkish authorities and Kurdish rebels created a state of emergency).

102. *See Aksoy*, 23 Eur. Ct. H.R. at 587 (stating the Court's acknowledgment that the terrorist activity in southeast Turkey created a public emergency); *see also* Zemach, *supra* note 5, at 107 (quoting the Court's agreement with the Commission that the circumstances in southeast Turkey presented an emergency situation). *See generally* Vince Burskey, *Times of Change—Can Turkey Make the Necessary Changes in Its Human Rights Policies to Be Admitted to the European Union?* 29 N.C.J. INT'L L. & COM. REG. 713, 723–24 (2004) (positing that the Court found violations of various provisions of the European Convention on Human Rights).

103. *See* Burskey, *supra* note 102, at 724 (stating the Court's holding that detention for 14 days was not justified); *see* Venkat Iyer, *States of Emergency: Moderating Their Effects on Human Rights*, 22: 2 DALHOUSIE L. J., 125, 139 (1999) (emphasizing that despite the government's formal derogation, the holding of the applicant for 14 days was "unacceptable"); Jeremie J. Wattellier, Note, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397, 407–8 (2004) (reiterating the Court's position that detention for an "exceptionally long" time without proper safeguards or judicial review was impermissible).

104. *See Brannigan & McBride*, 17 Eur. Ct. H.R. at 575–76 (enumerating some of the safeguards the Court recognized were present in Northern Ireland to avoid abuse of derogation).

cases subsequent to the decision in *Aksoy*.[105] *Demir and Others v. Turkey*,[106] *ªen v. Turkey*[107] *and Elci and Others v. Turkey*[108] all revealed violations of Article 5 on Turkey's part but little in the way of a substantive assessment of the state of emergency in that country from the Court. In these cases, the Court has restated its opinion that the "investigation of terrorist offences undoubtedly presents the authorities with special problems" but pointed out that

> [t]his does not mean, however, that the authorities have *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence . . . [109]

While the Court's expression of the sentiment is laudable, given the fact that the guarantees under Article 5 tend to be those most readily abandoned during emergencies, its failure to make a candid evaluation of the necessity of derogating from the Article effectively meant Turkey's compliance with the textual requirements of Article 15 was simply assumed.[110]

However, in *Sakik and Others v. Turkey*,[111] the Court did rule that the derogation under Article 15 was inapplicable to the measures imposed on the applicants as they had been arrested in an area that was not part of the declared state of emergency region. The government, for its part, contended that this was not a bar to the derogation's applicability, asserting that "[t]he

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105. *See* Aksoy v. Turkey, App. No. 21987/93, 23 Eur. Ct. H.R. 553, 587 (1997) (finding that terrorist activity in southeast Turkey has undoubtedly created an emergency situation); Sakik and Others v. Turkey, App. Nos. 23878/94, 23883/94, 26 Eur. Ct. H.R. 662, 663 (1997) (Eur. Ct. H.R) (relying on the decision in *Aksoy* as establishing a current public emergency in southeast Turkey); *see also* Demir v. Turkey, App. No. 21389/93, 33 Eur. Ct. H.R. 1056, 1058 (1998) (asserting that this case is not different from *Aksoy* regarding the existence of a public emergency).

106. *See* Demir v. Turkey, App. No. 21380/93, 33 Eur. Ct. H.R. 43, 1056, 1058 (1998) (holding that the facts establishing a "public emergency" are indistinguishable from *Aksoy* without conducting an independent inquiry).

107. *See* Nuray ªen v. Turkey, App. No. 41478/98, 2003 Eur. Ct. H.R. 297, § 27 (finding the circumstances in Turkey to be indistinguishable from those described in *Aksoy* and *Demir* and, therefore, declining to independently analyze the state of emergency).

108. *See* Elci and Others v. Turkey, App. Nos. 23145/93, 26091/94, 2003 Eur. Ct. H.R. 588, § 683 (2003) (acknowledging the state's right to derogate from Article 15 during public emergencies, but failing to analyze the current situation facing Turkey).

109. *See* Brogan and Others v. United Kingdom, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, 11 Eur. Ct. H.R. Rep. 117, 133 (1988) (recognizing for the first time the special problems associated with the investigation of terrorist offenses); *see also Demir*, 33 Eur. Ct. H.R. at 1057 (indicating that courts do not have "carte blanche" authority under Article 5 to arrest and detain suspects). *See generally* Mirja Trilsch & Alexandra Rüth, *European Convention on Human Rights—Human Rights Standards in Criminal Proceedings Against Terrorists—Capital Punishment Under Articles 2 and 3—Death Penalty After Unfair Trial,* 100 AM. J. INT'L L. 180, 181 (2006) (discussing Article 5 limitations on authority to arrest and detain suspects).

110. *See* Report of the Joseph R Crowley Program/Lawyers Committee for Human Rights: Joint 1998 Mission to Turkey, *Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey,* 22 FORDHAM INT'L L.J. 2129, 2138 (1999) (commenting that since 1992, Turkey has reported its derogations from Article 5 only, and asserting that neither the European Court nor the European Commission has ever questioned Turkey's grounds for derogation).

111. *See* Sakik and Others v. Turkey, App. Nos. 23878/94, 23883/94, 26 Eur. Ct. H.R. 662, 663 (1997) (noting that the applicants were located in Ankara, a city outside the declared state of emergency).

facts of the case constituted only the prolongation of a terrorist campaign being conducted from inside the area where the state of emergency had been proclaimed, in south-east Turkey.[112] The terrorist threat was not confined to any particular part of Turkish territory."[113] The Court, noting that Article 15 permits derogations from the Convention only "to the extent strictly required by the exigencies of the situation," was of the opinion that it "would be working against the object and purpose of (Article 15) if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation."[114] Therefore, it followed that the derogation in question was inapplicable, *ratione loci*, to the facts of the case and it was deemed unnecessary to determine whether it satisfied the requirements of Article 15.[115]

This decision of the Court was subsequently followed in three other applications where the Turkish government tried to rely on their derogation from Article 5 even though the events complained of did not take place in areas under state-of-emergency rule.[116] Turkey was found to have breached Convention guarantees in all cases, which is undoubtedly to be welcomed from the point of view of redress for the applicants but arguably has also prevented further

112. *See id.* at 683 (illustrating the government's argument that the facts of the case were indicative of the prolongation of an ongoing terrorist campaign). *See generally* Hanz Chiappetta, *Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan?* 13 PACE INT'L L. REV. 117, 130–34 (2001) (discussing the PKK as a terrorist group operating in part throughout southeast Turkey); Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 FORDHAM INT'L L.J. 606, 663 (2000) (recognizing that due to terrorist activities of the Kurdistan Workers Party, a state of emergency has existed in all six southeast provinces of Turkey since 1987).

113. *See Sakik and Others*, 26 Eur. Ct. H.R. at 683 (indicating that the terrorist threat in Turkey was not limited to a particularized area). *See generally* Chiappetta, *supra* note 112, at 118–21 (discussing the terrorist threat throughout Turkey); *Gross 1*, *supra* note 4, at 486–87 (detailing the history of terrorist activity in Turkey that led to a nationwide "public emergency").

114. *See Sakik and Others*, 26 Eur. Ct. H.R. at 683 (stating that extending the scope of derogation beyond the area named in the notice of derogation would be against the object and purpose of Article 15). *See generally* El Zeidy, *supra* note 4, at 289 (noting that derogations are permitted only in exceptional circumstances and must be strictly required); *Gross 1*, *supra* note 4, at 453 (positing that in order to qualify as an emergency situation under Article 15 the emergency must endanger the whole population and either the entire territory of the state or significant parts thereof).

115. *See Sakik and Others*, 26 Eur. Ct. H.R. at 663 (finding the derogation inapplicable because the derogation applies only to the region where a state of emergency has been proclaimed); *see also* Lawless v. Ireland, App. No. 332/57, 1 Eur. Ct. H.R. 15, 16 (1960) (limiting the definition of a public emergency to an exceptional situation of crisis or emergency that affected the whole population). *See generally* Brogan and Others v. United Kingdom, App. Nos. 11209/84, 11234/84, 11266/84, 11386/85, 11 Eur. Ct. H.R. 117, 128–29 (1988) (declining to address the Article 15 requirements because derogation was deemed to be inapplicable in this case).

116. *See* Sadak v. Turkey, App. Nos. 25142/94, 27099/95, 2004 Eur. Ct. H.R. 146 (2004) *available at* http://www.echr.coe.int/eng (disregarding the government's reliance on its Article 5 derogation and finding a violation of Article 3 of the ECHR). *See generally* Yurttas v. Turkey, App. Nos. 25143/94, 27098/95, 2004 Eur. Ct. H.R. 236, 2004, *available at* http://www.echr.coe.int/eng (finding Turkey in breach of Article 5 because the detention of the applicant, a Turkish national living in Ankara suspected of terrorist activities, for 11 days without judicial intervention could not be justified); Abdülsamet Yaman v. Turkey, App. No. 32446/96, Eur. Ct. H.R. 572, 2004, *available at* http://www.echr.coe.int/eng (finding Turkey in violation of multiple covenant guarantees under Article 5 and noting that even though the government suspected the applicant of being involved in terrorist activities, it did not give them "carte blanche" authority to arrest and detain him for 10 days without judicial intervention).

development of Article 15 jurisprudence.[117] It may well be the case that had a pattern of systematic violations of human rights in Turkey not already been well established by the Commission and Court, there would have been a greater willingness to engage with the argument of the Turkish government that the terrorist threat was so great that it could not reasonably be held to its confining the emergency to certain areas.[118]

III. States of Emergency and United Nations Human Rights Protection

A. Article 4 of the International Covenant on Civil and Political Rights

The only United Nations (UN) treaty that allows for derogation in times of emergency is Article 4 of the International Covenant on Civil and Political Rights (ICCPR).[119] Under this article, states may derogate from or limit Covenant guarantees as a proportionate response to a serious public emergency.[120] It is generally accepted that the right of derogation from international legal responsibilities, like the right of reservation to particular provisions of treaties, represents a necessary evil—to prohibit the state right of derogation in time of emergency may result in state unwillingness to sign and ratify international treaties.[121] While it can be argued that certain liberties must be curtailed during public emergencies to ensure general public security, it is also true that some of the most heinous human rights abuses occur during ostensible

117. *See Sadak*, 2004 Eur. Ct. H.R. 146 (holding that Turkey breached the covenant guarantee of the right to stand for election because the penalty imposed on the applicants was not proportionate to Turkey's aim); *see also* Abdülsamet Yaman v. Turkey, App. No. 32446/96, Eur. Ct. H.R. 572, 2004, *available at* http://www.echr.coe.int/eng (finding Turkey in violation of covenant guarantees under Article 5 because the applicant was detained for nine days instead of being brought promptly before a judge).

118. *See* Dinesh D. Banani, Note, *Reforming History: Turkey's Legal Regime and Its Potential Accession to the European Union,* 26 B.C. INT'L & COMP. L. REV. 113, 121 (2003) (noting that both the European Court of Human Rights and the European Human Rights Commission have seen several hundred cases about human rights violations in Turkey); *see also* Hugg, *supra* note 112, at 662 (Turkey's human rights record has been "fiercely criticized" by the European Commission, the European Court of Human Rights, the United Nations, the U.S. Department of State, and numerous advocacy groups); Tara C. Stever, Note, *Protecting Human Rights in the European Union: An Argument for Treaty Reform,* 20 FORDHAM INT'L L.J. 919, 972 (1997) (stating that Turkey has a "poor human rights record").

119. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, U.N. Doc. A/631 (Mar. 23, 1976) (stating that in times of public emergency, States Parties to the Covenant may derogate from their obligations under the Covenant, but only to the extent required by the situation); *see also* Pati, *supra* note 93, at 243 (noting that Article 4 permits the temporary and limited suspension of rights in emergency periods under the ICCPR, but recognizing that some rights are "emergency-proof"). *See generally* El Zeidy, *supra* note 4, at 278 (comparing the derogation clause of Article 4 of the ICCPR to Article 15 of the ECHR).

120. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, U.N. Doc. A/631 (Mar. 23, 1976); *see also* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 336 (2002) (asserting that derogations are subject to strict evaluation to determine whether the suspension of rights is a proportionate response to the emergency); Stephen P. Marks, *Branding the "War on Terrorism": Is There a "New Paradigm" of International Law?* 14 MICH. ST. J. INT'L L. 71, 103 (2006) (recognizing that the international system only allows derogations when they meet the requirement of proportionality).

121. *See* Jeffrey Wool, *The Case for a Commercial Orientation to the Proposed Unidroit Convention as Applied to Aircraft Equipment*, 31 LAW & POL'Y INT'L BUS. 79, 88 (1999) (asserting that reservations, while common, are often viewed as necessary evils and should not be contemplated in initial planning of treaties). *But see* Lawrence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L 367, 368 (2006) (claiming that reservations are not a necessary evil, but rather a useful tool for negotiating treaties); Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 324 (2006) (articulating a positive view of reservations as revealing information about the reserving state's interests).

public emergencies.[122] It is therefore of utmost importance that derogations to the Covenant are strictly monitored so that they do not serve as "a smokescreen for the destruction of rights."[123]

Derogations to the Covenant, such as with the ECHR, can be entered only in times of grave public emergency.[124] The text of Article 4 guarantees that this emergency must attain a minimum level of severity and that some provisions of the Covenant are non-derogable:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
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> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.[125]

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122. *See* El Zeidy, *supra* note 4, at 288 (claiming that the most serious violations of human rights occur during state emergencies); *see also* Sara Stapleton, supra note 69, at 585–86 (recognizing that although many serious human rights violations occur during emergencies, derogation is allowed because of the need to balance individual rights with the protection of the state).

123. *See* SARAH JOSEPH, JENNY SCHULT, MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 624–25 (Oxford 2000); *see also* Corinne E. Lewis, *Dealing with the Problem of Internally Displaced Persons,* 6 GEO. IMMIGR. L.J. 693, 717 (1992) (arguing that the United Nations should closely monitor state uses of derogation clauses); Scott Dolezal, Note, *The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?* 15 AM. U. INT'L L. REV. 1163, 1169 (2000) (recommending that the Human Rights Committee adopt a clearer set of guidelines and methodology for monitoring derogations in order to prevent the overextension of the ICCPR).

124. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 4, U.N. Doc. A/631 (Mar. 23, 1976); *see also* Pati, *supra* note 93, at 243 (acknowledging that states may only derogate from their obligations in states of emergency that threaten the life of the nation); Bertrand G. Ramcharan, *Contemporary Challenges of Human Rights Protection: A Call for Preventive Strategies*, 37 RUTGERS L.J. 495, 509 (2006) (listing the circumstances under which a state may derogate from its obligations under the ICCPR).

125. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, U.N. Doc. A/631 (Mar. 23, 1976); *see also* Berta Esperanza Hernandez-Truyol, *Globalized Citizenship: Sovereignty, Security and Soul,* 50 VILL. L. REV. 1009, 1015 (2005) (recognizing seven non-derogable rights under Article 4(2) of the ICCPR). *See generally* Dinah Shelton, *Normative Hierarchy in International Law,* 100 AM. J. INT'L L. 291, 315 (2006) (comparing the non-derogable rights of Article 4 with the content of peremptory human rights norms).

As is evident from the text, the circumstances of derogation are strictly prescribed.[126] Firstly, there must be a "public emergency which threatens the life of the nation," such as war; a political emergency, such as a coup or uprising; or a severe natural disaster.[127] The actual emergency can be geographically limited.[128] Jurisprudence of the Human Rights Committee concerning Article 4 will be examined below but it is important also to note that the Committee issued a General Comment on the Article in 2001.[129] This is supplemented by a number of international standards, which have emerged from expert symposia on human rights derogations.[130]

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126. *See* U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, Feb. 15, 2006, 45 I.L.M. 716, 719 (noting that Article 4 (1) of the ICCPR insures that derogation occurs only after certain procedural limitations and when substantive safeguards have been complied with); Heather L. Rooney, Comment, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions That Should Be Governing Our Treatment of Guantánamo Detainees*, 54 DRAKE L. REV. 679, 721 (2006) (commenting that derogation may only occur when it is necessary under the circumstances and when certain formal procedures have been complied with). *See generally Gross 1*, *supra* note 4, at 441 (comparing the International Covenant on Civil and Political Rights to the Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights, all which allow governments to derogate certain rights in the face of a national emergency).

127. *See* Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 485, 490 (2005) (affirming that even in extreme circumstances, derogation is permissible only if the situation is threatening the life of a nation); Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, 24 CHAMPION 28, 56 (2000) (indicating that the Article 4 of the International Covenant on Civil and Political Rights permits the suspension of rights when a public emergency is threatening the life of a nation); *see also* El Zeidy, *supra* note 4, at 279 (presenting that the derogation clause of the International Covenant on Civil and Political Rights allows a state to derogate from its obligations during emergency circumstances).

128. *See* Macdonald, *supra* note 27, at 239 (affirming that an emergency that is geographically limited can nonetheless affect an entire population and, therefore, can threaten the life of the nation); Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380, 394 (2004) (defining a threat to the "life of the nation" as a threat to a nation's population, territory or functioning organs and noting that a geographically limited crisis or emergency can still affect the whole population); Donald H. Wallace & Mark Kutrip, *Torture: Domestic Balancing and International Alternative and Extralegal Responses*, 42 CRIM. L. BULL. 2 (2006) (maintaining that a geographically limited emergency can threaten the life of a nation, provided it affects the entire population).

129. *See* Shelton, *supra* note 125, at 314–15 (indicating that in 2001, the Human Rights Committee issued General Comment No. 29, which discussed the non-derogable rights in Article 4(2) of the International Covenant on Civil and Political Rights); Marsha Wellknown Yee, *Hong Kong's Legal Obligation to Require Fair Trial for Rendition*, 102 COLUM. L. REV. 1373, 1386 (2002) (affirming that in 2001 the Human Rights Committee adopted General Comment No. 29); *see also Appellant A v. Secretary of State for the Home Department*, 17 INT'L J. REFUGEE L. 117, 128 (2005) (establishing that the U.N. Human Rights Committee, in General Comment No. 29, observed that derogation under Article 4 of the International Covenant on Civil and Political Rights must be temporary and exceptional in nature).

130. An example is the "Siracusa Principles," a set of standards that state parties should adhere to in dealing with the limitation and derogation provisions of the ICCPR. The principles were formulated at a meeting of independent international law experts, convened by the International Commission of Jurists, *inter alia*, at Siracusa, Sicily, in 1984. *See* Campbell, *supra* note 49 at 321, 339 (2005) (recognizing that there have been attempts to set an international standard in the area of derogations through the formulation of the Paris Minimum Standards of Human Rights Norms in a State of Emergency and the Siracusa Principles); Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1075 (1985) (outlining the international derogation standard as set forth in the Paris Minimum Standards of Human Rights Norms in a State of Emergency); *see also* Peerenboom, *supra* note 2 at 394 n.399 (remarking that Principle 39 of the Siracusa Principles interprets "threat to the life of the nation" as an exceptional, present or imminent danger that concerns the entire population and constitutes a threat to the community).

B. Limitations on the Application of Article 4

There are a number of conditions for and limitations to permissible derogation measures under Article 4, the most obvious being those provided for in the text of the article itself as paragraph 2 ensures that there can be no derogation from Articles 6, 7, 8 (1) and (2), 11, 15, 16, and 18 of the Covenant.[131] Although this catalogue of non-derogable rights goes beyond those listed under Article 15 of the ECHR, "it lags behind the extensive catalogue in Article 27(2) of the ACHR."[132] Article 4(2) ensures that the right to life (Art. 6); the right to be free from torture (Art. 7); the right to be free from slavery and servitude (Art. 8(1), (2)); the right not to be imprisoned merely on the ground of failure to fulfill a contractual obligation (Art. 11); the prohibition of retroactive criminal laws (Art. 15); the right to recognition as a person before the law; and the right to freedom of thought, conscience and religion are rights and freedoms that may not be derogated from even in time of grave public emergency.[133] Furthermore, according to Article 6(2) of the Second Optional Protocol, adopted by the General Assembly

131. *See* International Covenant on Civil and Political Rights, art. 4(2), Dec. 19, 1966, 6 I.L.M. 368 (codifying the fact that there will be no derogation from Articles 6, 7, 8(1) and (2), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights); Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152, 172 (1998) (acknowledging that Article 4 of the International Covenant on Civil and Political Rights prohibits derogation of certain rights under the covenant even during public emergencies). *See generally* El Zeidy, *supra* note 4, at 278 n.4 (commenting that the sufficiency of the limitations of derogation was debated).

132. *See* NOWAK, *supra* note 50, at 81 (stating that the essential rights listed in Article 27(2) of the American Covenant on Human Rights far surpass the rights granted by the International Covenant on Civil and Political Rights). *See generally* Mark Elliott, *United Kingdom: Detention Without Trial and the "War on Terror,"* 43 INT'L J. CONST. L. 553, § 2 (2006) (commenting that under the European Convention on Human Rights, a party can derogate from its obligations as long as the measures taken are required by the exigencies of the situation and are not inconsistent with the party's other obligations under international law); Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 63 (2000) (noting that most international human rights conventions have specific derogation clauses in which certain rights are declared non-derogable under all circumstances).

133. *See* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. INT'L & COMP. L. 459, 477 (2006) (enumerating the various rights granted under the International Covenant on Civil and Political Rights, among which are the right to life, the prohibition of torture, the prohibition of slavery and servitude, the prohibition of detention for debt, and the prohibition of retroactive criminal laws); Knowles, *supra* note 131, at 172 (stating that Article 6 of the International Covenant on Civil and Political Rights granted all human beings the absolute right to life); *see also* Mashood A. Baderin, *Recent Developments in the African Regional Human Rights System*, 5 HUM. RTS. L. REV. 117, 129 (2005) (revealing that any trial in which the death penalty is a possible sentence and which is pending during a state of emergency must conform to the provisions of the covenant because Article 6 provides the absolute right to life as a non-derogable right).

in 1989, the right not to be executed as guaranteed by Article 1(1) of the Second Optional Protocol, may not be subject to any derogation under Article 4 of the Covenant.[134]

Like Article 15 of the ECHR, Article 4 also provides for a number of procedural limitations on the scope of the Article's application, which ensures that the circumstances of derogation are strictly prescribed.[135] Primarily there must be a "public emergency which threatens the life of the nation."[136] Paramount among the procedural requirements governing any response to this threat is that of proportionality.[137] Rights may be derogated from only "to the extent strictly required by the exigencies of the situation" (Art. 4(1)).[138] This requirement of proportionality, according to Nowak, in addition to the catalogue of non-derogable rights, "represents

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134. *See* Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 916–17 (2005) (maintaining that in December 1989, the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, which prohibited execution); Simon H. Fisherow, *Follow the Leader? Japan Should Formally Abolish the Execution of the Mentally Retarded in the Wake of Atkins v. Virginia*, 14 PAC. RIM L. & POL'Y J. 455, 462 (2005) (claiming that with the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the U.N. General Assembly took the final step toward abolishing the death penalty under international law); Michelle S. Friedman, Note, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Execution Declarations,* 17 FLA. J. INT'L L. 187, 227 n.223 (2005) (asserting that Second Optional Protocol to the International Covenant on Civil and Political Rights was aimed at abolishing the death penalty).

135. *See generally* Henning, *supra* note 2, at 1273 (detailing the procedural requirement for derogation under the European Convention on Human Rights); Njål Hostmaelingen, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Norway,* 19 EMORY INT'L L. REV. 989, 1021 (2005) (comparing the derogation clause of the European Convention of Human Rights to the derogation clause of the International Covenant on Civil and Political Rights); *Appellant A v. Secretary of State for the Home Department*, 17 INT'L J. REFUGEE L. 117, 183–84 (2005) (acknowledging that the limitations on derogation present in the European Convention on Human Rights are not present in every human rights act).

136. *See* Henning, *supra* note 2, at 1272 (revealing that there is a public emergency exception to the convention allowing for derogation from a party's obligations under the covenant in certain circumstances); *see also* Sir David Williams, *The United Kingdom's Response to International Terrorism*, 13 IND. INT'L & COMP. L. REV. 683, 695 (2003) (acknowledging that a government can formally derogate from its obligations under the covenant in times of war or other public emergencies). *See generally* United Kingdom House of Lords: Opinions of the Lords of Appeal for Judgment in the Cause of A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) UKHL 56, 44 I.L.M. 654, 661 (2005) (indicating that derogation in times of public emergency has been promulgated by the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights).

137. *See* U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Situation of Detainees at Guantánamo Bay*, Feb. 15, 2006, 45 I.L.M. 716, 719 (explaining that the most important procedural requirement for derogation is that it must be proportionally related to the situation and implying that derogations will not be permitted when less intrusive means could achieve the same result); *see also* McGoldrick, *supra* note 128, at 389 (listing a set of integral principles that limit a state's ability to derogate from its obligations, including the requirement of a proportional response). *But see* Macdonald, *supra* note 27, at 235 (suggesting that in some circumstances, even if the derogation is proportionate to the harm being caused, derogation of certain rights can never be permissible).

138. *See* International Covenant on Civil and Political Rights, art. 4(1), Dec. 19, 1966, 6 I.L.M 368 (1967) (declaring that derogation is permissible only to the extent required by an emergency situation); *see also* Campbell, *supra* note 130, at 334 (stating that a state can justifiably derogate from certain rights even in times not technically amounting to an armed conflict, if the violence is at a level that can be termed an "emergency situation"); Rooney, *supra* note 126, at 721 (revealing that the derogation clause allowing a state to derogate from its obligations under certain circumstances is a loophole to the rule that the convention must apply at all times).

the most important limitation on permissible measures."[139] As elucidated in the Siracusa Principles, the principle of proportionality requires that competent independent national organs review the justification for derogation measures at regular intervals.[140] It is also required that the limitation clauses of provisions of the Covenant, such as Articles 14(1) and 18(3), be utilized before resorting to the imposition of emergency powers.[141] In addition to these requirements, General Comment 29 of the Human Rights Committee, along with § 70 of the Siracusa Principles, outlines that certain rights, such as that of *habeas corpus*, although not explicitly recognized as being non-derogable, may not be derogated from since to do so would be to contradict the principle of proportionality:

> The Committee is satisfied that States parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole . . . [142]

Another important criterion set out in Article 4(1) is the condition that derogation measures must not be inconsistent with other obligations under international law, with "obligations under international law" referring equally to customary international law and to international

139. *See* NOWAK, *supra* note 50, at 84 (asserting that the principle of proportionality to be the most important limitation on a state's ability to derogate from its obligations); *see also* Peerenboom, *supra* note 2 at 882 (arguing that it is the broad principle of proportionality as well as military necessity that guide the determination of the legality of a state's measures during wartime). *See generally* United Kingdom House of Lords: Opinions of the Lords of Appeal for Judgment in the Cause of A (FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and Another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) UKHL 56, 44 I.L.M. 654, 664 (2005) (affirming that any measure taken in derogation of a state's obligations under the convention cannot go beyond what is strictly necessary or proportional to the situation).

140. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, ¶ 52, U.N. Doc. E/CN.4/1985/4 (1985) [hereinafter *Siracusa Principles*], *available at* http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html (clarifying that national authorities must assess the necessity of all derogation measures taken or proposed to deal with the emergency situation); *see also* Bostan, *supra* note 89, at 32 (explaining how independent bodies of review determine when derogation is appropriate in certain circumstances); Sangeeta Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish*, 5 HUM. RTS. L. REV. 403, 413 (2005) (showing how courts review derogation measures and determine whether they were justified).

141. *See Siracusa Principles*, *supra* note 140, at ¶ 53 (asserting that if an ordinary measure would be adequate to deal with the threat, an alternate measure is not strictly required); Lillich, *supra* note 130, at 1074–75 (outlining the principles that must be upheld by any state wishing to exercise emergency powers such as derogation). *But see* Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDS*, 3 U. ST. THOMAS L.J. 311, 315 (2006) (suggesting that countries can decline to consent to the limitations on derogation when signing the International Covenant on Civil and Political Rights).

142. *See* Recommendation by the Human Rights Comm. to the Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *States of Emergency*, art. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (holding that a state cannot limit a person's right to habeas corpus even in an emergency situation). *See generally* Bostan, *supra* note 89, at 31 (comparing the proportionality requirements of the International Covenant on Civil and Political Rights to the standard of proportionality in the European system).

treaty law.[143] Furthermore, the prohibition of abuse clause in Article 5(1) prohibits actions by States Parties that are "aimed at the destruction of any of the rights and freedoms" recognized in the Covenant.[144]

The final limitation on the scope of Article 4 is the prohibition of discrimination in derogation measures.[145] Article 4(1) stipulates that derogation measures may not discriminate "solely on the ground of race, colour, sex, language, religion or social origin."[146] The use of the word "solely" in this article has been taken to mean that the non-discrimination guarantee prohibits only deliberate discrimination.[147] This allows for the reality of emergency measures, which often impact greater on a particular ethnic, religious or linguistic group, depending on

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143. *See* NOWAK, *supra* note 50, at 85 (noting that a state's derogation measures must comply with customary law, treaties, and human rights conventions); Gerald L. Neuman, *Comment, Counter-Terrorist Operations and the Rule of Law*, 15 EUR. J. INT'L L. 1019, 1027 (asserting that all derogation measures must be consistent with a state's obligations under all other international laws); Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict,* 171 MIL. L. REV. 1, 55–56 (2002) (indicating that even during a state of emergency, derogation measures must be consistent with other international law obligations).

144. *See* International Covenant on Civil and Political Rights, art. 5(1), Dec. 19, 1966, 6 I.L.M 368 (establishing that a state cannot engage in any type of behavior that would destroy the rights and freedoms guaranteed by the covenant); *see also* Tarlach McGonagle, *The Potential for Practice of an Intangible Idea* 13 FALL MEDIA L. & POL'Y 28, 38 (2003) (claiming that the prohibition on abusing rights in the European Convention on Human Rights is a built-in safety mechanism that prevents articles of the convention from being used in a manner contrary to what was intended); Ryan F. Haigh, Note, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms Into the Destruction of Freedom of Expression*, 5 WASH. U. GLOBAL STUD. L. REV. 187, 208 (2006) (alleging that the Universal Declaration on Human Rights prohibits acting in a manner that would destroy any of the rights or freedoms set forth in the declaration).

145. *See* Dennis, *supra* note 133, at 462–63 (noting that the International Covenant on Civil and Political Rights requires all signing parties to ensure that the rights granted by the covenant will be afforded to all citizens without discrimination); *see generally* Elliott, *supra* note 132, at n.45 (arguing that Article 14 of the European Convention on Human Rights similarly prohibits a state from discriminating against any group and from prohibiting the enjoyment of the rights and freedoms set forth in the convention); Friedman, *supra* note 134, at 230 (listing many of the rights guaranteed by the International Covenant on Civil and Political Rights, including protection against discrimination).

146. *See* International Covenant on Civil and Political Rights, art. 4(1), Dec. 19, 1966, 6 I.L.M 368 (1967) (holding that derogation is permissible so long as measures are taken to ensure that it does not involve discrimination on the ground of race, color, sex, language, religion or social origin); Makau Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927, 934 (2006) (affirming that the International Covenant on Civil and Political Rights prohibits discrimination on various grounds); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 544 (2005) (providing that derogations under Article 4 of the International Covenant on Civil and Political Rights are not allowed if they are discriminatory).

147. *See* Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations,* 43 Va. J. Int'l L. 249, 258 (2002) (stating that the United States has interpreted Article 4 as not barring distinctions that could have a disproportionate effect on members of a particular class). *See generally Gross 1, supra* note 4, at 451 (asserting that the general principle of proportionality also covers the issue of discrimination).

the geographical scope of the emergency.[148] In terms of the proclamation, notification and termination of the emergency, the requirements in the Covenant differ somewhat to those in the European and American Conventions, as the ICCPR requires that the emergency be officially proclaimed, whereas the two Conventions make no reference to this.[149] Another slight difference in the wording of Article 4 is that states are requested to "immediately" make information regarding the emergency and derogation available, whereas no time frame is outlined in the ECHR.[150] Article 4(3) stipulates that the derogating State Party:

> shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.[151]

The textual and procedural limitations on the application of Article 4 are not supplemented by any guidelines from the Human Rights Committee on the issue of entrenched emergencies.[152] However, in its General Comment of 2001, the Committee outlined that the *restoration of* a *state of normalcy*, where full respect for the Covenant can again be secured, must be the predominant objective of a State Party derogating from the Covenant, and stressed that measures derogating from the Covenant must be "of an exceptional and temporary nature."[153] Whether this is simply another example of a monitoring body's "over reliance on the 'normalcy-rule,

148. *See* Martin L. Friedland, *Judicial Independence and Accountability: A Canadian Perspective,* 7 CRIM. L.F. 605, 630 (1996) (noting that emergencies have often been used as a pretext for curtailing human rights); *see also* Mehlika Hoodbhoy, Martin S. Flaherty, & Tracy E. Higgins, *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya,* 29 FORDHAM INT'L L.J. 1, 98 (2005) (remarking that the United States has interpreted Article 4 to not infer discrimination merely because a law has a disproportionate impact). *See generally* Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act,* 26 FORDHAM INT'L L.J. 1345, 1372 (2003) (observing that the exacting terms of derogation were enacted to protect against disingenuous suspension of rights).

149. *See* Cyprus Case, Report of the Commission (1976), (1979), 4 EHRR, 556, reprinted in J. ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 37 (Clarendon Press Oxford 1992) (noting that the European Commission has stated that " . . . article 15 requires some formal and public act of derogation, such as a declaration of martial law or state of emergency, and that, where no such act has been proclaimed . . . art. 15 cannot apply."); *cf. Gross 1, supra* note 4, at 448-49 (stating that the ICCHR, the ECHR, and the American Convention all require some declaration of a state of emergency).

150. *See* International Covenant on Civil and Political Rights, art. 4(1), Dec. 19, 1966, 6 I.L.M 368 (1967); El Zeidy, *supra* note 4, at 267 (asserting that Article 15 of the ECHR does not refer to the word "immediately" in contrast to both the ICCPR and the ACHR,); Jim Davis, Note, *A Cautionary Tale: Examining the Use of Military Tribunals by the United States in the Aftermath of the September 11 Attacks in Light of Peru's History of Human Rights Abuses Resulting from Similar Measures*, 31 GA. J. INT'L & COMP. L. 423, 448 (2003) (commenting that states must inform the Secretary-General of United Nations of the provisions with which a nation does not intend to comply, and the reasons for doing so).

151. International Covenant on Civil and Political Rights, art. 4(3), Dec. 19, 1966, 6 I.L.M 368 (1967).

152. *See generally* U.N. CCPR, *General Comment No. 29: States of Emergency (Article 4): International Covenant on Civil and Political Rights*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001); Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L. & POL'Y 58, 66 n.52 (2002) (noting that the U.N. Human Rights Committee has emphasized that procedural rights, such as fair trial rights, must be respected even in times of emergency in order to protect other non-derogable rights).

153. U.N. CCPR, *General Comment No. 29: States of Emergency (Article 4): International Covenant on Civil and Political Rights*, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (July 24, 2001).

emergency-exception' paradigm"[154] will be assessed in the following section, which also looks at some of the salient jurisprudence of the Human Rights Committee.

C. Decisions and Views of the Human Rights Committee

The manner of scrutiny of states derogating from the Covenant engaged in by the Human Rights Committee is twofold: it examines the nature and conditions of emergencies and derogations both in the State reports and in individual communications coming before it.[155] Although the guidelines on the form and content of State reports make no specific reference to derogations under Article 4, requiring only that "restrictions or limitations even of a temporary nature imposed by law or practice or any other manner on the enjoyment of the right"[156] be laid out, the Committee's General Comment of 2001 stressed the importance of immediate international notification of a proclamation of emergency, stating that the notification "should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law."[157] As early as 1979, during the discussion of the initial British report, the Committee stressed that it had a duty "to ascertain whether there was a justification for each and every derogation under that article."[158] In the same year the Committee had occasion to question the legitimacy of prolonging a state of emergency in Chile.[159] In its concluding observations, following that State's report in 1979, the Committee pointed out that "it was the Junta itself that constituted the real state of emergency for the Chilean people and that article 4 of the Covenant had not been intended to justify the acts of persons who themselves created the emergency."[160] Indeed, Chile, having been under a state of siege during almost the entire period between September 1976 and August 1988, is a good example of how the Human Rights Committee has dealt with a de facto entrenched

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154. *See Gross 1, supra* note 4, at 442 (analyzing the jurisprudence of the European Court of Human Rights and European Commission of Human Rights to demonstrate the danger of "over reliance on the 'normalcy-rule, emergency-exception' paradigm").

155. *See* Thomas Buergenthal, *The UN Human Rights Committee*, 5 MAX PLANCK UNYB 341, 359 (2001).

156. U.N. Hum. Rts. Committee, *Report*, ¶ II(a), U.N. GAOR, 50th Sess., U.N. Doc A/50/40 (Oct. 3, 1995), *available at* http.//www.un.org/documents/ga/docs/ 50/plenary/a50-40/htm.

157. *See* U.N. Hum. Rts. Committee, *General Comment 29: States of Emergency (Article 4)*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (specifying the type of notice that is required of derogation); *see also* U.N. Hum. Rts. Committee*, General Comment 5: Derogation of Rights (Article 4)*, ¶ 1, U.N. Doc. CCPR/31/07/81 (1981) (declaring that in addition to the requirements of notice of the reasons for derogations, the date on which the derogations are terminated should be included).

158. A/34/40, 55, § 253.

159. *See* John Quigley, *Displaced Palestinians and the Right of Return*, 39 HARV. INT'L L.J. 171, 203 (1998) (noting that one Human Rights Committee case examined the validity of an emergency declared by the government of Chile because it was declared for an open-ended period); *see also* John Quigley, *Israel's Forty-five Year Emergency: Are There Limits to Derogations from Human Rights Obligations,* 15 MICH. J. INT'L L. 491, 503 (1994) *[hereinafter Quigley 1]* (stating that the Committee criticized Chile for practicing detention without trial, because of its seemingly indefinite emergency). *See generally* Dolezal, *supra* note 123, at 1203 (noting that Chile is one of several countries including Argentina, Colombia, Israel, Russia, Sudan, and Great Britain that have invoked Article IV).

160. U.N. Hum. Rts. Committee, *Concluding Observations to Chile*, ¶ 78, U.N. Doc. A/33/40 (1978).

emergency through the system of examining State reports.[161] Having been extremely critical of the Chilean regime in their observations of 1979,[162] 1984[163] and 1985,[164] the Committee in 1990, upon examining the third periodic State report, expressed unanimous satisfaction with the "significant progress that had been made in restoring the democratic process in Chile, notably through such steps as the . . . lifting of the states of emergency."[165]

In consideration of State reports, the Committee is reliant, in effect, on the information the State Party proffers in its report.[166] Individual communications to the Committee, on the other hand, provide a non-State-sanctioned interpretation of a particular country situation.[167] Although individual communications regarding Chile did not come before the Committee during the period of the state of siege, due to that country's failure to accede to the First Optional Protocol until August 1992,[168] the Committee has on other occasions examined individual communications relating to states of emergency.[169] In a series of cases concerning Uruguay, the Committee reviewed whether the exceptional security measures referred to by the government had resulted in a derogation from certain rights and found against the State

161. *See* Stefanie Ricarda Roos, *Development Genocide and Ethnocide: Does International Law Curtail Development-Induced Displacement Through the Prohibition of Genocide and Ethnocide*? 9 HUM. RTS. BR. 14, 20 (2002) (noting that the Human Rights Committee made observations based on Chile's state reports). *See generally* Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity,* 78 WASH. U. L. Q. 1583, 1591 (2000) (noting that the Human Rights Committee held that Chile's amnesty law was a violation of its obligations under international human rights law).

162. U.N. Hum. Rts. Committee, *Concluding Observations to Chile*, ¶ 78, U.N. Doc. A/33/40 (1978).

163. *Id.*

164. *Id.*

165. *Id.* at 209.

166. *See generally* Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 333 (2004) (underscoring the importance of detailed fact-finding by HROs and NGOs and their communication to the UN and other organizations in the overarching quest to identify and evaluate human rights violations).

167. *See generally* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 88 (2002) (outlining the means by which an individual may file a human rights complaint).

168. *See* Office of the U.N. Commissioner for Hum. Rts., *Status of Ratifications of Principal International Human Rights Treaties*, *available at* http://www.unhchr.ch/pdf/report.pdf (stating that Chile ratified the ICCPR on March 23, 1976 but only acceded to the First Optional Protocol on August 28, 1992. The First Optional Protocol introduced the right of individual petition, sanctioning the Human Rights Committee to hear complaints relating to alleged violations of the Covenant from individuals in States Parties).

169. *See* Thomas Buergenthal, *The UN Human Rights Committee*, 5 MAX PLANCK UNYB 341, 346 (2001) (maintaining that the Optional Protocol allows the Committee to deal with individualized communications from those who claim their rights as set forth in the Covenant have been violated); *see also* Pei-Yun Hsu, Note, *Should Congress Repeal the Alien Tort Claims Act?* 28 S. ILL. U. L.J. 579, 594 (2004) (asserting that upon ratification, the First Option Protocol enables the Human Rights Committee to examine communications from private individuals). *But see* Danchin, *supra* note 167, at 88 (indicating that an individual's communication will reach the Human Rights Committee only if that individual meets certain criteria, such as showing that all domestic remedies were exhausted).

Party.[170] In its notification on July 30, 1979, the government of Uruguay had simply pointed to the "emergency situation, the nature and consequences of which match the description in Article 4, namely that they threaten the life of the nation" and undertook to provide more information regarding the "scope and evolution" of the measures taken in its State report.[171] Writing in 1982, Walkate outlines how the Uruguayan initial State report, due in 1977 but submitted in February 1982,[172] was found wanting in a number of respects:

> Committee members were very critical of the report. They considered the human rights situation in Uruguay fraught with features unacceptable even by emergency standards. Specifically, they noted that Uruguay's notification under Article 4 did not meet the requirements of that article, because the notification did not specify the derogating measures, the extent of the limitations of the rights which were being derogated from, and the reasons therefore. Furthermore, the emergency measures, established for an indefinite period, amounted to permanent restrictions of human rights.[173]

Individual communications to the Committee alleged widespread incommunicado detentions, torture, restriction of political rights, and a plethora of other human rights abuses in Uruguay.[174] In *Jorge Landinelli Silva et al. v. Uruguay*,[175] the Uruguayan government relied

170. *See* U.N. CCPR, 10th Sess., Communication No. 4/1977, CCPR/C/10/D/4/1977 (April 8, 1980); 5/1977, CCPR/C/7/D/5/1977 (Aug. 15, 1979); 6/1977, CCPR/C/10/D/6/1977 (July 29, 1980); 8/1977, U.N. Doc. CCPR/C/OP/1 at 45 (Apr. 3, 1980); 9/1977, CCPR/C/8/D/9/1977 (Oct. 26, 1979); 10/1977, CCPR/C/15/D/10/1977 (Mar. 29, 1982); 11/1977, CCPR/C/10/D/11/1977 (July 29, 1982); 28/1978, CPR/C/11/D/28/1978 (Oct. 29, 1980); 31/1978, U.N. Doc. CCPR/C/OP/1 at 36 (Mar. 28, 1980); 32/1978, U.N. Doc. CCPR/C/OP/1 at 61 (Mar. 31, 1981); 33/1978, CPR/C/12/D/33/1978 (Apr. 8, 1981); 34/1978, CCPR/C/12/D/34/1978 (Apr. 8, 1981); 37/1978, CCPR/C/12/D/37/1978 (Mar. 27, 1981); 43/1979, CCPR/C/19/D/43/1979 (July 21, 1983). The series of cases continue on in various CCPR sessions through to 1983.

171. *See* NOWAK, *supra* note 50, at 811–12 (stating that the Uruguayan government notified the Committee of its derogation on July 30, 1979); *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, *available at* http://hei.unige.ch/~clapham/hrdoc/docs/UKderogationICCPR.html (maintaining that the Government of Uruguay declared a state of emergency in 1979 by official *notification* to the Committee). *See generally* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 135 (2005) (explaining that Article 4 requires that the State inform the other State Parties for the reasons it has derogated from the Covenant).

172. U.N. Doc. CCPR/C/1/Add. 57 (1982) (stating that the Uruguayan State Party report was due on March 22, 1977 but not submitted until January 29, 1982).

173. *See* Jaap A. Walkate, *The Human Rights Committee and Public Emergencies*, 9 YALE J. WORLD PUB. ORD. 133, 140–41 (1982) (maintaining that the Committee disapproved of Uruguay's actions during the public emergency regarding notification requirements and the protection of human rights); *see also Quigley 1*, *supra* note 159, at 505 (commenting that the Committee found the Uruguayan report insufficient). *See generally* Mizock, *supra* note 67, at 232 (explaining that States must make a formal notification of derogation, which the Committee then reviews).

174. *See* Walkate, *supra* note 173, at 141 (commenting that the Committee found that derogations from rights such as being free from torture and degrading treatment occurred frequently). *See generally* U.N. CCPR, 13th Sess., Communication No. 52/1979 at ¶ 2.3, CCPR/C/13/D/52/1979 (July 29, 1981) (finding that an Uruguayan man had been tortured and suffered a broken jawbone and a perforation of the eardrums); U.N. CCPR, 13th Sess., Communication No. 56/1979 at ¶ 11, CCPR/C/13/D/56/1979 (July 29, 1981) (holding that the ICCPR had been violated where an Uruguayan woman had been abducted, held incommunicado for four months and had no counsel of her choosing).

175. U.N. CCPR, 12th Sess., Communication No. 32/1978, CCPR/C/12/D/34/1978 at ¶ 1–3.1 (Apr. 8, 1981) (stating that Jorge Landinelli Silva, along with others, submitted a communication contending that a deprivation of their rights went beyond the restrictions in Article 25 of the Covenant).

upon its power of derogation in accordance with the proclamation of an emergency outlined in its notification of July 30, 1979 for the first time, thereby necessitating a substantive interpretation of Article 4.[176] The authors of the communication were all candidates on the lists of certain political groups for the 1966 and 1971 elections, groups that were later declared illegal through a decree issued by the new government of the country in November 1973.[177] Application of the Institutional Act No. 4 of September 1, 1976 (art. I(a)) deprived the authors of the communication of the right to engage in any activity of a political nature, including the right to vote, for a term of 15 years.[178] In its determination of whether there had been a violation of Article 25 of the Covenant, the Committee looked first at the requirements of Article 4(1) and found that they had not been satisfied by the Uruguayan government.[179] Referring to the lack of information on the situation provided by the State Party, the Committee noted that "if the respondent Government does not furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4(3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant."[180] The Committee, even assuming the exist-

176. *See* Ní Aoláin, *supra* note 65, at 140 (maintaining that in the *Landinelli* decision, the Committee held under Article 4 that a government cannot use its power of derogation without supplying sufficient information); *see also* Daniel O'Donnell, *Commentary by the Rapporteur on Derogation*, 7 HUM. RTS. Q. 23, 28 (1985) (asserting that in *Landinelli* the Committee held that it could make an independent determination as to whether derogation was "strictly required"); *Quigley 1*, *supra* note 159, at 500 (noting that the Committee held under Article 4 that the burden is on the derogating state to show an existence of an emergency).

177. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 2.3, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (stating that the authors of the communications were members of certain political groups declared illegal through an Uruguayan governmental decree); U.N. CCPR, 12th Sess., Communication No. 44/1979 at ¶ 2.3, CCPR/C/12/D/44/1979 (Apr. 9, 1981) (asserting that all the candidates who were on the 1966 and 1971 election lists of Marxist or pro-Marxist Political Parties were declared illegal by Executive Power resolutions); *see also* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 311, 312 (Oxford Univ. Press 1996) (stating that the authors of the communication were candidates for elective office and were all on the lists of certain political groups for the 1966 and 1971 elections).

178. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 2, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (declaring that those individuals that belonged to certain political groups were not allowed to vote for 15 years); s*ee also* U.N. CCPR, 11th Sess., Communication No. 28/1978 at ¶ 2, CCPR/C/11/D/28/1978 (Oct. 29, 1980) (stating the author's claim pursuant to Act Institutional No. 4, his brother is not allowed to engage in political activities for 15 years); McGoldrick, *supra* note 128, at 398 (maintaining that article 1(a) of Institutional Act No. 4 of September 1, 1976 deprived individuals of the right to vote because they had been members of certain political groups).

179. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶¶ 8–8.2, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (finding that the requirements set forth in Art. 4(1) were not met because the Uruguayan government failed to provide factual details in order to establish a public emergency and because it conclusively stated that its emergency was a "matter of universal knowledge"). *See generally* International Covenant on Civil and Political Rights, art. 4(1), Dec. 16, 1966, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (declaring that States may derogate from obligations in the Covenant during times of emergency as long as the States' derogation measures comply with the requirements of Article 4).

180. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 8.3, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (stating that the Committee needs to be provided with full information in order to determine the existence of a pubic emergency); s*ee also* MCGOLDRICK, *supra* note 177, at 311, 312 (maintaining that the Committee found that Uruguay did not comply with the notification requirements under Article 4(3)). *See generally* International Covenant on Civil and Political Rights, art. 4(3), Dec. 16, 1966, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (stating that "[a]ny State Party to the present Covenant availing itself of the right of derogation shall immediately inform [the Committee] . . . of the provisions from which it has derogated and of the reasons by which it was actuated").

ence of a state of emergency in Uruguay, could not find any justification for depriving all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years.[181] The government had therefore "failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom."[182]

Colombia has both declared and extended states of emergency more than five times since first doing so in July 1980.[183] In situations such as this, where there are repeated or prolonged emergencies, the approach of the Committee appears to mirror that of the European Court of Human Rights; rather than examining the situation as a whole, taking the entrenched nature of the emergency into account, the Committee examines each communication on a case-by-case basis.[184] However, in its assessment of whether a state of emergency for the purposes of Article 4 actually exists, the Committee has from the outset seemed to be less deferential to the assessment of States Parties than its Strasbourg counterpart.[185] For example, although the Colombian authorities had submitted in its notification of July 18, 1980 that it had "become

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181. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 8.4, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (stating that even assuming there was a public emergency, depriving individuals of a political right for 15 years was excessive); U.N. CCPR, 11th Sess., Communication No. 28/1978 at ¶ 15, CCPR/C/11/D/28/1978 (Oct. 29, 1980) (finding that there was no justification for withholding of political rights for 15 years). *See generally* McGoldrick, *supra* note 128, at 398 (discussing how the victims in Silva v. Uruguay were deprived of the right to engage in political activities for 15 years).

182. *See* U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 8.4, CCPR/C/12/D/34/1978 (Apr. 8, 1981) (finding that the government of Uruguay failed to show the need to eliminate political dissention to be able to cope with the alleged emergency state); McGoldrick, *supra* note 128, at 398 (stating that the Uruguayan government was not successful in showing that the prohibition of political dissent was necessary); Pati, *supra* note 93, at 246 (maintaining that Uruguay failed to show "that interdiction of political dissent was required in order to deal with the alleged emergency situation and pave the way to political freedom").

183. *See* U.N. Hum. Rts. Committee, *Concluding Observation of the Human Rights Committee, Colombia*, ¶ 25, U.N. Doc. CCPR/C/79/Add.76 (1997) (expressing concern over the number of Colombia's declarations of states of emergency); *see also* Larry Birns & Nora Connor, *Arms Transfers Hold Up Peace: More Military Aid Not Is Not Colombia's Cure*, WASH. TIMES, Nov. 3, 1999, ¶ 3 (maintaining that Colombia has repeatedly declared states of emergency); Sibylla Brodzinsky & David Adams, *A Year In, Uribe Racing to Reform*, ST. PETERSBURG TIMES, Aug. 4, 2003, ¶ 20 (proclaiming that Colombian President Alvaro Uribe declared a state of emergency almost immediately after taking office).

184. *See* Joseph, *supra* note 84, at 80 (noting that the Committee's assessment of the emergency situation on a case-by-case basis gives flexibility in addressing human rights concerns); *see also* Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?* 19 J. ASIAN L. (2005) 185, 214 (2005) (positing that both the Human Rights Committee and the European Court of Human Rights look at cases individually); Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?* 38 CORNELL INT'L L.J. 71, 113 (2005) (commenting that the Committee and the European Court of Human Rights apply a three-part test on a case-by-case basis).

185. *See* Michaelsen, *supra* note 52, at 290 (maintaining that the Strasbourg Court has generally granted a wider margin of appreciation with respect to monitoring State Parties than the Human Rights Committee); *see also* U.N. HUMAN RIGHTS COMMITTEE [HRC], *Report on Human Rights,* ¶ 31, U.N. Doc. A/57/40 (Vol. I) (Feb. 2002) (stating that the Human Rights Committee always applies the strict interpretation standard in cases of derogation and adding that it has found the State to be in violation of the Covenant on numerous occasions); Macdonald, *supra* note 27, at 258 (asserting that in the European Court of Human Rights, State Parties have wide freedom to declare a state of emergency).

necessary to adopt extraordinary measures" in view of the "events disturbing the public peace,"[186] the Committee reaffirmed in *Consuelo Salgar de Montejo v. Colombia*[187] that:

> the State party, by merely invoking the existence or a state of siege, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenant, the State party concerned is on duty bound, when it invokes article 4 (l) of the covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (l) of the Covenant exists in the country concerned.[188]

In the instant case, the Committee did not agree with the submission of the Colombian authorities that there had been a derogation from Article 14(5) of the Covenant.[189] Importantly, this view of the Committee clarifies that a notification of derogation under Article 4(3) will only be relevant with respect to the provisions of the Covenant expressly outlined in the notification; that is, a derogating state cannot rely on it to avoid their international legal responsibilities under other provisions of the Covenant not mentioned.[190] This principle has been confirmed in further views adopted by the Committee. In *Tae Hoon Park v. Republic of Korea*,[191] the State Party had "not made the declaration under article 4(3) of the Covenant that

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186. *See* NOWAK, *supra* note 50, at 785–86 (stating that the Uruguayan government notified the Committee of its derogation on July 18, 1980).

187. *See* U.N. CCPR, 15th Sess., Communication No. 64/1979, CCPR/C/15/D/64/1979 (Mar. 24, 1982).

188. *See* U.N. CCPR, 15th Sess., Communication No. 64/1979, at ¶ 10.3, CCPR/C/15/D/64/1979 (Mar. 24, 1982) (stating that States have a duty to provide detailed information to the Committee when invoking Article 4(1)); *see also* McGoldrick, *supra* note 128, at 399 (declaring that the quoted passage of the Committee illustrates the strict assessment function of the Human Rights Committee under the Optional Protocol). *See generally* Elizabeth Misiaveg, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 WASH. & LEE L. REV. 1109, 1136 (1995) (maintaining that the Human Rights Committee held that Colombia's laws violated the rights set forth in Art. 14(5)).

189. *See* Consuelo Salgar de Montejo v. Colombia, U.N. CCPR, 15th Sess., Communication No. 64/1979, at ¶ 10.3, U.N. Doc. CCPR/C/15/D/64/1979 (Mar. 24, 1982) (holding that there was no information to prove that Article 14(5) had been derogated from); *see also* Ní Aoláin, *supra* note 65, at 139 (stating that the Human Rights Committee was not prepared to rule that Article 14(5) had been derogated from); Misiaveg, *supra* note 188, at 1136 n.143 (finding that the Human Rights Committee ruled that Colombia had violated Article 14(5) of the Covenant).

190. *See* SVENSSON-MCCARTHY, *supra* note 63, at 238 (emphasizing the importance of notification reports to the Human Rights Committee); *see also* Rooney, *supra* note 126, at 721 (recognizing that a state may only derogate after providing the formal notification record to the U.N. Secretary-General). *But see* Michael J. Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,* 99 AM. J. INT'L L. 119, 135 (2005) (stating that the Human Rights Committee will not deprive a state of its derogation rights because of the state's failure to notify the Committee).

191. U.N. GAOR, 54th Sess., *Report of the Human Rights Committee: Volume II*, at 85–92, U.N. Doc. A/54/40 (Jan. 1, 2000) (citing Tae Hoon Park v. Republic of Korea, where a Korean national alleged that his rights under the ICCPR had been violated).

a public emergency existed and that it derogated certain Covenant rights on this basis"[192] and so could not use this provision to justify the measures taken against the author of the complaint. Similarly, in *José Luis Gutiérrez Vivanco v. Peru*,[193] the State Party was found to have violated Article 14.[194] Although Peru had derogated from Articles 9, 12, 17 and 21, it was not done so with regard to Article 14 and so could not rely on the state of emergency as a justification for the violation.[195] The Committee's approach certainly appears more forthright than that adopted by the European Court, whose Article 15 judgments afford an extraordinarily wide margin of appreciation to the national authorities in deciding both on the presence of a public emergency and the nature and scope of derogation measures necessary to overcome it.[196] In two other cases concerning the state of siege in Colombia, *Husband of Maria Fanny Suarez de Guerrero v. Colombia*[197] *and Orlando Fals Borda and Others v. Colombia*,[198] the Committee's decision was not influenced in the former case by the fact that there was a declared state of siege, as the violation of the right complained of related to the non-derogable right to life (Arti-

192. U.N. GAOR, 54th Sess., *Report of the Human Rights Committee: Volume II*, at 91, ¶ 10.4, U.N. Doc. A/54/40 (Jan. 1, 2000) (explaining that the State Party failed to declare a state of emergency pursuant to the Covenant and thus violated it because Korea gave priority to its national law over the obligations of the Covenant).

193. U.N. GAOR, 57th Sess., *Report of the Human Rights Committee: Volume II*, at 46–54, U.N. Doc. A/57/40 (Jan. 1, 2002) (citing Gutierrez Vivanco v. Peru where a Peruvian national's rights under the Convention were violated as he was beaten by police and tried by a criminal court in secret).

194. U.N. GAOR, 57th Sess., *Report of the Human Rights Committee: Volume II*, at 52, ¶ 8, U.N. Doc. A/57/40 (Jan. 1, 2002) (holding that Peru had not given the author a fair trial by a competent, independent and impartial tribunal, thus violating Art. 14).

195. *See Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997*, U.N. Doc. ST/LEG/SER.E/16 at 145–6 (Dec. 31, 1997) (stating that Peru gave notification to the Secretary-General of its derogation from articles 9, 12, 17, and 21 of the ICCPR in 1983); *see also Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997*, U.N. Doc. ST/LEG/SER.E/16 at 151–3 (Dec. 31, 1997) (proving that Peru had not given notification to the Secretary-General of any intention to derogate from Article 14 of the ICCPR in 1992, 1994, and 1995, the years of Mr. Gutierrez Vivanco's arrest, trial, and sentencing); U.N. CCPR, *Peru: Notification under Article 4(3) of the Covenant,* U.N. Doc. C.N.860.2004.TREATIES-9 (Aug. 18, 2004), *available at* http://untreaty.un.org/English/CNs/2004/801_900/860E.pdf (last visited Feb. 15, 2007) (stating in a letter to the U.N. Secretary-General that Peru derogated from Articles 9, 12, 17, and 21 of the ICCPR).

196. *See* Iyer, *supra* note 103, at 137–38 (stating that European Convention gives national governments a "fairly wide margin of appreciation" when determining their emergency status under Article 15); s*ee also* Dolezal, *supra* note 123, at 1181–2 (claiming that although the European Court of Human Rights grants deference to State governments in declaring a state of emergency, the amount of deference has not been defined). *See generally* Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to the Said Convention, art. 15, Nov. 4, 1950, Europ. T.S. No. 5 (outlining the requirements for derogation in times of emergency under the European Convention).

197. Husband of Maria Fanny Suarez de Guerrero v. Colombia*,* U.N. CCPR, 15th Sess., Communication No. 45/1979, U.N. Doc. CCPR/C/15/D/45/1979 (Mar. 31, 1982) [hereinafter *Husband of Maria Fanny*] (stating that the Colombian police raided a house and killed innocent people suspected of kidnapping).

198. Orlando Fals Borda and his wife, Maria Cristina Salazar de Fals Borda, Justo German Bermudez and Martha Isabel Valderrama Becerra v. Colombia, U.N. CCPR, 16th Sess., Communication No. 46/1979, U.N. Doc. CCPR/C/16/D/46/1979 (July 27, 1982) [hereinafter *Orlando Fals Borda*] (stating that Columbia's Brigada de Institutos Militates arrested Mr. Fals Borda without charges and detained his wife for a year without justification).

cle 6 of the Covenant);[199] whereas in the latter case, despite the existence of a state of siege, the Committee found violations of Article 9(3) and (4).[200]

In situations of entrenched emergencies the duty of the Committee "to assess whether a situation of the kind described in article 4(1) of the Covenant exists in the country concerned" becomes all the more vital.[201] From the outset of its work, the Committee made it clear that a full explanation and justification for the continuance of emergency measures is required from States Parties.[202] For example, when the United Kingdom notified States Parties that due to "campaigns of organized terrorism related to Northern Irish affairs" it was necessary

> to take powers, to the extent strictly required by the exigencies of the situation, for the protection of life, for the protection of property and the prevention of outbreaks of public disorder, and including the exercise of powers of arrest and detention and exclusion. In so far as any of these measures is inconsistent with the provisions of Articles 9, 10(2), 10(3), 12(1), 14, 17, 19(2), 21 or 22 of the Covenant, the United Kingdom hereby derogates from its obligations under those provisions, . . .[203]

The Committee made a full examination of "the consequence of the reference to Northern Irish affairs rather than to Northern Ireland for the territorial application of the derogating

199. *See* U.N. CCPR, *General Comment No. 29: States of Emergency (Article 4),* at ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (stating that the right to life under Article 6 shall not be derogated from according to Article 4(2) of the Covenant); *see also* Bostan, *supra* note 89, at 34 (specifying that Article 6 of the Covenant is non-derogable). *See generally Husband of Maria Fanny* at ¶ 13.3, 14 (holding that Mrs. Suarez de Guerrero was arbitrarily deprived of her life contrary to Article 6 (1)).

200. *See Orlando Fals Borda* at ¶¶ 12.2, 12.3, 12.4, 14 (holding that the facts of the case show violations of Articles 9(3) and 9(4) of the Covenant). *See generally* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 54, U.N. GAOR, 21st Sess., U.N. Doc A/6316 (Mar. 23, 1976) (stating that under Art. 9(3) a person is entitled to be brought before a judge and is entitled to a trial and under Art. 9(4) any person deprived of these rights is entitled to go before a court to determine the lawfulness of his detention).

201. This function of the Committee was first outlined in Jorge Landinelli Silva et al. v. Uruguay, U.N. CCPR, 12th Sess., Communication No. 34/1978 at ¶ 8.3, U.N. Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981) (stating that if the State Party does not prove justification for its actions, the Human Rights Committee cannot decide whether the reasons for departing from the ICCPR are legitimate); *see also* Barbara von Tigerstrom, *The Revised International Health Regulations and Restraint of National Health Measures*, 13 HEALTH L.J. 35, 63 (2005) (explaining that the ICCPR requires states to take measures to respond to actual threats and not to potential threats). *See generally* U.N. CCPR, *General Comment No. 29: States of Emergency (Article 4): International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 at ¶ 1 (July 24, 2001) (citing the importance of Article 4(1) to the system of protection of human rights under the Covenant).

202. See the Committee's consideration of the initial reports of the United Kingdom regarding derogations taken with respect to Northern Ireland, U.N. Doc. CCPR/C/1/Add.17 (1977) and U.N. Doc. CCPR/C/1/Add.35 (1978). *See also* Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 607–9 (1994) (outlining the requirements for filing a communication to the Human Rights Committee); Maura Mullen de Bolivar, *A Comparison of Protecting the Environmental Interests of Latin American Indigenous Communities from Transnational Corporations Under International Human Rights and Environmental Law*, 8 FLA. ST. J. TRANSNAT'L L. & POL'Y 105, 135 (1998) (stating that once a communication has been submitted to the Committee, the State has six months to submit an explanation of their actions).

203. *See Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997*, U.N. Doc. ST/LEG/SER.E/16 at 157 (Dec. 31, 1997) (discussing the United Kingdom's notification to the Human Rights Committee about its intention to continue derogation from the ICCPR).

measures; whether the situation in and related to Northern Ireland threatened the life of the nation; the reasons and extent of the derogations undertaken; and whether there was a justification for each derogation."[204]

This standard of examination by the Committee should arguably be even higher when faced with States Parties who repeatedly derogate from Covenant provisions.

IV. The American Convention on Human Rights

A. Article 27

The provision governing states of emergency in the American Convention differs slightly in two main respects from that of its predecessors; it explicitly mentions the case of a *public danger*, and the kind of emergency envisaged is one that threatens the *independence or security of the State.*[205] The first variation refers to the fact that a public disaster, such as a flood or earthquake, may not be a threat to the security of the state but it may well necessitate a declaration of emergency, whereas the second variation appears to substitute a less restrictive threshold than the "threat to the life of the nation" foreseen in the other two treaties examined above.[206] Another substantive difference in the text of Article 27 of the American Convention lies in paragraph 2, which provides a far more extensive list of non-derogable rights than either of its ECHR or ICCPR counterparts.[207] It is also the only treaty to explicitly state the judicial guar-

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204. *See* Walkate, *supra* note 173, at 137 (1982) (explaining how the Human Rights Committee weighed many factors in determining whether Great Britain's derogations were permitted under the Covenant). *See generally* Jane S. Jensen, *The Impact of the European Convention for the Protection of Human Rights on National Law*, 52 U. CIN. L. REV. 760, 779 (1983) (stating the Court's holding that the United Kingdom's interrogation techniques violated Article 3 of the European Convention); Linda Moore, *Academic Viewpoint*: *Policing and Change in Northern Ireland: The Centrality of Human Rights,* 22 FORDHAM INT'L L.J. 1577, 1583 (1999) (finding that the Human Rights Committee has criticized the United Kingdom about its behavior in Northern Ireland).

205. *See* Oraá, *supra* note 19, at 14 (explaining that derogation under the American Convention on Human Rights requires a public emergency constituting a threat to national independence or security); *see also* Louis Rene Beres, *Israel After Fifty: The Oslo Agreements, International Law and National Survival*, 14 CONN. J. INT'L L. 27, 32, n.27 (1999) (stating that the American Convention on Human Rights allows derogation when the emergency is such that it threatens the independence or security of the State).

206. *See* ORAÁ, *supra* note 19, at 14–15 (explaining that while other treaties allow derogation when there is a "threat to the life of the nation," the American Convention on Human Rights derogation standard is less demanding); *see also* HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS 819 (United Nations 1993) (stating that rather than referring to "the life of the nation," the American Convention on Human Rights authorizes derogation in times of war and public danger); Stephen C. McCaffrey, *Current Development: The Forty-second Session of the International Law Commission*, 84 AM. J. INT'L L. 930, 937 (1990) (listing occasions when a state of emergency would be declared under the American Convention on Human Rights, among which are floods, ice, landslides, and earthquakes).

207. *See* Major John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 86, n. 312 (1991) (explaining that only four non-derogable rights are common to the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the American Convention on Human Rights); Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 209 (1992) (recognizing that the list of non-derogable human rights varies slightly amongst the international human rights treaties).

antees essential for the protection of absolute rights may not be derogated from.[208] Article 27 states:

> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
>
> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
>
> 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.[209]

It is evident from the wording of Article 27 that the same textual and procedural limitations apply to the exercise of the right of derogation as apply with Article 15 of the ECHR and

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208. *See Judicial Guarantees in States of Emergency (ARTS. 27(2), 25 and 8 American Convention on Human Rights)*, OC-9/87 Op. Inter.-Am. C.H.R., ¶ 20 (1987), *available at* http://www.wcl.american.edu/humright/hracademy/corteidh/serieapdf_ing/seriea_09_ing.pdf?rd=1 (last visited Jan. 31, 2007) (presenting what the Court has defined as "essential" judicial guarantees); Stapleton, *supra* note 122, at 599–600 (stating that the idea about non-derogable judicial guarantees is expressly recognized in the American Convention on Human Rights). *See generally* Alicia Ely Yamin & Ma. Pilar Noreiga Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L. REV. 467, 480 (1999) (providing an example where the Inter-American Commission on Human Rights found violations of judicial guarantees provided under the Convention).

209. *See* American Convention on Human Rights, art. 27, Nov. 22, 1969, *available at* http://www.cidh.org/Basicos/basic3.htm (last visited Jan. 31, 2007) (outlining the rules that must be followed to suspend the guarantees under Article 27 of the American Convention on Human Rights); *see also* B.G. Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 99, 110, n. 44 (1983) (presenting the requirements of Article 27(1), which member States must meet in order to derogate from their responsibilities under the American Convention on Human Rights); Cesar Sepulveda, *Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law*, 33 AM. U. L. REV. 117, 120 (1983) (reiterating that the Convention permits temporary derogation when the independence or security of the state is threatened).

Article 4 of the ICCPR.[210] While the different threshold of an emergency that "threatens the independence or security" of a state has been noted, the derogating state must only take measures that are "strictly required by the exigencies of the situation" and consistent with their other obligations under international law.[211] From the outset of its work, the Inter-American Commission noted that exceptional measures "may only be justified in the face of real threats to the public order or the security of the state,"[212] that is, the situation must be sufficiently grave and constitute "a threat to the organized life of the state."[213] Paragraph 1 also contains the same non-discrimination clause as that in Article 4(1) of the ICCPR.[214] With regard to procedural requirements, Article 27(3) again mirrors the derogation provision of the ICCPR by stipulating that a derogating state must "immediately" inform the other States Parties about its derogation, the reasons therefore and, importantly, the "date set for termination of such suspension."

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210. *Compare* Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing derogation of obligations during states of emergency), *with* United Nations International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171 (allowing derogation in times of public emergency threatening the life of the nation), *and* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 (allowing derogation in times of emergency).

211. *See* Organization of American States, American Convention on Human Rights, art. 27, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (restricting derogations to those necessary for the situation and allowable under international law). *Compare* Organization of American States, American Convention on Human Rights, art. 27, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (setting the threshold at one that "threatens the independence or security") *with* United Nations International Covenant on Civil and Political Rights, art. 4, § 1, Dec. 16, 1966, 999 U.N.T.S. 171 (proclaiming the threshold to be an event that "threatens the life of the nation"), *and* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, § 1, Nov. 4, 1950, 213 U.N.T.S. 221 (establishing the threshold at "threatening the life of the nation").

212. *See* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (Oct. 16, 1981) (emphasizing that only extremely grave situations that imperil the public order call for the derogation of obligations established in the American Convention on Human Rights).

213. *See* Organization of American States, American Convention on Human Rights, art. 27, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (stating that public danger or emergencies threatening independence or security of the state allow for derogation of obligations under the treaty); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (Oct. 16, 1981) (interpreting Article 27 of the American Convention on Human Rights to include emergencies that threaten the public order); Claudio Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U. J. INT'L L. & POL'Y 35, 45 (1986) (reaffirming the Inter-American Commission's interpretation that the threat must be to the public order).

214. *See* Organization of American States, American Convention on Human Rights, art. 27, § 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (prohibiting discrimination on the grounds of race, color, sex, language, religion, or social origin); *see also* United Nations International Covenant on Civil and Political Rights, art. 4, § 1, Dec. 16, 1966, 999 U.N.T.S. 171 (disallowing racial, sexual, religious, or social origin discrimination even during states of emergency). *See generally* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 221 (lacking a prohibition against discrimination during states of emergency).

The idea that states of emergency are "readily transformed from temporary situations into permanent ones"[215] permeates the Inter-American system even more than its counterparts, as the situation of a prolonged or permanent emergency has been a characteristic of a large number of the Organization of American States (OAS) member states, many of whom were also party to the ACHR.[216] The following section will examine how the supervisory mechanisms of the American Convention have for their part dealt with the entrenched emergency phenomenon.

B. Jurisprudence of the Inter-American Supervisory Organs

The issue of states of emergency is one with which the Inter-American Commission has been concerned since beginning its work more than four decades ago.[217] At its 18th session in April 1968, a resolution on states of siege, which set out a number of significant conclusions and recommendations, was approved.[218] The declaration stated, *inter alia*, that the suspension of constitutional guarantees or "state of siege" was only compatible with the system of representative government when "established in a measure strictly limited to the exigencies of the situation and with application limited to the duration thereof."[219] Thus, the requirement of temporality was mooted at an early stage and is reflected in the Article 27(3) stipulation that the notification of derogation include "the date set for the termination" of the suspension of rights.[220] Commentators highlight the difficulties in analyzing the approach taken by the

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215. *See* Grossman, *supra* note 213, at 37 (acknowledging the ease with which states of emergency go from temporary to permanent); *see also* SVENSSON-MCCARTHY, *supra* note 63, at 264 (noting that by its very nature the state of siege in Colombia was temporary but became permanent due to periodic renewal). *See generally* Organization of American States, American Convention on Human Rights, art. 27, § 3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (calling for set termination dates in an effort to keep states of emergency temporary).

216. *See, e.g.,* Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Republic of Colombia*, at Conclusions and Recommendations, subdiv. B, § 2, OEA/Ser.L/V/II.53 doc. 22 (June 30, 1981) (finding that the state of siege has become endemic); Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. I, subdiv. A, § 7, pt. I, subdiv. B, § 1, OEA/Ser.L./V.II.62 doc. 10, rev. 3 (Nov. 29, 1983) (noting ongoing problems between the Miskito and Nicaraguan government from 1894 through at least 1979); *see also* Grossman, *supra* note 213, at 37 n.7 (listing several states that have been the subject of Inter-American Commission reports).

217. *See* SVENSSON-MCCARTHY, *supra* note 63, at 244 (outlining the beginning of the Commission's work on states of emergency); *see also* Grossman, *supra* note 213, at 35-36 (noting the extensive jurisprudence created by the Inter-American Commission regarding state emergencies); Detlev Vagts & Natan Lerner, *Los Estados de Excepcion y Los Derechos Humanos en America Latina*, 86 AM. J. INT'L L. 187, 188 (1992) (reviewing DANIEL ZOVATTO G., LOS ESTADOS DE EXCEPCION Y LOS DERECHOS HUMANOS EN AMERICA LATINA (1990)).

218. *See* SVENSSON-MCCARTHY, *supra* note 63, at 247 (noting the Commission's adoption of a resolution regarding states of siege in 1968).

219. General Secretariat of Organization of American States, 1968 Inter-Am. Y.B. on H.R. 61. *See* Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (requiring measures under a state of emergency to be narrowly tailored and exist for only as long as necessary); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9, rev. 1 (1981) (expressing that limitations must be strictly required and only for as long as necessary).

220. *See* Organization of American States, American Convention on Human Rights, art. 27, § 3, Nov. 22, 1969, 9 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (requiring a date of termination to be declared); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9, rev. 1 (1981) (noting the prohibition against indefinite suspension of rights under a state of siege).

Commission to Article 27,[221] but this notwithstanding, the Commission has found states of emergency to be in violation of Article 27 on a number of occasions, frequently because of the entrenchment of the emergency,[222] and it is possible to extrapolate some general principles from its assessments of Article 27 situations. For example, in a report of 1983, the Commission in determining whether Nicaragua had met the requirements laid out in Article 27(1) noted that the suspension of human rights obligations was acceptable "only when there are extremely, serious circumstances."[223] Therefore, the emergency should "be of a serious nature, created by an exceptional situation that truly represents a threat to the organized life of the State."[224] Assessing the facts of the case, the Commission was of the opinion that the security of the Nicaraguan state was truly threatened by the incursions of the groups of former members of the National Guard, which justified the declaration of a state of emergency and its maintenance[225] but stressed that "once the danger that threatens the security of the State has been overcome, the special provisions should also be terminated."[226]

In its 1981 report on the human rights situation in Colombia, the Commission criticized the fact that there had been a state of siege in place in the country for more than 30 years, calling it "an endemic situation which has hampered, to a certain extent, the full enjoyment of civil freedoms and rights,"[227] and recommended that Colombia "[l]ift the state of siege soon as circumstances allow; and comply with the provisions of article 27 of the American Convention

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221. *See* ORAÁ, *supra* note 19, at 24 (asserting that the reports of the Commission lack "a thorough analysis of the application of the principles of the derogation clause" due to the fact-finding nature of the Commission); *see also* SVENSSON-MCCARTHY, *supra* note 63, at 254 (stating that the Commission "has lacked a clear and rational legal approach to the question of human rights in states of exception").

222. *See* ORAÁ, *supra* note 19, at 54.

223. Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. II, subdiv. E, § 5, OEA/Ser.L./V.II.62 doc. 10, rev. 3 (Nov. 29, 1983); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9, rev. 1 (1981) (emphasizing the extremely grave nature necessary to declare an emergency under Article 27 § 1).

224. Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. II, subdiv. E, § 8, OEA/Ser.L./V.II.62 doc. 10, rev. 3 (Nov. 29, 1983); *see* Organization of American States, American Convention on Human Rights, art. 27, §1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (requiring the emergency to threaten independence or security).

225. Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. II, subdiv. E, § 12, OEA/Ser.L./V.II.62 doc. 10, rev. 3 (Nov. 29, 1983). *See generally* Michael B. Wise, *Nicaragua: Judicial Independence in a Time of Transition*, 30 WILLAMETTE L. REV. 519, 522-24 (1994) (chronicling the shaky history of Nicaragua's security).

226. Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, at pt. II, subdiv. E, § 14, OEA/Ser.L./V.II.62 doc. 10, rev. 3 (Nov. 29, 1983). *See* Organization of American States, American Convention on Human Rights, art. 27, §§ 1, 3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing the derogations for only as long as is necessary); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54 doc. 9, rev. 1 (1981) (emphasizing the requirement for speedy termination of special provisions once the state of emergency expires).

227. Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Republic of Colombia*, at Conclusions and Recommendations, subdiv. A, § 2, OEA/Ser.L/V/II.53 doc. 22 (June 30, 1981); *see* Martha I. Morgan & Monica Maria Alzate Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353, 369 n.74 (1992) (detailing the Colombian state of siege). *See generally* Vagts & Lerner, *supra* note 217, at 188 (noting arbitrary declarations of states of siege in Latin America).

[on] Human Rights."[228] More recently, in its report on Peru in 2000, the Commission was highly critical of a number of anti-terrorist and other repressive measures enacted under the state of emergency in that State Party and called on the Peruvian authorities to instigate a "return to the rule of law."[229] Similarly, in 2001 the Commission felt that the procedure in Article 27 "prescribed to safeguard the efficacy of the Convention's guarantees, was not followed" when a state of emergency was declared in Guatemala in 1998 in the aftermath of Hurricane Mitch.[230] The Commission urged the State Party to ensure that any further derogations from the Convention "be as exceptional and restrictive as the object and purpose of this Article require."[231]

The strict interpretation of Article 27 favored by the supervisory organs was also outlined by the Inter-American Court in two advisory opinions issued in 1987. The advisory opinions of the Court constitute the most important pronouncements on issues arising from states of emergency to date, and are repeatedly referred to in its case law arising from individual applications.[232] In its opinion on whether the writ of *habeas corpus* was one of the judicial guarantees that cannot be suspended by virtue of the last clause of Article 27(2), the Court made some

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228. Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Republic of Colombia*, at Conclusions and Recommendations, subdiv. B, § 1, OEA/Ser.L/V/II.53 doc. 22 (June 30, 1981) (recommending the ending of the state of siege and compliance with Article 27); *see* Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing the rules for suspension of obligations during states of emergencies). *See generally* Morgan & Buitrago, *supra* note 227, at 369 n.74 (1992) (acknowledging the Colombian state of siege and its negative impact on liberty).

229. *See* Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, at Final Considerations, § 12, OEA/Ser.L/V/II.106 doc. 59 rev. (June 2, 2000) (calling for a reinstatement of the rule of law); *see also* Davis, *supra* note 150, at 426 (acknowledging thousands of abuses during the use of anti-terrorism laws in Peru). *See generally* Amnesty Int'l, *Annual Report 2001*, http://web.amnesty.org/web/ar2001.nsf/webamrcountries/PERU?OpenDocument (last visited Feb. 2, 2007) (noting how hundreds of prisoners were falsely charged under Peru's anti-terrorism laws).

230. Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala*, at pt. I, subdiv. B, § 19, OEA/Ser.L/V/II.111 doc. 21 rev. (April 6, 2001). *See* Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing notification procedures during states of emergency). *See generally* Gwenda Richards Oshiro, *Donations Deluge Local Relief Agencies*, THE OREGONIAN, Nov. 10, 1998, at A1 (noting the devastation caused by Hurricane Mitch, which created a state of emergency).

231. Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala*, at pt. I, subdiv. B, § 19, OEA/Ser.L/V/II.111 doc. 21 rev. (Apr. 6, 2001). *See* Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (allowing for derogation of human rights with noted exceptions and calling for notification procedures); *see also* Inter-Am. C.H.R., *Annual Report*, at 115, OEA/Ser.L/V/II.54, doc. 9, rev. 1 (1981) (emphasizing the need for the derogation of rights to be narrowly tailored to combat the unique situation that gives rise to the state of emergency).

232. *E.g.,* Hilaire and Others v. Trinidad and Tobago, 2002 Inter-Am. C.H.R. (ser. C) No. 94, ¶ 147 (June 21, 2002) (citing Inter-American Court of Human Rights' 1987 advisory opinion holding that rights to a fair trial were a judicial guarantee that could not be suspended even during states of emergency)*;* Carranza v. Argentina, Case 107.087, Inter-Am. C.H.R., Report No. 30/97, OEA/Ser.L. ¶ 41 (1997) (citing Inter-American Court of Human Rights' 1987 advisory opinion holding that *habeas corpus* could not be suspended even during states of emergency*); see also* Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 29 (2000) (summarizing Inter-American Court of Human Rights' important holdings on issues relating to states of emergency).

important general statements relating to states of emergency.[233] In particular, it noted that it had been the experience of the region that abuses result "from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27."[234] The Court emphasized that derogation from provisions of the Convention would always be illegitimate where they were "resorted to for the purpose of undermining the democratic system"[235] and clarified that rights guaranteed in the Convention may not be suspended unless "very strict conditions are met."[236] Accordingly, "rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency."[237] Measures taken under the Article would violate the Convention if they "infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if

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233. *See* Elizabeth A. Faulkner, *The Right to Habeas Corpus: Only in the Other Americas*, 9 AM. U.J. INT'L L. & POL'Y 653, 669 (1994) (describing that Inter-American Court of Human Rights considered the right to habeas corpus to be the most crucial in times of emergency); Iyer, *supra* note 103, at 140–41 (noting that Inter-American Court of Human Rights in its advisory opinions found that *habeas corpus* remedy was of fundamental importance and therefore should be among non-derogable judicial guarantees); *see also* Jinks, *supra* note 152, at 66 (suggesting that the United Nations followed Inter-American Court of Human Rights' position regarding right to *habeas corpus* in states of emergencies).

234. *See* Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, 518 (1988) (observing that governmental abuses might occur where emergency measures were applied); *see* Mejia Egocheaga and Another v. Peru, Case 10.970, Inter-Am. C.H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 rev., Part V (1996) (finding that sexual abuses were common in areas declared to be under emergencies); *see also* Richard B. Lillich, *Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency*, 85 AM. J. INTL L. 716, 718 (1991) (noting that human rights abuses tend to co-exist with states of emergencies).

235. *See* Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, 518 (1988) (proclaiming that any guaranteed rights cannot be suspended for the purpose of undermining democratic political systems); *see also* Ní Aoláin, *supra* note 65, at 128 (recounting observations by Inter-American Court of Human Rights that states of emergency had been declared to subvert democratic orders); Vagts & Lerner, *supra* note 217, at 189 (suggesting that states of emergencies had been declared in Latin America for the purpose of submerging democracies).

236. *See* Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, 518 (1988) (promulgating that rights guaranteed by the American Convention cannot be suspended by member states unless very strict conditions are satisfied); Faulkner, *supra* note 233, at 667 (illustrating that American Convention set out strict conditions delineating time, territory, and situations in which rights guaranteed by the Convention could be suspended); *see also* Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 333, 345 (1994) (suggesting the derogation of obligation of member states to uphold certain rights of the people was subjected to precise conditions set out by American Convention).

237. Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, 518 (1988); *see also* Garay Hermosilla and Others v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev., ¶ 31 (1996) (holding that strict adherence to democratic regime is the guide to the Court's interpretation of the American Convention); Jeanine Bucherer, *International Decision: Castillo Petruzzi. Merits. Resoluciones y Sentencias, Serie C, No. 52.*, 95 AM. J. INT'L L. 171, 176 (2001) (reporting that Inter-American Court of Human Rights held that because right to judicial review is at the heart of rule of law, petition for *habeas corpus* could not be suspended even in times of emergencies).

they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them, there was a misuse or abuse of power."[238]

The principles outlined by the Court in its opinion on *habeas corpus* were confirmed in a further advisory opinion of October 1987, in which the Court reiterated the fact that, "states of exception or emergency . . . and the essential judicial guarantees in those moments, [are] a critical problem in the Americas"[239] but noted that declarations of a state of emergency "cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency."[240] Thus, there has been a large volume of individual cases before the Court where the domestic situation in States Parties have reached the threshold of an emergency for the purpose of Article 27, thereby necessitating derogations from provisions of the Convention.[241] However, the Court has stressed the importance of strictly controlling the measures taken by states during periods of emergency, noting that there is a "general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it."[242]

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238. *See* Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, ¶ 39, at 522 (1988) (emphasizing that suspension of rights guaranteed by American Convention of Human Rights could not be irrational or disproportional); *see also* Ní Aoláin, *supra* note 65, at 126–27 (informing that the Inter-American Court of Human Rights requires suspension of any rights to be in proportion to emergencies faced by the states). *But see* Jinks, *supra* note 152, at 64 (explaining that ICCPR allows suspension of human rights in exigent situations that "strictly require" it).

239. *See* Inter-Am. C.H.R.: Advisory Opinion on Judicial Guarantees in States of Emergency, ¶ 17, OC-9/87 (Oct. 6, 1987) (recognizing that judicial guarantees of rights had been a critical problem in the Americas).

240. Inter-Am. C.H.R.: Advisory Opinion on Judicial Guarantees in States of Emergency, ¶ 25, OC-9/87 (Oct. 6, 1987) (commanding that some rights could not be subjected to states of emergencies); *see also* Inter-Am. C.H.R.: Advisory Opinion on Habeas Corpus in Emergency Situations, 27 I.L.M. 513, ¶ 13, at 516 (1988) (advising that member states could not absolve themselves of international obligation by declaring states of emergency, and that some fundamental rights cannot be derogated even in times of emergencies); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 24 (describing that although Organization of American States member states were allowed to suspend their obligations under American Convention on Human Rights, such suspension could not extend to certain fundamental human rights).

241. See Ní Aoláin, *supra* note 65, at 129 (observing that Inter-American Court of Human Rights had attempted to delineate whether certain types of crises have passed the threshold of "emergencies" within the meaning of Article 27); *see also*, Iyer, *supra* note 103, at 140 (noting that Inter-American Court of Human Rights rejected governments' argument that terrorist attacks constitute emergencies within the meaning of Article 27). *See generally* Trindade, *supra* note 232, at 10–11 (recognizing that the Inter-American Court of Human Rights tried to define the requisites for an event to be qualified as an "emergency" under Article 27).

242. *See* Inter-Am. C.H.R.: Advisory Opinion on Judicial Guarantees in States of Emergency, ¶ 21, OC-9/87 (Oct. 6, 1987) (stressing that means used to confront emergencies had to be proportional to the threats and could not exceed strict limits provided by the American Convention); *see also* Durand & Ugarte Case, 2001 Inter-Am. C.H.R. (ser. C) No. 68, ¶ 118 (Aug. 16, 2000) (finding that the military forces in Peru used excessive forces disproportional to the perceived threat to confront alleged terrorists); Inter-American Court of Human Rights: Advisory Opinion on Habeas Corpus in Emergency Situations, ¶ 38, Jan. 30, 1987, 27 I.L.M. 513, 522 (1988) (reiterating that the suspension of rights guaranteed by the American Convention would be unlawful if it exceeded the strict limits provided by the Convention).

It was noted earlier that the catalogue of non-derogable rights protected by Article 27(2) is much more extensive than those enunciated in either the ECHR or the ICCPR.[243] The last phrase of Article 27(2), which deems the "judicial guarantees essential for the protection" of the rights listed to be non-derogable, has been of particular use in the Court's duty to uphold fundamental rights during periods of emergency.[244] Since the issuance of the two advisory opinions in 1987, the Court has found States Parties guilty of a violation of Article 27 in a plethora of cases.[245] In *Neira Alegría et al. v. Peru*,[246] the Court found that Peru had violated Articles 7(6) and 27(2) of the Convention by virtue of the Supreme Decrees of June 1986, declaring a state of emergency in the provinces of Lima and El Callao, and declaring three prisons to be Restricted Military Zones.[247] Although the decrees did not explicitly suspend the right of *habeas corpus*, they "translated into an implicit suspension" of the right.[248] In another case concerning the state of emergency in Peru, the State Party submitted that "from 1980 onward, terrorism had created a very tense situation in Peru that had necessitated successive, government-ordered states of emergency," all of which, it claimed, were in accordance with

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243. *See* Faulkner, *supra* note 233, at 682 (explaining that the European Convention provided lower standards for upholding human rights as compared to the American Convention); Macdonald, *supra* note 27, at 230–31 (explaining that the American Convention set out more extensive non-derogable rights than the enumerated non-derogable rights provided by the European Convention and the U.N. Covenant); *see also* Inter-Am. C.H.R.: Advisory Opinion on Judicial Guarantees in States of Emergency, ¶ 20, OC-9/87 (Oct. 6, 1987) (adopting an expansive approach, rather than an enumerated approach, to non-derogable rights).

244. *See* Ní Aoláin, *supra* note 65, at 128 (assessing that the Inter-American Court of Human Rights held that any suspension of rights had to be examined according to Article 27 requirements); *see also* Faulkner, *supra* note 233, at 673 (noting that the Inter-American Court of Human Rights found that suspension of right to Habeas Corpus did not conform to Article 27(2)); Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in* Human Rights *Law*, 26 U. MIAMI INTER-AM. L. REV. 297, 324–25 (1995) (presenting that Article 27(2) of the American Convention on Human Rights prohibited suspension of certain rights).

245. *See* Hilaire and Others v. Trinidad and Tobago, 2002 Inter-Am. C.H.R. (ser. C), No. 94, ¶ 150 (June 21, 2002) (listing some prior cases and opinions finding violations of Article 27). *See generally* Bucherer, *supra* note 237, at 175 (informing that substituting military judges for impartial judges even in times of emergencies violated Article 27 of the American Convention); Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 945–46 (1994) (explaining that Chile's derogation of some human rights violated Article 27 of American Convention).

246. Neira Alegría v. Peru, 1995 Inter-Am. Ct. H.R (ser. C), No. 20, ¶¶ 15–19 (Jan. 19, 1995), *available at* www.umn.edu/humanrts/iachr/e!13excp.pdf.

247. *See id.* (describing Peru's Supreme Decree that Peruvian government's actions under the Decree violated various provisions of the American Convention); *see also* Julie Lantrip, *Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 551, 564–65 (1999) (reasoning that in Neira Alegría et al. case, Peruvian government also committed Article 5 violations that could not be justified by Article 27 derogation provision); Orna Ben-Naftali & Keren R. Michaeli, *"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 286 (2003) (condemning Peruvian government for using unjustifiable forces against alleged terrorists in violation of the American Convention).

248. *See* Neira Alegría v. Peru, 1995 Inter-Am. C.H.R. (ser. C), No. 20, ¶ 84 (Jan. 19, 1995), *available at* http://www1.umn.edu/humanrts/iachr/e!13excp.pdf (last visited Feb. 19, 2007) (finding that unjustifiable killing violated judicial guarantees by the American Convention); *see also* Ben-Naftali & Michaeli, *supra* note 247, at 286 (holding that Peruvian government's use of unjustifiable forces against alleged terrorists had in effect violated the American Convention, even though it did not explicitly suspend the right to habeas corpus).

Article 27(2).[249] The Court disagreed with the contention that the state of emergency had been fully in accordance with the Convention and found, *inter alia*, that there had been violations of Articles 5 and 9, both of which are non-derogable under the terms of Article 27(2).[250] In disagreeing with the majority, stating that there had been violations of Articles 5 and 9, Judge Vidal-Ramirez in his dissenting opinion, highlighted the fact that the

> terrorist violence took a terrible toll on life in Peru and prompted enactment of laws classifying terrorism as a crime and establishing increasingly more severe penalties. These laws invested the police with the kind of authority and power that made them more effective in the war on terrorism and enabled them to bring terrorists to trial.[251]

The approach of the Inter-American Commission and Court of Human Rights has arguably been somewhat more vociferous in their opposition to the idea of entrenched emergencies.[252] Of course, the phenomenon has been an all too prevalent one in that hemisphere, but that notwithstanding, the supervisory organs of the European Convention, in particular, and the Human Rights Committee have shown a real lack of willingness to engage in an entrenched emergency debate.[253] Rather than recognizing situations of entrenched emergencies and raising the threshold of what constitutes a "public emergency" accordingly, the monitoring bodies have approached each application before them on a case-by-case basis and been overly

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249. *See* Castillo-Petruzzi v. Peru, 1999 Inter-Am. C.H.R. (ser. C), No. 52, ¶ 56 (May 30, 1999) (noting that Peruvian government claimed that its actions were justified in light of national emergencies that consisted of terrorist acts). *See generally* Bucherer, *supra* note 237, at 171–72 (describing Peruvian government's resistance to Inter-American Court's rulings); Karen C. Sokol, *International Decision: Ivcher Bronstein*, 95 AM. J. INT'L L. 178, 178–79 (2001) (recounting Peruvian government's strong resistance against Inter-American Court's rulings).

250. *See* Sokol, *supra* note 249, at n.5 (noting that Peru's military decree was nullified by the Inter-American Court for violating the American Convention). *See generally* Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J. L. & TRADE AM. 429, 457 (2006) (explaining that later Peruvian courts integrated Inter-American Court's holdings in Castillo-Petruzzi et al. Case into Peru's domestic jurisprudence).

251. *See* Castillo-Petruzzi v. Peru, 1999 Inter-Am. C.H.R. (ser. C), No. 52, ¶ 3 (May 30, 1999). Partially Concurring and Partially Dissenting Opinion of Judge Vidal-Ramirez.

252. *See* Ní Aoláin, *supra* note 65, at 108 (analyzing that the Inter-American Court had been more rigorous and strict when assessing states of emergencies and relating doctrines as compared to its European counterparts); Iyer, *supra* note 103, at 148 (arguing that the Inter-American Court stood in a stronger stance when facing controversies arising from application of states of emergencies in its member states than either the European Convention or the U.N.). *See generally* Edward J. Pauw & Ari Chaim Shapiro, Comment, *Defamation, the Free Press, and Latin America: A Roadmap for the Inter-American Court of Human Rights and Emerging Democracies*, 30 U. MIAMI INTER-AM. L. REV. 203, 221–22 (1998) (summarizing different categories of rights in relation to states of emergencies in American, European, and other international systems).

253. *See Gross 1*, *supra* note 4, at 442 (arguing that the European Convention and the Human Rights Committee failed to look into the problem of "entrenched emergencies" when hearing the cases before them); *see also* Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1947 (2004) (remarking that European Court of Human Rights deferred to the states' judgment as to what constituted emergencies that could justify suspension of guaranteed right because the Court believed that states were in the best position to make that judgment). *See generally* Mizock, *supra* note 67, at 230–37 (summarizing rules and cases concerning states of emergencies in Europe).

deferential to the States Parties concerned in their assessment of the existence of public emergencies threatening the life of the nation.[254] The following section will investigate if the new phenomenon of the permanent "emergency" engendered by the "war on terror" is analogous to the traditional entrenched emergency and examine their shared characteristics.

C. "International Terrorism": The New Emergency?

We have seen in some of the cases outlined above that political violence or "terrorism" of one form or another has often been the justification for the proclamation of a state of emergency. The traditional emergencies discussed were usually the product of internal political unrest accompanied by "wars" of national liberation. Throughout the history of international law, a "war," and a resultant "emergency," usually began with a *casus belli* or a declaration of war on a date certain and ended with an armistice or perhaps a peace treaty, again on a date certain. In contrast, today's unlimited and undefined "emergency" is a direct result of the "threat of international terrorism."[255] This change implicates the question of whether it is a legal anachronism to apply the body of international law concerning "emergencies" resulting from "wars," occurring during a finite time period, to the present situation. Governmental authorities' actions for the purposes of national security are admittedly often accompanied by societal demand for stringent laws to deal with the terrorists.[256] While authorities may take advantage of the broad public rise in support for a swift government response following acts of politically motivated violence, such as the attacks of September 2001, Brinkley claims that as we enter a period of apparently "open-ended crisis," we cannot reasonably expect that the heretofore

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254. *See*, *e.g.*, Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25, ¶ 207, at 91 (1978) (commenting on the "margin of appreciation" due state institutions under Article 15(1) of the ECHR); *see also Gross 1*, *supra* note 4, at 487 (asserting that the failure of the European Commission to fully appreciate the lasting nature of entrenched emergencies has led to the continuing justification of human rights violations); Angela Thompson, *International Protection of Women's Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Woman Center v. Ireland*, 12 B.U. INT'L L.J. 371, 379–80 (1994) (discussing the "margin of appreciation" doctrine employed under the ECHR, noting that its use has extended beyond cases of public emergency and has become a broad deference to state institutions).

255. *See* Adam Bell, *CBD Faces Lockdown—Terror Attack Plans Revealed*, SUNDAY TELEGRAPH (Australia), Sept. 17, 2006, at 29 (describing the significant preparation of Sydney's terrorist response plan); *see also* Robyn E. Blumner, *From Tommy Franks, a Doomsday Scenario*, ST. PETERSBURG TIMES (Fla.), Dec. 7, 2003, at 1P (noting that the emergency powers asserted in the U.S. are the same as those asserted in traditional wars, yet claiming that the nature of the present emergency does not justify the use of traditional emergency powers); Helen Rae, *Crisis Team Deals with "Disaster" at Airport*, EVENING CHRONICLE (Newcastle, Eng.), Oct. 26, 2006, at 34 (detailing an emergency response exercise at the Newcastle airport, an example of the new state of emergency).

256. *See* Michael Elliot, *How the U.S. Missed the Clues*, TIME, May 27, 2002, at 24 (analyzing American failures in counter-terrorism before September 11, 2001, and calling for significant modifications in strategy); *see also* Stuart Taylor, Jr., *Emergency Powers Should Be Temporary*, NAT'L J., Apr. 22, 2006, ¶ 7 (recounting the anonymous opinion of a Clinton Administration lawyer who would have argued for broad Presidential power following the attacks on September 11, 2001); Hugh Williamson, *Schroder Gets the Chance to Push Security Fears up the Election Agenda*, FIN. TIMES (London), July 14, 2004, at 10 (explaining the reaction to the London subway bombings in German society).

highly robust view of civil liberties that has been embraced, especially in the last number of decades, should survive unaltered.[257]

This is a claim that is becoming increasingly hard to maintain in the face of mounting public disagreement at the methods being used by governmental authorities in the "war on terror."[258] There has been sustained public outrage and debate surrounding the incommunicado detention of hundreds of alleged terrorist suspects at Guantanamo Bay and the treatment of prisoners in Iraq.[259] The international community is rapidly realizing that once relinquished in the fight against "terrorism," the same civil rights that liberal democracies are entrusted with upholding may be difficult to retrieve.[260] The following section will examine the new "emergency" we now face and investigate how it has been guided by the more traditional kind examined above.

V. Conjuring Up New Emergencies: Beyond September 11, 2001

A. Is the "Terrorist Threat" a New Emergency?

Shortly after the attacks on the World Trade Center of September 2001, President Bush deemed them to be an act of war and the United States was thereby at war with the terrorists

257. *See* Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 23 (Richard C. Leone and Greg Anrig, Jr., eds., 2003) (arguing that traditional conceptions of civil liberties ought not to prevail completely in the war on terror); Bruce Ackerman, *Putting Reason Back into Emergency Powers*, B. GLOBE, July 2, 2006, at K9 (questioning whether the new threat of terrorism justifies "a large shift in our traditional balance between freedom and security").

258. *See* Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 241–42 (2005) (arguing that the slippery slope arguments asserted by civil liberty advocates have been justified); *see also* Laura K. Donohue, *The British Traded Rights for Security, Too*, WASH. POST, Apr. 6, 2003, § B, at 1 (arguing that U.S. ought to avoid the overbroad restrictions on liberty that were common in the United Kingdom's response to violence in Northern Ireland); *This Expensive and Illiberal Intrusion into Our Lives*, INDEP. (London), Dec. 20, 2006, at 26 (rejecting the idea of national identity cards in Britain as an infringement on civil liberties).

259. *See* James Norton, *Roots of U.S. War Prisoners' Rights Run Deep*, CHRISTIAN SCI. MONITOR, June 14, 2006, at 9 (decrying the conditions of detainment at Guantanamo Bay and noting recent prisoner suicides); *see also* Donovan Webster, *The Man in the Hood and New Accounts of Prisoner Abuse in Iraq*, VANITY FAIR, Feb. 2005, at 122 (describing the U.S. military's physical and sexual abuse of Iraqi prisoners); Josh White, *Documents Tell of Brutal Improvisation by GIs: Interrogated General's Sleeping-Bag Death, CIA's Use of Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, § A, at 1 (stating that prisoner abuses have been present at detainment centers in Iraq, Afghanistan, and Guantanamo Bay).

260. *See* Mary Ann Glendon, *Interdisciplinary Approach: Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523–24 (1992) (noting that most liberal democracies have civil liberty guarantees in their constitutions); *see also* Michaelsen, *supra* note 52, at 277 (asserting that both the U.K. and Australia have responded to the threat of terrorism by failing to live up to their commitments under ECHR and ICCPR); Andrew Grice, *Brown Must Lose the Old Script to Find a "New Politics,"* INDEP. (London), Jan. 13, 2007, at 16 (quoting a former British government adviser who claimed that "the danger is . . . we would not get the balance right between security and civil liberties and that it would then be difficult to change").

responsible.[261] In order to facilitate the effective functioning of this "war," House Judiciary Committee Chairman F. James Sensenbrenner introduced the "Uniting and Strengthening of America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA PATRIOT Act) on October 2, 2001, which passed at breathtaking speed and became law on October 26, 2001.[262] As observed by Thomas,

> Emergency legislation passed as a consequence of national catastrophe associated with terrorism has a predictable pattern. It involves an unseemly scramble between the Executive and legislature so that they are seen by the public and the media to be doing "something." A previously prepared emergency Bill is dusted down and hastily pushed through the legislature. Policy and law are thereby tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to the media and public outcry. Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action. Indeed, such hasty responses may even have a negative effect in isolating vulnerable groups and disenchanting sections of society. The result is predictably disturbing: enhanced powers given to security agencies and the police; deviation from established principles of law; human rights abuses; alienation of innocent, affected people; and disappointing results, even alienating consequences, of these attempts to control anti-terrorist activities, which have not been subject to normal standards of scrutiny.[263]

In searching for similarities between traditional emergencies and the "new" emergency situation engendered by the terrorist threat, one need look no further than to the ill-thought-out

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261. *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) (asserting that the war on terror "will not end until every terrorist group of global reach has been found, stopped and defeated"); *see also* Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, *in* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 53, 53 (David Wippman and Matthew Evangelista, eds., 2005) (noting the questions surrounding the President's declaration of war); Katharine Q. Seelye and Elisabeth Bumiller, *Bush Labels Aerial Attacks "Act of War,"* N.Y. TIMES, Sept. 13, 2001, at A16 (describing the President's response to the attacks).

262. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 18 U.S.C.); *see also* Dana Milbank, *House Bill Would Expand Federal Detention Powers*, WASH. POST, Oct. 2, 2001, at A01 (discussing Representative Sensenbrenner's introduction of the House Resolution that was later passed as the USA PATRIOT Act). *See generally* G. Robert Hillman & Christopher Lee, *Bush Signs Bill to Widen Fight Against Terrorism*, DALLAS MORNING NEWS, Oct. 27, 2001, at 12A (outlining provisions in the USA PATRIOT Act that aid in the government's ability to investigate terrorism domestically).

263. Phillip A. Thomas, *Emergency and Anti-Terrorist Power: 9/11: USA and UK*, 26 FORDHAM INT'L L.J. 1193, 1196–97 (2003) (noting further that legislative responses to terrorism often have the tendency to affect normal criminal prosecutions); *see* Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1261 (2002) (analyzing the effect of the USA PATRIOT Act on grand jury procedure and describing the speed with which Congress passed the Act as "unprecedented"); Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 296 (2003) (claiming that the haste of the government in passing the USA PATRIOT Act led to legislation that did less to combat terrorism than to allow more government surveillance of digital communications).

legislative response. Before elaborating on this however, let us first examine the new situation under the long-established criteria established by the international monitoring bodies.

B. "War or Other Public Emergency Threatening the Life of the Nation"

It was noted above that to meet the threshold of "war or other public emergency threatening the life of the nation" the emergency must be of a particular gravity, the necessary criteria for which were most succinctly outlined by the European Commission of Human Rights in its consideration of the *Greek Case*.[264] If the contention of President Bush is true and the United States is in fact at war in the "war on terror," then the (somewhat generous) presumption that there exists a public emergency for the purposes of, in this case, Article 4(1) of the ICCPR can possibly be made.[265] Although no formal notification of derogation has been sent by the U.S. authorities, even if they were to do so they would still be bound by the requirement that a state may not invoke Article 4 "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."[266]

However, to date, the only European country that declared a state of emergency in the wake of the threat posed by "international terrorism" is the United Kingdom, having derogated from Article 5 of the European Convention and Article 9 of the ICCPR. In its notification of derogation under Article 4(3) of the Covenant on Civil and Political Rights, the existence of a public emergency was explained in the following terms:

> The terrorist attacks in New York, Washington, DC and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries.
>
> . . .
>
> The threat from international terrorism is a continuing one.
>
> . . .

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264. *See* Denmark, Norway, Sweden and Netherlands v. Greece, App. Nos. 3321/67; 3322/67; 3323/67; 3344/67, 12 Y.B. Eur. Conv. on H.R. 1, 70–71 (Eur. Comm'n on H.R. 1969) [hereinafter the *Greek Case*] (stating the criteria for a showing of the existence of a public emergency under the ECHR); *see also* Stapleton, *supra* note 69, at 588–89 (remarking on the use of an objective standard of proof in finding that there was insufficient public emergency to justify the political imprisonments and derogations of rights in the *Greek Case*).

265. *See* Bostan, *supra* note 89, at 30 (maintaining that the attacks of September 11, 2001 met the standards for public emergency under both the ICCPR and ECHR). *See generally* Michaelsen, *supra* note 52, at 288–89 (examining the jurisprudential meanings of "public emergency" under the ICCPR and ECHR, both of which lack specific definitions).

266. *See* U.N. Hum. Rts. Committee, *General Comment 29, States of Emergency (Article 4)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (restricting the use of Article 4 derogations); *see also* Michaelsen, *supra* note 42, at 292 (discussing Article 4(1)'s requirements that derogation measures must be consistent with international law and that war does not justify the discrimination of certain classes of citizens); Kenneth Roth, *The Law of War in the War on Terror*, 83 FOREIGN AFF. 1 (2004) (noting that international law supplements typical rules of law enforcement in times of war).

> There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of terrorists being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.
>
> As a result, a public emergency, within the meaning of Article 4(1) of the Covenant, exists in the United Kingdom.[267]

The notification also details the provisions of the legislation enacted to deal with the increased "threat," the Anti-terrorism, Crime and Security Act 2001, specifically those relating to extended powers of detention that may be inconsistent with the obligations under Article 9 of the Covenant, but contains relatively little in the way of explanation as to why the new provisions were necessary.[268]

Some instruction on the prevailing political climate leading to the declaration of a state of emergency is discernible from the parliamentary debates surrounding the derogation from the corresponding provision of the European Convention, Article 5.[269] Debating the "threat" in the House of Commons on November 19, 2001, then Home Secretary, David Blunkett, noted that "[c]ircumstances and public opinion demanded urgent and appropriate action after the September 11th attacks on the World Trade Center and the Pentagon."[270] Subsequently, the

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267. *See* Notification of the United Kingdom's Derogation from Article 9 of the International Covenant on Civil and Political Rights, Dec. 18, 2001, *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (detailing the justifications for the United Kingdom's derogation); *see also* Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 344 (2004) (reasoning that Britain's derogation declarations after September 11, consistent with pre-existing procedures, revealed a flaw in the U.S. government's claim of "unavoidable expediency and unmanageable emergency"); Timothy K. Kuhner, Note, *Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419, 469–70 (2003) (discussing the possibility of shame that nations face when they choose to publicly derogate their obligations under the ICCPR and other human rights treaties).

268. *See* Notification of the United Kingdom's Derogation from Article 9 of the International Covenant on Civil and Political Rights, Dec. 18, 2001, *available at* http://www.unhchr.ch /html/menu3/b/treaty5_asp.htm (extending powers of arrest and detainment for purposes of removing persons from the U.K.); *see also Gross 2*, *supra* note 4, at 1033 (noting the speed with which the Anti-terrorism, Crime, and Security Act passed in the British House of Commons); Henning, *supra* note 2, at 1266–67 (arguing that the British government acted properly in passing the Anti-terrorism, Crime, and Security Act).

269. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 124 (introducing the subject of Article 5 obligations); *see also* Scheppele, *supra* note 81, at 127 (discussing the United Kingdom's brief efforts at reversing its derogations of Article 5 requirements through the Terrorism Act of 2000, the substance of which was amended through the renewed derogations of post-9/11 legislation); *UK Anti-terror Law Faces Court Challenge*, UNITED PRESS INT'L, Dec. 14, 2001, ¶¶ 1–3 (highlighting the immediate challenges that the U.K. anti-terror legislation faced).

270. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 22 (asserting the need for action in the face of terrorist threats); *see also* Matthew Beard, *Public Opinion: Two-Thirds of Britons Back Blair Action*, INDEP. (London), Sept. 24, 2001, at 6 (discussing the public opinion poll that showed majority support for military action against terrorists); Joyce McMillan, *Fighting for the Right to Be Free from This Fear*, THE SCOTSMAN, Sept. 27, 2001, at 12 (remarking on the need for a strong response to terrorism, yet cautioning for a focus on fundamental democratic values).

then Parliamentary Under-Secretary of State for the Home Department, Beverly Hughes, clarified that the U.K. was facing a public emergency within the meaning of Article 15 of the Convention due to the "escalation in the scale and scope of the international terrorist threat to western interests," evidenced by the attacks of September 11; the fact that there had been "a number of public threats made by bin Laden and his supporters against western interests"; the increased risk of attack due to the "British role in the U.S.-led coalition against international terrorism"; and the "evidence to show that international terrorist organisations have links with the U.K." and therefore constituted a threat.[271] In response to the submission of Mr. Mark Fisher that the test for threatening "the life of the nation" imposed by Article 15 is greater than the mere recognition of a risk, the Under-Secretary could only surmise that "an attack of the kind sustained by the American people" would "clearly threaten the life of the nation."[272]

With even the most generous interpretation of the facts as forwarded by the Under-Secretary, the deduction that there existed a public emergency within the meaning of Article 15 of the Convention does not rest easy with the previous pronouncements of the Court.[273] For example, there is nothing to suggest that the threat to the "life" of the U.K. was actual or imminent.[274] The existence of the other characteristics of a public emergency threatening the life of the nation, that is, that its effects would involve the whole nation, the continuance of the organized life of the community would be threatened, and the crisis must be exceptional in that

271. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 127 (listing reasons for Britain's new legislation); *see also* Philip Johnston, *"Terror Groups" Hiding in the Heart of Britain*, DAILY TELEGRAPH (London), Sept. 28, 2001, at 14 (quoting Jack Straw, Britain's Foreign Secretary, who asserted that the presence of terrorist organizations and sympathizers in Britain was the fault of Parliament and the courts); Colum Lynch, *Officials Barred at U.N. Site After Crash: Police Close Building for More than Hour*, WASH. POST, Nov. 13, 2001, § A, at 12 (reporting on the effect of Osama bin Laden's threats toward the United Nations).

272. *See* 375 PARL. DEB., H.C. (6th ser.) (20061) 127–28 (Under-Secretary arguing that the risk faced by Britain was sufficient to justify the new legislation). *See generally* Lawless v. Ireland (No. 3), App. No. 332/57, 1 Eur. H.R. Rep. 15, 31 (1961) (outlining the meaning of circumstances "threatening to the life of the nation" under the derogation requirements of the ECHR); Macdonald, *supra* note 27, at 239–40 (detailing the possibility that arguably localized emergencies could affect national life, as would be the case with terrorist attacks).

273. *See* the *Greek Case*, 12 Y.B. Eur. Conv. on H.R. at 70–71 (listing the requirements for a public emergency under Article 15); *see also* Haase and Another v. Germany, 2004-III Eur. Ct. H.R. 119, 140–41 (noting that the state's emergency measures are only justified upon a showing of imminent danger). *But see* A and Others v. Secretary of State for the Home Department [2004] UKHL 56, [28]–[29] (Eng.) (judgment of Lord Bingham) (concluding that the government's action was justified under the ECHR because of the "breadth of appreciation" due to the state in its decision to declare a public emergency).

274. In fact, with the benefit of hindsight we know this to be the case as the "threat" did not materialize until July 2005. *See* Shelley Emling & Rebecca Carr, *Attack on London: Nations United to "Defeat This Terrorism"; Fear Drives Urgency in Search for Bombers*, ATLANTA J.-CONST., July 8, 2005, at 1A (reporting on the subway bombings in London). One can also make the argument here that had the U.K. not joined with the U.S. in the war in Iraq, it possibly would not have been subjected to the attacks of July 7, 2005. Ironically, the 2001 Act only makes provision for the indefinite detention of foreign suspects, whereas the attacks of July 7, 2005 proved to be carried out by British nationals. *See generally* Macdonald, *supra* note 27, at 241 (stressing that the imminence requirement is a necessary "time limit on states' capacity to take extraordinary measures").

normal measures or restrictions would be inadequate, at the time of the United Kingdom's derogation is equally dubious.[275]

C. "Strictly Required by the Exigencies of the Situation"

The measures enacted by the United Kingdom's authorities, most notably the enactment of the Anti-terrorism, Crime and Security Act 2001, in response to the perceived threat of "international terrorism" have been roundly criticized by international legal scholars and Non-governmental Organizations alike.[276] While the Act and its provisions have been examined in detail in notable works,[277] it is pertinent to note here those provisions that are clearly questionable in terms of their being "strictly required by the exigencies of the situation"[278] and a proportional response to the threat as professed by the United Kingdom's authorities.[279] The Act may be summarized under the three main headings of financial tracking, detention and identification of suspected offenders, and security measures.[280] It is the provisions under the second of

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275. *See* Lawless v. Ireland (No. 3), App. No. 332/57, 1 Eur. H.R. Rep. 15, 31 (1961) (concluding that the ECHR's derogation clauses may be invoked only in "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed"); *see also* U.N. Hum. Rts. Committee, *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, ¶ 6, U.N. Doc. CCPR/CO/73/UK (Dec. 6, 2001) (expressing reservations about whether Britain's new legislation is consistent with its obligations under Article 4 of the ICCPR); Michaelsen, *supra* note 42, at 294–5 (arguing that Britain's claim of public emergency in 2001, as opposed to the claims it made between 1972 and 1992, is not justified under the ECHR).

276. *See* Mark Elliott, *Constitutional Developments*, 1 INT'L J. CONST. L. 334, 335 (2003) (declaring the Anti-terrorism, Crime and Security Act 2001 to be an overreaction to the events of September 11); Williams, *supra* note 136, at 693 (denouncing the Anti-terrorism, Crime and Security Act 2001 for its lack of proportionality); Amnesty Int'l, *United Kingdom—Justice Perverted Under the Anti-terrorism, Crime and Security Act 2001*, AI Index EUR 45/029/2003, Dec. 11, 2003, *available at* http://web.amnesty.org/library/index/engeur450292003 (last visited Feb. 5, 2006) (finding that certain provisions of the Anti-terrorism, Crime and Security Act 2001 violate the rights of detainees).

277. *See generally* CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION (Oxford University Press 2002) (providing a general overview of the Anti-terrorism, Crime and Security Act 2001); Christopher Harding, *International Terrorism: The British Response*, 2002 SING. J. LEGAL STUD. 16, 16 (2002) (summarizing the Anti-terrorism, Crime and Security Act 2001 under three main headings: financial tracking; detention and identification of suspected offenders; and security measures); Henning, *supra* note 2, at 1288–89 (highlighting the important safeguarding provisions within the Anti-terrorism, Crime and Security Act 2001); Thomas, *supra* note 263, at 1223 (chronicling the events surrounding the United Kingdom's derogation from the European Convention on Human Rights); Williams, *supra* note 136, at 693 (suggesting that many of the items included in the Anti-terrorism, Crime and Security Act 2001 were a carryover from other terrorism related legislation).

278. *See* Anti-terrorism, Crime and Security Act 2001, 2001 c. 24 (Eng.).

279. *See* Michaelsen, *supra* note 52, at 302 (doubting whether the UK made a good faith derogation from its international obligations); Colin Warbrick & Dominic McGoldrick, *Current Developments—Public International Law*, 52 INT'L & COMP. L.Q. 245, 253 (2003) (commenting on the discriminatory nature of several provisions of the Anti-terrorism, Crime and Security Act 2001); Keith, *supra* note 14, at 477–78 (questioning the assertion of the legislature that the provisions of the Anti-terrorism, Crime and Security Act 2001 are narrowly tailored to its compelling state interest).

280. *See* Sangeeta Shah, *United Nations and Regional Human Rights Systems: Recent Development*, 5 HUM. RTS. L. REV 403, 404 (2005) (cataloguing the various heightened security measures introduced by the legislature as part of the Anti-terrorism, Crime and Security Act 2001); Warbrick & McGoldrick, *supra* note 279, at 253 (reporting that the Anti-terrorism, Crime and Security Act 2001 provided for the implementation of a Terrorism Financing Convention). *See generally* Williams, *supra* note 136, at 693 (suggesting that many of the items included in the Anti-terrorism, Crime and Security Act 2001 were a carryover from other terrorism related legislation).

those headings that necessitated derogation from Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights.[281] Section 21 of the Act provides for the power of certification where the Secretary of State reasonably believes that a person's presence in the U.K. is a risk to national security and suspects that the person is a terrorist, with "terrorist" defined as a person who "is or has been concerned in the commission, preparation or instigation of acts of international terrorism," "is a member of or belongs to an international terrorist group," or has links with an international terrorist group."[282] Following certification, certain types of detention are possible and provided for in Section 23.[283] As Harding has noted, it is now possible to detain

> suspected terrorists under the existing provisions of the Immigration Act 1971, notwithstanding the fact that their removal from the U.K. is temporarily or indefinitely prevented by a point of law relating to an international agreement or a practical consideration. Such detention is either that of persons liable to examination or removal or that pending deportation.[284]

It is little wonder then that it has been suggested that this amounts to indefinite detention without trial, effectively internment.[285] The effect of this provision of the Act was not lost on one MP:

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281. *See* Thomas, *supra* note 263, at 1217 (chronicling the events surrounding the United Kingdom's derogation from the European Convention on Human Rights). *See generally* Inna Nazarova, Comment, *Alienating "Human" from "Right": U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT'L L.J. 1335, 1406 (2002) (emphasizing the fact that the UK is the only European government to derogate from its international human rights treaty obligations).

282. *See* Elliott, *supra* note 276, at 335 (expressing concern that individuals suspected of terrorist activity may be detained indefinitely without a trial); *see also* Keith, *supra* note 14, at 438 (scrutinizing the vagueness in some of the provisions in section 21 of the Anti-terrorism, Crime and Security Act 2001); Nazarova, *supra* note 281, at 1407 (denoting that reasonable suspicion is the standard under section 21 of the Anti-terrorism, Crime and Security Act 2001).

283. *See* Michaelsen, *supra* note 52, at 277–79 (recognizing the fact that upon certification, a suspect may be detained indefinitely if either a "point of law" or "practical consideration" prevents his removal); Kent Roach & Gary Trotter, *Article: Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 1007 (2005) (focusing on the possibility of continued detention despite the legal and practical issues under section 23 of the Anti-terrorism, Crime and Security Act 2001); Christopher Sallon, *William Reece Smith, Jr. Distinguished Lecture in Legal Ethics: Taking Liberties with Justice—The Legal Landscape in Britain Post September 11th*, 35 STETSON L. REV. 983, 995 (2006) (stating that a suspect may be detained indefinitely when he could not be extradited due to the prospect of being tortured in his home country).

284. Harding, *supra* note 277, at 22 (explaining the practical circumstances that may prevent removal of suspected terrorists); *see* Rhonda Powell, *Comparative Constitutionalism and Rights: Human Rights, Derogation and Anti-Terrorist Detention*, 69 SASK. L. REV. 79, 86–88 (2006) (affirming the link between the detention powers under the Anti-terrorism, Crime and Security Act 2001 and the Immigration Act of 1971); Sallon, *supra* note 283, at 995 (laying out an instance when a suspected terrorist would not be deportable).

285. *See* Thomas, *supra* note 263, at 1223 (indicating that Part 4 endows the executive with the power of internment); Clive Walker, *Science and Technology of Terrorism and Counter-Terrorism*, 53 INT'L & COMP. L.Q. 257, 257 (2004) (book review) (remarking on the fact that the United Kingdom has once again returned to its draconian policy of internment). *But see* Lord Peter Goldsmith, *Ramo Lecture: Terrorism and the Rule of Law*, 35 N.M. L. REV. 215, 225 (2005) (stating that the legislature's policy is not one of internment since the suspected terrorists are free to leave the country).

> The House should not mince its words. The Executive are in effect suspending habeas corpus and ending trial by jury, a right that can be traced back more than 700 years to the Magna Carta. We are bringing in indefinite internment and introducing to the English mainland something that we never did even at the height of the IRA offensive. As with internment, the normal burden of proof will be reversed: people will be treated as guilty unless they can prove their innocence. Those who are detained will not be able to see the evidence gathered against them, and will therefore not be able to challenge its accuracy.[286]

The remainder of the debate on the 2001 Act reveals little in the way of governmental explanation as to why some of the harsher provisions of the Act were "strictly required by the exigencies of the situation."[287] Indeed, successive attempts at questioning the government as to why the United Kingdom was the only member state of the Council of Europe that felt the international "terrorist" threat necessitated a legislative response so draconian in nature that it required a derogation from the European Convention did not provoke any elaboration on the issue.[288] The controversial provisions in Part IV, Sections 21-23, were renewed on March 3, 2004,[289] thus ensuring that they remained in force despite the conclusion of the Joint Human Rights Committee that "[i]nsufficient evidence has been presented to Parliament to make it possible (for the Committee) to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life

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286. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 136 (warning by Mr. Graham Allen, who addressed the dangers that accompany a return to the prior internment policy); Roach & Trotter, *supra* note 283, at 994 (documenting the fact that terrorism legislation in the UK uses lower fault levels in addition to lower burdens of proof); Sallon, *supra* note 283, at 995 (confirming the burden shifting approach in the Anti-terrorism, Crime and Security Act 2001).

287. *See* JOINT COMMITTEE ON HUMAN RIGHTS, SECOND REPORT, 2001-2, H.L. & H.C., ¶ 37, *available at* http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/ 037/3702.htm (finding a lack of thorough consideration of all the implications of the proposed 2001 Act legislation). *See generally* David Feldman, *The Impact of Human Rights on the UK Legislative Process*, 2004 STAT. L. REV. 91, 94 (2004) (providing one likely explanation for the lack of evidence of a debate on the 2001 Act); *Gross 2*, *supra* note 4, at 1033 (inferring that the urgency of the situation may be one reason for a lack of vigorous debate).

288. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 138 (expressing the frustration of one legislator with the proposed Bill); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23 (2006) (describing the Anti-terrorism, Crime and Security Act 2001 as the most draconian legislation that Parliament passed in peacetime history in over a century); Amnesty Int'l, *United Kingdom—Justice Perverted Under the Anti-terrorism, Crime and Security Act 2001*, AI Index EUR 45/029/2003, Dec. 11, 2003, *available at* http://web.amnesty.org/library/index/engeur450292003 (conveying grave concern over the draconian nature of some of the emergency provision of the Anti-terrorism, Crime and Security Act 2001).

289. *See* Powell, *supra* note 284, at 88 (marking the renewal of sections 21 and 23). *But see* Anti-terrorism, Crime and Security Act 2001 (Continuance in Force of Sections 21 to 23) Order 2004, 2004 No 751 (repealing the order continuing the application of sections 21 and 23); Kent Roach, *Terrorism, Globalization and the Rule of Law: Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2164 (2006) (citing the subsequent repeal of certain measures in Part IV of the Anti-terrorism, Crime and Security Act 2001).

of the nation."[290] The Committee was not persuaded that it was "appropriate to renew Part 4 when there is no end in sight of the 'emergency' by which these exceptional powers were considered to be justified."[291]

D. History Repeating Itself: The Temporary Permanence of the New "Emergency"

The question posed earlier—Is the terrorist threat a "new emergency"?—has unfortunately been rendered largely academic by events since September 11, 2001. Regardless of whether we are convinced that the threat posed by international "terrorism" actually threatens the life of the nation or indeed whether this position can be maintained upon a balanced legal analysis, the fact remains that while legislators continue to act as if a public emergency exists, from the point of view of individual human rights protections, it does.[292] Where the rules of the game are indeed changing appears to be in the jettisoning of the rules pertaining to international legal responsibilities.[293] However, whereas previously states of emergency were declared to meet a (usually) specific threat, for example to deal with the political violence in Northern Ireland or the PKK "terrorist" threat in southeast Turkey, we are now witnessing the declaration of public emergencies for something as vague as "a terrorist threat . . . from persons suspected of involvement in international terrorism."[294] From where the threat emanates, for how

290. *See* JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT, 2003-4, H.L. & H.C., ¶ 34, *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/38/3806.htm (doubting the necessity of derogation from international obligations); Peter L. Fitzgerald, *Constitutional Crisis over the Proposed Supreme Court for the United Kingdom*, 18 TEMP. INT'L & COMP. L.J. 233, 263 (2004) (recording the Law Lord's decision that the Anti-terrorism, Crime and Security Act 2001 was not narrowly tailored to its compelling state interest); Human Rights Watch, *Neither Just nor Effective: Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001*, June 24, 2004, *available at* http://hrw.org/backgrounder/eca/uk/anti-terrorism.pdf (finding the United Kingdom's derogation unwarranted).

291. *See* JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT, 2003-4, H.L. & H.C., 37, *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/38/3806.htm (calling the renewal of Part IV of the Anti-Terrorism, Crime and Security Act 2001 unjustified); JOINT COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT, 2001-2, H.L. 51 & H.C. 420, ¶¶ 7–9, *available at* http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/51/5102.htm (declaring Part IV of the anti-terror legislation presumptively unreasonable). *See generally* Joint Committee on Human Rights, Second Report, 2001-2, H.L. 37 & H.C., 372, *available at* http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/3702.htm (doubting whether the measures in the Bill can be said to be strictly required by the exigencies of the circumstances).

292. *See* Fritz & Flaherty, *supra* note 148, at 1377–78 (observing that Malaysia is functioning as if a public emergency exists even though it has never declared any such emergency); Henning, *supra* note 2, at 1277–81 (analyzing the United Kingdom's contention that it has a valid public emergency); *see also* Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495, 501–2 (noting the consequences of declaring a public emergency).

293. *See* Simon Jeffery, *The Rules of the Game Are Changing*, THE GUARDIAN, Aug. 5, 2005, at A1 (quoting Prime Minister Tony Blair's lengthy Downing Street statement that the rules of the game are changing). *See generally* Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 900 (2005) (advancing the argument that because terrorists have changed the rules of the game, states must adjust their tactic accordingly).

294. *See* Bostan, *supra* note 89, at 29 (outlining the parameters involved in declaring a state of emergency); *see also* Jonathan H. Marks, *9/11 + 3/11 + 7/7 =?: What Counts in Counterterrorism*, 37 COLUM HUM. RTS. L. REV. 559, 566 (2006) (advising caution in the declaration of states of emergency).

long the normal legal system will be paralyzed in order to deal with it, and whether state repressive measures will in fact be effective are all questions that remain unanswered.[295]

State reaction to the attacks of September 11, 2001 would suggest that they have been presented with a novel problem.[296] But none of this is new; justification for the abrogation of human rights during periods of "emergency" has long been a feature of the international legal landscape.[297] From Northern Ireland to Turkey, to Israel/Palestine, the purported threat to state security and interests has been used as a smokescreen for the lack of human rights protections afforded to individuals during entrenched emergencies.[298] While the new scenario may differ in that the threat we are led to believe is now a global one, the repressive measures being used to deal with it, and indeed the effects of those measures, are the same.[299] O'Connor and Rumann have warned against making similar mistakes fighting the "new threat" as were made fighting political violence during the prolonged emergency in Northern Ireland, suggesting that the reaction to the events of September 11, 2001 in the U.S.:

> . . . conformed to a pattern that has long held true in Northern Ireland, where anti-terrorist legislation has often been proposed and passed in the superheated environment immediately following a terrorist attack . . . Whenever legislation is passed during a time of national outrage and collective passion like that which naturally follows a terrorist attack, we dramati-

295. *See* Bostan, *supra* note 89, at 4 (questioning the fair trial guarantees afforded suspects in the face of this new threat to national security). *But see* Michel Rosenfeld, *Terrorism, Globalization and the Rule of Law: Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2094 (2006) (providing a framework with which to answer some of those hard questions that many states will soon face).

296. *See* Laura K. Donahue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 236 (2005) (indicating some of the factors motivating a state's reaction to September 11); Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT'L L. & COM. REG. 1, 3 (2002) (describing one state's reaction to this novel problem of international terrorism); Scheppele, *supra* note 81, at 146–47 (tracking the reactions of a few states in addition to that of several transnational bodies).

297. *See* Ní Aoláin, *supra* note 3, at 1368 (asserting that emergency powers created serious human rights abuses); *see also* Colm Campbell & Fionnuala Ni Ní Aoláin, *Local Meets Global: Transitional Justice in Northern Ireland*, 26 FORDHAM INT'L L.J. 871, 887 (2003) (attributing human rights abuses to conflicts); K.A. Cavanaugh, *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom*, 35 CORNELL INT'L L.J. 491, 513 (2002) (reiterating that entrenched emergencies have led to an erosion of human rights protections).

298. *See* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?* 38 U.C. DAVIS L. REV. 609, 699 (2005) (suggesting that judicial-like proceedings do not adequately provide detainees with a fair trial); *see also* Richard Falk, *Revisiting the Great Terror War: Remarks Given at the University of Oregon School of Law, November 20, 2003*, 6 OR. REV. INT'L L. 19, 23 (2004) (asserting that President Bush is using September 11 as a smokescreen to advance his own policy judgments); Daniel Rothenberg, *"What We Have Seen Has Been Terrible" Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 465–67 (2003) (asserting that national security is being used as a smokescreen for torture).

299. *See* Cavanaugh, *supra* note 297, at 513 (arguing that the effects of the repressive measures used to combat terrorist threats are uncertain). *See generally* Ekho Moskvy, *Russian MP Calls on Police to Stop Protest March, Opposition Claims Intimidation*, BBC MONITORING INT'L REP., Dec. 15, 2006, at 1 (noting that repressive measures sometimes will have no effect); Herman Saen, *Terrorism on the Upswing, Panel Reports*, UNITED PRESS INT'L, Mar. 26, 1987, ¶ 2 (rationalizing that blind repressive measures should not be employed in combating terrorist threats for they may have no effects or adverse effects).

> cally increase the risk that our laws will be based upon false assumptions and incomplete understandings. In addition, the hasty consideration and shortened debate attending such legislation raised the probability that these laws will have unforeseen and unwanted effects.[300]

The U.S. response, like that of its closest ally, the United Kingdom, has provided for extraordinarily wide powers of arrest and detention of suspected terrorists but has also expanded police powers into other areas of law enforcement not involving terrorism, thus mirroring the "expansion of law enforcement powers that occurred over time with the legislative efforts to combat terrorism in Northern Ireland."[301] The fact that emergency powers can often become part of ordinary domestic criminal legislation and remain on the statute books even after the "emergency" is a corollary problem.[302] Therefore, it would seem that states are bound to repeat the same mistakes when it comes to emergency, and particularly anti-terrorist powers, but it also appears that there has been little or no analysis of whether or not counter-insurgency methods utilized over the last century have in fact proved successful.[303] Again the example of Northern Ireland is instructive here, where it has been noted that while some of the emergency measures

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300. *See* Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1659–1660 (2003) (detailing the hasty measures the legislature takes after a terrorist attack); *see also* Thomas, *supra* note 263, at 1196–97 (proclaiming that hasty emergency legislation after a terrorist attack can have negative effects).; *Cf.* Michael A. McCann, *Social Psychology, Calamities, and Sports Law*, 42 WILLAMETTE L. REV. 585, 585 (2006) (reporting that professional sports leagues and professional athletes may engage in unprecedented behavior in response to terrorist attacks).

301. O'Connor & Rumann, *supra* note 300, at 1707 (indicating that the expansion of police powers are not confined to just fighting terrorism, but for other purposes as well, just like in Northern Ireland). *See* Craig M. Bradley, *Section V: Criminal Law and Procedure: Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671, 685 (2006) (revealing that the courts will not interfere with the expansion of federal police power in the fight against terrorism); *see also* Richard H. Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165, 182 (2003) (announcing the administration going to Congress to request an expansion of police power so that it can combat the war on terrorism more aggressively).

302. *See, e.g.,* Cavanaugh, *supra* note 297, at 499 (stating that Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 curtails the right to silence by permitting an inference of guilt to be drawn from the defendant's refusal to testify at trial); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1127 (2002) (explaining the amendment to the International Emergency Powers Act, which grants the President broad powers in the time of armed hostilities or attack by foreign actors); *see also* Mariano-Florentino Cuellar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 55–6 (2004) (reporting that emergency powers can be used to fill the gaps that criminal statutes may leave).

303. *See* O'Connor & Rumann, *supra* note 300, at 1750–51 (recognizing that the U.S. government is making the same mistakes that Great Britain made in fighting terrorism in Northern Ireland and that such mistakes must not be repeated if the U.S. is to be successful in the war on terror); *see also* Linda Racioppi & Katherine O'Sullivan, *Peace and Reconciliation in Northern Ireland: An Examination of the EU's Peace Programme*, 13 MICH. ST. J. INT'L L. 155, 174 (2005) (suggesting that the British Government's counter-insurgency methods in Northern Ireland have proved to be unsuccessful due to innocent victims being shot without warning). *But see* Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 330 (2006) (stressing that the government does not repeat the same mistakes over and over, with each successive emergency, but rather the government's polices become less hasty and less extreme).

used had the effect of suppressing violence, the manner in which the powers were used disproportionately against one section of the community led to an escalation of violence.[304]

Scruton observes that

> the idea of a "war against terrorism" makes little sense. Terrorism is not, after all, an enemy, but a method used by the enemy. The enemy is of two kinds: the tyrant dictator, and the religious fanatic whom the tyrant protects. To act against the first is feasible, if we are prepared to play by the tyrant's rules. But to act against the second requires a credible alternative to the absolutes with which he conjures.[305]

The reality with which we are now faced, however, is that the actions of states in eroding human rights protections and effectively rewriting international law during the "war against terrorism" means that individuals may run a far greater risk of having their human rights abused by their own "liberal" government than by the enemy "terrorist."[306] It is undoubtedly the case that the "most dangerous aspect of the current war on terrorism is its potential permanence and continued expansion."[307] It would appear that the emergency is not a temporary

304. *See* Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1263 (2005) (reaffirming that some of the emergency measures used in Northern Ireland were initially successful in suppressing violence, but the disproportionate use of same powers on the Republican community led to an increase in violence); O'Connor & Rumann, *supra* note 300, at 1702 (reiterating that the disproportionate use of the emergency measures on the Republican community in Northern Ireland led to a rapid increase in violence); *see also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 675 (1984) (noting the tension between the necessity of emergency measures and the evils of violence which they may promote).

305. *See* ROGER SCRUTON, THE WEST AND THE REST: GLOBALISATION AND THE TERRORIST THREAT 161 (ISI Books 2003) (stressing that terrorism is not an enemy, but rather a method used by the enemy and that there are two types of enemies; the tyrant dictator and the religious fanatic whom the tyrant protects); *see also* John S. Baker Jr., *Competing Paradigms of Constitutional Power in "The War on Terrorism,"* 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 5, 31 (2005) (citing Roger Scruton that terrorism is not an enemy, but rather a method used by the enemy and therefore, the "war on terrorism" does not make much sense); Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L L.J. 581, 588 (2002) (maintaining that terrorism is a weapon).

306. *See* John Cerone, *Foreign and International Law in Gay Rights Litigation: "Dangerous Dicta": The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication*, 32 WM. MITCHELL L. REV. 543, 557 (2006) (concluding that due to an increase of security measures by the U.S. government there has been an erosion of human rights protection in the U.S.); *see also* Larissa Eustice, *International Decision: Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) Case Summary*, 39 CORNELL INT'L L.J. 457, 475 (2006) (commenting that the erosion of human rights protections following September 11 has had a significant impact on human rights standards around the world); Natasha Fain, *Between Empire and Community: The United States and Multilateralism, 2001–2003: A Mid-Term Assessment: Human Rights: Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607, 618 (2003) (maintaining that the Bush administration's response to the September 11 attacks compromises domestic human rights protections).

307. *See* Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 772 (2002) (stressing the expansion and permanence of terrorism as its most dangerous aspects); *see also Canada Endorses Pakistan Plan to Fence Border with Afghanistan*, BBC MONITORING INT'L REP., Jan. 10, 2007, at 1 (addressing the need to have strategic relationships to prevent the expansion of terrorism); *Iran Press: Commentary Views U.S. Anti-Iranian Activities*, BBC MONITORING MIDDLE EAST, Jan. 27, 2007, at 1 (outlining various activities that have led to an expansion of terrorism).

one.[308] Nor is it easily determined what applicable legal rules govern the "war" engendering the emergency.[309] As Fitzpatrick has outlined,

> [a]ssuming the enemy is the full range of international terrorists, one must navigate the boundaries between humanitarian law and international criminal law to locate the legal rules for this campaign. This is not an international armed conflict cognisable under Common Article 2 of the Geneva Conventions of 1949, nor even under the expanded definition of Article 1(4) of Additional Protocol I of 1977. In essence, the United States has made a claim of "instant custom", enabling it to exercise extraordinary powers related to international armed conflict, but without any defined protections for its non-state enemies.[310]

VI. Conclusion

The current notion of "emergency" resulting from the threat of "international terrorism" evidently bears a great resemblance to the traditional phenomenon of entrenched emergencies outlined in the earlier sections of this article and, as with the latter, displaces the notion of "normalcy-rule, emergency-exception."[311] This paradigm shift has had a profoundly negative effect on international human rights law. Whereas traditionally the apprehension and prosecution of those responsible for political violence was to a certain limited extent controlled under the derogation provisions of international human rights treaties, in a post-September 2001 world, there is effectively no readily identifiable enemy and, thus, limited knowledge, not to

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308. *See* Thomas P. Ludwig, *The Erosion of Online Privacy Rights in the Recent Tide of Terrorism*, 8 COMP. L. REV. & TECH. J. 131, 142 (2003) (maintaining that terrorism will not be abolished in the near future); *see also* Jared Perkins, Note and Comment, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYU J. PUB. L. 437, 471–72 (2005) (proclaiming that the war on terrorism will not end anytime soon). *But see* Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 351 (2002) (stressing the temporariness of terrorist emergencies).

309. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056 (2005) (recognizing that there are uncertainties in the application of legal rules to the war on terrorism); *see also* Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 337 (2005) (asserting that the present legal rules are not suitable to countering terrorism). *See generally* Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?* 38 GEO. WASH. INT'L L. REV. 561, 561 (2006) (claiming that other nations are willing to help the U.S. in fighting terrorism if they are convinced that the U.S. has sound legal rules in place to fight terrorism).

310. Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 249 (2003), *available at* http://www.ejil.org/journal/Vol14/No2/art3.pdf (emphasizing the need to study the scope of international and humanitarian law in addressing the threat of terrorism). *See* George H. Aldrich, *New Wars, New Laws? Applying the Laws of Wars in the 21st Century Conflicts*, 100 AM. J. INT'L L. 495, 495 (2006) (suggesting that international humanitarian law is not irrelevant to the war on terror); *see also* Thomas M. Franck, Comment, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT'L L. 686, 686 (2004) (addressing the debate about the obsoleteness of international humanitarian law in dealing with the modern threat of terrorism).

311. *See* Cavanaugh, *supra* note 297, at 513 (stressing that the vast emergency legislation is prompted by entrenched emergencies). *See generally* Oren Gross, *Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1834 (2000) (describing the "normalcy-rule, emergency-exception"); *Gross 1*, *supra* note 4, at 440 (defining the "normalcy-rule, emergency-exception").

mention control, over the apprehension and treatment of captives in the "war on terror."[312] As Mégnet suggests, there is "an attempt to use the rhetoric of justice to overturn the laws of war, and to use the rhetoric of war to subvert the rendering of justice."[313]

The principal architects of the "global war on terror" have, through consistent references to state security, sidelined their international legal obligations. As we have seen, undermining the rendering of justice is made all the more easy in times of emergency when the normal functioning of states may become paralyzed. The assertion that the "war on terrorism" is the "quintessential 'normless and exceptionless exception'" is borne out by the facts that

> [n]o territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks, and success in applying control measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of "hostilities" is measured by the persistence of fear that the enemy retains the capacity to strike. Long periods without incident do not signify safety, because the enemy is known to operate "sleeper cells." The enemy may be of any nationality, occupation or residence, and is perceived by all as the more dangerous for his seeming ordinariness. The war will end when the coalition decides, on the basis of unknown criteria.[314]

It has been observed that the international monitoring bodies have been largely inept in dealing with the crises yielded by entrenched emergencies. In particular, there has been a critical lack in appreciation of the reality that the derogation articles neither envisage nor provide for such sit-

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312. *See* Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417, 428–29 (2006) (alleging that the means taken by the U.S. in fighting terrorism has disadvantaged the protection of international human rights); *see also* Wasana Punyasena, *The Facade of Accountability: Disappearances in Sri Lanka*, 23 B.C. THIRD WORLD L.J. 115, 155–56 (2003) (stressing that certain anti-terrorism acts should be repealed to protect international human rights norms); Joan Fitzpatrick, *supra* note 310, at 249 (revealing various international human rights violations as a result of the enforcement measures used after September 11).

313. *See* Frédéric Mégnet, *Justice in Times of Violence*, 14 EUR. J. INT'L L., 327, 328 (2003); Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 244 (2001) (declaring that the law of war was derived from general principles of justice); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 575 (2006) (establishing that the law of war found its roots from general principles of justice); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 830 (2005) (asserting that the law of war was established through principles of justice). There should be a reference to the article from which the Mégret quote is taken here.

314. Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L., 241, 251 (2003); *see* Dara Kay Cohen, Mariano-Florentino Cuellar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 52 STAN. L. REV. 673, 759 (2006) (reporting that terrorism is not predictable because the enemy is elusive and not defined); *see also* Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L.J. 131, 143 (2007) (declaring that the seizure of enemy assets is nothing new); Ozan O. Varol, *Substantive Due Process, Plenary-Power Doctrine, and Minimum Contacts: Arguments for Overcoming the Obstacle of Asserting Personal Jurisdiction over Terrorists Under the Anti-Terrorism Act*, 92 IOWA L. REV. 297, 351 (2006) (commenting that there is widespread public debate over the constitutionality of the detention and interrogation practices of suspected terrorists).

uations.[315] If this is true for the entrenched emergencies of old, it is doubly so for the kind we are now experiencing. It is no longer satisfactory for the monitoring bodies to refuse to engage with the entrenched emergency crisis. In this vein, two suggestions have been made with regard to strengthening the derogations procedure: the monitoring bodies must reconsider their traditionally deferential approach to states' claims of the existence of emergencies,[316] and/or fact-finding missions should be sent to derogating states to make an independent assessment of whether the situation constitutes a public emergency threatening the life of the nation.[317] A third approach, which is contingent on the first two, must involve definite action to be taken against those states that are deemed to have declared a state of emergency and derogated from their international obligations unnecessarily. Harsh measures must be employed; states should not continue to enjoy the respect that ratifying human rights treaties bestows, where there is persistent failure to honor the obligations therein. As it stands, the derogation procedure, although seriously flawed, remains the only method of regulating emergencies in international law. It is imperative that the monitoring bodies step up to the mark in ensuring that states cannot continue playing the "public emergency" card as a smokescreen for the enactment of draconian legislation and the destruction of rights.

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315. *See DUP Running Scared Claims McGimpsey*, GLOBAL NEWS WIRE, Aug. 23, 2003, at 1 (emphasizing a fierce attack on an international monitoring body); *see also* Ciaran McKeown, *Watchdog Is Doomed to Failure: DUP; Monitoring Body a Toothless Talking Shop—Dodds*, BELFAST NEWSLETTER (Northern Ireland), Aug. 22, 2003, at 8 (quoting Dodds as saying that the international monitoring body will prove to be ineffective). *But see* John P. Grant, *"Terrorism on Trial": Beyond the Montreal Convention*, 37 CASE W. RES. J. INT'L L. 453, 469 (2005) (stressing that the Financing of Terrorism convention does not even have an international monitoring body).

316. *See* James J. Silk & Meron Makonnen, *Economic Exploitation of Children: Ending Child Labor: A Role for International Human Rights Law?* 22 ST. LOUIS U. PUB. L. REV. 359, 363 (2003) (emphasizing the monitoring bodies' limited power and the deference it must give to the states); *cf.* Richard B. Lillich, *Current Development*, 85 AM. J. INT'L L. 716, 716–17 (1991) (asserting that monitoring bodies can terminate states of emergencies and prevent abuses of emergency measures).

317. *See* Lillich, *supra* note 316, at 716 (reiterating that monitoring bodies have the power to require states to provide facts during times of emergency); Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J.L. & MED. 479, 519 (1999) (emphasizing that all of the UN treatises have a requirement that forces states to report periodically to its corresponding monitoring body).

Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy

Peter Margulies*

A terrorist group's rise to electoral power is one of the worst-case scenarios in the annals of transitions to democracy. Nations that provide aid to the country in question fear that the new government may use public resources to facilitate terrorist activity. Other nations may decline aid merely to express their opposition to terrorist violence. This article acknowledges those concerns, which are particularly compelling in light of violence directed by two such organizations, Hamas and Hezbollah,[1] against the Israeli Defense Force (IDF)[2] in the summer of 2006.

One approach to this difficult situation is a rigid rule imposing sanctions and financing restrictions on terrorist groups. However, a more pragmatic policy toward terrorist organizations exercising electoral power may diminish future violence and enhance democratic accountability. An electoral victory by a terrorist organization need not require a cessation of aid to a regime, or even the channeling of aid through "humanitarian" organizations. A pragmatic approach that requires the new regime to take substantial steps to end terrorism and violence may be more effective in promoting lasting transitions and countering terrorist violence.

These issues arise because both American law and a range of multi-lateral agreements among Western countries bar assistance to terrorist organizations.[3] Such provisions include the

1. *See generally* Steven R. David, *Israel's Policy of Targeted Killing*, 17 ETHICS & INT'L AFF. 111, 118 (2003) (indicating how terrorist organizations like Hamas effectively carry out their attacks); *Anti-Defamation League Lists Top Ten Issues Affecting Jews in 2006*, U.S. FED. NEWS, Dec. 22, 2006 (describing violence in northern Israel directed by Hezbollah and in southern Israel directed by Hamas); Erel Shalit, *Denial and Demonization*, MIDSTREAM, Jan. 1, 2007, at 4 (explaining why Hezbollah attacks Israel).

2. *See generally* Sergio Catignani, *Motivating Soldiers: The Example of the Israeli Defense Forces*, 34 PARAMETERS: U.S. ARMY WAR C. 108, 108–09, 111–12 (2004) (analyzing the way the IDF historically undertakes its combat operations); *Council on American-Islamic Relations Forum*, FED. NEWS SERV., Aug. 28, 2006, at paras. 6–7, 89–90 (commenting on the IDF's performance in the Lebanon war); Israel Ministry of Foreign Affairs, Israel Defense Forces (IDF), http://www.mfa.gov.il/MFA/Facts+About+Israel/State/THE+STATE-+Israel+Defense+Forces+-IDF-.htm (last visited Feb. 3, 2007) (explaining the history, methods of operation, and objectives of the IDF).

3. *See* USA Patriot Act of 2001, H.R. 3162, 107th Cong., § 903 (2001) (providing that intelligence relationships be established and maintained to acquire information on any person, entity, or group engaged in aiding or assisting a terrorist organization); Siobhan Gorman, *Power to the Government*, NAT'L J., July 27, 2002, at para. 21 (stating that the USA Patriot Act would aim to increase punishment for those who aid terrorists or terrorist organizations); *see also* U.S. DEP'T OF STATE, EUROPE AND EURASIA OVERVIEW 84, http: //www.state.gov/documents/organization/65470.pdf (last visited Feb. 17, 2007) (remarking in what ways European nations have contributed to counterterrorist efforts including the suppression of terrorist financing).

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United States' "material support" statute.[4] These restrictions are designed to deter provision of cash and other assistance to terrorist groups that practice violence against civilians.[5] They also signal the public's determination to stop the flow of resources that support or legitimize violence.[6] Moreover, taken together they provide the outlines of an emerging international consensus that terrorists' targeting of civilians for political ends is unacceptable among the community of nations.[7]

Despite the merits of terrorist financing restrictions, such restrictions have serious problems in practice. Although certain groups, such as Hamas, have an indisputable history of involvement with terrorism that amply supports their designation as foreign terrorist organizations,[8] an inflexible regime of restrictions on aid to *governments*, as opposed to terrorist groups, may have the unintended consequences of promoting terrorism and defeating democratic tran-

4. *See* 18 U.S.C. § 2339B (2004) (prohibiting the provision of "material support," including financial services, ammunition, personnel and training to an organization designated as a terrorist group by the Secretary of State); Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1, 16–17 (2005) (outlining the foundation and purpose of material support statutes). *See generally* Andrew C. McCarthy, *Hamas More Don't We Know?* NAT'L REV., Mar. 1, 2006, at paras. 9, 11 (noting that people and entities have been indicted in the United States for providing material support to Hamas after it was designated as a foreign terrorist organization).

5. *See* Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1347 (2004) (establishing that legislation like the USA Patriot Act halts the flow of financial support and other resources to terrorist organizations preventing them from carrying out their terrorist activities); Sahar Aziz, Note, *The Laws on Providing Material Support to Terrorist Organizations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?* 9 TEX. J. C.L. & C.R. 45, 58 (2003) (stating the rationale for regulating the provision of material support to terrorist organization).

6. *See* Daniel Whiteneck, *Deterring Terrorists: Thoughts on a Framework*, 28 WASH. Q. 187, 197 (2005) (suggesting a strategy of public diplomacy to influence the Arab and Muslim countries to minimize the support for terrorists); *State's Wayne Reviews Efforts to Combat Terrorist Financing*, STATES NEWS SERV., July 14, 2005 (stating that public designations and identification of terrorists and their supporters would help discourage terrorist financing); OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2004 at 67 (2005), http://www.state.gov/documents/organization/45313.pdf (illustrating how Saudi Arabia implemented a public campaign that rallied citizens to report anyone planning to carry out terrorist attacks).

7. *See* Joshua Brilliant, *Analysis: Palestinian Economy in Free Fall*, UPI, Dec. 7, 2006, at paras. 7–8 (voicing the consensus of the international community to boycott the Palestinian government led by Hamas, for refusing to renounce violence); *see Glimmer of Light in Mideast*, POST & COURIER (Charleston, S.C.), Nov. 13, 2006, at A12 (affirming the refusal of the international community to provide aid to governments led by terrorists). *See generally Turkish Prime Minister Interviewed on Lebanon, Iraq, US-Iran Disagreement*, BBC MONITORING MIDDLE E., Oct. 20, 2006, at para. 41 (remarking that the international community did not recognize the threat of global terrorism until after the September 11 attacks).

8. *See* MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD 33–48 (2006) (describing links between some of Hamas' political leaders, including the late Sheikh Ahmed Yassin, and terrorist activities); *see also* Stephen C. Warneck, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 224 (1998) (indicating that Hamas, as a militant Islamic organization, employs suicide bombers to attack foreign civilians while aiming to halt the Israeli peace process). *See generally* Francisco J. Gonzalez Magaz, Comment, *Can Good Fences Make Good Neighbors? The Virtues of the Green Line Fence*, 74 REV. JUR. U.P.R. 173, 174, 192 (2005) (reporting the violent presence of Hamas in the Arab-Israeli conflict).

sitions.[9] The concern about unintended consequences is buttressed by a number of factors. First, financing restrictions provide no incentive for governmental adversaries of terrorist groups to modify their own policies,[10] which may help to fuel terrorist violence. Second, such restrictions fail to take into account the dynamic behind the terrorist groups' electoral success, which often includes popular discontent with the corruption of the current regime.[11] Third, reliance on financing restrictions and other forms of coercion can crowd out other worthwhile options, such as encouraging negotiations.[12] Fourth, restrictions generate negative externalities, injuring whole populations more than the terrorists themselves.[13] Fifth, restrictions are often counterproductive, robbing moderates within the terrorist organization of leverage and bolster-

9. *See* Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 316-23 (2003) (analyzing how lack of transparency both facilitates terrorist financing and impedes government law enforcement efforts); Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625, 631 (2002) (asserting that while governments implement counterterrorism efforts, corruption and permeable borders persist, creating a safe haven for terrorists); Graham Usher, *The Democratic Resistance: Hamas, Fatah, and the Palestinian Elections*, 35 J. PALESTINE STUD. 20, 21 (2006) (discussing reasons for Hamas' electoral victory in the occupied territories).

10. *See* Stewart Patrick, *Weak States and Global Threats: Fact or Fiction?* 29 WASH. Q. 27, 34 (2006) (noting that some countries invite terrorist groups because of the vulnerability of weak or nonexistent governments); Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334 (2003) (confirming the difficulty of getting universal support for legal instruments that require states to review and update their domestic laws to discourage terrorist financing); Kimberley L. Thachuk, *Countering Terrorism Across the Atlantic?* DEFENSE HORIZONS, July 1, 2006, at 1 (claiming that finance restrictions stopping some terrorists will create more problems for countries as other members of a terrorist network use more sophisticated methods to complete their objectives).

11. *See* Vita Bekker, *Palestine Dilemma: A Stunning Electoral Victory for Hamas Creates New Uncertainty in the West Bank and Gaza Strip and Threatens to Act as a Fresh Deterrent to Much-Needed Investment*, EUROMONEY INSTITUTIONAL INVESTOR, Feb. 1, 2006, at 64 (making an example of how Hamas has defied the global community, despite potential finance restrictions, when it was elected in a landslide victory); *see also* Mustafa Barghouti, *Post-euphoria in Palestine*, 25 J. PALESTINE STUD. 87, 90–91 (1996) (exemplifying how Hamas managed to garner support from Palestinians even after a series of suicide bombings); *cf.* Larry Diamond, *Lessons from Iraq*, 16 J. DEMOCRACY 9, 11–13 (2005) (discussing the importance of local issues and local elections in transitions, such as the transition to democracy in Iraq that the United States is attempting to ensure).

12. *See* Scott E. Atkinson, Todd Sandler & John Tschirhart, *Terrorism in a Bargaining Framework*, 30 J.L. & ECON. 1, 3–4 (1987); *cf.* Audrey Kurth Cronin, *How Al-Qaida Ends: The Decline and Demise of Terrorist Groups*, INT'L SEC., at 7 (2006) (positing that negotiations can be a prospective method of achieving a legitimate political process). *But see* Jennie Kim, *Common Ground: Politics of Terrorism*, UPI, Apr. 13, 2006, at para. 1 (suggesting that the failure of negotiations is due to the terrorists' refusal to negotiate).

13. *See* Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 603 (2004) (maintaining that finance restrictions have far more negative effects on a state's population than the intended targets of the economic sanctions); *see also* Scott Wilson, *"Shells Kept Falling" on Gaza Apartment, Killing 17 in Family; Israeli Leader Expresses Regret; Palestinians Say U.S. Shares Blame*, WASH. POST, Nov. 9, 2006, at paras. 15–18 (stating that economic sanctions work to escalate and provoke further violence against the civilian population); *cf. UN Chairman of Security Council's Counter-Terrorism Committee Describes Recent Success in Implementing Council's Anti-Terrorism Strategy*, M2 PRESSWIRE, June 28, 2002, at para. 27 (stressing the need to respect human rights when designing and implementing sanctions in the fight against terrorism).

ing the position of extremists with access to funding sources that are impervious to financing curbs.[14]

A more promising approach to the electoral success of terrorist organizations takes its lessons from the emerging field of transition studies.[15] This approach views transitions to democracy as a pragmatic undertaking that requires continual adaptations to changed circumstances. A wise architect of transitions recognizes that her plans will go awry, as the United States' plans in Iraq have, without the mobilization of a broad group of stakeholders. Contending parties must acquire shared stakes and appreciate their common ground. Redressing inequality must be a part of this process of cultivating stakes in democratic outcomes. In addition, transition cannot rely on one tool, whether that tool is financial pressure, military force, or persuasion; rather, a repertoire of tools and institutions is necessary.[16]

Following this theoretical approach, the article outlines a transition-centered approach containing three elements. First, a terrorist group forming a new regime must cease *all* violence against its external adversaries. Second, the group must promote transparency in its finances, perhaps by opening its books to monitors from donor nations. Third, to reciprocate for these measures, the adversaries of terrorist groups should reject targeted killings of terrorist leaders; engage in negotiations for the exchange of prisoners and detainees; and practice proportionate military responses to terrorist violence. The transition-centered approach requires that each side undertake confidence-building measures. Although no side gets exactly what it wants, over

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14. This seems to have been the result of the heavy bombing of Lebanon by the Israeli Defense Forces (IDF) during the recent crisis. *See* Max Rodenbeck, *War Within War*, 53 N.Y. REV. BOOKS 6, 12 (2006) (stating that the Israeli government's strategy to blame Hezbollah for the war damage only led to a rally of support for Hezbollah); *cf.* STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ 196 (2006) (noting that after coups sponsored by the United States against democratically elected regimes in Iran and elsewhere, anti-American feelings grew more intense); *cf.* Steven A. Cook, *The Promise of Pacts*, 17 J. DEMOCRACY 63, 67 (2006) (commenting on the need to develop democratic institutions for citizens to seek redress for their grievances so as to avoid resorting to violence).

15. *See* GERARD ALEXANDER, THE SOURCES OF DEMOCRATIC CONSOLIDATION 58–59 (2002) (discussing the various degrees of democracy); AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 189–90 (2003); JUAN LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 7–9 (1996) (listing the conditions necessary for a democracy to be consolidated); Gerard Alexander, *Institutionalized Uncertainty, the Rule of Law, and the Sources of Democratic Instability*, 35 COMP. POL. STUD. 1145, 1150 (2002); *see also* Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 6 (1998) (proclaiming the importance of the interrelationship between marketization, democratization and ethnic conflict); Diamond, *supra* note 11, at 9, 12 (noting the consequences of a slow process in a country's economic reconstruction); *see* Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 6–7 (2000) (noting that law and development literature on social and governmental transitions focuses on democratic participation and inclusion); Guillermo A. O'Donnell, *Democracy, Law, and Comparative Politics*, 36 STUD. COMP. INT'L DEV. 7, 9–12 (2001) (providing context to the definition of democracy); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 2 J. DEMOCRACY 75, 80–82 (1991).

16. *See Top Spanish Official Explains Spanish Role in Iraqi Transition*, BBC MONITORING EUR., Feb. 1, 2004, at paras. 11–14 (demonstrating the institutional tools needed for a democratic transition); *cf.* Sumit Ganguly, *A Crumbling Defence*, HINDU, Mar. 27, 2004, at para. 8 (remarking that continued instability in a country may rule out the prospect of democracy). *See generally* F. Gregory Gause III, *Can Democracy Stop Terrorism?* FOREIGN AFF., Sept.–Oct. 2005, at 62 (suggesting that a transition to democracy may not win the fight against terrorism).

time, the habits developed by these measures can enhance the prospects for a durable transition.

This article proceeds in five parts. Part I sets out the current regime of terrorist financing restrictions embodied in the United States' "material support" statute. Part II outlines the flaws of such measures as applied to terrorist groups' electoral success. Part III advances a transition-centered view of antiterrorism policy, including the need to mobilize support globally, not merely nationally. Part IV proposes a transition-centered model for transitions involving terrorist groups that participate in the political process. Finally, Part V briefly considers one alternative to the transition-centered approach—the more flexible approach adopted by the European Union.

I. Terrorist Financing Restrictions

Terrorist organizations have exploited gaps in the global financial system;[17] fortunately, the international community is committed to closing those gaps.[18] However, the process of closing those gaps triggers two significant concerns: overzealous enforcement can (1) jeopardize rights and (2) can endanger the rights of particular groups, such as those who define themselves as being Arab, South Asian, or Muslim. These concerns can undermine the legitimacy of antiterrorism efforts and imperil international cooperation.[19]

A. The Statutory Framework

Statutes that impose criminal and civil liability on those providing "material support" to terrorist activity or designated foreign terrorist organizations illustrate the risks and rewards of efforts to curb terrorist financing. One such statute criminalizes "material support" for a desig-

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17. *See* LEVITT, *supra* note 8, at 54–62 (outlining the financial infrastructure of Hamas); *see also* Todd M. Hinnen, *The Cyber-Front in the War on Terrorism: Curbing Terrorist Use of the Internet*, 5 COLUM. SCI. & TECH. L. REV. 5, para. 5 (2003) (stating that the Internet has provided an unrestricted means of financing terrorism); *see also* Sheppard, *supra* note 9, at 634 (showing how terrorists have infiltrated international financial institutions).

18. *See* Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime: A Brave New World Revisited*, 50 VILL. L. REV. 509, 534–35 (2005) (commenting on how intergovernmental organizations (IGOs) have responded in the international fight against terrorist financing); *see also* Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti–Money Laundering Regimes*, 34 LAW & POL'Y INT'L BUS. 45, 85 (2002) (demonstrating how 20 nations planned to freeze terrorist assets); Alison S. Bachus, Note, *From Drugs to Terrorism: The Focus Shifts in the International Fight Against Money Laundering After September 11, 2001*, 21 ARIZ. J. INT'L & COMP. L. 835, 859–61 (2004) (discussing the global response to terrorist financing).

19. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 75–79 (2003) (maintaining that counterterrorism efforts have minimized the respect for human rights); *see also* Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 394–98 (2004) (describing the adverse effects of exigent counterterrorism measures on equality); Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 404–8 (2004) (discussing how changes to United States immigration law could promote democratic change globally); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 495–99 (2002) (demonstrating how the use of nationality, ethnicity and religion may undermine the legitimacy of government detention); Leti Volpp, *Critical Race Studies: The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575–82 (2002) (describing the marginalization of particular communities after September 11).

nated foreign terrorist organization.[20] The Secretary of State has statutory authority to designate groups as DFTOs (Designated Foreign Terrorist Organizations).[21] When the Secretary files a notice that she intends to designate a group, the group has an opportunity to submit evidence to rebut the proposed designation.[22] If the Secretary proceeds with the designation, the DFTO can seek judicial review. Review may take place only in the D.C. Circuit, in order to promote uniformity in enforcement. The D.C. Circuit must uphold the designation if it is not arbitrary or capricious or lacks substantial support in the administrative record, including classified evidence.[23] Groups that have been designated include al-Qaeda, Hamas, Hezbollah, and Egypt's "Islamic Group," which was formerly headed by Sheik Abdel Rahman, the so-called "blind Sheik," who is now in prison for life in this country for seditious conspiracy.[24] Members of the Islamic Group admitted responsibility for the massacre of more than 60 tourists at Luxor

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20. *See* 18 U.S.C. § 2339B (2004); *see also* Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1, 19–20 (2005) (discussing the prosecution of John Walker Lindh—the "American Taliban"). *See generally* McCarthy, *supra* note 4, at para. 8 (describing the context of material support statutes).

21. *See* 8 U.S.C. § 1189 (2005); *see also Uganda: USA Retains LRA on Terror List*, AFR. NEWS, May 2, 2006, at para. 4 (emphasizing the role of the Secretary of State to determine the list of Designated Foreign Terrorist Organizations); *cf.* William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 732 (2003) (recognizing that the president's action to withhold foreign assistance to a state is contingent upon the Secretary of State's designation).

22. *See generally* United States v. Afshari, 426 F.3d 1150 (9th Cir. 2005) (holding that individuals prosecuted for violation of the statute cannot collaterally attack the legality of the designation). *But see* Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 140, 150–51 (2003) (arguing that material support statutes violate due process at the designation stage and when determining an individual's guilt for assisting a designated organization).

23. *See* People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1241–42 (D.C. Cir. 2003) (stating that the Secretary of State's reliance on secret, classified evidence is not unconstitutional); s*ee also* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (ruling that the Secretary's designation will be upheld if it is not arbitrary and capricious, and is supported by substantial evidence); Office of Counterterrorism, U.S. Dep't of State, *Foreign Terrorist Organizations (FTOs)* (Oct. 11, 2005), http://www.state.gov/s/ct/rls/fs/37191.htm (describing the designation process and procedures for revocation of the foreign terrorist organization designation).

24. *See* United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (upholding the conviction of defendants under the federal seditious conspiracy statute, 18 U.S.C. § 2384, for conspiring to blow up New York City landmarks such as the Holland Tunnel); *see also* 18 U.S.C. § 2384 (1994) (setting forth the operative legal definition of "seditious conspiracy" and its penalty under federal law). *See generally* Office of Counterterrorism, *supra* note 23 (listing 42 current designated foreign terrorist organizations).

in Egypt in 1997.[25] While the statute providing for designation also gives the Secretary of State authority to revoke the DFTO designation, revocation of the designation is rare.[26]

Such statutes, which prohibit the provision of financial assistance and other forms of "material support" to transnational terrorist organizations,[27] can serve an important governmental interest by reducing the resources available to groups such as al-Qaeda.[28] Courts have

25. *See* Douglas Jehl, *70 Die in Attack at Egypt Temple*, N.Y. TIMES, Nov. 18, 1997, at A1 (describing the terrorist attack that killed 70 people at Egypt's Luxor temple site); *see also Gunmen Attack Tourists at Egypt's Luxor Temple Site,* CNN, Nov. 17, 1997, http://www.cnn.com/WORLD/9711/17/egypt.attack/index.html (reporting an attack by unidentified gunmen at the Luxor Temple and further noting that attacks by Muslim militants in the area have killed numerous international tourists). *See generally* Howard Schneider, *Egyptian Radicals Veering Away from Violence*, WASH. POST, May 12, 2002, at A17 (identifying the Islamic Group as responsible for the massacre of tourists at Luxor in 1997).

26. *See* 8 U.S.C. § 1189 (2004) (setting out the means and effects of revocation of the "foreign terrorist organization" designation); *see also* AUDREY KURTH CRONIN, CONG. RESEARCH SERV., THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 2 (2003) *available at* http://www.fas.org/irp/crs/RL32120.pdf (describing the designation process and procedures for revocation of foreign terrorist organization designation); *cf.* Derek P. Jinks, International Decision, *People's Mojahedin Organization of Iran v. United States Department of State,* 94 AM. J. INT'L L. 396, 396–99 (2000) (recognizing that judicial review of the Secretary of State's designation is very limited).

27. In this vein, "funding" includes currency or monetary interests in financial securities and services, and "material support" includes provision or facilitation of lodging, false documentation or identification, weapons, lethal substances, and explosives. Furthermore, in 2001, the Patriot Act broadened the scope of "material support" to include the provision of expert advice or assistance. *See* 18 U.S.C. § 2339A(b) (2006) (setting forth the legal definitions of "material support or resources," "training," and "expert advice or assistance"); *see also* 18 U.S.C. § 2339B (2004) (describing conduct by individuals and financial institutions that could constitute providing material support or resources to designated foreign terrorist organizations); *cf.* COLE, *supra* note 19, at 75–79 (arguing that the statute on its face violates the First Amendment); Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 21–30 (2005) (discussing intent issues under the statute); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty by Association Critique*, 101 MICH. L. REV. 1408, 1432–51 (2003) (noting the legal and policy concerns of the statute); Crimm, *supra* note 5, at 1345–48 (analyzing the relationship between material support and charitable giving); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 200–07 (2003) (discussing the appropriate scope of the material support provisions).

28. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 301, 110 Stat. 1214 (noting that some terrorist organizations have raised significant funds within the United States or used the United States as a conduit for the receipt of funds raised in other nations through affiliated groups or individuals); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (noting the lack of transparency in transnational terrorist organizations' finances makes it impossible to determine whether the activities are prohibited by the material support statute); Terrorism Prevention Act, at S3463–S3464 (1996) (Conf. Rep.) (statement of Sen. Brown, asserting that the material support provisions will allow the government to "begin to crack down on the use by terrorist groups of international financial institutions and front companies").

upheld similar statutes, including those delegating authority to the president to bar transactions with particular nations, such as Cuba,[29] as imposing merely incidental burdens on free speech, as long as the measure is content-neutral, serves an important government purpose, and constitutes the least restrictive alternative available.[30] Following this doctrine, courts have repeatedly held that providing money to a DFTO can be constitutionally prohibited, because individuals are still free to express their political opinions, for example by praising groups like al-Qaeda, and because restrictions on financial support are closely tailored to the important governmental purpose of cutting off assistance to violent groups.[31] Taking judicial notice of the difficulty of monitoring contributions to groups such as Hamas that may undertake both violence and social service, courts have upheld Congress's determination that such groups are so "tainted" by their violent activities that *any* contribution may in fact promote violence.[32] In accord with this view, most courts have held that to be prosecuted for providing material sup-

29. *See* International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (1999) (authorizing trade restrictions against particular nations upon the president's determination that they pose an "unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States"); *see also* National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2002) (describing national emergencies and the power of the president and Congress during such times); Regan v. Wald, 468 U.S. 222, 224–29 (1984) (upholding a presidential travel restriction to and economic embargo of Cuba); Zemel v. Rusk, 381 U.S. 1, 7–9 (1965) (upholding travel and trade restriction to Cuba). *See generally* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 123–25 (3d ed. 2002) (discussing the presidential and congressional authority to promulgate trade restrictions). Courts have long been willing to uphold embargo-type of legislative measures, which prohibit American citizens and residents from involving themselves in transnational conflicts while tailoring such statutes to constitutional and international law. For instance, in Murray v. The Schooner *Charming Betsy*, 6 U.S. 64 (1804), the Supreme Court limited coverage of legislation barring trade with France to vessels owned by United States nationals.

30. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (articulating that a sufficiently important governmental interest in regulating a non-speech element can justify incidental limitations on First Amendment freedoms); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (holding that the material support statute meets the incidental burden standard because it allows First Amendment activity, such as praise of terrorist organizations, and because lack of transparency in transnational terrorist organizations' finances makes it impossible to ensure that resources contributed by American citizens or residents for peaceful purposes are not used to subsidize violence); *cf.* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (discussing incidental burdens doctrine and offering some caveats); *cf.* Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 331 (2000) (arguing that the limitation on prohibiting support of violent activity is impracticable because of the difficulty of enforcing such legislation).

31. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (holding that the material support statute withstands constitutional scrutiny because it allows First Amendment associational and speech rights while it prohibits material support); s*ee also* Jennifer Van Bergen, *In the Absence of Democracy: The Designation and Material Support Provisions of the Anti-Terrorism Laws*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 107, 111–16 (2003) (describing the rationale behind the AEDPA and the USA Patriot Act); *cf.* Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 863–68 (2004) (discussing the statutory scheme for prosecution of the crime of providing material support or resources to designated foreign terrorist organizations).

32. *See* United States v. Assi, 414 F. Supp. 2d 707, 713 (E.D. Mich. 2006) (stating that material support given to a terrorist organization can be used to promote the organization's unlawful activities, regardless of the donor's intent); *see also* Linde v. Arab Bank, 384 F. Supp. 2d 571, 577–78 (E.D.N.Y. 2005) (determining liability for "aiding and abetting" international terrorism); *cf.* United States v. Sattar, 395 F. Supp. 2d 79, 96–100 (S.D.N.Y. 2005) (discussing the nature of conspiracy against unidentified prospective victims of terrorist acts under 18 U.S.C. § 2339A). *See generally* Robert M. Chesney, *Beyond Conspiracy? The Anticipatory Prosecution Power and the Challenge of Unaffiliated Terrorism*, 80 S. CALIF. L. REV. __ (forthcoming 2007), *available at* http://ssrn.com/abstract=932608 (discussing risks and benefits of enforcement strategies under the material support statute).

port to a DFTO, an individual who has provided money or tangible aid need not specifically intend to assist violent acts, but may intend only to further the aims of the organization.[33]

B. Problems in Enforcement

One problem with the "material support" statutes is that their application to forms of assistance besides financial aid has created some confusion among communities such as Muslims, whose cooperation is required for antiterrorism efforts.[34] This confusion in turn has given prosecutors more leeway than may be healthy.[35] The result has been a perceived focus on markers of ethnicity, religion, and in some cases political opinion, that may undermine the legitimacy of antiterrorist efforts.[36] Congress and the courts have sought to clarify the meaning of other statutory terms, such as "personnel" and "training." After courts held that "training" and "personnel" were void for vagueness because they could curb activity protected under the First

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33. Courts have also held that provision of money or financial services, such as the establishment of special accounts for money provided to the families of suicide bombers, to terrorist groups can give rise to "aiding and abetting" liability under the Anti-Terrorism Act, 18 U.S.C. § 2333, which gives United States victims of terrorism and their families a private right of action in federal court. *See, e.g.,* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1027 (7th Cir. 2002) (noting that courts have held that provision of money or financial services, such as the establishment of special accounts for money provided to the families of suicide bombers or terrorist groups, can give rise to "aiding and abetting" liability under the Anti-Terrorism Act, 18 U.S.C.A. § 2333); *see also* Linde v. Arab Bank, 384 F. Supp. 2d 571, 577–78 (E.D.N.Y. 2005) (determining liability for "aiding and abetting" international terrorism). *See generally* 18 U.S.C.A. § 2333 (2007) (creating a private right of action in federal court for United States victims of terrorism and their families).

34. *See* CHARLES DOYLE, CONG. RESEARCH SERV., MATERIAL SUPPORT OF TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS: SUNSET AMENDMENTS 2–3 (2006), *available at* http://www.usembassy.it/pdf/other/RL33035.pdf (noting that even courts have been troubled by ambiguity in the terms "training," "personnel" and "expert advice or assistance" as they are used in 18 U.S.C.A. § 2339, which may include simple advocates, benign academic instruction, etc.); *see also* Crimm, *supra* note 5, at 1347–51 (noting the decrease in global philanthropy as a result of enforcement of the material support statutes). *See generally* R. Richard Banks, *Racial Profiling and Antiterrorism Efforts,* 89 CORNELL L. REV. 1201, 1201–02 (2004) (noting that antiterrorism efforts have severely restricted the civil liberties of thousands of innocent people, with particular emphasis on Arabs and Muslims).

35. *See Anti-Terrorism Efforts, Civil Liberty and Civil Rights: Before US Comm'n on Civil Rights,* Mar. 19, 2004 (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Heritage Found.), http://www.heritage.org/Research/LegalIssues/tst031904a.cfm (discussing incidences of backlash among several ethnic groups as noted in the Report of the Inspector General); *see also* Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4 (discussing prosecution of a student for including a link to Hamas on a Web site). *See generally* Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 10–12 (2003) (noting that differential treatment by race or national origin may be offensive to American values but surged after September 11, 2001).

36. *See* Banks, *supra* note 34, at 1207–16 (highlighting concerns and confusion about racial profiling that may undermine perceived legitimacy of antiterrorist efforts); *cf.* Milton Viorst, *The Education of Ali al-Timimi*, ATLANTIC MONTHLY, June 2006, at 69, 77–78 (arguing that distrust of Muslims contributed to the conviction of a cleric on terrorism-related charges supported by ambiguous evidence). *See generally* Peter Margulies, *Above Contempt? Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449, 449–52 (2005) (discussing problems of overreaching in terrorism prosecutions).

Amendment, such as seminars on nonviolence or international law,[37] Congress amended the statute to focus the definition of "training" on activities, such as weapons training abroad, and to provide that "personnel" referred to individuals under the "direction or control" of the DFTO.[38]

However, definitional problems continue with prosecutions under the statute. Consider the indictment of two men, one a musician from the Bronx, Tarik ibn Osman Shah, and the other a doctor, Dr. Sabir, after a government sting operation in which the two men allegedly "pledged allegiance" to al-Qaeda.[39] Shah and Sabir were indicted for conspiring to provide personnel and training.[40] The attempt to provide military and martial arts training, however, did not get very far beyond the "wish list" stage, leading to questions about whether the indictment seeks to punish mere statements of vigorous, if highly misguided, support of the kind that the First Amendment clearly protects.

These definitional problems dovetail with the consequences of applying the law inflexibly even in cases involving the provision of monetary support. I discuss these adverse consequences in the next section.

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37. *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (asserting that the material support statute passed intermediate scrutiny, except for the terms "training" and "personnel," which were impermissibly vague); *see also* United States v. Sattar, 272 F. Supp. 2d 348, 357–61 (S.D.N.Y. 2003) (dismissing two counts of an indictment where charges relating to "personnel" and "communications equipment" were found to be void for vagueness); DOYLE, *supra* note 34, at 2–3, *available at* http://www.usembassy.it/pdf/other/RL33035.pdf (positing that there is ambiguity in the terms used in 18 U.S.C.A. § 2339 and as such, they are void for vagueness).

38. *See* 18 U.S.C. § 2339A(b) (2006) (setting forth the legal definitions of what constitutes provision of material support to terrorists); *see also* 18 U.S.C. § 2339B (2004) (describing conducts by which individuals and financial institutions may be held accountable for providing material support to designated foreign terrorist organizations). *See generally Aiding Terrorists—An Examination of the Material Support Statute: Before US Comm'n on Civil Rights,* May 5, 2004 (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Heritage Found.), http://www.heritage.org/Research/LegalIssues/tst050504a.cfm (discussing fair notice as a basic principle of due process and evaluating the clarity of the terms "personnel," "training" and "expert advice").

39. *See* Larry Neumeister, *Terror Suspects Called Bin Laden Followers,* WASH. POST, May 31, 2005, at A3 (reporting that two U.S. citizens were arrested on charges they conspired to provide material support to al-Qaeda); *see also* Michelle O'Donnell, *2 Men, in New York and Florida, Are Charged in Qaeda Conspiracy,* N.Y. TIMES, May 30, 2005, at A1 (noting that the arrests came as part of a two-year sting operation that ended with each man facing a single conspiracy charge).

40. *See* Sealed Complaint at 1, United States v. Shah, No. S405CR.673(LAP), 2007 WL 414485 (S.D.N.Y. Jan. 30, 2007), http://www.umaryland.edu/healthsecurity/docs/usshahsabir52705.pdf (charging the defendants with conspiring to provide material support and resources to a foreign terrorist organization); *see also Aiding Terrorists—An Examination of the Material Support Statute: Before US Comm'n on Civil Rights, supra* note 38 (critiquing the ambiguity of the statutory terms and the consequent problems of fair notice and due process); Neumeister, *supra* note 39, at A3 (reporting on the arrest of two U.S. citizens on charges of conspiracy and provision of material support to al- Qaeda).

II. The Unintended Consequences of Terrorist Financing Restrictions in the International Arena

While courts have generally upheld sanctions and financing restrictions,[41] the role of such measures in promoting transitions to a rule of law in the home countries of DFTOs is somewhat less clear. Financing restrictions express nations' condemnation of violence against civilians and may in some cases promote accountability and hobble terrorists' capability for violence.[42] However, they also can be both unfair and ineffective, undermining transitions to nonviolence and rule-of-law values.[43]

A. Skewed Agendas

A central problem with terrorist financing restrictions, even when those restrictions seek to curb the activities of groups manifestly engaged in violence against innocents, is that such restrictions serve the limited agendas of regimes allied with the United States.[44] In Indonesia,

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41. *See* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1027 (7th Cir. 2002) (noting that courts have held that provision of money or financial services to the families of suicide bombers or terrorist groups can give rise to liability under the Anti-Terrorism Act, 18 U.S.C. § 2333); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000) (holding that the material support statute comports with the First Amendment right in that it protects advocacy of the beliefs and ideals of terrorist organizations).

42. *See* U.S. Dep't of State, International Cooperation Against Terrorist Financing Urged (Aug. 23, 2004), http://usinfo.state.gov/ei/Archive/2004/Aug/23-71079.html (discussing the importance of efforts to combat terrorist financing and their virtue as a tool in the war on terror); *see also* JEANNE GIRALDO ET AL., CTR. FOR CONTEMP. CONFLICT, TERRORISM FINANCING & STATE REPONSES IN COMPARATIVE PERSPECTIVE (2004), http://www.ccc.nps.navy.mil/events/recent/nov04TerrorismFinance_rpt.pdf (identifying ways to hobble terrorists' capacity for violence by undermining the efficiency of their organizations and increasing the costs of committing acts of terrorism). *See generally* William Patton, *Preventing Terrorist Fundraising in the United States*, 30 GEO. WASH. J. INT'L L. & ECON. 127, 129–130 (1996) (recognizing that a disruption of terrorist fundraising would impact international terrorist activities).

43. *See* Ruti G. Teitel, *Theoretical and International Framework: Transitional Justice in a New Era,* 26 FORDHAM INT'L L. J. 893, 893–94 (2003) (discussing complexities of transitional redress); *see also* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2014–18 (1997) (recognizing challenges to the rule of law inherent in societies transforming their political, legal, and economic systems). *See generally* Margulies, *Judging Terror, supra* note 19, at 392–96 (commenting on some adverse effects of the preemptive approach on the rule of law and its effect on transitioning to democracy).

44. *See* Joshua Kurlantzick, *The Rise and Fall of Imperial Democracies: From the Beltway to Bangkok, Moscow to Manila, Elected Leaders Are Using the Threat of Terror to Grab More Power—and Making the Threat Worse*, 38 WASH. MONTHLY 33 (2006) (detailing instances where allied governments have used the war on terror to consolidate power); *cf.* Anthony L. Smith, *A Glass Half Full: Indonesia-U.S. Relations in the Age of Terror*, 25 INST. SOUTHEAST ASIAN STUD. 449 (2003) (recognizing the dilemma facing the United States and its global war on terrorism, which affects the political climate and increases human rights abuses in Indonesia); *cf.* Joe Cochrane & Jonathan Kent, *Drifting Toward Extremism: Malaysia and* Indonesia *Are Known for Their Gentle Version of Islam, So Why Is the Mainstream Worried?*, NEWSWEEK, Dec. 4, 2006 (noting that efforts to curb insurgency in Malaysia have resulted in the imprisonment of alleged terrorists without trial).

for example, the United States has bolstered a brutal regime that has fueled an insurgency.[45] While this regime purports to promise stability—traditionally a core value in United States' foreign policy[46]—stability of this kind often comes at the price of compromising accountability for government abuses. The Indonesian regime has reasons of its own to seek to stifle political opposition, and it has sought to use United States' aid to do this.[47] A couple of years ago, liberals in Congress, along with a somewhat odd bedfellow, then–Deputy Secretary of Defense Paul Wolfowitz, who was responsible for much of the theoretical framework for the Iraq war, were making some headway in Indonesia by holding the regime's feet to the fire and demanding reforms.[48] Now, the Administration has apparently retreated from that position, resuming aid to the regime without firm evidence of positive change.[49]

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45. *See* Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?* 9 J. TRANSNAT'L L. & POL'Y 153, 163 (1999) (citing the United States' record of supporting regimes that violate human rights in countries such as Vietnam, El Salvador, Nicaragua, and Indonesia); *see also* Jim Glassman, *The War on Terrorism Comes to Southeast Asia*, 35 J. CONTEMP. ASIA 3 (2005), *available at* 2005 WLNR 2756305 (noting that Indonesian intelligence and security forces have used national security rhetoric to legitimize stepping up operations, including assassinations, torture, and displacement of communities friendly to independence movements within Indonesia). *But see* John G. Cacomanolis, *East Timor's Unfinished Struggle: Inside the Timorese Resistance*, 29 N.Y.U. J. INT'L L. & POL. 677, 679 (1997) (stating that while the United States has influence over the Indonesian regime, it is by no means a puppet of Washington, D.C.).

46. *See* Margulies, *supra* note 15, at 33 (noting the importance of stability in the execution of United States foreign policy); *see also* Timothy J. Kepner, Comment, *Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni,* 19 DICK. J. INT'L L. 475, 477–78 (2001) (stating that after World War II the United States was more concerned with regional stability than freedom, democracy, or human rights); Rex J. Zedalis, *An Independent Quebec: State Succession to NAFTA,* 2-FALL NAFTA L. & BUS. REV. AM. 3, 14 (1996) (commenting that the United States' position during the breakdown of the Soviet Union was one of promoting stability in international relations).

47. *See* Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504, 520 (2005) (stating that the global war on terror has allowed states to justify political oppression); *see also* Jared Levinson, *"Living Dangerously": Indonesia and the Reality of the Global Economic System*, 7 J. INT'L L. & PRAC. 425, 425–26 (1998) (remarking that the United States, among other countries, acted improperly by providing political and military support to the Indonesian regime); Katharine H. Woodward, Comment, *Neo-Colonialism, Labor Rights, and the "Growth Triangle" of Indonesia, Malaysia, and Singapore: Who Will Protect the "Hinterland" and Indonesia's Workers?* 15 DICK. J. INT'L L. 171, 184 (1996) (noting the legal and physically violent methods used by the Indonesian government to stifle political opposition).

48. *See* James Gomez, *September 11: Asian Perspectives*, 13 IND. INT'L & COMP. L. REV. 705, 709 (2003); *see also* Sam Nunn, Douglas Paal & Paul Wolfowitz, Op-Ed., *Malaysia's Leader Betrays the Future*, N.Y. TIMES, Oct. 7, 1998, at A23 (lamenting that the Indonesian regime is ruining its future by indefinitely detaining a political activist, and calling for his immediate release); Paul Wolfowitz, Op-Ed., *The First Draft of Freedom*, N.Y. TIMES, Sept. 16, 2004, at A27 (imploring the Indonesian government to take stock of the progress it had made thus far, and to continue on the same path by dismissing the federal defamation case against a newspaper reporter, and to embrace the freedom of the press, as a cornerstone of democracy).

49. *See* Jonathan T. Stoel, Note, *Codes of Conduct on Arms Transfers—The Movement Toward a Multilateral Approach*, 31 LAW & POL'Y INT'L BUS. 1285, 1307–09 (2000) (arguing for the development of a standardized set of criteria that must be met in order to participate in the arms trade, as a means of protecting human rights concerns); *see also* Scott Morrissey, *U.S. Lifts Indonesia Arms Embargo*, 36 ARMS CONTROL TODAY 35, Jan. 1, 2006, *available at* 2006 WLNR 2131063 (discussing the lifting of arms embargo imposed by the United States and European Union after Indonesian military intervention in a secessionist region of East Timor, which resulted in the deaths of 1,500 civilians and destruction of much of East Timor's infrastructure); *Jakarta Welcomes U.S. Move to End Arms Curbs*, N.Y. TIMES, Nov. 24, 2005, at A13 (noting that while the United States lifted the arms embargo, the Indonesians would still be accountable for all past human rights abuses).

Consider also the case of Israel, which has strong and legitimate security interests[50] as a state created to protect the Jewish people from genocide[51] and persecution that is surrounded by present or recent enemies.[52] Necessary American support for Israel has sometimes been accompanied by undue deference to inequitable or short-sighted policies. These policies include promotion of settlements in the West Bank and the appropriation of Palestinian land in East Jerusalem,[53] security checkpoints that impose humiliation on innocent Palestinians

50. *See* Dalia Dorner, *The Protection of Human Rights in the New Age of Terror*, 11 HUM. RTS. BRIEF 16, 16 (2003) (noting that experience has shown that despite a government's responsibility to enforce democracy, human rights, in particular, in times of emergency become secondary to the security interests of the people); *see also* Emanuel Gross, *Democracy in the War Against Terrorism—The Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1194 (2002) (discussing the Israeli military's balancing of security issues and concerns about collateral damage to civilians in response to terrorism). *But see* Jason Litwack, Note, *A Disproportionate Ruling for All the Right Reasons: Beit Sourik Village Council v. The Government of Israel*, 31 BROOK. J. INT'L. L. 857, 875–76 (2006) (explaining that while military commanders have been given power to issue military commands, they must be made through the process of balancing the Israelis' security interest against the needs of the Palestinians).

51. *See* ANTON LA GUARDIA, WAR WITHOUT END: ISRAELIS, PALESTINIANS, AND THE STRUGGLE FOR A PROMISED LAND 360 (2002) (noting that the United Nations partitioned Palestine to create a Jewish state as an act of expiation for the Holocaust); *cf.* Peter Margulies, *Differences and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives,* 6 ST. THOMAS L. REV. 135, 135–36 (1993) (drawing on family history and other sources to analyze parallels between experiences of Holocaust and Haitian refugees).

52. The persistence of terrorist violence is a reminder of Israel's precarious position. *See* Benjamin M. Greenblum, *The Iranian Nuclear Threat: Israel's Options Under International Law*, 29 HOUS. J. INT'L L. 55, 74–76 (2006) (recalling the Iranian president's explicit call for the destruction of Israel, and the clear sentiment that the two nations are enemies)*; see also* Brandon Hollinder, Note, *A Golden State Solution to the Israeli-Palestinian Water Conflict*, 30 HASTINGS INT'L & COMP. L. REV. 103, 106–07 (2006).

53. The Bush Administration has opposed some of these policies, but often in a perfunctory fashion. *See* Steven R. Weisman, *U.S. Now Said to Support Growth for Some West Bank Settlements*, N.Y. TIMES, Aug. 21, 2004, at A1 (announcing a shift in the United States–Israeli foreign policy, and the administration's support of the expansion of the West Bank Settlements, with conditions). *But see* Steven Erlanger, *Over U.S. Objections, Israel Approves West Bank Homes,* N.Y. TIMES, Sept. 5, 2006, at A10 (describing "pro forma" United States' objections to the expansion of suburban-style settlements in East Jerusalem).

while providing convenience for settlers,[54] and targeted killings of terrorist leaders and military responses to acts of violence that may cause disproportionate harm to civilians.[55]

Finally, in Sri Lanka, where the rebellious Tamil Tigers group has been designated as a foreign terrorist organization, recent episodes of violence entailed acts against civilians by both the LTT and the government.[56] In Sri Lanka, repression of Tamils by the Sinhalese majority helped set the stage for two decades of terrorist response.[57] Justifiable revulsion at terrorist violence should not preclude criticism of such policies, any more than critics of such policies should excuse terrorist violence.

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54. *See* Deborah Sontag, *The Palestinian Conversation*, N.Y. TIMES, Feb. 3, 2002, at 637 (stating how the checkpoints have become more backlogged and humiliating, and that many Palestinians have resorted to riding donkeys to circumvent them). *But see* Steven R. Weisman, *Donors Consider Large Rise in Aid to Palestinians,* N.Y. TIMES, Dec. 17, 2004, at A1 (reporting a proposal to double the amount of aid given to Palestine on condition that they and Israel take steps to reducing their conflict, including the removal of checkpoints). *See generally* Clyde Haberman, *For Palestinians, a Daily, Dirty Obstacle Course,* N.Y. TIMES, Aug. 21, 2001, at A1 (offering a first-person account of the daily task of passing through checkpoints).

55. *See The Ethics of War: Mind Those Proportions*, ECONOMIST, July 29, 2006 (analyzing criticisms by human rights groups of Israeli bombings of targets in Lebanon that caused substantial harm to civilians and Hezbollah's firing of rockets at Israeli cities and towns, which caused civilian deaths with no legitimate strategic objective). While one can question the wisdom or appropriateness of the decisions of the Israeli government in the recent conflict in Lebanon, evidence indicates that Israel's actions did not constitute war crimes. Indeed, once the Israeli government made the decision to respond militarily, Hezbollah's placement of rocket installations in civilian areas made civilian casualties inevitable. See Greg Myre, *Offering Video, Israel Answers Critics on War*, N.Y. Times, Dec. 5, 2006, at A1 (describing evidence of Hezbollah rocket placements); *cf.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 28, 6 U.S.T. 3538, 75 U.N.T.S. 308 ("The presence of a protected person may not be used to render certain points or areas immune from military operations"); Statute of Rome on Establishment of International Criminal Court, art. 8(2)(b)(xxiii), at http://www.un.org/law/icc/statute/romefra.htm (last visited Feb. 6, 2006) (providing that "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime); Eyal Benvinisti, *Human Dignity in Combat: The Duty to Spare Enemy Civilians*, 39 ISR. L. REV. 81, 104 (2006) (analyzing international humanitarian law provisions); Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State Against Terrorism?* 16 EMORY INT'L L. REV. 445, 455 (2002) (same). Because Israel is a democracy with a commitment to the rule of law, Israel's judiciary has often acted as a check on excesses prompted by security concerns. *See Judgment Concerning the Legality of the General Security Service's Interrogation Methods (September 6, 1999), in* TORTURE: A COLLECTION 165, 173–77 (Sanford Levinson ed., 2004) (refusing to authorize coercive interrogation methods). *See generally* Kenneth Lasson, *Scholarly and Scientific Boycotts of Israel: Abusing the Academic Enterprise*, 21 TOURO L. REV. 989, 1067–68 (2006) (discussing dangers of targeting Israeli civil society in order to express disagreement with Israeli government policies).

56. *See* Payal K. Shah, Note, *Assisting and Empowering Women Facing Natural Disasters: Drawing from Security Council Resolution 1325*, 15 COLUM. J. GENDER & L. 711, 723 (2006) (noting that the vulnerability of citizens after the tsunami created opportunities for military groups, specifically the Tamil Tigers, which human rights groups fear are recruiting orphaned children); *see also* Shimali Senanayake & Somini Sengupta, *Monitors Say Troops Killed Aid Workers in Sri Lanka*, N.Y. TIMES, Aug. 31, 2006, at A12 (cataloguing the numerous kidnappings and murders of journalists and aid workers that have occurred recently and accusing the government of being involved); Somini Sengupta, *Resumption of Sri Lanka War Tests Civilians' Endurance,* N.Y. TIMES, Sept. 18, 2006, at A12 (discussing the severe impact of armed conflict on innocent civilians).

57. *See* Neil DeVotta, *Illiberalism and Ethnic Conflict in Sri Lanka,* 13 J. DEMOCRACY 84 (2002), *available at* 2002 WLNR 9066765 (examining the waning hope for democracy in Sri Lanka); *see also* Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 613–15 (2004) (offering a general overview of the history between the Tamil Tigers and the Sinhalese, and explaining the significance of the unrest that still exists today).

B. A Misleading Monolithic Perspective

Viewing countries or groups as monolithic is also a problem with rigid financial restrictions, as with other aspects of foreign and national security policy. In Iraq, for example, disgust with the concededly monstrous regime of Saddam Hussein blinded policy-makers to internal divisions that undermined plans for a democratic transition.[58] Similarly, the West has typically viewed Iran through the prism of fear about the spread of Islamic radicalism, which obscures nuances such as Iran's condemnation of the Taliban in Afghanistan in the period leading up to September 11.[59] Even critics of groups such as Hamas have echoed this theme, acknowledging a moderate strand within the organization that favors cessation of violence.[60]

The flaws in this monolithic perception also obscure common ground between the tendencies of voters in the West and populations given the chance to vote in Islamic countries. Studies have shown that strong adherents of Islam are no less attuned to democratic principles than their more secular brethren.[61] In Islamic countries, as elsewhere, voters support candidates for a mix of reasons, including dissatisfaction with the ineffectiveness or corruption of a prior regime. In Iran, for example, President Ahmadinejad's victory owed much to the missteps of

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58. *See* Christopher C. Joyner, *Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq*, 32 VA. J. INT'L L. 1, 13 (1991) (noting that the United Nations' sanctions on Iraq included financial sanctions in order to further isolate the nation from other nations); *see also* Claire M. Diallo, Note, *The U.S. Empire: Is Any Sovereign Nation Safe After the Russian and Belarus Democracy Acts?* 91 IOWA L. REV. 673, 707 (2006) (explaining the theory behind economic sanctions and claiming that they have not worked, because they only manage to hurt the poor, not the wealthy); *cf.* Jason C. Nelson, *The United Nations and the Employment of Sanctions as a Tool of International Statecraft: Social Power Theory as a Predictor of Threat Theory Utility,* 29 LAW & PSYCHOL. REV. 105, 115 (2005) (observing that the United Nations has begun to investigate alternative forms of sanctions as a result of the negative consequences sanctions usually have on the citizens of a country, for example, in Iraq).

59. *See* JOHN L. ESPOSITO, THE ISLAMIC THREAT: MYTH OR REALITY? 121 (3d ed. 1999) (acknowledging concerns that Iran was supporting terrorism); *see also* Christopher A. Ford, *Siyarization and Its Discontents: International Law and Islam's Constitutional Crisis,* 30 TEX. INT'L L.J. 499, 499–500 (1995) (recognizing that most Westerners do not understand Islam but that it is important to learn more about it). *See generally* Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1, 72 n.276 (2005) (noting that Iran is the largest regional and global supporter of Islamic radicalism).

60. *See* LEVITT, *supra* note 8, at 241–42 (noting that there is a current within the Hamas movement calling for a cessation of military activity and a focus on Islamist political and social activity).

61. *See* Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries*, 36 GEO. J. INT'L L. 947, 961 (2005) (noting that Iraq's constitution provides for Islam to be a check on legislative powers in addition to requiring that no piece of legislation contradict with accepted principles of human rights); Mark Tessler & Eleanor Gao, *Gauging Arab Support for Democracy*, 16 J. DEMOCRACY 83 (2005), *available at* 2005 WLNR 13474047 (concluding that support for democracy in the Arab world is strong and is independent of a particular set of religious beliefs or practices). *See generally* Anver Emon, *Reflections on the "Constitution of Medina": An Essay on Methodology and Ideology in Islamic Legal History*, 1 UCLA J. ISLAMIC & NEAR E. L. 103, 125 (2001) (remarking that there are some Muslims who believe that Islam expounded the fundamental principles of democracy before it came to the West).

the incumbent, whose performance in office did not live up to his reformist rhetoric.[62] Similar anti-incumbent feeling was a key reason for Hamas' victory on the West Bank and Gaza.[63]

Imposing sanctions automatically on governments or quasi-governments run by DFTOs displays a paradox: observers of emerging democracies tend to expect the best, assuming as a baseline the virtues that established democracies have gained after decades or even centuries of development.[64] At the same time, however, observers of these democracies, confronted by decisions that the observers oppose, often attribute the worst possible motives to political actors in emerging democracies. The Bush Administration's reaction to Chavez and Morales in Latin America is a notable example, in which the Administration has insisted on rule-of-law virtues that are not always securely displayed in the United States itself.[65] By the same token, the Administration has also viewed Chavez and Morales as irresponsible or evil, instead of seeing them as flawed political leaders whose posturing often stems from decades of excessive interference from Washington[66] and attempts—often misguided—to address inequities in the allocation of wealth that American foreign policy has typically neglected. The result is that Western expectations are unrealistically high, while the West attributes the failure to meet those expectations to a cartoonish malevolence that also lacks foundation in reality.

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62. *See* Harry F. Tepker, *Reply to Noah Feldman: Democracy's Paradox: Popular Rule as a Constitutional Limit on Foreign Policy Promoting Popular Rule*, 58 OKLA. L. REV. 21, 24 (2005) (observing that despite concerns to the contrary, voter turnout was significant for the first election in Iraq and terrorist attacks were at a minimum, making a clear statement that the Iraqi people want to govern themselves); *see also* Michael McFaul, *Chinese Dreams, Persian Realities*, 16 J. DEMOCRACY 74 (2005) *available at* http://search.ebscohost.com.proxy.queenslibrary.org/login.aspx?direct=true&db=afh&AN=18769672&site=ehost-live (noting that the basic demographics in Iran are favorable to democratization). *But see* Sidney Buchanan, *From Conservative Republican to Liberal Democrat: A Political Journey*, 39 HOUS. L. REV. 447, 461–62 (2002) (positing the idea that all religions can influence their followers' worldview and this will be expressed in the polls).

63. *See* Usher, *supra* note 9, at 20–21; *see also* Hollinder, *supra* note 52, at 107 (noting that political uncertainty and instability has reached an all-time high with the election of Hamas to power, a group considered to be terrorists by most countries). *See generally* Natalie Huls et al., *International Legal Updates*, 14 HUM. RTS. BRIEF 31, 33 (2006) (remarking that Palestine has entered the most severe economic depression in history as a result of self-imposed restrictions on movement and taxes being charged by the newly elected Hamas leadership).

64. *See* Philippe C. Schmitter, *The Ambiguous Virtues of Accountability*, 15 J. DEMOCRACY 47 (2004); *see also* Richard N. Haass, *The Three-Quarters Mark*, NAT'L INTEREST, Jan. 1, 2007, *available at* 2007 WLNR 1720875 (remarking that creating a mature democracy is a daunting task, and partial democracies may turn into failures); *Bush Blames Iraq's Sectarian Violence on al-Qaida,* ST. DEP'T PRESS RELEASES & DOCUMENTS, Nov. 28, 2006, *available at* 2006 WLNR 20620779 (stating that the violence in Iraq is part of a larger trend in the Middle East where al-Qaeda and other extremists are working to undermine emerging democracies, as they are a major defeat for extremist politics).

65. *See* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV 955, 956 (2006); *see also* Hale E. Sheppard, *Revamping the Export-Import Bank in 2002: The Impact of This Interim Solution on the United States and Latin America*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 114 n.126 (2002) (suggesting that U.S officials had knowledge of the coup and even encouraged it, as a result of a disagreement with Chavez). *See generally* Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 529, 555 (2004) (noting that one may have a different perception of Cuba's government depending on where one lives).

66. See KINZER, supra note 14, at 195–96 (discussing the U.S. policy toward Chile); *see also* Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 450 (2006) (citing the Bush administration's support of a coup attempt against Chavez as evidence of the problems that persist between Chavez and Washington).

C. The Political Dynamic Favoring Sanctions

Moreover, the use of financing restrictions may stem more from the familiarity of political actors with this tool than with the tool's effectiveness, and with aspects of the United States' political marketplace that make the use of other tools risky. Scholars of institutions tell us that, as Mark Twain observed, "[t]o a man with a hammer, everything looks like a nail."[67] When coercive tools, whether those involving force or those involving pressure of other kinds, are available, actors in the legal and political system tend to use those tools.[68]

The domestic political marketplace exacerbates this tendency. Imposing restrictions and adding groups to the list of designated foreign terrorist organizations allows politicians to wear a macho mantle. Raising prison sentences for drug and other offenses, or adding to the list of offenses for which immigrants can be deported, reveals a similar dynamic.[69] No politician has ever been defeated for re-election by voting to raise the maximum sentence for drug offenders. On the other hand, politicians rightly see *lowering* sentences as politically risky. Being soft on crime, soft on illegal immigration or soft on terrorism is a clear political liability that an opponent can readily exploit with campaign ads.[70] This dynamic bolsters financial restrictions, while allowing little room for nuance.

D. The Negative Externalities Wrought by Financing Restrictions

Another problem is that terrorist financing restrictions often impose grave hardship on an already-oppressed population, while doing little to weaken forces supporting violence. In Gaza,

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67. *See* Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION 257, 271 (Sanford Levinson ed., 2004) (arguing that judicial approval is an acceptable means of constraining and controlling the use of torture).

68. *E.g.*, Lou Henkin, *Notes from the President*, AM. SOC'Y INT'L L. NEWSL. (ASIL, Wash., D.C.), June 1993 (describing the use of coercive force by the United States to respond to an international conflict); *cf.* Frederic L. Kirgis, Jr., *Enforcing International Law*, AM. SOC'Y INT'L L. NEWSL. (ASIL, Wash., D.C.), Jan. 1996 (addressing reasons for the lack of effectiveness of sanctions); Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral Highground*, 56 A.F. L. REV. 1, 55 (2005) (arguing that states will defend international law only when they have an interest to do so).

69. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–48 (2001) (discussing the convergence of interests between legislators and prosecutors on measures targeting street crime). *See generally* Stuart A. Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 LAW & SOC. INQUIRY 857, 868 (1998) (arguing that the modern state's penology may be considered an agent of class, race and gender inequalities).

70. *E.g.*, Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES MAG., Dec. 24, 2006, at 46 (illustrating Senator Brownback's political fears of being labeled as soft on crime); *Labour: The Future for Britain, Lib Dems: Soft on Thugs, Soft on Drugs*, http://www.labour.org.uk/libdemsthetruth (last visited Jan. 27, 2007) (attacking the liberal democrats for being soft on crime). *See generally* Robin Toner, *In Tight Senate Race, Attack Ad on Black Candidate Stirs Furor*, N.Y. TIMES, Oct. 26, 2006, at A1 (discussing how racist depictions in political campaign ads in the 1988 were used to depict Michael Dukakis as soft on crime).

for example, funding restrictions have devastated an already shaky health care system.[71] Sanctions regimes may also constitute collective punishment that violates international law, since they fall so heavily on those who are powerless to change the offending policy or regime.[72] By fraying the fabric of civil society, sanctions erode the capacities of institutions that pose an alternative to violence, thereby making transitions more difficult.

Externalities might be less of a problem if other sources of assistance, such as humanitarian assistance through international organizations, could meet the need. However, humanitarian assistance has problems of its own. First, such efforts rarely meet the full extent of the need.[73] In addition, because of flaws in implementation, humanitarian programs often encourage corruption. Much humanitarian aid does not go to the needy, but to established "kleptocrats"—powerful individuals who prosper by skimming off cash from aid programs.[74] Aid programs of this kind bolster the very people that the electorate has rejected, leading to popular alienation and a fertile climate for renewed violence.

E. Terrorist Financing Restrictions as Counter-Productive Measures in a Multilateral World

A final problem with terrorist financing restrictions is their ineffectiveness in a multilateral global environment. Policymakers and actors in the legal system must acknowledge that they

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71. *See* Steven Erlanger, *Funds Cut, Gaza Faces a Plague of Health Woes*, N.Y. TIMES, May 8, 2006, at A1 (stating that the destruction of Gaza's health care system is a result of Israeli pressure and the cutting off of funds); *see also* David D. Henley, Eva Bergholtz & Gunnar Olofsson, *Health and Health Care for the Palestinians of the West Bank and Gaza Strip*, 15 J. PALESTINE STUD. 132, 133 (1986) (describing the lack of funding the Israeli government provided the health facilities of the West Bank and Gaza Strip); Sara Roy, *Economic Deterioration in the Gaza Strip*, MIDDLE EAST REP., July–Sept. 1996, at 36, 36 (1996) (describing how Israeli closure of the West Bank and Gaza Strip increases hardship and damage to the economy).

72. *See* Rome Statute of the International Criminal Court, art 8(2)(a)(iv), July 17, 1998, U.N. Doc. A/Conf./183/9, 37 I.L.M. 999, *available at* http://www.un.org/law/icc/statute/romefra.htm (defining a "war crime" as, *inter alia*, the wanton destruction of the property of protected persons); *see also* Ariel Zemach, *The Limits of International Criminal Law: House Demolitions in an Occupied Territory*, 20 CONN. J. INT'L L. 65, 77–89 (2004) (arguing that international law prohibitions on collective punishment require that criminal acts be of sufficient moral gravity to violate fundamental international law norms, and that house demolitions do not meet this standard). Of course, sanctions often occur outside the realm of actual hostilities, raising doubts about whether international prohibitions against war crimes apply. In addition, sanctions do not directly destroy property. However, they may have a comparable effect, for example, where a prohibition on aid makes it impossible to maintain needed medical equipment. *See generally* David Malone, *Iraq: No Easy Response to "The Greatest Threat,"* 95 AM. J. INT'L L. 235, 235 (2001) (reviewing RICHARD BUTLER, THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION, AND THE CRISIS OF GLOBAL SECURITY (2000)) (addressing the author's description of the diversion of resources to the Iraqi elite during the UN sanctions and the resulting suffering of the Iraqi people).

73. *See* Celia W. Dugger, *World Bank Study Faults Its Work in Rural Africa*, N.Y. TIMES, Dec. 8, 2006, at A12 (describing the World Bank's own report detailing its failure to properly address rural poverty in Africa); *see also* Sharon LaFraniere, *Crowds of Pupils but Little Else in African School*, N.Y. TIMES, Dec. 30, 2006, at A1 (reporting on the staggering educational challenges facing African schools despite increased international financial support); *U.N. Says Rise in Somali Refugees Is Straining Aid*, N.Y. TIMES, Oct. 7, 2006, at A7 (reporting on the inability of aid workers to handle the overwhelming influx of refugees in Somalia).

74. *See* Mark Landler, *First Lady's Squawk Hints at Dictator's Nest Egg*, N.Y. TIMES, Dec. 22, 1998, at A4 (discussing Imelda Marcos' admission that her husband, the former Filipino dictator, amassed a huge fortune and vast business interests in the Philippines); *see also* Jeevan Vasagar, *Commission for Africa: Reaction: "Aid ended in bank accounts because a kleptocrat was preferable to a communist*," GUARDIAN (London), Mar. 11, 2005, at 10 (detailing how corruption in government and Cold War politics was responsible for misappropriating aid money).

have multiple audiences in order to make effective policy in a multilateral environment. These audiences include foreign governments and transnational communities with members held together by ties of nationality, ethnicity, religion, or ideology.[75] Unfortunately, attempts to impose financing restrictions on a global basis founder and do not address this multilateral component.

First, international financing restrictions compound the resentment of globalization felt by many transnational communities, including those in the Muslim world.[76] Subordinated people throughout the world who feel threatened or displaced by the powerful forces of globalization tend to blame the United States for not doing enough to alleviate these pressures.[77] Restrictions on terrorist financing can exacerbate this trend, by wrongly stigmatizing or penalizing organizations that provide legitimate philanthropic support to the international Muslim community.[78]

The impossibility of enforcing terrorist financing restrictions internationally also distorts the influences on terrorist groups. Organizations like Hezbollah or Hamas that lack access to

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75. *See* CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 32–33 (2003) (describing political identities as networks of actors connected through shared experiences, cultures and histories); *cf.* Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335, 1337–38 (1999) (defining social, cultural and ethnical arrangements that create a community beyond the state as "transnational civil society"); Philippe C. Schmitter, *Civil Society East and West*, *in* CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES 239, 250 (Larry Diamond et al. eds., 1997)

76. *See* Amy Chua, *The Profitable and the Powerless: International Accountability of Multinational Corporations*, 19 AM. U. INT'L L. REV. 1239, 1249 (2004) (comparing the United States to a market dominant minority and explaining why there is so much resentment against the United States); *see also* David Brooks, Op-Ed, *Trade, Oppression, Revenge*, N.Y. TIMES, Dec. 25, 2005, at 49 (describing the global rise of an ethno-nationalistic backlash resulting from globalization and the subsequent market inequities). *But see* Ellen Hale & Vivienne Walt, *Extremists' Hatred of U.S. Has Varied Roots: Resentment Builds Over Success, Broad Influence*, USA TODAY, Sept. 19, 2001, at A1 (explaining that the United States has become a target because it is a convenient symbol of the "other" for discontented groups).

77. *See* Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, 27 INT'L SEC. 30, 46 (2002). *See generally* Duncan Campbell, *Where They Hide the Cash: We Help Rich Individuals and Companies to Spirit Away Vast Sums from the Developing World*, GUARDIAN (London), Dec. 5, 2005, at 27 (commenting on the money laundering that powerful Western countries allow to occur and benefit from that results in financing corruption and terrorism); Mark Levine, Op-Ed, *Why Globalization Isn't Working*, BOSTON GLOBE, Aug. 17, 2006, at A13 (arguing that globalization's class inequalities fuel anger and violent reactions by the disadvantaged classes).

78. *See* Cronin, *supra* note 77, at 42 (stating the process of determining terrorist supporters from genuine philanthropies may itself ignite conflict). *See generally* Alan Cooperman, *Muslim Charities Say Fear Is Damming Flow of Money*, WASH. POST, Aug. 9, 2006, at A3 (illustrating the chilling of legitimate Muslim charities by the U.S. government's policies); Farah Stockman, *Detentions over Charity Ties Questioned: Terror Links Called Overstated*, BOSTON GLOBE, Aug. 31, 2006, at A1 (reporting on the detention of relief workers from Islamic aid organizations).

financing from the West through legitimate avenues will turn to more radical elements, such as sources in Iran or Saudi Arabia,[79] to finance their operations. Moreover, these elements will rely more on cash or other difficult-to-trace sources of support, if conventional transactions through banks are off-limits. Leaving the funding to radical elements promotes the tendency within such groups to "go to extremes" in determining policy choices.[80] Without inputs from moderate avenues, the debate within a group like Hezbollah or Hamas takes a turn toward violence. Rigidly applied financing restrictions therefore, function as a self-fulfilling prophecy, writing in stone the outcomes that the West wishes to avoid.[81]

III. Transitions Generally

Transitions from violence to civil forms of dialogue between contending groups are never easy. As a "contingent product of human collective action,"[82] any transition encounters numerous uncertainties.[83] However, theorists of transitions from dictatorships to democracy have wis-

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79. *See* Andrew Higgins, *Fund-Raising Target: Branded Terrorist by U.S., Israel, Microcredit Czar Keeps Lending; Hezbollah Financier Endures Bomb Runs on Branches, Pursues His Mixed Mission; Money for Bullets, $865 Loans,* WALL ST. J., Dec. 28, 2006, at A1 (describing the U.S. strategy of stopping Hezbollah money used to fund microcredits may be misguided because funds and material for Hezbollah's military operations are more likely sent clandestinely from Iran); *cf.* Don Van Natta Jr. & Timothy L. O'Brien, *Flow of Saudi's Cash to Hamas Is Scrutinized*, N.Y. TIMES, Sept. 17, 2003, at A1 (quoting an American diplomat describing the cultural norms against questioning motivations for charity).

80. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 118 (2000) (studying the mechanisms that cause a group to shift its judgments and increase polarization); *cf.* Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J. L. & PUB. POL'Y 429, 429–30 (2002) (analyzing the role of polarization and group homogeneity in fomenting violence). *See generally* Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 624-25 (1998) (examining the phenomenon, which the author calls *ethnification*, where a social group further redefines its core identity elements).

81. Financial pressure may be more effective in changing the behavior of established institutions, organizations, and nations, with a stake in the world community. *See* Andrew Solomon, *Circle of Fire: Letter from Libya*, NEW YORKER, May 8, 2006, at 44 (discussing Libya's efforts to rejoin the world community, including settlement of lawsuits arising from Libya's role in bombing of aircraft over Lockerbie, Scotland).

82. *See* Schmitter & Karl, *supra* note 15, at 178 (arguing that systematic comparison between societies undergoing regime change should be used in order to evaluate whether they have a shared model of transformation).

83. *See* Rosemary Nagy, *Postapartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled?* 40 LAW & SOC'Y REV. 623, 627 (2006) (inquiring into the various issues that need to be dealt with for an emerging nation in constructing a new identity during a period of transition); *see also* Naomi Roht-Arriaza, *The Complex Architecture of International Justice*, 10 GONZ. J. INT'L L. 38, 41 (2006-7) (outlining the problem of trying only the leadership while failing to account for local perpetrators and how this model neglects the victims of the emergent nation in a transitional justice regime); Phillippe C. Schmitter & Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidogists: How Far to the East Should They Attempt to Go?* 53 SLAVIC REV. 173, 174 (1994) (quoting Machiavelli's trenchant analysis:

> There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things: for he who introduces it has all those who profit from the old system as his enemies and he has only lukewarm allies in those who might profit from the new system.

(NICCOLO MACHIAVELLI, THE PRINCE, ch. VI (Modern Library 1950)).

dom to offer. Three factors are central: reciprocity, institutional repertoire, and a pragmatic model of redress. I explain each in turn.

A. Reciprocity

Lasting agreements that end or constrain violence require some kind of mutuality or shared stake.[84] Each side needs to know that the future holds common risks or benefits, and that the risks it poses to the other side also create risks for its own constituents. When each side recognizes this shared stake and signals its recognition to the other, agreements are possible.

The promise of reciprocity extends beyond bilateral disputes, to matters involving multiple players.[85] The protections accorded to captives under the Geneva Convention[86] are a good example. Signatories to the Convention have generally understood that complying with the provisions of the Convention, such as the prohibition on "humiliating and degrading treatment" of detainees in Common Article 3, also serves their own interests, by imposing on other signatories an equal obligation. Moreover, broad agreement about the importance of reciprocity in this context can also create habits of cooperation that facilitate resolution of other disputes.[87] Conversely, defections from the reciprocity norm by one player can trigger a cycle of mistrust and violence.[88]

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84. *Cf.* Daniel R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 785–86 (1999) (arguing that a community requires reciprocity, which entails a sense of mutuality of responsibility between members and their duties to one another). *See generally* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 503–04 (1989) (describing a successful political ethics dependent on successfully distributing resources in order to reconcile both one's devotion to personal relationships and one's broader communitarian ideals).

85. *Cf.* Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 554 (2006) (discussing both the shortfalls and benefits of reciprocity in a multilateral context). *See generally* George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 580 (2005) (analyzing the relevant factors in forming multilateral customary rules of international law).

86. *See* Geneva Convention Relative to the Treatment of Prisoners of War, pt. 1,, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (codifying the agreement of mutual responsibilities among all signatory parties). *See generally* Case Law, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 14 INT'L J. REFUGEE L. 96, 119 (2002) (reasoning that multilateral treaties and the Geneva Convention give rise to an international peremptory norm). *But see* Lisa Napoli, Note, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT'L & COMP. L. 131, 186 (1996) (arguing that the Geneva Convention is not reciprocal because enforcement failures result in collective disadvantages between particular states).

87. *See* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 26 (1986) (stating that the threat that a multilateral agreement will collapse between multiple parties creates a shared interest in the successful outcome of the agreement); *cf.* Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 91 (2005) (arguing that habits of cooperation are first formed in small groups before a more generalized reciprocity is developed); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2065 (1996) (advancing the idea that small-scale, localized habits of cooperation precede a broader, global disposition toward reciprocity).

88. *See In re* Extradition of Strunk, 293 F. Supp. 2d. 1117, 1119 (E.D. Cal. 2003); Andrew Kydd & Barbara F. Walter, *Sabotaging the Peace: The Politics of Extremist Violence*, 56 INT'L ORG. 263, 264 (2002) (arguing that a peace settlement can be successfully broken down by an extremist player who fosters mistrust among other players in the agreement); Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1257 (2002) (stating that terrorists often justify their violent attacks by claiming that they are a response to the other side's defection).

A truly international sanctions regime requires this kind of multilateral commitment to be effective. Governments around the world weighing the adoption of sanctions must perceive that enforcement is legitimate under both domestic and international law. If global audiences doubt the legitimacy of enforcement, a sanctions regime will be inconsistent and ineffective. Here, the United States' lack of fidelity to international humanitarian norms in its interrogation of suspected terrorists undercuts the case for sanctions.[89] The dubious legality of the United States' policies against alleged terrorist detainees colors global perceptions of United States' legitimacy, particularly when the United States seeks global cooperation on a broad range of antiterrorist programs, including terrorist financing restrictions. Suspicions of the United States on this front are heightened by the mistakes and exaggerations in intelligence that afflicted the United States intervention in Iraq.[90]

Transitions within countries or regions also benefit from shared recognition and signaling of reciprocity. For example, theorists of transitions have demonstrated that supporters of authoritarian regimes fully commit to democracy only when their opponents reject drastic changes such as nationalization of private property or dismantling of the armed forces.[91] Absent this signaling of reciprocity by opponents, authoritarians "hedge their bets" on transitions by retaining the option of a military coup or some other action that will defeat democracy.[92] Hedging inspires defection on the other side, undermining the basis for agreement. Reliance on sanctions, even when the other side reciprocates through cessation of violence, is a kind of hedging that undercuts the prospects for transitions.

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89. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3516, 5 U.N.T.S. 287 (prohibiting torture); Geneva Convention art. 3(1)(c), Aug. 12, 1949, 5 U.N.T.S. 287, 6 U.S.T. 3516 (prohibiting humiliating and degrading treatment); *cf.* Oren Gross, *The Prohibitions on Torture and the Limits of the Law*, *in* TORTURE: A COLLECTION, 229, 237 (Sanford Levinson ed., 2004) (expressing arguments for necessity and the need for some form of accountability); *cf.* John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, *in* TORTURE: A COLLECTION, 145, 149–50 (Sanford Levinson ed., 2004) (discussing prohibitions against torture in international human rights and humanitarian law); Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 316–18 (2006) (analyzing accountability for torture and other forms of harsh interrogation).

90. *See* Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 40 (2006) (commenting on the permissive attitude of the United States toward interrogation and intelligence); Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285, 330–31 (2005) (stating that the International Committee of the Red Cross reported that between 70% and 90% of Iraqi detainees have been arrested mistakenly by the United States and claiming that the treatment of detainees was often poor).

91. *See* ALEXANDER, *supra* note 15, at 66–67 (discussing authoritarian regimes' transitions to democracy); Georges Anglade, *Rules, Risks, and Rifts in the Transition to Democracy in Haiti*, 20 FORDHAM INT'L L.J. 1176, 1201 (1997) (stating that a general mobilization toward democracy is necessary in order to abandon authoritarian tendencies and transition toward a real democracy); *see also* Manuel Chavez, *Trade and Environment in Latin America: When Institutions, Transparency and Accountability Are Essential*, 14 MICH. ST. J. INT'L L. 225, 257 (2006) (arguing that the participation of governments is integral to the transition from authoritarian regimes to democracy).

92. *See* ALEXANDER, *supra* note 15, at 66–67; Irwin P. Stotzky, *On the Promise and Perils of Democracy in Haiti*, 29 U. MIAMI INTER-AM. L. REV. 1, 6 (1998) (stating that military coups intentionally undermine democracy). *See generally* Shayna S. Cook, Note, *The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act*, 99 MICH. L. REV. 452, 476 (2000) (acknowledging that a military coup put an end to the democratically elected regime in Haiti).

Concrete examples from the world's hotspots of terror reveal the importance of reciprocity. In Spain, for example, the Socialist government has moved gradually toward concessions to Basque separatists and the terrorist ETA group.[93] While the government is not offering the full-scale autonomy sought by ETA, it has offered accommodations on ETA prisoners and other issues that have clearly improved the prospects for negotiation.[94] ETA, which has observed a three-year truce with the government, can point to the government's moves as a reciprocal benefit. Spain's former government, a more conservative regime that sought initially to blame ETA for the horrendous Madrid train bombings committed by al-Qaeda,[95] lacked the flexibility to participate in this positive cycle of change. In Northern Ireland, reductions in British security forces under the government of Tony Blair have matched a ceasefire launched by Sinn Fein, the political wing of the Irish Republican Army.[96] In contrast, in Sri Lanka, renewed violence that has gravely endangered a four-year-old truce agreement coincided with the election of a hard-line government that opposed autonomy for the Tamil minority.[97] In sum, when insurgents feel that cessation of violence has enhanced the political momentum for change, transitions to

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93. *See* Zachary E. McCabe, *Northern Ireland: The Paramilitaries, Terrorism, and September 11th*, 30 DENV. J. INT'L L. & POL'Y 547, 565 (2002); Jeremie J. Wattellier, Note, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397, 399 (2004) (acknowledging the compromises made in Spain as a result of Basque-ETA interests in achieving political autonomy and Spain's balancing of security interests with its desire to leave authoritarian policing in the past).

94. *See* Wattellier, *supra* note 93, at 400 (explaining that the Spanish government has extended the period to investigate prisoners' cases, given prisoners the right to a lawyer and habeas corpus, and also implemented a statute protecting prisoners from torture); *Talking Peace: Spain and ETA*, ECONOMIST, July 8, 2006 (claiming that negotiations between Spain and ETA may put an end to terrorist violence in Spain); *cf. Spanish Government Held Talks with ETA in August*, BBC INT'L REP., Sept. 17, 2006 (concluding that the Spanish government's refusal to make concessions to the ETA has created a deadlock in the negotiations between the parties).

95. *See* James Nieland, Note, *Executive Suspension of National Elections: Sacrificing an American Dream to Avoid a Spanish Nightmare?*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 389, 408 (2005) (stating that the Madrid train bombings have been the only successful attack on Spain by al-Qaeda); Dale Fuchs, *Investigation of Madrid Bombings Shows No Link to Basque Group, Spanish Minister Says*, N.Y. TIMES, Mar. 30, 2004, at A6 (discussing earlier insistence by government that ETA was responsible for the bombings and resulting disillusionment of Spanish voters).

96. *See* Timothy P. McEldruff, Jr., *In re McMullen and the Supplementary Extradition Treaty: An Unconstitutional Bill of Attainder?* 11 N.Y. INT'L L. REV. 139, 145 n.42 (1998) (stating that the IRA's announcement of the ceasefire ended 25 years of violence); Duncan Shipley-Dalton, *The Belfast Agreement*, 22 FORDHAM INT'L L.J. 1320, 1339 (1999) (asserting that Northern Ireland was "desperate to maintain the so-called IRA ceasefire" and would continue to make concessions to terrorism to keep the peace); Gerry Adams, *Blessed Are the Peacemakers*, ECONOMIST, Sept. 9, 2006 (discussing progress in Northern Ireland and discussing the leader of Sinn Fein's efforts in offering advice to Palestinian factions and the Israeli government).

97. *See* Margulies, *Making "Regine Change," supra* note 19, at 400 (stressing the attacks by the Tamil, and arguing that stopping the violence occurring in Sri Lanka will require an agreement allowing autonomy for both groups); Sengupta, *supra* note 56, at A12. *See generally* S.I. Keethaponcalan, *Social Cubism: A Comprehensive Look at the Causes of Conflict in Sri Lanka*, 8 ILSA J. INT'L & COMP. L. 921, 922–23 (2002) (stating that the "Tamil separatist movement" was a result of the Tamil's desire for greater autonomy in Sri Lanka).

nonviolence can consolidate.[98] In contrast, when insurgents believe that momentum has slowed or reversed course, efforts to maintain nonviolence appear unreciprocated and unsustainable.

B. Institutional Repertoire

According to the transition theorists, another vital element in transitions is institutional repertoire.[99] A transition-centered approach is a pragmatic enterprise requiring a portfolio of methods to cope with the contingencies that surround attempts to make a better future.[100] Adversaries also need opportunities to interact about low-level issues where consensus may be more readily attainable than it is on "end-stage" issues, such as land and autonomy. Undue reliance on sanctions and force shrinks institutional repertoire, yielding opportunity costs that can undermine the prospects for transitions.

The tilt of United States foreign policy under the Bush Administration provides a clear example that is close to home. In earlier eras, the United States was able to achieve its goals on the international stage through a deft commingling of the capacity for coercion and the deployment of "soft power"[101]—America's prestige, cultural and economic influence, and vivid example of democracy in action. Sadly, too much of American policy today seems to sound only one note out of the scale. The United States looks to force—either through military might or eco-

98. *See* Brian J. Foley, *Avoiding a Death Dance: Adding Steps to the International Law on the Use of Force to Improve the Search for Alternatives to Force and Prevent Likely Harms*, 29 BROOK. J. INT'L L. 129, 151 n.87 (2003) (describing the various ways to stop terrorism, and alleging that terrorists flourish where legitimate and peaceful ways of redressing a grievance do not exist); *cf.* Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 DENV. J. INT'L L. & POL'Y 285, 297 (2005) (discussing benefits accruing to antiterrorism policy through increased regard for human rights, and citing as example the benefits of pressure from Europe on Turkey to observe international human rights norms); Martha Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's "Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism,"* 75 FORDHAM L. REV. 593, 602 (2006) (promoting an approach to counterterrorism that takes both physical security and human rights into account).

99. *See* Margulies, *supra* note 15, at 6–7 (stating that transition scholars generally focus on three elements in their analyses, one of which is institutional repertoire); Margulies, *Making "Regine Change," supra* note 19, at 391 (defining institutional repertoire as the range of a country's social and political institutions, including the organizations of civil society and the political branches of government); *cf.* Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 877 (2005) (declaring that institutional repertoire is decreased when each side's stake in reaching a peaceful resolution is diminished).

100. *See* Thomas J. Moyer & Emily Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 652–53 (2003) (contrasting the nonviolent decision-making process of democratic societies with those of authoritarian regimes, and concluding that there is an increased need for nonviolent forums for change in transitioning societies); Margulies, *Judging Terror*, *supra* note 19, at 418 (describing this approach as a long-term remedy that promotes the investment of human capital into nonviolent, democratic institutions).

101. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE, 35 (Oxford University Press 2002); Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States, and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 1, 20 (2006); *see also* Harold Hongju Koh, *Can the President Be Torturer in Chief?* 81 IND. L.J. 1145, 1153 n.38 (2006) (claiming that the United States' soft power, which was developed so that countries would not have to rely solely on force, flows from moral authority and is inherent in diplomacy and international law).

nomic coercion in the form of sanctions.[102] As we discussed in the last section, relying on coercion develops a distinctive momentum of its own. Actually talking to adversaries seems futile at best, and dangerous at worst. After all, talking seems like a quixotic endeavor when there are sanctions to be applied. Those who meekly suggest communication seem to lack the intestinal fortitude required for confronting the United States' enemies. The result is that the skills for communication atrophy, and coercion becomes the method of choice. This dynamic has no room for the possibility that in certain cases, talking and engagement can avoid the need for coercion.[103]

A higher threshold against sanctions imposed by donor nations, such as the United States, also broadens the institutional repertoire available to struggling democracies.[104] Institutions of civil society, including business, professional, and cultural associations, are necessary to promote habits of deliberation and participation that produce alternatives to violence and terrorism.[105] However, the rigid application of sanctions starves these institutions of resources, while doing little to shrink the resources available for violence. Part of the problem here is an asymmetry between the time horizon required for the development of civil society, compared with the time horizon required for resort to violence. Violence yields a quick payoff in blood, bodies, and attention.[106] In contrast, the fragile institutions of civil society require careful nurturance over extended periods. In a climate in which sanctions can disrupt the flow of resources

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102. *See* Louis Klarevas, *W Version 2.0: Foreign Policy in the Second Bush Term,* 29 FLETCHER F. WORLD AFF. 165, 168 (2005) (emphasizing the United States' available resources to use hard power through coercion and inducement, but realizing that hard power is often overvalued); Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 430 (2004) (reasoning that hard power is used to coerce another party to do something they would not otherwise do, and might not be as effective as persuasion whereby the other party is convinced that another course of action is what they want); *cf.* Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. 771, 779 (2006) (describing a view of hard power used through military or economic coercion as "the real power" in international law).

103. *See* Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 216 (2003) (noting that the use of soft power, because of its voluntary rather than coercive nature, facilitates reaching international compromises and reduces the need for hard power); David Sloss, *Do International Norms Influence State Behavior?* 38 GEO. WASH. INT'L L. REV. 159, 200 (2006); However, military force should be carefully tailored to ensure that it addresses such needs and avoid the use of military force in less exigent circumstances.

104. *See* Kevin J. Fandl, *Recalibrating the War on Terror by Enhancing Development Practices in the Middle East*, 16 DUKE J. COMP. & INT'L L. 299, 326–27 (2006) (arguing that institutional development is key to sustaining democracy). *See generally* John Norton Moore, *A New Paradigm in International Relations: A Reduction of War and Terror in the World Through Democratization and Deterrence*, 17 TRANSNAT'L LAW. 83, 85 (2004) (commenting that democracies are less likely to resort to coercion than non-democracies). *But see* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 53–54, 63–65 (2001) (arguing that unilateral sanctions can bolster democratic norms within a sanctioned country and in the global community, while acknowledging that certain kinds of sanctions can be counterproductive).

105. *See* Ziad Abu-Amr, *Pluralism and the Palestinians*, 7 J. DEMOCRACY 83 (1996), *available at* 1996 WLNR 4165249 (discussing the fragile development of civil society in the West Bank and Gaza). *See generally* Avigael N. Cymrot, *Reading, Writing, and Radicalism: The Limits on Government Control over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607, 642 (2006) (asserting that freedom of speech is necessary for democratic institutions to flourish, but there should be some limits on that freedom in order for self-governance to succeed).

106. *See, e.g.*, John Alan Cohan, *Necessity, Political Violence, and Terrorism*, 35 STETSON L. REV. 903, 951 (2006) (discussing the immediate effects of the September 11, 2001 terrorist attacks, such as destroying billions of dollars worth of property, attacking a significant symbol of the economic power of the United States, and a resulting symbolic victory for the terrorists).

quickly, investment of the time and effort required to develop institutions of civil society seems like a bad risk. On this view, sanctions actually help terrorists, by weakening institutions that can compete with terrorists for popular allegiance and support.[107] Refraining from sanctions strengthens civil society, allowing it to compete more effectively with terrorists in the process of popular mobilization.[108] Increasing the resources available for civil society also gives greater leverage to nonviolent factions *within* terrorist organizations, increasing their status as "rainmakers" who can obtain resources without resorting to violence.[109]

Institutional repertoire also involves the cultivation of low- and medium-level contacts between adversaries on day-to-day matters of mutual concern, including food, education, and health care.[110] Often, adversaries can find common ground in dealing with day-to-day issues, even as they continue to disagree about ideology.[111] Over time, the habits and dispositions developed in such pragmatic exchanges can build confidence that accord is possible on larger issues.

Recent attempts to manage transitions to nonviolence reveal the importance of these low- and medium-level contacts. In Northern Ireland, for example, Unionists and Catholics cooper-

107. *See* Margulies, *Uncertain Arrivals*, *supra* note 19, at 485 (claiming that terrorist actions weaken democratic institutions and make way for a totalitarian regime). *See generally* Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 FLETCHER F. WORLD AFF. 59, 61–62 (2003) (arguing that counterterrorism efforts are usually most effective in civil societies when society works together).

108. *See* Henry H. Perritt, Jr., *Lessons from the Balkans for American Foreign Policy: Building Civil Society within a Multilateral Framework*, 3 CHI. J. INT'L L. 229, 234 (2002) (taking the position that the United States should be more involved in the development of institutions, which will lead to the strengthening of civil society); *cf.* Maxwell O. Chibundu, *For God, for Country, for Universalism: Sovereignty as Solidarity in Our Age of Terror*, 56 FLA. L. REV. 883, 908–9 (2004) (suggesting that popular mobilization might not be necessary to combat terrorism as long as terrorism is regarded as an event that can be effectively policed).

109. *See* Jonakait, *supra* note 31, at 870 n.27 (declaring that many groups which are characterized as terrorist organizations engage in some legal, nonviolent activity); Margulies, *Making "Regime Change," supra* note 19, at 420 (advocating an approach to terrorism that would promote nonviolent alternatives). *But see* David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 967–68 (2002) (contending that some organizations have separate branches for violence and nonviolence, respectively, but acknowledging that organizations such as al-Qaeda use nonviolent acts as a "front for terrorism").

110. *See* Jerome D. Frank & Andrei Y. Melville, *The Image of the Enemy and the Process of Change, in* BREAKTHROUGH: EMERGING NEW THINKING 1, 8 (Walker Publishing 1988) (noting that cooperative attitudes among combat-hostile adversaries can be promoted through common goals, the most obvious one being general survival); *see also* Jeffrey Gettleman, *Ex-Rivals Uniting*, N.Y. TIMES, Apr. 9, 2004, at A1 (quoting an Iraqi government clerk, who states that Shiite fighters in Iraq stormed Fallujah to provide food to their adversaries, the Sunnis, who were starving during the U.S. invasion of Iraq); Mehdi Lebouachera, *Bird Flu Forces Israeli-Palestinian Cooperation*, AFP, Mar. 23, 2006 (noting that Israeli officials communicated with Palestinian officials that they would provide everything needed to combat the bird flu that plagued the region).

111. *See, e.g.,* Lebouachera, *supra* note 111 (noting that Israeli officials planned to continue cooperating with Palestinian officials to combat the bird flu crisis despite the fact that a Hamas-dominated government, committed to the destruction of Israel, was set to take control within days); *cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 40 (1999) (arguing that the court's effort to narrow the grounds for a decision can promote consensus that would prove elusive on larger questions). *But see* Mary Murray, *Katrina Aid from Cuba? No Thanks, Says U.S.* (last visited Sept. 14, 2005), *available at* http://www.msnbc.msn.com/id/9311876 (describing the negative reaction of the United States government to an offer from Communist Cuba to send medical aid after Hurricane Katrina).

ate in a range of complex areas, including health, education, and finance.[112] The habits developed through these interactions have produced a reservoir of goodwill that the parties can draw on even as disagreements remain about key issues, such as the participation of both militant Protestants and Sinn Fein in a new government.[113] In the Middle East, as well, signs of cooperation are sporadically visible. For example, at least until the most recent outbreak of violence, Israeli and Hamas functionaries maintained local contacts on a range of matters, including dealing with the recent outbreak of bird flu in the area.[114] Indeed, while Hamas' recent attack on an Israeli military base near Gaza was clearly an unjustified act of aggression, this act of violence occurred against a backdrop in which continued sanctions gutted the everyday agenda of government, including health and education.[115] Moreover, both Hamas' and Hezbollah's acts of aggression seemed designed to force contacts on a relatively low-level issue—release of Palestinian detainees—which the parties had negotiated successfully in the past.[116] Finally, in Sri Lanka, the immediate cause for the most recent outbreak of violence was a breakdown in dealings between the government and the Tamil rebels about access to water for communities allied with each side.[117]

In sum, instead of prodding adversaries to engage with each other on these low-level issues, rigid sanctions weigh the balance toward one side. They encourage the dominant party to believe that low-level negotiations are unnecessary, and the insurgents to view them as futile. This is a sure recipe for a return to violence.

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112. *See* Colm Campbell & Fionnuala Ni Aolain, *Local Meets Global: Transitional Justice in Northern Ireland,* 26 FORDHAM INT'L L.J. 871, 886 (2003) (referring to the areas in which adversarial political groups are cooperating); *see also* John Dallat, *Outrageous Claims Answered*, BELFAST NEWS LETTER, Sept. 7, 2000, at 8 (recognizing local cooperation between Protestants and Catholics in Northern Ireland); Ian Graham, *250 Jobs for Power Sharing Town*, PRESS ASS'N, June 7, 1993 (explaining that Protestant and Catholic groups have set aside differences for the sake of creating employment).

113. *See* Campbell & Aolain, *supra* note 112*; cf.* Shipley-Dalton, *supra* note 96, at 1333 (remarking on the equal representation of Unionists and Nationalists in political power). *See generally* Jeremy A. Colby, *Getting to Peace: Avoiding Roadblocks on the Path to Peace in Northern Ireland,* 14 TEMP. INT'L & COMP. L.J. 1, 7 (2000) (discussing the way politics broke the stalemate between Unionists and Nationalists).

114. *See* Andreas Schloenhardt, *From Black Death to Bird Flu: Infectious Diseases and Immigration Restriction in Asia,* 12 NEW ENG. J. INT'L & COMP. L. 263, 281–82 (2006) (presenting the methods used by nations when dealing with international epidemics); Hussein Agha & Robert Malley, *Hamas: The Perils of Power,* N.Y. REV. BOOKS, Mar. 9, 2006, at 22, 24 (discussing how the Israelis and Hamas weigh ideological differences with the benefits of working together). *But see Eygptian Website Highlights for 21 Feb 06*, BBC MONITORING INT'L REP., Feb. 21, 2006, at 1 (claiming that the outbreak of bird flu is being dealt with poorly due to societal conflict).

115. *See* Robert Malley, *A New Middle East*, 53 N.Y. REV. BOOKS, Sept. 21, 2006, at 83, 85 (reporting the view of Hamas' insiders that Hamas' government was "starved of resources" by sanctions and rendered unable to govern).

116. *Id.* at 86 (acknowledging the unjustifiable nature of Hezbollah attacks, while arguing that its purposes—"a brief military confrontation and abduction followed by protracted third-party negotiations over yet another prisoner exchange"—did not constitute a fundamental departure from the "long history of such encounters").

117. *See Broken Pieces: Sri Lanka,* ECONOMIST, Aug. 5, 2006; *see also* John Lancaster, *In Some Ways, Rebels Without a Cause; Sri Lanka's Tamil Tigers Have Already Achieved De Facto Independence,* WASH. POST, Jan. 14, 2003, at A14 (detailing the history of guerilla tactics used by the Tamil Tigers).

C. A Pragmatic Model of Redress

As situations change, policymakers should seize opportunities for greater trust and balance between stakeholders. Seizing these opportunities often means making difficult choices. In this sense, transition thinkers owe much to a line of political theorists who emphasize dialogue and change, including Machiavelli and more recently, Max Weber and Michael Walzer.[118] These thinkers argue that a politician sometimes must act with dirty hands to achieve a compelling objective. For example, transition theorists recognize a tragic tension between achieving complete redress for past wrongs and reducing future violence.[119]

The history of transitions is littered with failed attempts to provide complete redress. Attempts at "lustration" of Communist officials in Poland bogged down that country's progress for years.[120] Moreover, attempts to "de-Baathify" Iraq, starting with the disbanding of the army after the fall of Saddam, have built alienation among Sunnis and fueled the insurgency.[121] Insisting on complete redress can be a fig-leaf for refusing to face up to difficult choices about future risks.

This is particularly true because of the pervasiveness of violence in transitions throughout history.[122] Machiavelli, recalling Exodus, noted that the journey of the Israelites from enslavement in Egypt and the worship of idols to piety and self-government required Moses to kill

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118. *See* Michael Walzer, *Political Action: The Problem of Dirty Hands*, *in* TORTURE: A COLLECTION 61 (Sanford Levinson ed., 2004) (theorizing that political change sometimes requires violence); *see also* Major Richard P. Dimeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum,* 186 Mil. L. Rev. 116, 138–39 (2005) (using Walzer's work to review what is necessary for transition to a new government); Garry Abrams, *Author "Links" Moses and Lenin: Political Philosopher Poses a Provocative Theory*, L.A. TIMES, Feb. 13, 1985, at 2 (reviewing Walzer's theories on the necessity of political violence throughout history).

119. *See* Dimeglio, *supra* n. 118, at 138–40 (discussing the need for accountability of past wrongs in creating new regimes); *see also* Teitel, *Theoretical and International Framework, supra* note 43, at 898 (remarking that transition requires recognition and correction of past violations).

120. *See* Denise V. Powers & James H. Cox, *Echoes from the Past: The Relationship Between Satisfaction with Economic Reforms and Voting Behavior in Poland*, 91 AM. POL. SCI. REV. 617, 628 (1997) (remarking on how attempts to provide redress against Communist officials in Poland hindered the country's transitional progress); *see also* Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 363 (1999) (alleging that lustration sometimes led to falsely accused collaborators); *see also* Ved P. Nanda, *Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights*, 26 DENV. J. INT'L L. & POL'Y 389, 393–95 (1998) (noting the work of the Lustration Court in Poland, which disqualified those officials guilty of human rights violations).

121. *See* Diamond, *supra* note 11, at 7 (discussing the importance of local issues and local elections in transitions, such as the transition to democracy in Iraq that the United States is attempting to ensure); *see also* Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 883–99 (2006) (examining the poor representation of the Sunnis in the new government); Note, *Democracy in Iraq: Representation Through Ratification*, 119 HARV. L. REV. 1201, 1206–08 (2006) (asserting the marginalization of the Sunnis in political representation).

122. *See* Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1891–1900 (1998); *see also* Fionnuala Ni Aolain, *Political Violence and Gender During Times of Transition,* 15 COLUM J. GENDER & L. 829, 834 (2006) (discussing the use of violence as a means of creating transition). *But see* Luis Lopez Guerra, *Peaceful Transitions to Democracy*, 19 CARDOZO L. REV. 1937, 1942 (1998) (alleging that transition is possible without resorting to violent practices).

many unbelievers among his own people.[123] Machiavelli also observed that the founding of the Roman republic required the slaying of Remus by his brother Romulus.[124] The American Revolution involved significant violence against Loyalists allied with the British.[125] The excesses of the French Revolution were legion.[126] More recently, the founding of the modern state of Israel involved significant violence directed against Palestinian civilians and British soldiers targeted in their quarters, as well as Arab riots and shootings directed at Jews.[127]

Due to these pervasive problems, theorists recognize that limits on redress are often necessary in transitions.[128] The recent initiatives of the new Iraqi government of Prime Minister Maliki, which include a program of national reconciliation that seeks to build trust with the long-dominant Sunni population by offering amnesty to insurgents, aim to reverse this process.[129] National truth and reconciliation commissions in countries such as South Africa

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123. *See* SEBASTIAN DE GRAZIA, MACHIAVELLI IN HELL 275 (1989); *see also* Exodus 32:27-29 (King James). *See generally* Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, 237–39 (1996) (detailing Machiavelli's belief that man is inherently bad and becoming "good" requires violence).

124. *See* Walzer, *supra* note 119, at 69; *see also* Cascarelli, *supra* note 124, at 239–40 (detailing Machiavelli's praise of the violence used by Romulus in obtaining power).

125. *See* Robert J. Allison, Benjamin Frankel, Keith Krawcyzinski & Dennis E. Showalter, HISTORY IN DISPUTE: THE AMERICAN REVOLUTION 1763, 1789 (Gale Publishers 2003), *available at* http://www.gale.com/pdf/samples/toc24562.pdf (noting that the Patriots used violence, intimidation, confiscation of property, banishment, and political, economic, and social ostracism to persecute Loyalists); *see also* Cynthia Crossen, *Colonists Who Opposed American Revolution All but Forgotten*, WALL ST. J., July 4, 2006 (stating that during the American Revolution, "violence against loyalists was not uncommon").

126. *See* HANNAH ARENDT, ON REVOLUTION, 110–11 (1965) (discussing vengeance, terror, and disregard of established norms concerning appropriate targets of violence during the French Revolution); *see also* ARNO J. MAYER, THE FURIES: VIOLENCE AND TERROR IN THE FRENCH AND RUSSIAN REVOLUTIONS 171 (2000) (covering the history of the French Revolution and the use of violence as a means of control); Janine M. Lanza, *"What Is the Law If Not the Expression of the Rights of Man and Reason?" The Champ de Mars Massacre and the Language of Law*, 19 LAW & HIST. REV. 283, 304 (2001) (reviewing the pervasive violence in the French Revolution).

127. *See* Shai Lavi, *The Use of Force Beyond the Liberal Imagination: Terror and Empire in Palestine, 1947*, 7 THEORETICAL INQ. L. 199, 207–08 (2006) (remarking on the political goal of the Irgun to undermine British rule).

128. *See* RUTI G. TEITEL, TRANSITIONAL JUSTICE 225 (2000); *see also* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 39 (2002) (assessing whether redress for human rights violations is even possible in the wake of transition); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551–52 (1991) (arguing for obligation to punish higher-ups who committed human rights violations, but acknowledging that punishing all wrongdoers is impossible and counterproductive).

129. *See* Scott Peterson, *Iraq Leader's Security Plan Targets Sunni Participation,* CHRISTIAN SCI. MONITOR, June 26, 2006, at 4 (noting Maliki's 24-point plan, which includes amnesty for past human rights violations); Edward Wong, *Some Insurgents Are Asking Iraq for Negotiations*, N.Y. TIMES, June 27, 2006, at A1 (describing overtures by Sunni insurgents to reciprocate for the Iraqi government's initiative).

embody this same tragic choice for accommodation and dialogue over a perfect redress or punishment of human rights violators.[130]

In transitions from terror, a broad spectrum of relief should be on the table, but used selectively to diminish the risk of future violence. In some cases, major outside powers with an interest in the result can foster redress by providing compensation.[131] Moreover, some individuals allegedly responsible for violence have already been punished in a summary fashion through dominant regimes' self-help and unilateral action, such as targeted killings.[132] A regime that has engaged in self-help in this fashion, which often harms civilians, is not well-situated to insist on perfect redress. For this reason, victims of violence by terrorist groups should focus on shutting down sources of aid specifically dedicated to supporting violence, such as accounts set aside for the families of suicide bombers.[133] Other efforts to secure compensation may impose externalities on groups seeking to move from violence to the rule of law, acting as an overhang that discourages such transitions.[134]

By the same token, subordinated or occupied communities that have turned to violence cannot expect that the other side will address all of their grievances. In Sri Lanka, for example, Tamil rebels may rightfully expect government redress for killings of civilians, but payment

130. *See* Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. LAW 753, 753–54 (1998) (arguing that amnesty for human right violations is a necessary element of transition); *see also* Sherrie L. Russell-Brown, *Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding "Effective Remedies,"* 26 HASTINGS INT'L & COMP. L. REV. 227, 262 (2003) (establishing the different treatment of varying levels of human rights violations and those which require amnesty*). But see* Ziyad Motala, *The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations*, 45 SANTA CLARA L. REV. 913, 914–15 (2005) (arguing that it is inappropriate to grant amnesty for gross human rights violations*).*

131. *See, e.g.,* Margulies*, Making "Regime Change," supra* note 19*,* at 418–19 (commenting on the use of an international tribunal for the trial of former Ba'athist officials); *see also* Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 184 (2004) (discussing the ability of a tribunal to remedy the residual problems of past genocide in Rwanda).

132. *See Security Council Confronts Ambitious Agenda in 2006, Brokering Ceasefires, Easing Difficult Transitions, Blunting Relapses into Conflict*, U.S. FED. NEWS, Jan. 12, 2007 (providing evidence of targeted killings in the Israel-Palestine conflict); *see also* Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 325 (2004) (defending the legality of targeted killings and its proper use to "pinpoint" those accountable and minimize civilian killings).

133. *E.g.,* Linde v. Arab Bank, 384 F. Supp. 2d 571, 577 (E.D.N.Y. 2005) (describing "universal death and dismemberment plans" or "comprehensive insurance death benefits," whereby the families of Palestinian terrorists receive "rewards" or payments according to the degree of injury sustained during a terrorist activity); *see* Jude McCulloch & Sharon Pickering, *Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism*, 45 BRIT. J. CRIMINOLOGY 470, 475–78 (2005) (enumerating potential advantages of combating terrorist financing).

134. *Cf.* Thomas M. Sanderson, *Transnational Terror and Organized Crime: Blurring the Lines*, 24 SAIS REV. 49, 50 (2004) (concluding that since terrorist funding has been drained from loss of state sponsorship and U.S. pressure on charities and other financing means, terrorist organizations have turned to organized crime groups instead as the source for funding violence). *But see* Jacqueline Benson, *Send Me Your Money: Controlling International Terrorism by Restricting Fundraising in the U.S.*, 21 HOUS. J. INT'L. L. 321, 342–66 (1999) (identifying problems in U.S. legislation that restricts terrorist funding such as defining terrorist organizations and overseeing the transfer of funds by questionable groups).

received will not fully compensate for the losses suffered.[135] Similarly, Palestinians in Gaza, the West Bank, or the global diaspora may rightfully expect that Israel phase in adoption of a family reunification policy that will allow limited numbers of Palestinians to rejoin relatives within Israel's pre-1967 borders.[136] However, an absolutist approach that extends an individual right of return to all Palestinians would undermine the status of Israel as a refuge for Jews,[137] impeding a transition to nonviolence.

IV. Applications of the Transition-Centered Model

Applying the transition-centered model to concrete situations requires a careful balancing of factors. Three elements are crucial: (1) an end to all violence by the terrorist group; (2) a commitment to transparency in financing; and (3) reciprocal confidence-building measures by the dominant side. The following paragraphs explain these elements.

A. An End to Violence

A terrorist group must cease all violent activities and financial or logistical support of violence by others, in order to be eligible for the lifting of financing restrictions. Violence on this definition includes not only attacks on civilians, but also attacks on the armed forces of the group's adversaries. An organization seeking legitimacy within the international community should not be able to pick and choose what violent tactics it wants to employ. Instead, all such tactics should be off-limits. While some in the organization may argue that this commitment to nonviolence sacrifices the organization's mission,[138] a group that seeks legitimacy and access to funding must give up some tools in its repertoire if it wishes that its adversaries make reciprocal concessions. Moreover, violence of any kind is a habit. Violence against armed forces

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135. *E.g., The JVP Makes Its Move*, FIN. TIMES, July 25, 2006 (reporting that a main goal of the 1988 temporary merger of the Sinhalese and Tamils was an attempt to provide redress for Tamils).

136. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Article 12(4) (1966) (granting a right to repatriation to refugees seeking to return to their countries of origin; *see* Margulies, *Making "Regine Change," supra* note 19, at 420 n.130 (suggesting a phased-in adoption of a family reunification policy that includes apology, compensation, and enhanced immigration rights for Palestinians by Israel as an effective compromise that safeguards Israel's position as a haven for Jews); *see* Dan Izenberg, *Court Rules to Uphold Citizenship Law*, JERUSALEM POST, May 13, 2006 (reporting that Israel's Supreme Court upheld the legality of the Citizenship and Entry into Israel Law, which limits the rights of Palestinians to reside inside Israel and explaining that the reunification law may be extended indefinitely for a one-year maximum at one time).

137. *See* Jerome M. Segal, *Clearing Up the Right-of-Return Confusion*, 8 MIDDLE E. POL'Y 23, 23–24 (2001) (suggesting that the difference between a Palestinian "right" of return to Israel and Palestinians' abilities to actually return must be reconciled whereby the "right" is afforded without threatening Israel's Jewish character). *See generally* Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 AM. J. INT'L L. 586, 586–87 (1978) (examining Israel's obligation under international law to recognize Palestinians' right of return).

138. *Compare* Yasser Arafat & Patrick Seale, *Arafat on Peace*, 13 J. PALESTINE STUD. 171, 173 (1984) (defending violent retaliation in the form of military operations aimed at military targets as just to combat Israeli occupation and to pursue the Palestine Liberation Organization's mission) *with* Jesse L. Jackson, *An Open Letter to Yasser Arafat* (2002), *available at* http://www.ncccusa.org/news/02news.50 html (last visited Feb. 19, 2007) (urging Arafat to use nonviolent strategies because violence destroys, rather than builds, the future). *See generally* Julian Madsen, *Suicide Terrorism: Rationalizing the Irrational*, 3 STRATEGIC INSIGHTS 26, 28–29 (2004) (explaining that suicide terrorism is infused into certain terrorist cultures as martyrdom and is used to propel political and religious revolts).

shades into violence against civilians,[139] whether through collateral damage or through an ongoing disposition to target civilians themselves. If violence resumes, donor nations should suspend aid for exponentially longer periods, in order to send a clear message.

B. Promoting Transparency

A terrorist group must commit itself to realizing transparency in its financial structure. Donors and private institutions should require a demonstration that the regime is moving toward transparency, avoiding that situation identified by Congress in which a multiple-purpose terrorist group uses money intended for peaceful purposes or social services to support violence. One simple step would be for a group to open its books to international monitors, much as countries allow international monitoring of nuclear energy programs.

C. Reciprocal Measures

If terrorist financing restrictions are to work, they must also be perceived as legitimate by relevant communities, including populations that comprise the terrorist organization's base of support. To that end, nations or national governments opposing terrorist organizations should make reciprocal commitments. First, they should ensure that military responses to terrorist acts are proportionate, and minimize collateral damage to innocents.[140] Second, to encourage groups to develop responsible leaders within their communities, instead of sequestering leaders (as Hamas does) in unaccountable third party territory, such as Syria,[141] forces opposing terrorism should generally refrain from "targeted killing" or assassination of organization leaders.[142] Third, forces opposing terrorist organizations should strive to set up regular channels, formal or informal, for discussing issues such as release of prisoners. Having channels for communica-

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139. *Compare* Imre Karacs, *Suicide Bomber Kills More than 140 in Baghdad*, SUNDAY TIMES (U.K.), Feb. 4, 2007, at 27 (noting the hundreds of injured and killed civilians resulting from a suicide bomber's purposeful attack of civilians) *with* Greg Myre, *17 Die as Fatah-Hamas Warfare Spreads Throughout Gaza*, N.Y. TIMES, Feb. 3, 2007, at A3 (reporting that civilians were killed in the midst of internal Palestinian fighting by security force personnel).

140. *See* Lance Morrow, *Why Collateral Damage Is Permanent: Long After the Rubble Is Cleared, the Innocent Victims Refuse to Be Forgotten*, TIME, May 7, 2001, at 84 (commenting that while collateral damage tends to imply insignificance, civilian loss is the greatest tragedy of war); *cf.* John A. Nevin, *Retaliating Against Terrorists,* 12 BEHAV. & SOC. ISSUES 109, 111–26 (2003) (mustering empirical evidence to argue that violent retaliation does not deter future terrorist activity).

141. *See* LEVITT, *supra* note 8, at 44 (stating that Khaled Mishal, the political chief of Hamas, is currently based in Syria); *see also* Ely Karmon, *Hamas' Terrorism Strategy: Operational Limitations and Political Constraints*, 4 MIDDLE E. REV. INT'L AFF. 1, 11 (2000) (explaining that, according to Khalil Shikaki, director of the Center for Palestine Research and Studies, Hamas will gain strength from its regional reach, as the organization's military leadership is based in Syria and Iran); George W. Bush, President Bush Calls for New Palestinian Leadership (June 24, 2002), *available at* http://www.whitehouse.gov/news/releases/ 2002/06/20020624-3.html (urging the Palestinians to raise new leadership that is rid of official corruption and concentration of power in irresponsible individuals).

142. *Cf.* Daniel Byman, *Do Targeted Killings Work?* 85 FOREIGN AFF. 95, 98–106 (2006) (describing risks and benefits accruing to Israel because of its strategy of targeted killings directed at Hamas and Hezbollah). *But see* Guiora, *supra* note 132, at 325 (defending the legality of targeted killings and its proper use to "pinpoint" those accountable and minimize civilian killings).

tion open minimizes the need to use violence as the only form of action available to meet organizational needs.[143]

V. The European Union Approach as an Alternative

While the transition-centered approach seeks to temper the absolutism of current United States policy, the European Union (EU) approach moves even further in the direction of flexibility.[144] The EU approach commendably links control of terrorist financing to broader democratic goals, and acknowledges that terrorist organizations find fertile ground in a "range of conditions," including poor governance, lack of political participation, and economic inequality.[145] The EU also expressly connects the success of terrorist financing restrictions with measures that promote good governance, human rights, education, and economic prosperity.[146] This more comprehensive look at the sources of terrorism contrasts with the United States' view, which downplays such concerns as rhetorical fig-leaves for excusing violence.

Unfortunately, the EU approach, while it emphasizes dialogue and avoids the opportunity costs of an absolutist approach, fails to provide clear ex ante incentives to terrorist organizations to move away from violence. Consider here the EU's failure in the weeks following the end of the Israeli-Hezbollah conflict to take decisive action to add Hezbollah to its list of terrorist

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143. *See* DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR: RADICAL ISLAM'S WAR AGAINST AMERICA, 416–18 (2003) (discussing the various nations, including Saudia Arabia, Egypt, and the U.S., that should commence dialogue with one another so that destruction is not the only resolution); Brian Martin & Wendy Varney, *Nonviolence and Communication*, 40 J. PEACE RES. 213, 213 (2003). *But see Spanish Daily Speaks of Terrorist Enemy Within, Praises Blair Message*, BBC NEWS, July 8, 2005 (advising democracies to thoroughly examine their flaws because it does not suffice to consider terrorism as a mere by-product of lack of communication).

144. *Cf.* National Security Archive Electronic Briefing Book No. 55, *Volume I: Terrorism and U.S. Policy* (2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/index1.html (announcing the Bush administration's goal post–September 11 is the "destruction of terrorism," by apprehending or killing the terrorists, destabilizing their infrastructure, and punishing all who aid terrorists) *with* Jonathan Stevenson, *How Europe and America Defend Themselves*, 82 FOREIGN AFF. 75, 75 (2003) (noting that the European Council did not respond as promptly or as forcefully as the United States from the outset), *and* BARRY RUBIN & JUDITH COLP RUBIN, ANTI-AMERICAN TERRORISM AND THE MIDDLE EAST, 102 (2002) (suggesting that terrorist entities in fact believe that America is too weak not to be defeated, rather than fear America's seeming strength).

145. *See* Draft, The EU Counter-Terrorism Strategy from Presidency and CT Coordinator, Council of European Union, to Council of European Union (Nov. 30, 2005), at 9, ¶ 11 (noting that the "range of conditions" giving rise to radicalism includes autocratic governance and political, economic, and educational deficiencies). *But see Europe Adopts New Counter-Terrorism Strategy*, FIN. TIMES, Dec. 2, 2005 (stating that the EU counterterrorism plan is vague in many ways).

146. *See* Draft, *supra* note 145 (announcing that it plans to combat the "range of conditions" that produce radicalism with good governance, human rights, democracy, and education). *But see* Ludo Block, *Devising a New Counter-Terrorism Strategy in Europe*, 4 TERRORISM MONITOR 4, 5 (2006) (arguing that although getting at the root causes of radicalism is an important long-term strategy, short-term results call for stricter legislation and law enforcement). *See generally EU Hopes for UN Counter-Terrorism Strategy*, XINHUA NEWS, Dec. 12, 2005 (reporting the EU's eagerness to see the United Nations adopt a similar counter-terrorist strategy).

organizations.[147] In light of this failure, the EU approach gives too much room to terrorist organizations to hedge their bets[148] by providing social services to solidify their hold on the population, while still retaining the potential for violence. Admittedly, restricting aid to multidimensional terrorist groups, such as Hamas and Hezbollah, creates negative externalities for people who have come to rely on such groups for social services.[149] However, deferring unduly to concern about externalities condones violence, and crowds out less dramatic approaches that build trust and reciprocity. If Hezbollah understood that violence of any kind was inappropriate, it might consider other ways of securing goals, such as a dialogue with Israel. Hezbollah's view that dialogue is unacceptable, while violence is appropriate, demonstrates the folly of the EU's approach. A clear message serves the goal of transitions more effectively.

VI. Conclusion

Restrictions on funding for terrorist organizations are an important element of a coordinated strategy in the war on terror. However, restrictions of this kind require flexibility, particularly when groups designated as terrorist organizations seek to participate in the electoral process. A rigid, absolutist approach to financing restrictions in this regard may be counterproductive, undercutting the transition to nonviolence within the organization.

There are a number of reasons why terrorist financing restrictions can generate harmful unintended consequences when terrorist groups turn toward the political process. First, restrictions can stack the deck in favor of the terrorists' adversaries, who have often pursued inequitable policies.[150] Second, such restrictions often reflect a lack of nuanced knowledge of the situation "on the ground" in other regions, including reasons for terrorist groups' electoral success that relate to issues distinct from the group's pursuit of violence, such as popular discon-

147. *See* Dan Bilefsky, *EU Calls for "Cessation of Hostilities,"* INT'L HERALD TRIB., Aug. 2, 2006 (reporting the EU's intent to not include Hezbollah in its list of terrorist organizations); *see also Senator Nelson Pressing to Put Hezbollah on EU Terror List,* U.S. FED. NEWS, Aug. 3, 2006 (describing Senator Bill Nelson's agenda, supported by at least 70 Senate colleagues, which urges the European Union to add Hezbollah to its list of terrorist organizations). *See generally Broken Pieces*, *supra* note 117, at 39–49 (noting that the European Union did add the Tamil Tigers to its list after the start of the recent violence in Sri Lanka).

148. *See* ALEXANDER, *supra* note 15, at 64–65 (discussing hedging strategy as an obstacle to transitions). *But see* Monica Den Boer & Jorg Monar, *11 September and the Challenge of Global Terrorism to the EU as a Security Actor*, 40 J. COMMON MARKET STUD. 11, 12–14 (2002) (acknowledging substantial military contribution post–September 11 despite denying strong solidarity to the U.S. in the War on Terror).

149. *See* WILLIAM J. CUNNINGHAM, JR. ET AL., TERRORISM: CONCEPT, CAUSES, AND CONFLICT RESOLUTION, 28 (2003) (defining multidimensional groups as those engaged in more than terrorist violence, participating in larger social and political activities); Erlanger, *supra* note 71, at A1 (recognizing that shortages of hospital and medical supplies resulting from funding cutoffs have replaced a once remarkable public health system). *See generally* Anastas Angjeli, *The Challenge of Terrorism and Organized Crime*, 14 MEDITERRANEAN Q. 34, 36 (2003) (suggesting a multidimensional approach to fighting terror).

150. *E.g.,* Glassman, *supra* note 45, at 18 (suggesting that Indonesia has used national security and counterterrorism rhetoric to defend its operations that include assassinations and dividing communities); Gross, *supra* note 50, at 1194 (noting that one of Israel's responses to terrorism has been targeted killings of terrorist leaders, risking lives of civilians); Kristian Stokke & Anne K. Ryntveit, *The Struggle for Tamil Eelam in Sri Lanka*, 31 GROWTH AND CHANGE 285, 285–86 (2000) (discussing the Sri Lankan government's acts of violence that contribute to its armed conflict with the Tamil Rebels).

tent with the corruption of the current regime.[151] Third, reliance on financing restrictions and other forms of coercion can obscure the benefits of other options, just as the emphasis on incarceration in dealing with street crime domestically has narrowed the responses available.[152] Fourth, restrictions inevitably create externalities, imposing harm on populations without other resources.[153] Fifth, restrictions are often futile, discrediting moderates within the terrorist organization who wish to renounce violence, and handing more power over to extremists who can offer illicit sources of funding that financing restrictions will not curb.[154]

As a result of these problems, donor nations considering sanctions against terrorist groups that have attained electoral success should consider the wisdom of transition theorists. Transition theorists have developed three criteria: reciprocity, institutional repertoire, and a pragmatic model of redress.[155] Reciprocity speaks to the need for mutuality, trust, and shared stake between adversaries, even when violence has occurred from one or both sides. A shared stake is necessary to bolster moderates on each side and put acolytes of violence on the defensive.[156] Institutional repertoire refers to a model that employs military force, economic leverage, and a range of other methods in combination. Use of military and economic coercion alone polarizes the parties to disputes, instead of holding out the possibility of dialogue.[157] Finally, a pragmatic model of redress recognizes the tragic truth that perfect remedies for wrongdoing are not practical in transitions. The quest for such remedies can become dangerously quixotic, soaking up

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151. *See* McFaul, *supra* note 62, at 80 (positing that the election of Iranian President Ahmadinejad, has been credited to the Iranians seeking change from the incumbent's unsatisfactory performance); Usher, *supra* note 9, at 21 (explaining that Hamas' electoral success was based on recognition of Hamas' role as a service provider, the people's dissatisfaction with Fatah's misrule and the false belief that peace with Israel was forthcoming).

152. *See generally* Mark Colvin et al., *Coercion, Social Support, and Crime: An Emerging Theoretical Consensus,* 40 CRIMINOLOGY 19, 19–23 (2002) (recapitulating the history and evidence of the idea that coercion causes crime, while social support discourages it); James D. Unnever et al., *Crime and Coercion: A Test of Core Theoretical Propositions*, 41 J. RESEARCH CRIME & DELINQ. 244, 244 (2004) (defining coercion as a force that compels an individual to act based on fear or anxiety).

153. *See* Fandl, *supra* note 13, at 603 (maintaining that restrictions hurt populations more than the targeted terrorists).

154. *E.g.,* Sanderson, *supra* note 134, at 50 (explaining that leaders of terrorist groups have begun collaborating with organized crime entities as a result of financing restrictions); Natta & O'Brien, *supra* note 79, at A1 (noting that with the restrictions on legitimate sources of funding, Hamas now receives approximately $10 million a year from radical elements, such as Saudi Arabia). *See generally* Sunstein, *Why They Hate Us, supra* note 80, at 429–33 (describing the phenomenon of "group polarization," whereby individuals with similar ideas and beliefs move toward extreme behavior, such as violence).

155. *See* Margulies, *supra* note 15, at 27 (listing the three central elements of defining democracy as institutional repertoire, inclusion and redress); *see also* Margulies, *Making "Regime Change," supra* note 19, at 399 (emphasizing the three central elements of defining democracy as institutional repertoire, inclusion and redress).

156. *See* Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 360 (2006) (stressing that reciprocity should be based on a foundation of trust). *See generally* Dan Belz, *Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?*, 7 THEORETICAL INQ. L. 97, 115 (2006) (maintaining that reciprocity is necessary in the development and implementation of the laws of war); James T. Hubler, Comment, *The Ends Justifies the Means: The Legal, Social, and Economic Justifications for Means Testing Under the Bankruptcy Reform Act of 2001*, 52 AM. U. L. REV. 309, 332 (2002) (stressing that in order for democracy to prosper, trust and reciprocity must be maintained).

157. *See* Belz, *supra* note 156, at 107; (claiming that a state increases its military arsenal when it sees its adversary increase its military arsenal). *See generally* Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 431 (2000) (critiquing that arbitration is used less often in dispute resolution than military coercion).

energy that is best used on foreclosing future violence. Accommodations are necessary to avoid stalling transitions indefinitely.

In dealing with transitions for terrorist groups participating in the electoral process, three elements are necessary. First, the organization must suspend *all* violence, directed at civilian or military targets, for a period of one year. Second, the organization must take meaningful steps toward transparency, opening up its books to provide proof that financial support it receives is not enhancing its capacity for violence. Third, the adversaries of terrorist groups should forswear targeted killings with their inevitable collateral impacts; establish channels for dialogue about prisoner exchanges; and strive to ensure that military responses to violence are proportionate.

Other approaches, such as the EU approach, are amorphous, not absolutist. They do not push moderates sufficiently to confront extremists in their midst. By rarely cutting off funds, the amorphous approach encourages moderates to put off this difficult but necessary process. Better ex ante guidance is necessary.

The transition-centered approach recognizes that no set of policies presents a magic wand. Transitions are inherently works in progress, and potential breaches of the peace always wait in the wings. However, a transition-centered approach can provide clear direction and offer moderates on each side a stake in dialogue. In the contingent realm of transitions from violence to the rule of law, that is a significant achievement.

Japanese Only: Xenophobic Exclusion in Japan's Private Sphere

Canon Pence*

Introduction

On Sunday, September 19, 1999, a diverse group of families entered the popular giant *onsen* (privately run communal bathhouse resort) Yunohana in Hokkaido, the cold northernmost island of Japan.[1] A sign at the front door clearly read "Japanese Only" in English, Japanese, and Cyrillic.[2] Inside, the ticketing attendant immediately refused entry to the adults with Western features.[3] A Chinese woman in the group, previously admitted due to her Asian features, was subsequently asked to leave when her nation of origin was discovered.[4] Furthermore, upon questioning, Yunohana's manager indicated that while the child of a Japanese and an American with Asian features could enter, their other child with Western features could not.[5]

The fact that this blatant racial discrimination happened in a nation as modern as Japan may surprise many, but what is truly surprising is that such discrimination was not per se illegal. In fact, "there is at present no provision in national [Japanese] legislation that outlaws racial discrimination" in the private sphere.[6] Although the Constitution of Japan does prohibit discrimination,[7] it does so only with regards to state action;[8] "the Supreme Court and the executive remain fiercely opposed to recognition of legal rights other than those provided under the Constitution as it has been narrowly construed by Japanese courts."[9] As a result, when the

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1. *See* DEBITO ARUDOU, JAPANESE ONLY—THE OTARU HOT SPRINGS CASE AND RACIAL DISCRIMINATION IN JAPAN 27–30 (2d ed. 2006) The title, "Japanese Only," refers to the exclusionary sign at Yunohana and many other establishments around Japan. It is used here with kind permission of Mr. Arudou.

2. *See* ARUDOU, *supra* note 1, at 30; *see also* Mark Magnier, *THE WORLD; Japanese Court Ruling Favors Foreigners; Bathhouse Must Pay Three Men Who Were Denied Entry; Decision Is Called "Significant" in a Nation that Tolerates Discrimination*, L.A. TIMES, Nov. 12, 2002, at 3.

3. *See* ARUDOU, *supra* note 1, at 30.

4. *See id.* at 32; *see also* Zal Sethna, *Otaru Bathhouse Ordered to Pay 3; Court: Ban on Foreigners Discriminatory*, THE DAILY YOMIURI (Tokyo), Nov. 12, 2002, at 2 (revealing that non-Japanese individuals were denied access to the bathhouse because they were considered foreigners).

5. *See* ARUDOU, *supra* note 1, at 34.

6. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶ 11, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006); *see also* Eric Johnston, *Would Permanent UNSC Seat Beget More Responsible Japan?* JAPAN TIMES (Tokyo), Dec. 4, 2004 at 1 (Japan "is the only advanced industrial country that does not have specific domestic legislation outlawing [racial] discrimination")

7. *See* KENPŌ, art. 14.

8. *See* Arudou v. Yunohana (Sapporo D. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407; *see also* Hiroko Hayashi, *Women's Rights as International Human Rights: Sexual Harassment in the Workplace and Equal Employment Legislation*, 69 ST. JOHN'S L. REV. 37, 60 n.5 (1995) (commenting that Japanese courts have read a state action requirement into Article 14 of the Japanese Constitution, which prohibits discrimination).

9. *See* Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 419–20 (1999).

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above-mentioned exclusionary incident led to a well-publicized lawsuit, known as the *Otaru Onsen* case,[10] the plaintiffs were forced to sue under domestic tort and international anti-discrimination laws. The resultant outcome from this and similar cases presents a troublesome judicial standard that outlaws *unreasonable* discrimination only among private parties, requiring judicial analysis of social customs and factual circumstances even when the facts of a case reveal racial discrimination on its face.

Despite Japan's public message of internationalization, lingering perceptions of Japan as a monoethnic nation serve to fortify barriers between native Japanese and outsiders. Incompatibly, however, Japan's decreasing population has required a recent and continuing surge in foreign migration, if only to maintain an adequate working population. This demographic shift has necessarily increased friction with Japanese culture and has led a number of private businesses to exclude foreigners in an attempt to maintain a traditional sense of Japanese self-identity.[11] With population statistics predicting an ever-increasing amount of foreign migration[12] and mounting pressure from internal[13] and external human rights organizations,[14] it is likely that the Japanese government will ultimately have to re-examine its policy of providing a discrimination control mechanism exclusively through current judicial channels.

Part I of this article will address the traditional image of a homogenous Japan, examine the statistics behind Japan's changing population demographics, and investigate historical groups of outsiders within Japan. Part II will view the Japanese government approach to increasing foreigner populations and how this has affected the exclusionary tactics of some private businesses. Part III will address three legal cases brought by victims of exclusionary practices and

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10. Arudou v. Yunohana (Sapporo D. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407.

11. *See* Matthew R. Hicks, Note and Comment, *Japanese-Auto Products v. BBS—A Threat to Exacerbate U.S.-Japanese Trade Relations?* 19 LOY. L.A. INT'L & COMP. L. REV. 479, 499 (1997) (noting that Japan's private businesses serve as market barriers to foreigners). *Cf.* Jay L. Eisenstat, Comment, *The Impact of the World Trade Organization on Unilateral United States Trade Sanctions Under Section 301 of the Trade Act of 1974: A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute*, 11 EMORY INT'L L. REV. 137, 160 (1997) (listing private Japanese automotive businesses and the Kodak business as examples of private businesses that have prevented foreigners from entering). *But see Japanese Firms Eye Oilsands*, CALGARY SUN (Alberta), Jan. 14, 2006, at 53 (asserting that Japan's private oil businesses are seeking diversity).

12. *See* Claire J. Hur, Comment, *Returnees from South America: Japan's Model for Legal Multiculturalism?* 11 PAC. RIM L. & POL'Y J. 643, 686 (2002); Kevin Yamaga-Karns, Note, *Pressing Japan: Illegal Foreign Workers Under International Human Rights Law and the Role of Cultural Relativism*, 30 TEX. INT'L L.J. 559, 560 (1995).

13. *See* MIE FUJIMOTO, JAPAN CIVIL LIBERTIES UNION, PRESENTATION BY THE JAPAN CIVIL LIBERTIES UNION FOR MR. DOUDOU DIÈNE, THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE 4–5 (July 6, 2005), *available at* http://www.jclu.org/katsudou/Special_Rapporteur.pdf (showing JCLU's pressure for change regarding discrimination in Japan); *see also* JAPAN FED'N OF BAR ASS'NS, DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES (Oct. 8, 2004), *available at* http://www.nichiben-ren.or.jp/en/activities/statements/20040808.html (outlining the Japan Federation of Bar Associations' efforts to persuade the national and local Japanese governments to pass ordinances that prevent discrimination).

14. *See* International Movement Against All Forms of Discrimination and Racism [IMADR], *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, ¶¶ 2–3, CERD/C/58/MISC.17/REV.3 58TH SESSION 6 (Mar. 23, 2001), *available at* http://www.imadr.org/old/geneva/cerd.2001.japan.html (illustrating how the committee has exerted itself in combating the evils of racial discrimination in Japan); *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 11.

the interplay between factual circumstances and various avenues for legal remedy. Finally, Part IV will examine Japan's obligations under international human rights treaties and the viability of anti-discrimination legislation in a nation that prefers to resolve interpersonal disputes exclusively privately through traditional self-regulation.

Part I—Challenging Japan's Image of Homogeneity

Japan has many reasons to be proud. "[A] strong work ethic, mastery of high technology, and a comparatively small defense allocation (1% of GDP) [has] helped Japan advance with extraordinary rapidity to the rank of second most technologically powerful economy in the world after the [United States] and the third-largest economy in the world after the [United States] and China, measured on a purchasing power parity (PPP) basis."[15] "Among all industrialized democracies, [Japan has] the narrowest gap between the richest [ten] percent and the poorest [ten] percent of citizens[.]"[16] Perhaps most impressively, "[i]n the course of half a century, Japan has moved from recipient of World Bank funds to second largest shareholder."[17]

The Japanese and even outsiders often attribute Japan's remarkable post-war success, at least in part, to unique attributes of Japan's incredibly homogenous population.[18] After all, out of a population of approximately 127.5 million,[19] there are only "1.97 million legal foreign residents."[20] In fact, the Japanese government does not even deem it necessary to track ethnicities in official population surveys.[21] Notably, the "[f]amous remarks by Prime Ministers Miki in November 1975 and Nakasone in September 1986 echoed official statements by the Japanese government to international bodies denying the existence of ethnic minorities in Japan."[22]

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15. CIA, *The World Factbook 2006—Japan* (Feb. 8, 2007), *available at* https://www.cia.gov/cia/publications/factbook/geos/ja.html.

16. LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY—JAPAN'S TWO CONSTITUTIONS, 1889–2002 142 (Univ. Press of Colorado 2002); *see also* Douglas W. Cassel, *Mass Incarceration: Perspectives on U.S. Imprisonment: An International Perspective*, 7 U. CHI. L. SCH. ROUNDTABLE 107, 113 (2000) (illustrating that Japan has the narrowest gap between its richest and poorest citizens among countries in the "High Human Development" category).

17. Paul Wolfowitz, *Japan, World Bank Must Tackle Poverty Together*, THE DAILY YOMIUIRI (Tokyo), Oct. 10, 2005, at 4.

18. *See* Yamaga-Karns, *supra* note 12, at 571; *see also* Sumi Shin, *Global Migration: The Impact of "Newcomers" on Japanese Immigration and Lobor Systems*, 19 BERKELEY J. INT'L L. 265, 280 (2001); Ronald E. Yates, *Immigrants Knocking at Japan's Door*, CHI. TRIB., Mar. 13, 1988, at C5.

19. *See The World Factbook 2006—Japan*, *supra* note 15. *See generally* Kenneth L. Port, *Trademark Dilution in Japan*, 4 NW. J. TECH. & INTELL. PROP. 228, 231 (2006).

20. *See* U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN (Mar. 8, 2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61610.htm.

21. *See Japan's Population Growth Rate Hit Record Low in FY 92*, JAPAN ECON. NEWSWIRE, Aug. 12, 1993, at 1; *see also* MINISTRY OF FOREIGN AFFAIRS OF JAPAN, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, ¶ 7 (June 1999), *available at* http://www.mofa.go.jp/policy/human/race_rep1/intro.html#5 (stating that Japan "does not conduct population surveys from an ethnic viewpoint").

22. Mark A. Levin, *Essential Commodities and Racial Injustice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understanding of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 439–40 (2001). *But see* Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous People Under International Law*, 8 CHAP. L. REV. 201, 225–26 (2005) (reporting the eventual legislative acknowledgment of the Ainu Shinpou as an ethnic minority).

The notion of Japan as a nation peopled entirely with the homogenous Wajin[23] ethnicity chiefly arose out of Japan's self-imposed isolation of nearly four hundred years,[24] which only ended in 1853 when Commodore Perry of the United States Navy appeared in the Tokyo harbor to open Japan to the outside world.[25] Often believing that this nearly vacuum-like isolation has created a unique people, "group distinction on a national level comes quite naturally to most Japanese when dealing with non-Japanese people, and indeed one commentator has called the Japanese a 'single great tribe,' noting that their society is essentially exclusionary in nature."[26] However, "[d]espite master narratives of racial and cultural homogeneity, which precludes the existence of minorities, Japan is [nevertheless] home to diverse populations."[27]

a. Historical Outsiders

Behind Japan's rice-paper facade of monoethnicity, groups of outsiders have always existed within Japanese society. While the populations of these traditional outsiders may seem small, or even insignificant, in order to contextualize the "defensive ethnic separatism" of some Japanese regarding outsiders, it is important to understand the ways in which outsiders from within "have suffered legal and social discrimination" historically.[28]

i. Ainu

"The Ainu people have inhabited the northern areas of Japan from before recorded time."[29] While there are many theories about the origins of the Ainu, their ancestral source is

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23. *See* INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, *supra* note 21, at ¶ 7 n.3. *But see* Andrew Daisuke Stewart, *Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil and Political Rights, an Alternative Paradigm for Okinawan Demilitarization*, 4 ASIAN-PAC. L. & POL'Y J. 307, 317–18 (2003) (stating that the Sapporo District Court countered the general notion that Japan is a monoethnic nation).

24. *See* Crane Stephen Landis, Comment, *Human Rights Violations in Japan: A Contemporary Survey*, 5 D.C. L. J. INT'L L. & PRAC. 53, 65 (1996); Mie Murazumi, Comment, *Japan's Laws on Dual Nationality in the Context of a Globalized World*, 9 PAC. RIM L. & POL'Y J. 415, 427 (2000).

25. *See* BEER & MAKI, *supra* note 16, at 8; KENNETH L. PORT & GERALD PAUL MCALINN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 25 (2d ed. 2003); Morihiro Ichikawa, *Understanding the Fishing Rights of the Ainu of Japan: Lessons Learned from American Indian Law, the Japanese Constitution, and International Law*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 245, 271–72 (2001).

26. Yamaga-Karns, *supra* note 12, at 571; *see also* Hur, *supra* note 12, at 680–81 (stating that the Japanese believe Japan to be a monoracial society and contending that the Japanese government subordinates other ethnic groups through assimilation and seclusion).

27. Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 514 (2001); *see also* Shin, *supra* note 18, at 266 (noting that Japan is the home of nearly 1.5 million foreign residents).

28. *See* BEER & MAKI, *supra* note 16, at 154–55; *cf.* Hiroshi Matsubara, *Prejudice Haunts Atomic Bomb Survivors*, JAPAN TIMES (Tokyo), May 8, 2001, at A1 (asserting that the *hibakusha* (atomic bomb survivors) often face discrimination within their own country due to the misunderstanding of the effects of radiation poisoning).

29. Levin, *supra* note 27, at 420; *see also* Ichikawa, *supra* note 25, at 271–72 (referring to the Ainu people as the indigenous people of Hokkaido Island, having lived there since "time immemorial").

ultimately unknown.[30] Some commentators have referred to the Ainu as "aboriginal[,]"[31] while the UN has referred to them as an "indigenous population."[32] The Japanese government, on the other hand, is unwilling to recognize the Ainu as indigenous.[33] Rather, the government has "recognized the Ainu as an ethnic minority" without the determination that they "deserve[] special rights as a distinct ethnic group[.]"[34]

Throughout recorded Japanese history, accounts refer to a back-and-forth between peaceful trading and warring relationships amongst the Ainu and Wajin peoples.[35] Despite the fact that relations may have at times been relatively positive, the fact remains that the Wajin did not generally hold the Ainu in high esteem.[36] An early written account "describe[d] an incestuous people, living in holes and nests, who 'drink blood,' have supernatural animal-like physical powers, and rob agricultural harvests[.]"[37] By the sixteenth century, during the period of international isolation, the Wajin had established a permanent foothold in the Ainu home territory of Hokkaido.[38]

The period in the mid-nineteenth century after Japan was re-opened to the world is known as the Meiji Restoration, during which time forces supporting the Japanese emperor wrested power from the Tokogawa shogunate warlord and saw Japan presenting itself on the world stage, rapidly becoming a modern regional power.[39] One of the many national reforms included expansion of national borders; Hokkaido was relatively easy to colonize.[40] During this

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30. *See* Levin, *supra* note 27, at 420; *see also* Teri Leon, *The Draft Declaration on the Rights of Indigenous Peoples: Three Case Studies*, 6 NEW ENG. INT'L & COMP. L. ANN. 47, 48–49 (2000) (commenting that "[a]nthropologists have yet to propose one universally accepted theory on the origin of the Ainu people").

31. *See* BEER & MAKI, *supra* note 16, at 157; Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 U. DET. MERCY L. REV. 187, 191–92 (1997).

32. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 4.

33. *See* THE MINISTRY OF FOREIGN AFFAIRS OF JAPAN, COMMENTS OF THE JAPANESE GOV'T ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOV'T, at ¶ 12 *available at* http://www.mofa.go.jp/policy/human/comment0110.html (last visited Mar. 2, 2007) (providing the Japanese government's opinion that "[s]ince there is no fixed international definition of the term 'indigenous people,' the question of whether the Ainu are actually 'indigenous people' . . . needs to be examined carefully"); *see also* Ichikawa, *supra* note 25, at 282 (referring to Prime Minister Nakasone's statement as one that "denies the Ainu status as an indigenous people and ethnic minority").

34. *The World Factbook 2006—Japan*, *supra* note 15; *Ainu Law Changes Status, Indigenous Question Remains*, JAPAN ECON. NEWSWIRE, May 30, 1997, at ¶ 1.

35. *See* Levin, *supra* note 27, at 428.

36. *See id.* at 429 (noting that the Wajin often referred to the Ainu as barbarians). *See generally* Stewart, *supra* note 23, at 338 (stating that the Japanese considered the Wajin culture to be superior to the Ainu culture and scorned the latter).

37. Levin, *supra* note 27, at 429 (quoting an early description of the Ainu from the Nihonshiki, compiled around 720 C.E.).

38. *See* Levin, *supra* note 27, at 430.

39. *See* PORT, *supra* note 25, at 26; *see also* Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 195 n.169 (1999).

40. *See* Levin, *supra* note 27, at 433; *see also* Stewart, *supra* note 23, at 338 (asserting that after the Meiji Restoration, the Japanese government made Hokkaido a Japanese prefecture in 1869).

period, the policy of the Japanese government toward the Ainu was one of forced assimilation.[41] "The policy was designed to eradicate the Ainu's cultural identity, practices, and traditions."[42] On a day-to-day level, this policy took the form of bans on "traditional earrings and tattoos and abrogation of Ainu tribal dispute resolution processes in favor of Japanese national and Hokkaido colonial judicial authority."[43] Furthermore, an 1899 law refused Ainu "the right to own land unless the government specifically granted permission."[44]

While a 1997 "law for the promotion of the Ainu culture was enacted,"[45] which finally voided the old discriminatory laws, today the Ainu still control only "approximately 0.15 percent of their original land holdings[.]"[46] Prior to the 1997 law, there were many instances in which the government of Japan referred to the Ainu as a "dying race."[47] Even recently there are many reports of social discrimination against the Ainu.[48] As a result, many Ainu choose to conceal their ethnic identity and represent themselves as Wajin Japanese.[49] While the government puts the population of Ainu at close to 24,000,[50] there is speculation that this number is underrepresentative due to extensive concealment of identity.[51]

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41. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 22. *See generally* Hur, *supra* note 12, at 674 (noting the Japanese government's historical policies of dealing with ethnic minorities utilized assimilation, subordination, and exclusion, and suggesting that the Ainu were the subject of these policies).

42. Landis, *supra* note 24, at 67; *see also* Hadjioannou, *supra* note 22, at 224 (describing the assimilation policies that were implemented by the Japanese government).

43. Levin, *supra* note 27, at 435; *see also* Ichikawa, *supra* note 25, at 275 (stating that the Japanese government banned ear piercing and tattooing "because these were 'savage customs' inconsistent with Japanese traditional norms").

44. Landis, *supra* note 24, at 67 (detailing the Act of the Protection of the Former Primitive Inhabitants in Hokkaido of 1899 under which the Ainu were refused the right to own land).

45. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 23; *see also* Hadjioannou, *supra* note 22, at 224 (claiming that the enactment of the Act for the Promotion of Ainu Culture and Dissemination of Knowledge Regarding Ainu was a way to promote the history and culture of the Ainu people).

46. *See The World Factbook 2006—Japan*, *supra* note 15. *See generally* Ichikawa, *supra* note 25, at 271–72 (documenting that in 1897 the Land Disposition Act conveyed 1,830,000 hectares of Ainu land to Japanese settlers and nobility).

47. *See* Levin, *supra* note 27, at 438–39. *See generally* Leon, *supra* note 30, at 48–49 (estimating the Ainu population to be around 25,000); Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 89 (1999) (commenting on the shameful decimation of the Ainu society and the disintegration of the Ainu culture).

48. *Racism*, *Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 24 (reporting that marriage refusal is one type of the social discrimination against the Ainu). *See generally* Madison, *supra* note 31, at 191–92 (arguing that the Japanese society continues to discriminate against the Ainu, especially in the context of hiring); Leon, *supra* note 30, at 48–49 (stating that although the Ainu are still discriminated against, they continue to fight for their rights).

49. *See Racism*, *Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 22; *see also* Leon, *supra* note 30, at 48–49 (reporting that many Ainu continue to hide their heritage for fear of discrimination).

50. *See* INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (FIRST AND SECOND REPORT)—HUMAN RIGHTS OF FOREIGNERS, *supra* note 21, at ¶ 7; *see also* Ichikawa, *supra* note 25, at 266–67.

51. *See Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination*, *supra* note 6, at ¶ 22; Leon, *supra* note 30, at 51.

While the Ainu have arguably not received the full recognition that they would prefer from the Japanese government, the Ainu have made some recent strides in the judicial arena. During the 1970s, plans were drawn up for a dam to be built in the Nibutani river valley, which happened to be one of the few remaining ancestral Ainu cultural centers.[52] In fact, Nibutani was "known as 'the birthplace of Ainu scholarship,'" and even featured an Ainu cultural museum.[53] After plans for the museum became known, the owner of the Ainu museum made many appeals to the Minister of Construction, although all were ultimately rejected.[54] Eventually a suit was brought, and the decision came down in the Sapporo District Court in 1997 in a case known as the Nibutani Dam Decision.[55]

Although the decision was ultimately a victory for the plaintiffs, it in fact "failed to provide . . . a remedy."[56] Nevertheless, the decision is valuable for the language used in the court's rationale. To begin with, the court recognized the Ainu as a minority group protected under the International Covenant on Civil and Political Rights (ICCPR) Article 27,[57] which states that "such minorities shall not be denied the right . . . to enjoy their own culture[.]"[58] Furthermore, "the court found itself to be bound by duties arising under Article 13 of the Constitution of Japan[,]"[59] which declares that "[a]ll of the people shall be respected as individuals."[60] Particularly upon analysis of Article 13, the court found that in order for the government to respect the Ainu as individuals, it must respect the "distinct ethnic culture of the Ainu people" which is an "essential commodity" of their individual identity.[61] With this in mind, following a lengthy discussion of the history of "social and economic devastation the Wajin majority has inflicted on the Ainu," the court found that the government had "failed to satisfy its burden . . . to show that [it] had adequately considered the Nibutani Dam's impact on Ainu culture during the

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52. *See* Hamano, *supra* note 9, at 479 (asserting that "the prefectural government confiscated sacred Ainu land" for the Nibutani Dam); *see also* Levin, *supra* note 22, at 445–48 (describing the government's plans for the dam and noting the unique Ainu character of the Nibutani village).

53. Levin, *supra* note 22, at 448 (noting the importance of culture in the Nibutani river valley); *see also* Kayano et al. v. Hokkaido Expropriation Comm. (The Nibutani Dam Decision), 1598 HANREI JIHŌ 33 (Sapporo D. Ct., Mar. 27, 1997), *translated in* 38 I.L.M. 394, 412 (1999) (asserting that the Nibutani area fostered Ainu poetry).

54. Levin, *supra* note 22, at 454; *see also* Masaya Tomizuka, *Belated Recognition for Aboriginal People*, DAILY YOMIURI (Tokyo), Apr. 2, 1997, at 3 (stating that the plaintiffs in the eventual challenge to the Nibutani Dam claimed that bringing suit was the only way to gain public attention for the injustices suffered by the Ainu).

55. *See Kayano*, 38 I.L.M. at 412 (outlining the facts and procedural history of the lawsuit).

56. *See* Hamano, *supra* note 9, at 479; *see also* Takashi Nishimura & Hajime Eguchi, *Landmark Court Decision Recognizes Ainu as Indigenous Minority*, MAINICHI SHIMBUN (Tokyo), Mar. 28, 1997, at 1 (acknowledging the partial failure of the District Court to fully redress the injury suffered by the Ainu community).

57. *See Kayano*, 38 I.L.M. at 418; Stewart, *supra* note 23, at 312–13.

58. International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by Japan on June 21, 1979) [hereinafter ICCPR]; *see also* Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189, 204–6 (2001) (discussing the use of Article 27 of the ICCPR to protect indigenous peoples' cultural rights).

59. Levin, *supra* note 22, at 460–61; *see also Kayano*, 38 I.L.M. at 418–19 (noting that the court found that Article 13 guaranteed the plaintiffs' right to enjoy the Ainu culture).

60. KENPŌ, art. 13.

61. *See* Levin, *supra* note 22, at 462–63; *see also* Hadjioannou, *supra* note 22, at 225 (noting the District Court's assertion that indigenous minorities are entitled to "enhanced protection of cultural rights").

project's authorization process."[62] Nevertheless, the court ultimately treated the issue as moot considering that the damage in question had already been done by the dam's construction.[63]

ii. Ryukyuans

Although the people of Okinawa are not recognized specifically as an indigenous people or even an official minority group by either the Japanese government or the United Nations, it has been suggested nevertheless that they meet the characteristics for such recognition under ICCPR.[64] "The 'Ryukyu Kingdom,' maintained by the Okinawa people from the fourteenth century, was conquered by the Government of Japan and annexed in 1879."[65] After that point, Japan instituted assimilation policies against the Ryukyuans similar to those applied to the Ainu, such as the prohibition of "Ryukyu dialects, traditional customs, religious faith[,] and lifestyle."[66] Since that time, Okinawa's distance from Japan, both physically and culturally, has led to a "quasi-foreign" distinction and subsequent "exploit[ation]."[67] The main complaint of discrimination from Ryukyuans comes from the perceived "inequality of treatment under the law represented by the presence of [75] percent . . . of [United States] military bases in Japan on Okinawa's 0.6 percent of Japan's land area[.]"[68]

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62. Stewart, *supra* note 23, at 316; *see Kayano* 38 I.L.M. 394, 426–27 (claiming that the Japanese government did not adequately consider the impact of the Nibutani Dam on the Ainu culture).

63. *See Kayano*, 38 I.L.M. 394, 428–29; *see also* Levin, *supra* note 22, at 465–66 (stating that the court denied plaintiffs relief because it did not want to waste the public resources already invested in the dam).

64. *Compare* Stewart, *supra* note 23, at 318–37 (arguing that Ryukyuans would be properly classified as a minority under the ICCPR), *with* MINISTRY OF FOREIGN AFFAIRS OF JAPAN, COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, ¶ 2, *available at* http://www.mofa.go.jp//policy/human/comment0110.html (last visited Feb. 25, 2007) (rejecting the claim that the people of Okinawa deserve minority group status).

65. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 6.

66. *Id.*; *see also* Stephanie Shapiro, *The PR Battle of Okinawa, Japan: The U.S. Military Presence Is a Constant Reminder of the Prefecture's Chronic Inability to Determine Its Own Destiny*, BALT. SUN, May 20, 2002, at 2A (describing the Japanese policies aimed at assimilating Ryukyuans into the Japanese culture).

67. *See* BEER & MAKI, *supra* note 16, at 155; *see also* Gwyn Kirk & Carolyn Bowen Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 235 (2000) (stating that Okinawans have their own culture and language and adding that Okinawans are regarded as inferior by the Japanese majority).

68. BEER & MAKI, *supra* note 16, at 156 (citing the opinion of Ota Masahide, former governor of Okinawa, who sees the extensive U.S. military presence in Okinawa as illustrative of the more general problem of inequality in the region); *see also* Chalmers Johnson, *The Okinawan Rape Incident and the End of the Cold War in East Asia*, 27 CAL. W. INT'L L.J. 389, 391 (1997) (arguing that Okinawans have borne the "brunt of American superpower pretensions," despite lacking participation in the decisions that have allowed U.S. forces to be based there).

iii. Burakumin

During Japan's feudal period prior to the Meiji Restoration, a caste-like social hierarchy was formed.[69] At the bottom of this hierarchy, although ethnically identical to all other Wajin, were *senmin* (the humble people), who were butchers and leatherworkers, and, even lower, "*eta* (extreme filth) and *hinin* (non-humans)."[70] During this time, "[o]utcasts were forbidden from marrying commoners, living outside their proscribed ghettos, or even serving as commoners' servants."[71] Furthermore, "[t]hey could not eat, sit, or smoke in the company of commoners, dress their hair in the conventional manner, wear *geta* (wooden sandals), or cross a commoner's threshold."[72] Although the social hierarchy system was technically abolished during the Meiji Restoration by way of the Emancipation Edict of 1871, afterward the newly named Burakumin[73] were forced to register their previous social status in the national family register known as *koseki*.[74] It was this register that would carry over the brand of "untouchable[]" beyond the so-called Burakumin emancipation.[75]

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69. *See* Ian Neary, *Political Protest and Social Control in Pre-War Japan: The Origins of the* Buraku *Liberation*, HUMANITIES PRESS INT'L, 15–16 (1989) (claiming that the caste system in Japan was first identifiable in the Tokugawa era); Frank K. Upham, *Instrumental Violence and Social Change: The Buraku Liberation League and the Tactic of "Denunciation Struggle," reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 872–73 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003); *see also* Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339, 340–42 (1982) (analyzing the historical social structures leading up to the Tokugawa era).

70. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 6; *see also* Landis, *supra* note 24, at 65 (stating that the Burakamin's status as a cultural minority is rooted in their history of working in "unclean" occupations).

71. Upham, *supra* note 69, at 872–73; *see also* Knapp, *supra* note 39, at 170.

72. *See* Upham, *supra* note 69, at 872–73; *see also* NEARY, *supra* note 69, at 39 (describing the range of private discrimination against the Burakamin, and arguing that this discrimination was sanctioned by various public policies).

73. Burakumin literally translates to "hamlet people," a reference to the ghettos in which the former outcasts were forced to live. *See* MIKISO HANE, PEASANTS, REBELS, AND OUTCASTES: THE UNDERSIDE OF MODERN JAPAN 139 (1982); *see also* NEARY, *supra* note 69, at 10–11, n.3 (comparing the insult inherent in the term "Burakumin" as equivalent to the racial slurs sometimes used in the U.S.); Knapp, *supra* note 39, at 171 (describing the current social inequalities in Burakumin communities and stating that "[d]espite the abolition of the caste system in 1871, they have continued to suffer discrimination of a most pervasive and pernicious nature").

74. *See* Upham, *supra* note 69, at 872–73; Emily A. Su-lan Reber, Comment, *Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future*, 12 HARV. HUM. RTS. J. 297, 305 (1999) (recounting continued instances of discrimination against the Burakumin, including a Ministry of Justice "Handbook of Japanese Customs and Folkways," which referred to the Burakumin as "the lowliest of people, resembling animals," and a 1922 case of government authorized arson).

75. *See* Tony McNicol, *Color Blinded: A User's Guide to Racism in Japan*, J@PAN, INC. (Tokyo), Apr. 1, 2004, at 60; John Toler, Letter to the Editor, *Law or No, the "Burakumin" Live*, JAPAN TIMES (Tokyo), Feb. 24, 2002; *see also* Richard Werly, *The Burakumin, Japan's Invisible Outcasts*, UNESCO COURIER, Sept. 1, 2001, at 29 (describing that many Burakumin dislike the term "Burakumin" and prefer to use the term Dowa, which alludes to the existence of discrimination against them as a group but which, as a word, does not carry the same negative connotation).

Today, social discrimination against Burakumin is pervasive even if diminished by time.[76] This discrimination can take the form of merciless teasing of Burakumin schoolchildren[77] or harassment by neighbors.[78] Burakumin are also discriminated against by way of public access to the national *koseki*, which can disrupt employment and marriages.[79] Since registrants are required to list a homesite, or *honseki*, listing a known *buraku*/hamlet for one's *honseki* can serve as a red flag for discriminators.[80] Although modifications to *koseki* procedure now allow new family registrants (after marriage) to record a new *honseki*, "a completely new *honseki* or subsequent change of *honseki* . . . suggest[s] an attempt to hide one or both of the spouses' *honseki*."[81] "While some [B]urakumin have attempted to change their *honseki* several times in order to remove themselves from a particular, damning geographic location, the fact of a change, which is itself recorded, is usually sufficiently suspicious to defeat the purpose of the change."[82]

In addition to problems with the *koseki*, Burakumin have also had to deal with discrimination stemming from privately created directories of *buraku honseki* known as *Chimei Sokan*.[83] These lists were first revealed in 1975 when private investigators were caught selling *Chimei Sokan* to prominent companies and prospective marriage partners.[84] Even after publication was

76. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 16; Reber, *supra* note 74, at 358 (analogizing discrimination against the Burakumin in Japan with discrimination against the African Americans in the United States, which persists despite the change of laws).

77. *See, e.g.,* Editorial, *Cultural Conformity Breeds Contempt*, ST. LOUIS POST-DISPATCH (St. Louis, MO), July 24, 1989, at 2B (reporting that in November 1988, a Burakumin student "found the words 'dirty animal' scrawled on his desktop"); Tomoko Nakajima, *Buraku Children and the Convention on the Rights of the Child*, BURAKU LIBERATION NEWS, Sept. 1999, ¶¶ 9–10, *available at* http://blhrri.org/blhrri_e/news/new110/new11004.html (reporting that a second year high school student committed suicide after being routinely bullied by his schoolmates due to his Burakumin status, and that other students from Burakumin neighborhoods were also regularly bullied).

78. *See, e.g.,* Mari Yamaguchi, *"Burakumin" Descendents Still Suffering*, JAPAN TIMES (Tokyo), June 5, 2004, at ¶¶ 1–3 (describing that after a daughter was rejected for a marriage due to her family's Burakumin status, the family received a letter that read "[y]ou nonhumans from the hamlets have blood that is vulgar and tainted," and the family's neighbors received letters that appeared to be sent to embarrass the family by revealing its Burakumin status); *see also* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1238 (1997) (claiming that the Burakumin tend to live in segregated communities and social isolation due to the discriminatory treatment they receive from fellow Japanese).

79. *See* Stephen M. Salad, Note, *Discrimination from Sea to Shining Sea: Who Fares Better Under Their Respective Country's Anti-Discrimination Laws: The Burakumin of Japan or Gays and Lesbians of the United States?* 20 N.Y.L. SCH. J. INT'L & COMP. L. 527, 550 (2000); *see also* Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 265 (1996) (reporting that a twenty-three-year-old woman abandoned her husband and her newborn child after learning about her husband's Burakumin status).

80. *See* Taime L. Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109, 116–19 (1991); Madison, *supra* note 31, at 193.

81. Bryant, *supra* note 80, at 118; Madison, *supra* note 31, at 193.

82. Bryant, *supra* note 80, at 118.

83. *See* Reber, *supra* note 74, at 311–12; Nakajima, *supra* note 77, at ¶ 8.

84. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 18; Reber, *supra* note 74, at 311–12. *See generally* Juan Williams, *West Meets East*, WASH. POST, Jan. 5, 1992, at W12 (estimating that 150 or more companies had been using *Chimei Sokan* to avoid hiring people with Burakumin status).

halted, new *Chimei Sokan* were discovered up until 1979.[85] Purchasers of the lists included such international corporations as Toyota and Nissan.[86]

In response to discrimination against Burakumin, the Japanese government instituted the Special Measures law in 1969.[87] This law was "aimed at improving the living environment of [*buraku*] districts[] and improving access to employment and education."[88] The Special Measures law was terminated, however, in 2002, "when the [g]overnment considered that the situation of [Burakumin] had improved and that the question could now be dealt with by common law."[89] Currently, the Japanese government seems quite hesitant to admit that any serious ongoing problem of Burakumin discrimination exists.[90] Nevertheless, since discrimination "against [Burakumin] persists,"[91] it is likely that population counts, currently somewhere between 1.5[92] and 3 million,[93] are not accurate due to concealed identities.[94]

Burakumin have been able to independently develop a moderately effective means of fighting discrimination through private enforcement, which can even involve "the actual or threatened use of limited physical force by large groups of Burakumin."[95] This strategy is referred to as *kyudan* (denunciation).[96] Essentially, *kyudan* involves mass "solicit[ation] from the discriminator (or alleged offender) apologies, self-criticism, [and] promises to participate in enlightenment education[.]"[97] *Kyudan* has even received implicit acceptance from the Japanese judiciary, so long as the measures applied do not "exceed 'the socially reasonable bounds as set

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85. *See* Madison, *supra* note 31, at 192–93.

86. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 21; Reber, Note, *supra* note 74, at 312; *see also* Williams, *supra* note 84 *(*reporting that 150 or more companies in Japan used *Buraku* lists up until 1992).

87. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 15.

88. *Id.*; *see also* Madison, *supra* note 31, at 193; Reber, *supra* note 74, at n. 61.

89. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 15. *But see* Eric Johnston, *Osaka Rights Funds, "Buraku" Kingpin, Mob Enjoy Shady Ties*, JAPAN TIMES (Tokyo), Aug. 22, 2006, at ¶ 1 (insinuating that it was possible that opinions toward the Dowa programs soured with news of misappropriation of Special Measures funds and links to organized crime).

90. *See* COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶ 3(2).

91. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 16; *see also* William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1, 6 (1991).

92. BEER & MAKI, *supra* note 16, at 155 (stating that there are about 1.5 million to 2.5 million Burakumin people in Japan); Bryant, *supra* note 80, at n. 23.

93. *See* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES —2005: JAPAN, *supra* note 20, at § 5.

94. *See* Werly, *supra* note 75; *see also* Reber, *supra* note 74, at n.277 (presenting that several factors contributing to the inaccuracy in the estimation of the Burakumin population).

95. Upham, *supra* note 69, at 872–73; *see* James J. Nelson, *Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 UCLA PAC. BASIN L. J. 45, 78–79 (1996).

96. *See* Reber, *supra* note 74, at 331; *see also* Kenneth C. Wu, Note, *The Protruding Nail Gets Hammered Down: Discrimination of Foreign Workers in Japan*, 2 WASH. U. GLOBAL STUD. L. REV. 469, 477 (2003) (stating that in the 1920s, Burakumin groups devised *kyudan* and used forcible interrogation against people who discriminated against them).

97. Reber, *supra* note 74, at 331.

by the legal order' [although] 'a certain level of severity is to be approved.'"[98] One of the reasons for this surprising step was the judiciary's acknowledgment that "legal redress for discrimination is [otherwise] limited[.]"[99]

iv. *Zainichi* Koreans

In 1910, Japan annexed Korea and Koreans were thereafter considered Japanese nationals until Japan's surrender at the end of World War II.[100] During the interim, many Koreans emigrated to Japan voluntarily, while many others were conscripted into forced labor.[101] Korean "liberties were suppressed [and] the use of the Korean language [was] discouraged and then totally forbidden in 1940."[102] Following the war, "about 700,000 of the then [two] million-strong community stayed on rather than return to their homeland, which was then sliding into a war that would kill millions and split the country into two bitterly opposed states."[103]

A peace treaty signed in the early 1950s indicated that "Japan, recognizing the independence of Korea, renounce[d] all right, title[,] and claim to Korea."[104] At the same time, the Japanese government "issued a Circular Notice . . . announcing that all Koreans, including those residing in Japan, were to lose their Japanese nationality."[105] Those still in Japan, having been "rendered stateless[,]" began to be referred to as *zainichi*, meaning "foreigners living in Japan[.]"[106] Because of this important status shift, *zainichi* Koreans were denied the ability to register their families on the Japanese *koseki*[107] and they "had to carry alien registration cards

98. *See* Upham, *supra* note 69, at 872, 880; *see also* Reber, *supra* note 74, at 334 (explaining that whether *kyudan* was socially and legally acceptable depended on the severity of force used in particular cases of denunciation).

99. Upham, *supra* note 69, at 872, 880 (explaining that the judges treated *kyudan* defendants leniently, because the judges acknowledged that the Burakumin had no other recourse against their discriminators); *see also* Wu, *supra* note 96, at 477–78.

100. *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW—THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 130 (1998); *see also* James Kearney, *Local Public Employment Discrimination Against Korean Permanent Residents in Japan: A U.S. Perspective*, 7 PAC. RIM L. & POL'Y J. 197, 201, 203 (1998). Naturalized Koreans, however, were registered on a segregated *koseki* from that of Wajin Japanese.

101. *See* Kearney, *supra* note 100, at 201, 203; *see also* David McNeill, *The "Undigested Other": Koreans in Japan*, JAPAN TIMES (Tokyo), Dec. 11, 2005, at ¶ 4 (discussing both voluntary and involuntary Korean emigrations to Japan during the annexation of Korea).

102. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 8; *see also* Paul E. Kim, *Darkness in The Land of the Rising Sun: How the Japanese Discriminate Against Ethnic Koreans Living in Japan*, 4 CARDOZO J. INT'L & COMP. L. 479, 481–82 (1996) (explaining how Japan attempted to destroy the Korean culture by forcible assimilation); Landis, *supra* note 24, at 67 (noting the banning of Korean media and language in both Japan and Korea).

103. McNeill, *supra* note 101, at ¶ 4; *see also* Kim, *supra* note 102, at 481–82.

104. IWASAWA, *supra* note 100, at 130; *see also* Treaty of Peace with Japan, art. 2, § a, Sept. 8, 1951, T.I.A.S. No. 2490, 3 U.S.T. 3169.

105. IWASAWA, *supra* note 100, at 130 (reporting that the Japanese government issued a "Circular Notice" stating that all Korean–Japanese would lose their Japanese nationality); *see also* Kearney, *supra* note 100, at 203 (detailing the stripping of Japanese citizenship from Koreans after the Treaty of Peace with Japan came into effect in 1952).

106. S*ee* McNeill, *supra* note 101, at ¶¶ 5–6. *See generally* Kearney, *supra* note 100, at 203.

107. *See* Bryant, *supra* note 80, at 124–25. "[T]he Ministry of Justice is now considering establishing a family registration system for South Koreans." *Id.* at 126.

with them at all times and were forced to register their fingerprints."[108] Furthermore, there is much evidence of "various forms of discrimination that deny [*zainichi* Koreans] occupational, educational[,] and social benefits[,]" even though most of them living now were born in Japan and only speak Japanese.[109]

Currently, there are just over 600,000 *zainichi* Korean permanent residents in Japan.[110] While the government allows *zainichi* Koreans to apply for naturalization, many do not because the process is lengthy and arbitrary—applicants can be refused if the government finds them to be "'inappropriate' as a Japanese citizen."[111] Furthermore, many *zainichi* held back due to fears of backlash within their own community, which might consider them to be "'traitors' by fellow Koreans."[112] Until 1985, naturalizing *zainichi* Koreans was "recommended" by Japanese authorities to assume a Japanese name.[113] More recently, however, naturalization is seen as a more plausible option and about 10,000 naturalize annually.[114]

While conditions for *zainichi* Koreans in Japan are considered to be improving,[115] discrimination still exists.[116] In 2004, the U.N. Committee on Rights of the Child urged Japan to "'undertake all necessary proactive measures to combat societal discrimination and ensure access to basic services' for children of Korean residents[.]"[117] After news "coverage of the return of Japanese abductees" by North Korea, reports indicate[d] several hundred incidents of

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108. *See* Kanako Takahara, *Koreans Here Inclined to Assimilate to Dodge Racism*, JAPAN TIMES (Tokyo), Aug. 6, 2005, at ¶ 43 (also stating that "[t]he fingerprinting system was abolished in 1999"); Kim, *supra* note 102, at 486.

109. *See* Takahara, *supra* note 108, at ¶ 44 (stating that Koreans were the subjects of multifarious types of discrimination that deprived them of many benefits); *see also* Kim, *supra* note 102, at 486–87 (acknowledging that Koreans are denied many rights and protections in Japan, as Japan has no civil rights law protecting employment rights of ethnic, racial, and national minorities).

110. *See* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20; THE MINISTRY OF JUSTICE, IMMIGRATION BUREAU: REGISTRATION OF FOREIGN RESIDENTS, Dec. 2004, *available at* http://www.moj.go.jp/ ENGLISH/IB/ib-01.html.

111. *See* Takahara, *supra* note 108, at ¶ 14; *see also* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20 (detailing the reasons why Koreans do not apply for naturalization, including the fear of losing their cultural identity as well as the extensive government background checks on their economic status and degree of assimilation).

112. *See* Takahara, *supra* note 108, at ¶ 17; COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20.

113. *See* IWASAWA, *supra* note 100, at 139; *see also* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20.

114. *See* McNeill, *supra* note 101, at ¶ 15.

115. *Id.* at ¶ 18.

116. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra* note 6, at ¶ 2; *see also End Discrimination Against Koreans: U.N. Child Panel*, JAPAN TIMES (Tokyo), Feb. 1, 2004.

117. *See End Discrimination Against Koreans: U.N. Child Panel*, JAPAN TIMES (Tokyo), Feb. 1, 2004; *see also Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶¶ 57–58 (providing examples of discrimination against Korean children some of which are refusal to provide financial support to schools and failure to protect Korean children from assaults in public).

harassment of Korean schoolchildren in the streets.[118] The children were "identified by their distinctive uniforms and [were] subjected to verbal and even physical attack[,]"[119] such as the ripping of their traditional Korean dresses.[120] As a result of this and other kinds of discrimination, many *zainichi* Koreans attempt to hide their heritage by assimilating into Japanese culture fully.[121] "In primary school, only 14.2 percent of the Korean children use their Korean name [while i]n secondary school, only nine percent" do so.[122] One popular media pastime is for publications to "out[] many celebrities they have named as *zainichi*[.]"[123]

In the judicial arena, *zainichi* Koreans have found modest success. In 1974, in the Yokohama District Court,[124] a Korean named Mr. Pak won a discrimination suit he brought against the Hitachi Corporation.[125] In Pak's job application to Hitachi, he used an assumed Japanese name.[126] After passing his employment examination and interview, however, Hitachi retracted its offer of employment when it received Pak's Korean family registry.[127] Similarly, in a case brought by a *zainichi* Korean in 1995, the Tokyo District Court ruled that, "a nationality requirement on membership [to a golf club] was 'unreasonable under the contemporary ideas accepted by . . . society,' and held it to be unlawful."[128] Finally, in 2006, the Kobe District Court ruled in favor of two *zainichi* Koreans who were refused housing due to their nationality.[129]

In the 1995 Japanese Supreme Court case *Chong v. Tokyo*,[130] the court held that while the Constitution does not per se prohibit *zainichi* Koreans from voting in local elections, laws barring foreign residents from voting are not unconstitutional.[131] Furthermore, in *Chong*, the

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118. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 30 (reporting physical violence against female Korean students after the media coverage of the abduction of Japanese nationals by the North Koreans, which included harassment, verbal abuse, and physical violence); *see also* McNicol, *supra* note 75 (describing how after the media coverage of the return of Japanese abductees from North Korea, some 400 Korean-Japanese students were harassed and subjected to physical abuse).

119. McNicol, *supra* note 75.

120. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 30; *Pro-N. Korean Schools, Students Harassed Over Missiles*, JAPAN TIMES (Tokyo), July 16, 2006, at ¶¶ 1, 6.

121. *See, e.g.,* Kim, *supra* note 102, at 488; Takahara, *supra* note 108, at ¶ 5.

122. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 30.

123. *See* John Lie, *The Discourse of Japaneseness* in JAPAN AND GLOBAL MIGRATION: FOREIGN WORKERS AND THE ADVENT OF A MULTICULTURAL SOCIETY, 70, 82 (Mike Douglas & Glenda Susan Roberts eds., 2003) (detailing the astonishment of Japanese citizens when they discovered that celebrity Yasuda Narumi was ethnically Korean); McNeill, *supra* note 101, at ¶ 6.

124. Takahara, *supra* note 108, at ¶ 48.

125. *See* Pak Chong-Sok v. Hitachi, 744 HANREI JIHŌ 29 (Yokohama D. Ct., 1974); *see also* Bryant, *supra* note 80, at 127.

126. *See* Bryant, *supra* note 80, at 127.

127. *Id.*

128. 1531 HANREI JIHŌ 53 (Tokyo D. Ct., Mar. 23, 1995).

129. *See Refusing Housing "Discrimination," Rules Kobe District Court Amagasaki*, MAINICHI SHIMBUN (Tokyo), Jan. 25, 2006.

130. *See* Chong v. Tokyo, 49 MINSHŪ 2-639 (Sup. Ct., Feb. 28, 1995).

131. *Id.*; *see also Supreme Court Rejects Appeal from Koreans for Voting Rights,* JAPAN ECON. NEWSWIRE, Feb. 28, 1995, ¶¶ 2, 3.

Supreme Court ruled that so long as Tokyo had a "rational basis" for its decision, it could "uniformly reject all foreign applicants" for all managerial posts.[132] In this case, Chong, a second-generation *zainichi* Korean,[133] was for six years "Tokyo's first non-Japanese public health nurse[.]"[134] After she decided to apply for a management position, however, the city government refused her application to take the employment test.[135] Under the court's analysis, it determined that due to the likelihood that those in governmental management posts will exercise "the local public body's public authority or participat[e] in public decision-making[,]" such positions cannot be said to be constitutionally guaranteed to individuals other than Japanese citizens.[136] However, since such duties can vary widely, the government must "distinguish between managerial posts that must not be open to foreign nationals and those that may . . . , depending on the contents of the duties as well as how and to what extent the authority granted to each post is involved in performing governing functions."[137] By looking at the circumstance at hand, however, the court found that it was "within the bounds of vertical discretion" of the city to determine that non-citizen public nurses cannot be promoted to "division director-level or upper management posts" and thus Chong's rejection "shall not be deemed to be illegal."[138]

b. The Modern Influx of Foreigners

"Japan, like it or not, is now on the road to becoming a much more culturally diverse nation."[139] This demographic shift represents a marked difference from Japan's isolationist past. As mentioned previously, Japan was almost exclusively closed off to the rest of the world for several centuries, ending in the Meiji Revolution in the mid-nineteenth century.[140] Even today, not that much has changed; Japan still "has the lowest percentage of immigrants and expatriate workers of any advanced industrialized nation[.]"[141] However, relatively speaking, the recent population shift is immense. Japan is currently undergoing "the largest voluntary influx of foreigners in over 1,000 years."[142]

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132. Kearney, *supra* note 100, at 217–18 (explaining that the court based its decision on the traditional theory of national sovereignty to require civil servants to have Japanese citizenship); *see also* Timothy Webster, Note, *Legal Excisions: "Omissions Are Not Accidents,"* 39 CORNELL INT'L L.J. 435, 453 (2006) (finding that the city's rational basis for distinguishing between foreigners and Japanese nationals was the principle of national sovereignty).

133. Kearney, *supra* note 100, at 218.

134. Webster, *supra* note 132, at 451.

135. Chong v. Tokyo, 59 MINSHŪ 1 (Sup. Ct., Jan. 26, 2005) (finding that the deputy director refused to accept Chong's application because she lacked Japanese nationality).

136. *Id.*

137. *Id.*

138. *Id.*

139. Sumi Shin, *Newcomer Migrants: Implications for Japan's Administration of Social Services and Nationality*, 6 UCLA J. INT'L L. & FOREIGN AFF. 313, 362 (2002) (quoting Daniel Foote, *Japan's 'Foreign Workers' Policy: A View from the United States*, 7 GEO. IMMIGR. L.J. 707, 744 (1993)).

140. *See* PORT & MCALINN, *supra* note 25, at 30–31.

141. Howard W. French, *"Japanese Only" Policy Takes Body Blow in Court,* N.Y. TIMES, Nov. 15, 1999, at A1; *see also* Shin, *supra* note 18, at 275–76 (suggesting that due to Japan's reluctance to grant rights to foreigners, the percentage of immigrants in the Japanese population is low).

142. BEER & MAKI, *supra* note 16, at 155 (finding that because Japan relaxed their immigration laws in 2002, there has been a great influx of foreigners into the country); *see also* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 376 (1992) (showing that since the early 1990s, there has been a growing number of foreign workers arriving in Japan).

The chief factor motivating changes on this scale is likely a simple combination of economics and population statistics. In terms of economy, after a lost decade of depression in the 1990s, Japan's economy is finally booming again.[143] One of the reasons for the turnaround is that after "[fifteen] years of stagnation . . . [c]orporate restructuring has cut out some of the dead wood" of an otherwise bloated infrastructure.[144] Real estate values have finally started to rise.[145] After several years of zero percent interest rates, Japan has finally started toying with raised rates.[146] "However, such growth and prosperity have in turn created their own limitations in the form of severe manual labor shortages[,]" particularly for "'3K' jobs—dangerous (*kiken*), dirty (*kitanai*), and difficult (*kitsui*)."[147] In some locations, such as Aichi prefecture, "the shortage of workers has reached acute proportions" and "1.7 jobs are offered for every applicant."[148]

Compounding this issue has been the mounting problem of a statistically significant decrease in Japan's domestic population.[149] According to the Japanese government, the population could fall from approximately 128 million to 100 million by 2050, or to as low as 86 million by some estimates.[150] "By 2030, Japan will have only two workers for every retiree and, by

143. *See On a Roll; Japanese Monetary Policy*, ECONOMIST (London), July 8, 2006, at 67 (declaring that Japan's long era of deflation is over); *see also* Heather Stewart, *Rising Japan Follows Its Leader*, GUARDIAN (London), Sept. 18, 2005 (examining statistics of a decrease in unemployment, an increase in wages, and an increase in property prices, all suggesting an economic recovery in Japan); Jonathan Watts, *G2: The Sun Also Rises*, GUARDIAN (London), Nov. 14, 2005, at 8 (declaring that Japan's economy is making a comeback and is growing in many sectors).

144. *See* Stewart, *supra* note 143; *see also Yen Weakness to Continue but Japan Corporate Outlook Strong—Merrill Lynch,* AFX INT'L FOCUS (London), Nov. 14, 2006 (recognizing that Japan is benefiting from government deregulation and corporate restructuring).

145. *See Average Land Values Rise for the First Time in 14 Years*, ASAHI SHIMBUN (Tokyo), Aug. 2, 2006, ¶¶ 1–3 (indicating that Japanese land value rose 0.9 percent in the middle of 2006); *see also Roadside Land Price Up 0.9% on Average*, DAILY YOMIURI (Tokyo), Aug. 2, 2006, at 1 (finding that the increase in the average land value was facilitated by increasing land prices in three major urban areas).

146. *See On a Roll; Japanese Monetary Policy, supra* note 143 (explaining that capital expenditures will be the key factor in determining when to raise interest rates); *see also Taking a Step Back,* CNNMONEY.COM, Feb. 23, 2006, http://money.cnn.com/2006/02/23/markets/stockswatch/index.htm (suggesting that the Bank of Japan may raise interest rates because of Japan's strong economy).

147. Yamaga-Karns, *supra* note 12, at 560; *see also Today in Business: Japan's Jobless Rate Drops,* N.Y. TIMES, Dec. 26, 2006, at C2 (informing that some of Japan's largest companies are facing the most severe labor shortages in 14 years).

148. *Meet the New Salaryman*, ECONOMIST (London), Nov. 12, 2005, at 41; *see also* Elizabeth Peek, *Savvy Investors Look to That Other Asian Giant,* N.Y. SUN, Oct. 21, 2005, at 7 (finding that employment is tight in manufacturing regions, such as the region in which Toyota is located).

149. *See Meet the New Salaryman*, *supra* note 148 (revealing that fewer births have led to a decrease in the population); *see also Japan—Estimated Population Decrease in 2005,* MEDISTAT NEWS (West Sussex), Jan. 19, 2006 (suggesting that in 2005, the number of deaths was expected to exceed the number of births); Junichiro Koizumi, Prime Minister of Japan, General Policy Speech to the 163rd Session of the Diet (Sept. 26, 2005), *available at* http://www.kantei.go.jp/foreign/koizumispeech/2005/09/26shoshin_e.html (finding that Japanese society faced the prospect of a serious decrease in the population).

150. *Survey—Japan: Visions of 2020*, ECONOMIST, Oct. 8, 2005, ¶ 4; *see also Panic over Low Birth Rate Spreading in World's Second-Largest Economy,* IRISH TIMES, May 15, 2006, ¶ 3.

mid-century, three workers for every two retirees."[151] While there are plans in the works to increase the age of retirement[152] and to take advantage of robotic automation as much as possible,[153] it is impossible to avoid the seeming necessity of foreign labor.

Population statistics have reflected Japan's need for an influx of labor by way of significantly increased numbers of foreign immigration. Currently, Japan is home to "1.97 million legal foreign residents[,]"[154] out of a total population of 127.7 million.[155] This represents a 45 percent increase since the mid-nineties.[156] In terms of individual ethnic communities, there are 607,419 ethnic Koreans, 487,570 Chinese, 286,557 Brazilians, and 199,394 Filipinos.[157] In fact, it is such a shock to Japan that a full 1.5% of their total population is foreign,[158] "a team of experts led by Vice Justice Minister Taro Kono published a report calling for a new immigration policy, one that limits foreigners to [3] percent of the total population[.]"[159]

Perhaps, not surprisingly, population statistics significantly "undercount" in regards to illegal immigrants in Japan.[160] Although it is naturally difficult to determine exactly how many illegal immigrants are in Japan, estimates in 1987 were around 400,000, "a six-fold increase"

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151. *Japan: Meet the New Salaryman, supra* note 148, at ¶ 4; *see also 54% of Firms Fear Lack of Skilled Labor*, ASAHI SHIMBUN (Japan), Dec. 1, 2006 (finding that a sense of labor crisis is currently already palpable in Japanese businesses).

152. *See Japan: Meet the New Salaryman*, *supra* note 148, at ¶ 10 (declaring that the age of retirement will be raised in stages from 60 to 65 to 70); *see also Employers Not Keen on Plan to Raise Retirement Age to 75*, S. CHINA MORNING POST, Feb. 3, 2005, ¶ 1 (stating that a plan to raise the retirement age to 75 has been met with scorn by employers).

153. *See Survey—Japan: Visions of 2020*, *supra* note 150, at ¶¶ 10–12; *see also* Yamaga-Karns, *supra* note 12, at 561 (maintaining that an increase in the use of robotics has been proposed to meet the demand for labor).

154. JAPAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005, *supra* note 20, at § 5; *see also* Yoshimi Chitose, *Demographic Profiles of Brazilians and Their Children in Japan*, 4 JAPANESE J. POPULATION 93, 97 (2006).

155. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra* note 6, at ¶ 4; *see also Population Drops for First Time on Record*, CHI. TRIB., Dec. 22, 2005.

156. DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13; *see also* IMMIGRATION BUREAU, MINISTRY OF JAPAN, CONTROL OF JAPANESE AND FOREIGN NATIONALS ENTERING AND LEAVING JAPAN, *available at* http://www.moj.go.jp/ENGLISH/IB/ib-01.html (charting the increase in registered foreign residents in Japan from the nineties to today).

157. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005: JAPAN, *supra* note 20, at § 5; *see also* CONTROL OF JAPANESE AND FOREIGN NATIONALS ENTERING AND LEAVING JAPAN, *supra* note 156 (charting the increase in registered foreign residents in Japan from the nineties to today).

158. DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 3; *see also* Yasuo Kuwahara, *Migrant Workers in the Post-War History of Japan*, 2 JAPAN LAB. REV. 25, 25 (2005).

159. *See* Eric Johnston, *Trouble Looms as Foreign Labor Floods In*, JAPAN TIMES (Tokyo), Sept. 12, 2006, ¶ 8.

160. *See* BEER & MAKI, *supra* note 16, at 155; *see also* Foote, *supra* note 139, at 728–29.

since 1982.[161] In 1998 alone, the Justice Ministry deported 48,500 foreigners.[162] Such illegal immigrant laborers face many challenges in Japan, such as difficulty to access medical care[163] and free education.[164]

Part II—Motivation and Justification for Exclusion of Foreigners

Before examining the reasoning behind the exclusion of foreigners by some private business owners, it should be informative to take a closer look at the scope of the problem itself. There has been no definitive survey across Japan to determine exactly how many businesses are systematically excluding foreigners and, as such, the case should not be overstated. Nevertheless, "[s]imilar cases [to the Otaru Onsen exclusion] exist throughout Japan, where racial discrimination is practiced undisturbed[.]"[165]

In addition to the court cases discussed later, there have been many sporadic reports of private business exclusion of foreigners from the media, human rights organizations, and concerned community activists. For example, as part of the fact-finding missions that led to the Otaru Onsen case, the future plaintiffs discovered at various points in their investigation in Hokkaido three exclusionary *onsen* in Otaru,[166] one in Wakkanai, and exclusionary sports and barber shops, also in Wakkanai.[167] The investigators also found a partially exclusionary *onsen* in Rumoi.[168] In 2000, the *Japan Times* reported that approximately 100 businesses used "Japanese Only" signs which had been prepared by "a local association of restaurants and bars[.]"[169]

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161. *See* Yates, *supra* note 18; *see also* Yasuzo Kitamura, *Evolution of Antitrafficking in Persons Law and Practice in Japan: A Historical Perspective*, 4 TUL. J. INT'L & COMP. L. 331, 347 (2006) (contending that by the early 1990s, the number of illegal immigrants in Japan increased to nearly 300,000).

162. *See Racism in Business Rampant: Groups*, JAPAN TIMES (Tokyo), Apr. 21, 2000, ¶ 26; *see also* Yates, *supra* note 18 (declaring that an average of 50 illegal immigrants are deported every day); Ronald E. Yates, *Foreigners in Japan Say Openness All Talk*, CHI. TRIB., Apr. 15, 1990, at C6 (stating that "22,262 foreigners were booted out of Japan [in 1989]—a 27 percent increase over 1988 and double the total of 1986").

163. *See* Shin, *supra* note 139, at 316–38. For example, presumably to scare off illegal immigrants from its facilities, one Tokyo emergency medical center posted a sign that read in English and Chinese, erroneously, "The hospital has an obligation to report to the Immigration Control Bureau." *Id.*; *see also* Tomoko Otake, *Universal Access—If You Speak Japanese*, JAPAN TIMES, May 9, 2006, ¶¶ 8–10 (describing the difficulties faced when attempting to access health care facilities in Japan without a basic understanding of the Japanese language).

164. *See* Shin, *supra* note 139, at 350–59 (stating that non-citizen children do not have a right to education as a matter of law); s*ee also This Is the New Japan: Immigrants Are Transforming a Once Insular Society, and More of Them Are on Their Way*, NEWSWEEK INT'L, Sept. 11, 2006, ¶ 1 (stating that foreigners face difficulties with respect to education as the Japanese government offers "virtually no provisions for teaching Japanese as a foreign language to students entering the system").

165. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra* note 6, at ¶ 64.

166. ARUDOU, *supra* note 1, at 30–43; *see also* Dave Aldwinckle, *Photo Substantiation for Otaru Lawsuit*, *available at* http://www.debito.org/photosubstantiation.html (showing the "Japanese Only" sign at the *onsen* in Wakkanai).

167. ARUDOU, *supra* note 1, at 219.

168. *See id.* at 221–22 (describing where "Japanese Only" policies were enforced for certain times of the day); *see also* Dave Aldwinckle, *The Spread of "Hikokusaika," available at* http://www.debito.org/onsennyuuyokutimes041300.html (finding that an *onsen* in Rumoi excluded foreigners between the hours of 5 P.M. and 7 P.M.).

169. Takuya Asakura, *Shops Continue Discriminatory Practices*, JAPAN TIMES (Tokyo), Nov. 8, 2000, ¶ 4; *see also Dialogue Leads Hokkaido Spa to Lift Ban on Foreigners*, JAPAN WEEKLY MONITOR, Jan. 14, 2002, ¶ 6 (stating that about half of the 200 restaurants and bars in Monbetsu in Hokkaido posted "Japanese Only" signs).

The use of such practices has not just been limited to Hokkaido. "Similar cases of discrimination have been reported to the group from cities including Hamamatsu[,] . . . Naha, Okinawa Prefecture[, and] also [] in the entertainment districts of Tokyo's Shinjuku Ward."[170] In Shinjuku, ironically, one business "had a sign that read: 'Club International—No foreigners allowed."[171] Some Japanese Only signs are intended mainly for a particular group of foreigners, such as the United States Navy.[172] Although it was not from a private business, there was at least one instance in 1998 of a public pool in Azuma which featured a "Closed to Foreigners" sign.[173]

There are also many reported instances of unequal treatment arguably due to racial discrimination. For example, in the early 1990s, the six private Japan Railway companies were criticized sharply for charging more for Korean students than Japanese students, who normally get a student discount.[174] In another example, HIS, Japan's "largest discount travel agency," was revealed to have a disparate pricing policy based on Japanese or foreign customers.[175] When the policy was reported, HIS denied that discriminatory motives were behind the pricing decision, but rather stated that "business concerns" were the cause.[176] On a smaller scale, there are many cases of reported discrimination in housing. For example, "[w]hen an Indian engineer called a real estate agent to find housing, the staff asked him repeatedly the color of his skin."[177]

One relatively well-publicized case of disparate treatment based on nationality came from American Steve Herman.[178] Herman was the chairman of the Foreign Press in Japan and had a salary the equivalent of approximately $200,000 in U.S. currency.[179] Herman, with his Japanese wife and family, applied to Asahi Bank for a housing loan, but his application was refused outright when the bank discovered that he was neither a Japanese citizen nor a permanent resi-

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170. Asakura, *supra* note 169, at ¶ 8; *see also* Dave Aldwinckle, *The Rogues' Gallery*, *available at* http://www.debito.org/roguesgallery.html#Uruma (providing discriminatory signs from all parts of Japan, including Naha, Okinawa Prefecture, and Shinjuku).

171. Peter Hadfield, *Japan's Foreigners Fight Back Against Widespread Bias—They Say They're Denied Access to Loans, Baths, Bars*, USA TODAY, Mar. 8, 2000, at 24A.

172. Willis Witter, *Japanese Commonly Show Anti-Foreigner Biases; U.S. Military, Latin American Settlers Targeted*, WASH. TIMES, Sept. 18, 1998, at A15; *see also* Sharon Moshavi, *Japanese Foreigners Distrusted, Needed*, BOSTON GLOBE, Nov. 19, 2000, at ¶ 7 (contending that while the "Japanese Only" signs may be intended for a particular group, such as Russians or Chinese, banning all *foreigners* is seemingly more neutral).

173. Witter, *supra* note 172 (also mentioning that after complaints, the sign was removed); *see also Japan: Neikajin, Foreign Students*, 5 MIGRATION NEWS, ¶ 5 (1998), *available at* http://www.migration.ucdavis.edu/mn/more.php?id=1656_0_3_0 (noting that the City of Azuma closed its pool to foreigners because of two incidents of "horseplay" involving people with "brown skin").

174. *See Korean Students Pay More on JR Trains*, DAILY YOMIURI (Tokyo), Aug. 26, 1992, at 2 (stating that Japan Railways' justification for the differences in price was that it categorizes Korean High Schools under the abnormal "miscellaneous" educational institutions).

175. *See* Vanessa Mitchell, *Travel Firm Rapped over Foreign Ticket Policy*, JAPAN TIMES, July 4, 2006.

176. *See id.* (noting that HIS implemented its pricing policy because many foreigners purchase round trip tickets and do not use the return portion of the ticket).

177. FUJIMOTO, *supra* note 13, at 2; *see also* Arudou Debito, *Lawsuit-Free Land a Myth*, JAPAN TIMES (Tokyo), Jan. 3, 2006.

178. *See* Hadfield, *supra* note 171.

179. *Id.*

dent.[180] After Herman sued, "[t]he court affirmed the bank's criteria to give housing loans only to Japanese citizens or permanent residents because the bank needed to lower its costs in deciding which applications to accept, and categorically excluding foreigners without permanent resident visas was justifiable."[181]

There are also many cases of discriminatory practices reported in regards to employment in Japan.[182] The opportunity for discrimination in employment begins early; Japanese resumes generally "require a picture of the applicant."[183] In one case, a talented Indian computer specialist, Kamal Sinha, was specifically recruited by Mitsubishi Electric to work in Japan.[184] Upon arrival, however, Sinha "was not permitted to take free company classes in Japanese offered to other foreign employees who were [white]."[185] In another example, after a strike by foreign English-language instructors at a Japanese university to protest unequal treatment,[186] the university retaliated by "decreas[ing] the number of English classes it offered and [increasing] the size of some [] classes."[187] Within two years, nearly all of the foreign instructors at the university at the time of the strike had been terminated.[188]

a. Presumption of Foreign Incompatibility with Domestic Japanese Culture

Kokusaika is the Japanese word for internationalization,[189] and during the 1980s and 1990s *kokusaika* was a popular buzzword representing the country's intended movement toward greater international interaction.[190] This welcoming trend represents a marked difference from the Japan of the past. For an extreme example, in 1862, around the time of the Meiji Restoration, foreigner Charles Richardson was beheaded when he failed to follow what was then the proper cultural protocol of dismounting in the presence of a passing Japanese prince.[191] However, while the age of *kokusaika* certainly represents some kind of ideological

180. *See* FUJIMOTO, *supra* note 13, at 2.

181. *Id*. The District Court decision was affirmed by the Tokyo High Court in 2002, and his appeal was refused by the Japanese Supreme Court in 2004, "on the grounds that his case was not a constitutional issue." *See* ARUDOU, *supra* note 1, at 189.

182. *See, e.g.*, Knapp, *supra* note 39 (asserting that many women are denied career opportunities in Japanese international enterprises because of their perception as caregivers).

183. *See* Madison, *supra* note 31, at 190.

184. *See* Robert Guest, *A Case of Racial Discrimination? An Indian Worker Sues His Japanese Employer*, AM. CHAMBER OF COM. IN JAPAN J. 37-39 (Nov. 1992) (noting that this was the first lawsuit ever brought in a Japan court for employment discrimination).

185. *Indian Sues Mitsubishi for Race Bias*, DAILY YOMIURI (Tokyo), July 22, 1992, at 2. Sinha eventually brought his case to court, but lost at both the District and the High Court level. *See generally* Kamal Sinha, *Mitsubishi Lawsuit Ends*, http://www.kamalsinha.com/mitsubishi/end.html (last visited Mar. 30, 2007).

186. *See Foreign Teachers Announce Strike*, JAPAN TIMES (Tokyo), June 20, 1998.

187. Alan Brender, *Foreign Lecturers Bear the Brunt of Budget Pains at Japanese Universities*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 23, 2001, at 45.

188. *See id.*

189. Yates, *supra* note 162.

190. *See id.*; Hadfield, *supra* note 171; Yamaga-Karns, *supra* note 12, at 574–75.

191. *See* Madison, *supra* note 31, at 187 (noting that this event is known as the "Namamugi Incident").

shift, some observers have pointed out that "simply saying *kokusaika* has not necessarily made the nation more international."[192]

Some things about Japan are clearly more international than they used to be. Japan's markets have opened significantly to foreign investment since the 1980s.[193] Also, there are now more foreigners in Japan than ever before.[194] While having more foreigners represents one aspect of internationalization, the question remains as to whether "Japan [has truly] decided to accept people from abroad."[195] According to some, the Japanese have a "pervasive tendency to view everyone in terms of in-groups and out-groups[,]" with foreigners always falling on the outside.[196] Can Japan truly represent *kokusaika* if foreigners will always be *soto* (outside) to the Japanese *uchi* (inside)?[197]

One way to address this question is by looking at how the Japanese view themselves in relation to Japan's economic success in the post-war era. "Although diffuse, the belief is strong that Japan's domestic stability and international success were achieved partially through adherence to norms and values associated with" a traditional Japanese social order.[198] "In Japan[,] hierarchical patterns of social and national organization combine with an ideology of homogeneity and its necessary counterpart, exclusivity, as bases of national solidarity."[199] Unlike in the United States, citizenship in Japan is not granted to children "simply by being born within its borders."[200] As might be expected, the exclusive, homogenous Japan can sometimes turn against its own—many Japanese who have spent much time abroad complain of discrimination due to so-called *gaijin kusai*, or "reek of foreignness[.]"[201] Presumably, this is because those individuals have lost touch with the intricate subtleties expected in day-to-day Japanese social interaction.

It is not surprising, then, that there might be a cultural clash between the traditional "communitarian orientation"[202] of Japan and a new influx of foreign immigration, ignorant of Japanese culture. It should also be noted, however, that the pervasiveness of the term *kokusaika* roughly coincided with the onset of Japan's "lost decade" of economic downturn in the late

192. Yates, *supra* note 162.

193. Hadfield, *supra* note 171.

194. *See* Johnston, *supra* note 159 (noting the steady increase of foreign laborers in Japan).

195. Hadfield, *supra* note 171.

196. *See* Yamaga-Karns, *supra* note 12, at 571 (noting the severe lack of manual laborers in Japan that brings many foreign workers there).

197. *See* Reber, *supra* note 74, at 305.

198. *See* Bryant, *supra* note 80, at 111.

199. *Id.* at 164.

200. Landis, *supra* note 24, at 61 (explaining that Japan grants citizenship based on the "law of blood" not based on the "law of the soil"); *see also* Hur, *supra* note 12, at n.34.

201. *See* BEER & MAKI, *supra* note 16, at 158. *See generally* Lash III, *supra* note 91, at 3 (suggesting reasons for Japan's disdain toward foreigners).

202. John Owen Haley, *Lessons from a Changing Japan,* 2 PAC. RIM L. & POL'Y J. 1, 3–4 (1993), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 40 (Kenneth L. Port & Gerald Paul McAlinn eds., 1996).

1980s and 1990s.[203] At the same time, two of Japan's closest East Asian Neighbors, South Korea and China, have been undergoing dramatic reformation, representing emerging cultural and economic superpowers, respectively.[204] Rivalry between Japan and South Korea came to a head in 2002 when the two "countries were co-hosts of soccer's World Cup and South Korea advanced further than Japan."[205]

The culmination of these conflicts has led to a distinct rise in anti-foreign hostilities amongst some Japanese. "[M]any . . . feel threatened by rapid social change, the protracted economic downturn[,] and rising crime[,] . . . spur[ring] a backlash in some quarters against outsiders and the loss of traditional values."[206] These feelings have led to complaints that "[t]here are too many foreigners here—throw them out immediately"[207] or, more directly, fears that "Japan could be overrun by 'swarms' and 'torrents' of 'cockroach-like' immigrants[.]"[208] It could be this "insecurity" of a threatened populace that has led to the rise of nationalist *manga* (comics) which depict Japan's Asian neighbors in a less-than flattering light.[209] Two such best-sellers are entitled "Hating the Korean Wave" and "Introduction to China[.]"[210] While the former states that "there is nothing at all in Korean culture to be proud of[,]" the latter "portrays the Chinese as a depraved people obsessed with cannibalism[.]"[211] Tellingly, despite the facial similarities between Japanese, Chinese, and Koreans, these *manga* depict "Japanese char-

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203. *See* Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 54 (2005); Watts, *supra* note 143, at 8.

204. *See* Norimitsu Onishi, *Ugly Images of Asian Rivals Become Best Sellers in Japan*, N.Y. TIMES, Nov. 19, 2005, at A1 (asserting that the "Korean Wave—television dramas, movies[,] and music from South Korea—swept Japan and the rest of Asia, often displacing Japanese pop cultural exports"); *Ultranationalist Manga Gain Popularity in Japan as Regional Tensions Rise*, MAINICHI DAILY NEWS (Japan), Dec. 1, 2005, *available at* http://mdn.mainichi-msn.co.jp/features/archive/news/2005/12/20051201p2g00m0fe022000c.html (discussing tensions between Japanese self-identity and China's impressive economic growth).

205. *See* Onishi, *supra* note 204 (attributing the emergence of the full force Japanese/Korean conflict to Korea advancing further than Japan in the 2002 World Cup). *But see Embrace the World's Game*, DENV. POST, June 17, 2006 at C13 (alleging that co-hosting the 2002 World Cup was the culmination of Japan and Korea overcoming years of conflict).

206. Magnier, *supra* note 2, at 3; *see also* Carmel A. Morgan, *Demographic Crisis in Japan: Why Japan Might Open Its Doors to Foreign Home Health-Care Aides*, 10 PAC. RIM L. & POL'Y J. 749, 773 (2001) (reiterating the fear many Japanese have that unskilled foreign workers will lead to an increase in the crime rate).

207. Editorial, *Time to End Discrimination Against Foreigners*, DAILY YOMIURI (Japan), Dec. 14, 2004 at 4, *available at* 2004 WLNR 13984706 (quoting a postcard sent to the social welfare council in Higashinari Ward, Osaka asking for all the foreigners to be thrown out of Japan).

208. Yamaga-Karns, *supra* note 12, at 563 (referring to angry letters sent to Japanese government and news offices comparing foreigners to cockroaches); *see also* Wu, *supra* note 96, at 473 (acknowledging the Japanese fear of foreigners and proposing a way to alleviate those fears).

209. *See* Onishi, *supra* note 204; *Ultranationalist Manga Gain Popularity in Japan as Regional Tensions Rise*, *supra* note 204 (reporting that many readers feel vindicated by Japanese comics that finally depict history from the Japanese point of view and portraying its Asian neighbors as the villains).

210. *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 72 (revealing that these new comics have become best-sellers in Japan); *see also* Kwan Weng Kin, *Japan's "Hate Comics": New Wave of Manga Spreads Disturbing Lies About Country's Past and Its Neighbours*, STRAITS TIMES (Singapore), Dec. 3, 2005 (finding Japanese manga such as "Hating the Korean Wave" to be very popular with Japanese youth).

211. Onishi, *supra* note 204.

acters . . . with big eyes, blond hair[,] and Caucasian features; the Koreans are drawn with black hair, narrow eyes[,] and very Asian features."[212]

While these *manga* may represent an extreme viewpoint, such feelings in the abstract are quite common. For example, a 2004 survey indicated that 44 percent of all Japanese felt that foreigners are a bad influence on the country—the exact same percent which felt that foreigners were a good influence.[213] A different survey indicated that, on the receiving end of such negative sentiment, 81 percent of foreigners living in one Tokyo ward said that the "Japanese were prejudiced towards them or had discriminated against them."[214] If the Japanese really do "attribute . . . their present economic strength and high standard of living" to Japan's "communal mentality," which requires "voluntary compliance with accepted and well-known norms[,]" it follows that foreigners will typically lack understanding of such norms and will be "ill-suited to . . . integration[.]"[215] When there is a presumption that foreigners will be ignorant of the very cultural attributes that supposedly made Japan a post-war success, such foreigners will be seen as incompatible, posing a threat to continued success in the future or even as a source for past failures.

b. Inflammatory Government Statements and Actions

Despite a supposed governmental policy of *kokusaika*, there have been numerous instances of governmental officials' speeches and actions that have only served to fan the flames of already-existing negative feelings toward foreign incursions into Japan.[216] These state-sponsored gaffes include statements by prominent politicians, misleading statistics, and crime-prevention campaigns by local police agencies. While at first blush, individually, these actions may seem relatively harmless, when applied collectively they can lead to serious overreaction by the many Japanese who already see foreigners as unfamiliar and suspect.[217]

Perhaps the most famous racially insensitive faux pas made by a Japanese politician was that of former Prime Minister Yasuhiro Nakasone in 1986.[218] At that time, Nakasone indicated that "Japan was a 'more intelligent society' than the United States, 'where there are blacks, Mex-

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212. *Id. But cf.* Michael O'Sullivan, *Manga's Powerful Feminine Mystique*, WASH. POST, Feb. 23, 2007, at T22 (noting that white skin in Japanese Manga usually indicates a foreigner, while Asian features depict Japanese characters).

213. *See Japanese Divided on Whether Foreigners Are Good Influence*, JAPAN TIMES (Tokyo), May 27, 2004. (finding that Japan is equally divided over whether foreigners are a good or bad influence).

214. Yates, *supra* note 162.

215. Yamaga-Karns, *supra* note 12, at 571–72.

216. *See* Hur, *supra* note 12, at n.234.

217. *See* IWASAWA, *supra* note 100, at 201–2 (describing generally the reasons why "Japanese society is relatively closed to outsiders[,]" particularly to non-Caucasians); *see also* Shin, *supra* note 18, at 269 (maintaining that Japan is notoriously racist and unwelcoming to foreigners).

218. *See* Kearney, *supra* note 100, at n.6; Yates, *supra* note 162.

icans[,] and Puerto Ricans, and the level is low.'"[219] While Nakasone did later apologize,[220] in 1988 former Finance Minister Michio Watanabe indicated that "American blacks were habitually in debt and had no concern about going bankrupt."[221] In 1990, "Justice Minister Seiroku Kajiyama drew a cavalier parallel between the effects of foreign prostitutes on Tokyo's residential districts and the flight of [American] homeowners 'forced out . . . because blacks move in . . . and ruin the atmosphere.'"[222]

The most offensive recent comments have come from Tokyo Governor Shintaro Ishihara.[223] Most notably, in 2000 Ishihara indicated that, in the wake of a major earthquake, "a big riot could be expected" by illegal foreigners.[224] Additionally, in 2001, Ishihara stated "that the 'very pragmatic DNA of Chinese . . . [makes them] steal without hesitation in order to satisfy their desire.'"[225] Although the message that Ishihara appears to be espousing to the public is that "immigration and internationalization seem to equal more crime" for Japan,[226] his statements have not prompted any reaction from the national government.[227]

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219. *Tokyo Bigots; Racist Remarks About U.S. Minorities Invite a Backlash that Japan Can Ill Afford*, NEWSDAY (New York), Oct. 27, 1990, at 14. Around the same time, American protests forced hit book *Little Black Sambo*, often criticized for its racially insensitive imagery, off Japanese bookshelves. *See* Bruce Wallace, *"Sambo" Returns to Bookracks in Japan*, CHI. TRIB., June 13, 2005, at 5 (noting that in 2005, the book was republished with modest success); *see also* Justin McCurry, *Page Turner, Japanese Publisher Defies Little Black Sambo Protest*, GUARDIAN (London), June 15, 2005, at 12 (revealing that after 17 years off the shelves, *Little Black Sambo* made a comeback).

220. Yates, *supra* note 162; *see also* Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and Its Lack of Sensitivity to Minority Issues*, 22 CAL. W. INT'L L.J. 135, 135 (1991–92) (discussing the Japanese reaction to the backlash from Nakosone's statements).

221. *Tokyo Bigots; Racist Remarks About U.S. Minorities Invite a Backlash that Japan Can Ill Afford*, *supra* note 219.

222. *Id.* Kajiyama's "remark was followed by pained official regrets, hedged and defensive in tone." *Id.*

223. *See* Eileen M. Mullen, Note, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 725, 756 n.188 (1993); McNicol, *supra* note 75 (quoting various offensive comments made by Ishihara including accusing foreigners of bringing new crimes to Japan).

224. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, supra* note 6, at ¶ 62; *Racism in Business Rampant: Groups*, *supra* note 162; *cf.* Gregory Clark, *Much Ado About Nothing?* JAPAN TIMES (Tokyo), May 21, 2000 (asserting that the statements made by Ishihara were directed only at non-law-abiding immigrants and were justified by the recent rise in illegal activity being perpetrated by illegal immigrants).

225. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum—Mission to Japan*, ¶ 62, U.N. Doc. E/CN.4/2006/16/Add.2 (Jan. 24, 2006) (*prepared by* Doudou Diène) [hereinafter Diène]. "The National Police Research Institute of Police Science is [now] trying to develop a DNA test to identify the race of criminal suspects who leave DNA at crime scenes." McNicol, *supra* note 75.

226. *See* McNicol, *supra* note 75; *see also* Howard W. French, *Tokyo Politician's Earthquake Drill Is a Military Moment,* N.Y. TIMES, Sept. 4, 2000, at A3 (discussing incendiary xenophobic comments made by Ishihara's administration suggesting that foreigners are responsible for committing heinous crimes in Japan).

227. Diène, *supra* note 225 (indicating that the national government has recently, however, taken some general steps to curtail off-the-cuff statements from politicians on politically sensitive issues); *see also LDP Policy Initiative: No More Gaffes*, ASAHI SHIMBUN (Tokyo), Oct. 28, 2006, *available at* http://www.asahi.com/english/Herald-asahi/TKY200610270408.html (indicating Prime Minister Shinzo Abe's reluctance to address incendiary comments made by his various Cabinet Ministers).

Police agencies in Japan also seem to be indicating that foreign immigration brings with it the serious risk of increased crime.[228] "The National Police Agency's [NPA] press releases exaggerate the role of foreigners in criminal offenses by mentioning that crimes by foreigners were worsening [] or widespread[.]"[229] However, the statistics hailed by the NPA have been strongly criticized by commentators.[230] While it is true that crime overall is increasing and, with it, crimes committed by foreigners,[231] the press releases are nevertheless misleading because they do not address the fact that "[t]he foreign population is growing, [but] the Japanese one is not."[232] In reality, while the foreign population in Japan rose 18 percent in 2004, crimes committed by foreigners rose only approximately 9 percent that year.[233] Furthermore, that figure includes visa violations, which is a crime only foreigners can commit.[234]

In addition to propagating misleading statistics, local police agencies have taken steps that further solidify to the Japanese public the concept that foreigners bring with them a serious risk of criminal activity.[235] For example, the Tokyo Metropolitan Police distributed flyers in 2000

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228. *See* McNicol, *supra* note 75; *see also* Minehiko Oda, *Crimes by Foreigners Pose Challenge,* DAILY YOMIURI (Tokyo), June 9, 1999 at 6 (detailing comments from the National Police Agency's 1998 white paper encouraging public sentiment that foreign immigration causes increased crime, such as "[c]rimes by foreigners have become a frequent occurrence . . . Chinese 'snake heads,' pose a serious threat to Japan's security"); *Face of the Weeklies,* MAINICHI SHIMBUN (Tokyo), Apr. 23, 2000, at 7 (stating that the National Police Agency released statistics indicating that the number of foreigners arrested for crimes increased by 700% from 1980 to 1999, but recognizing that the National Police Agency could have just as easily cited a rise in crime among Japanese juveniles).

229. Dièn̈e, *supra* note 225, at ¶ 60.

230. *See* Kakumi Kobayashi, *Ishihara Crime Fight Serving Big Brother, Stoking Xenophobia?* JAPAN TIMES (Tokyo), Aug. 29, 2006, *available at* http://search.japantimes.co.jp/cgi-bin/nn20060829f2.html (recognizing that published police statistics mislead and manipulate the public into believing that non-Japanese are more likely to commit crimes than Japanese); *see also* Debito Arudou, Editorial, *Published Figures Are Half the Story: Foreigner Crime Stats Cover Up a Real Cop-Out*, JAPAN TIMES (Tokyo), Oct. 4, 2002, *available at* https://search.japantimes.co.jp/member/member.html?file=fl20021004zg.html (criticizing the police statistics for not taking into account the increasing foreign population or the fact that police target foreigners).

231. *See* McNicol, *supra* note 75 (stating that in 2003, a police white paper began with 30 pages describing how foreign nationals have entered Japan and formed criminal gangs); *see also* Reiji Yoshida, *Poll Finds Growing Crime Concern,* JAPAN TIMES (Tokyo), Sept. 19, 2004, at ¶ 11 (suggesting that crime statistics, including crimes involving foreigners, have shown significant increase since the early 1990s, when Japan was believed to be the safest country in the world).

232. Arudou, *supra* note 230, at ¶ 1; *see also* Yumiko Miyai & Yosuke Sakurai, *Special Report: Gaikokujin; Criminal Stereotype Questioned,* DAILY YOMURI (Tokyo), Apr. 19, 2002, at 1 (stating that the statistics released by the police fail to address the issue of crime by foreign nationals in a context that reflects the influx of foreigners in the nation).

233. *See* Kobayashi, *supra* note 230, at ¶ 5; *see also* Michael Hoffman, *Ishihara Sticks the Boot into Foreign Thugs,* JAPAN TIMES (Tokyo), Nov. 17, 2002, at ¶ 18 (recognizing that even in 2002, statistics showed that the rate of foreigners committing crimes was already beginning to decline).

234. *See* McNicol, *supra* note 75 (noting that when visa violations are excluded from the statistics, foreigners account for only 4% of arrests); *see also* Arudou, *supra* note 230 (noting that the crime rate of foreigners is inflated due to visa violations).

235. *See Dièn̈e*, *supra* note 225, at ¶ 62; *see also* Miyai & Sakurai, *supra* note 232 (stating that although the National Police Agency has willingly released statistics and sensationalized comments regarding the increase of crime by foreigners, it has refused to comment on whether there is, in fact, a higher crime rate among Japanese or non-Japanese resulting in few reliable studies examining the relationship between immigrants and crime in Japan).

which encouraged citizens to "call the police if you hear someone speaking Chinese."[236] Also in 2000, "the Shizuoka Police Department distributed to shopkeepers a handbook entitled 'Characteristic Crimes by Foreigners Coming to Japan.'"[237] Additionally, police in Tokyo's Nakano ward placed posters on subway walls "warning of 'purse-snatching "bad" foreigners[.]'"[238] When the Nakano Police were approached with complaints about the posters, they responded by saying, "It's not as though we're targeting all foreigners[—only] 'bad foreigners[.]'"[239]

The national media also has a tendency to support the concept that rising crime is a foreigner problem.[240] Sensationalism has led to erroneous headlines such as "Foreign Crime Rises Again, Six-Fold in Ten Years."[241] Other articles strongly suggest that foreign criminals are solely responsible for the crimes generally reported.[242] "[L]urid stories about rings of Indian thieves, Thai and Filipino prostitutes[,] and Pakistani drug smugglers abound in Japan's well-read weekly magazines."[243] Advertisers have also joined in on the sensationalizing of foreigner crime—for example, "Miwa Locks, Japan's best-selling locksmith, . . . advertised [its] new foreigner-proof security" system.[244]

On the receiving end of this trend of misrepresentation of rising foreigner crime, many foreigners are forced to experience unreasonable and unnecessary suspicion from the Japanese

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236. Arudou, *supra* note 230, at ¶ 13; Ryann Connell, *Foreigners Slam "Racist" Poster in Nagano,* MAINICHI SHIMBUN (Tokyo), Feb. 22, 2001, at ¶ 1 (discussing public outrage against the posters, which were described as "blatantly racist").

237. Arudou, *supra* note 230, at ¶ 12; *see also* The Community, *Shizuoka Prefectural Police's Guidebook on "Characteristics of Crime by Foreigners Coming to Japan (Feb. 2000),"* http://www.debito.org/TheCommunity/shizuokakeisatsuhandbook.html (last visited March 4, 2007) (depicting the cartoons included in the handbook). The National Police Agency was embarrassed in 1990 by a leaked internal report that characterized Pakistanis as having "a unique body odor, . . . skin diseases[, and a proclivity] to lie a lot." Yates, *supra* note 162.

238. McNicol, *supra* note 75. The posters went on to add that "If a suspicious foreigner . . . calls out to you, do not take your eyes or hands off your money or your bag." Arudou, *supra* note 230.

239. Connell, *supra* note 236; *see also Volunteer Group: "Discomfort from Discrimination Towards Foreigners" Demands Removal of Banners etc Distributed by Nakano Police*, MAINICHI SHIMBUN (Tokyo), Oct. 1, 2002, at ¶ 4, *available at* http://www.debito.org/TheCommunity/mainichi100102.html.

240. *See* Arudou, *supra* note 230, at ¶ 3 (indicating the mass media's selective reporting of statistics such as "foreigners are three times more likely than Japanese to commit crimes in groups" in order to arouse public support for the idea that rising crime is a foreigner problem). *See generally* Marc Lim, Comment, *The First Step Forward—The AIDS Dismissal Case and the Protection Against AIDS-Based Employment Discrimination in Japan*, 7 PAC. RIM. L. & POL'Y 451, 452–56 (1998) (commenting that for years after AIDS was introduced into Japan, Japanese officials and the media treated it as a problem caused and perpetuated by foreigners).

241. Arudou, *supra* note 230, at ¶ 4; *see also* Miyai & Sakurai, *supra* note 232 (asserting that the Japanese media's sensationalism creates a stereotype that foreigners are more likely than Japanese to commit crimes).

242. *See, e.g.*, *Burglaries Down, But Lock-Picking Cases Up 40%*, DAILY YOMIURI (Tokyo), Sept. 22, 2006, at ¶ 3; Howard W. French, *Disdainful of Foreigners, the Japanese Blame Them for Crime*, N.Y. TIMES, Sept. 30, 1999, at A17 (noting for example, that the Japanese media often blame Chinese residents for crimes before the facts are even known).

243. Yates, *supra* note 162.

244. Arudou, *supra* note 230, at ¶ 8; *see also* Howard W. French, *Still Wary of Outsiders, Japan Expects Immigration Boom,* N.Y. TIMES, Mar. 14, 2000, § A, at 1 (noting that Japanese lock companies use advertisements that explicitly link crime to foreigners).

public.[245] One South Korean–born resident stated that while "[t]here must be bad people among foreign nationals, . . . ordinary residents are also made to feel uneasy as if they are suspected only because they are foreigners[.]"[246] In the town of Hamamatsu, as a Brazilian factory worker boarded a city bus, she heard the bus driver announce on the intercom: "Ladies and gentlemen, . . . [p]lease watch your bags[, t]here is a foreigner on board."[247] As a concrete example, overreaction to the threat of foreign crime was the source of the closing of the Azuma public pool to foreigners.[248] While children's safety was the publicly stated reason for the "Closed to Foreigners" sign that briefly adorned the pool, it turns out that the true source was two complaints—one involving horseplay incidents with brown-skinned foreigners and another of sexual molestation by a non-Japanese-speaking pool guest, which a pool official later admitted was a "case of mistaken identity" of a man patting the wrong fourth grader on the bottom.[249]

Part III—Adjudicating Discrimination in Japanese Courts

If a foreigner in Japan experiences blatant discrimination in the private sphere, going to the authorities is not an option, because, as mentioned previously, there is no law against discrimination.[250] Nevertheless, some foreigners who have experienced such discrimination have brought civil suit against the discriminating business owner under domestic tort and international human rights law. This section will detail the three cases brought thus far by foreigners against Japanese private business owners after having been excluded from a place of business due to racial and national origin discrimination.

a. *Bortz* Case

Hamamatsu, a city in the Shizuoka prefecture, "boasts the highest concentration of Japanese-Brazilians in" Japan.[251] The relatively large number of Brazilians in Japan stems from the government's decision in 1990 to allow the immigration of unskilled laborers if they were the

245. *See* Yoshiomi Morishita, *Gaikokujin; Media Seen Hindering "Internal" Globalization,* DAILY YOMIURI (Tokyo), Apr. 19, 2002, at 7.

246. *See* Natsumi Mizumoto, *Ethnic Minorities Hope for Better Life Post-Koizumi*, JAPAN TIMES (Tokyo), Sept. 26, 2006, at ¶ 5.

247. *Disappearing Dreams*, MAINICHI SHIMBUN (Tokyo), Oct. 11, 1998, at 7.

248. *See* Witter, *supra* note 172; *see also Gumma Swimming Pool Bans Foreigners,* MAINICHI SHIMBUN (Tokyo), Aug. 15, 1998, at 14 (indicating that the Gumma pool was closed entirely to foreigners because two local families complained that their children had been touched by foreigners).

249. *See* Moshavi, *supra* note 172 (suggesting that public officials cited concern for the safety of children as the sole basis for the pool closing); Witter, *supra* note 172 (indicating that the inappropriate touching was merely a case of mistaken identity); *Gumma Swimming Pool Bans Foreigners, supra* note 248 (noting that state officials steadfastly maintained that the act of closing the pool was not a racist reaction, but merely a response due to concern for the safety of children).

250. *See Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, *supra* note 6, at ¶ 11.

251. *Court Orders Damages in Discrimination Case*, JAPAN WEEKLY MONITOR, Oct. 18, 1999, at ¶ 10 (approximately 10,000 Brazilians live and work in Hamamatsu); *see also Disappearing Dreams*, *supra* note 247. *See generally* Keiko Yamanaka, *New Immigration Policy and Unskilled Foreign Workers in Japan*, 66 PAC. AFF. 72, 76, 78–79 (1993) (explaining that Japanese-Brazilians commonly worked as subcontractors and Hamamatsu is an area with a high concentration of manufacturing subcontractors).

foreign descendants of Japanese emigrants, known as Nikkeijin—"most of whom originated in Brazil[.]"[252] However, the Nikkeijin were not, as officials had hoped, "culturally familiar"[;] they were essentially "cultural strangers."[253] In Hamamatsu, conditions for Nikkeijin are difficult, with low-paying jobs and little or no access to government-sponsored medical services and public education.[254] Local media frequently stereotype Brazilians as criminals[255] and Hamamatsu police followed suit.[256] As a result, many locals generated vague general fears of the local Brazilian population.[257]

On June 16, 1998, Ana Bortz, a Brazilian journalist and legal Japanese resident since 1992,[258] entered a jewelry store in Hamamatsu.[259] Once inside, the owner approached Bortz and inquired about her nation of origin.[260] When Bortz responded that she was from Brazil, the shop owner angrily demanded that she leave, pointing to one sign which indicated that foreigners were excluded from the premises and another sign from the police, which warned of robbers.[261] Bortz nevertheless refused to leave and the police were called.[262] When the police determined that there was no criminal action by either party, they left without resolution.[263] The exchange had been documented on the store's video surveillance system.[264]

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252. Takeyuki Tsuda, *The Stigma of Ethnic Difference: The Structure of Prejudice and "Discrimination" Toward Japan's New Immigrant Minority*, 24 J. JAPANESE STUD. 317, 319 (1998); *see also* Keiko Yamanaka, *Ana Bortz's Law Suit and Minority Rights in Japan*, ¶ 11 (Japan Pol'y Res. Inst., Working Paper No. 88, 2002), *available at* http://www.jpri.org/publications/workingpapers/wp88.html.

253. *See* Yamanaka, *supra* note 252, at ¶¶ 16-17; *see also* Takeyuki Tsuda, *Transnational Migration and the Nationalization of Ethnic Identity Among Japanese Brazilian Return Migrants*, 27 ETHOS 145, 150–51 (1999) (highlighting the "cultural distinctiveness" that both Japanese and Japanese-Brazilians recognized between their two cultures).

254. *See* Yamanaka, *supra* note 252, at ¶¶ 19–24; Shin, *supra* note 139, at 350 n.160.

255. *See* French, *supra* note 141; *Tokyo Now: Housing Complex Faces Problems of "Internationalization,"* JAPAN ECON. NEWSWIRE, June 14, 2005, ¶ 7.

256. *See* Toshi Maeda, *Hamamatsu Brazilian Files Suit*, JAPAN TIMES, Sept. 3, 1998, ¶ 12; *cf.* Yamanaka, *supra* note 252, at ¶¶ 26–27 (arguing that, in reality, the volume of crimes committed in Hamamatsu by Brazilians roughly approximated their proportion of the Hamamatsu population).

257. *See Disappearing Dreams*, *supra* note 247, at 7. *See generally* Gregory Clark, *Japan's Particular Racism*, JAPAN TIMES, Dec. 25, 1999, ¶ 7 (explaining that there does not seem to be a good reason for locals to want to exclude foreigners from their shops despite the Hamamatsu police's concern with petty theft by Brazilians).

258. Yamanaka, *supra* note 252, at ¶ 1. *See* Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 354 n.242 (2000).

259. *See* Webster, supra note 132, at 450; *see also* French, *supra* note 141.

260. *See* Maeda, *supra* note 256, at ¶ 5; *see also* McNicol, *supra* note 75 (explaining that Bortz was initially approached in a friendly manner by the store owner and asked where she was from).

261. *See* Shin, *supra* note 139, at 361; Maeda, *supra* note 256, at ¶¶ 4–6.

262. *See* Shin, *supra* note 139, at 361 n.213; Webster, supra note 132, at 450.

263. *See* Webster, supra note 132, at 451 (explaining that after demanding apologies for three hours and threatening legal action, Bortz left without any further action by the police); *see also* Maeda, *supra* note 256, at ¶ 7 (reporting that the police left after determining that the incident was a "personal matter").

264. *See* Bortz v. Suzuki, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999); *see also* Hadfield, *supra* note 171 (remarking that the store's video surveillance indicated that Bortz had not been acting suspiciously, contrary to the owner's claim).

Two months later, Bortz filed suit in civil court, claiming that Suzuki, the store's owner, had committed illegal discrimination.[265] Although recognizing that no domestic law forbid discrimination, Bortz instead pointed to international human rights treaties that Japan had signed.[266] In particular, Bortz made reference to Articles 2(d) and 6 of the International Convention on Eliminating All Forms of Racial Discrimination (CERD).[267] CERD Article 2(d) states that signatory parties must "bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group[,] or organization[.]"[268] CERD Article 6 indicates that signatory parties "shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[269] In addition to citing to international law, Bortz also pointed to Japanese Civil Code provisions 90, 709, and 719, which generally "rule on the maintenance of public order and compensation for damages incurred."[270] In her complaint, Bortz requested 1.5 million yen in compensation as well as an apology from Suzuki.[271]

Suzuki's answer cited Article 22 of the Constitution of Japan,[272] which states that "[e]very person shall have freedom . . . to choose his occupation[.]"[273] Suzuki argues that this provision accords "the autonomy of a business owner as long as his act does not interfere with public order" and "the right to select his customers in order to protect his business[.]"[274] In general, Suzuki presented that "foreigners are unpredictable in behavior and [are] known to be prone to criminal acts[.]"[275] In particular with Bortz, Suzuki claimed that her actions were "unnatu-

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265. *See Foreigner Wins Racism Case*, MAINICHI SHIMBUN, Oct. 13, 1999, ¶ 8; Yamanaka, *supra* note 252, at ¶ 2.

266. *See* Wu, *supra* note 96, at 483; Yamanaka, *supra* note 252, at ¶¶ 29–30.

267. *See* Webster, supra note 132, at 451; Yamanaka, *supra* note 252, at ¶¶ 29–30 (stating that Bortz's claim demanded that Article 2(d) of CERD be applied to determine the illegality of the defendant's behavior and that Article 6 of CERD be applied to give her a remedy for racial discrimination).

268. International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, ¶ 1(d), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter *Convention*] (entered into force for Japan on Jan. 16, 1996).

269. *Convention, supra* note 268, art. 6 (entered into force for Japan on Jan. 16, 1996).

270. MINPŌ, art. 90, *reprinted in* J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN I 88 (1979) (1909) (Article 90 states that "[a] juristic act whose object is a matter contrary to public order or good manners and customs is void."); *see* MINPŌ, art. 709, *reprinted in* J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN II 273 (1979) (1909) (Article 709 states that "[a] person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence"); MINPŌ, art. 719, *reprinted in* J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN II 281 (1979) (1909) (Article 719 states that "[w]hen damages have been caused to another person by an unlawful act committed in common by several persons, they are all jointly bound to make compensation therefor[e]," supporting the joining of the co-owners of the jewelry store in the same suit); *see also* Yamanaka, *supra* note 252, at ¶ 30 (remarking that the Japanese Civil Code supports "public order" and provides a remedy for victims of discrimination).

271. *See* Maeda, *supra* note 256, at ¶ 8; *Shop Owner Told to Pay 1.5 Million Yen for Discrimination*, DAILY YOMIURI (Tokyo), Oct. 13, 1999, ¶¶ 1, 4.

272. Yamanaka, *supra* note 252, at ¶ 31.

273. KENPŌ, art. 22.

274. *See* Yamanaka, *supra* note 252, at ¶ 31; Bortz v. Suzuki, 1045 HANREI TAIMUZU 216 (Shizuoka D. Ct., Oct. 12, 1999).

275. Yamanaka, *supra* note 252.

ral[,]"[276] in that she "look[ed] directly into his eyes and walk[ed] around the store in a different direction than most Japanese customers would."[277]

Judge Soh of the Shizuoka District Court, head of a three-judge panel,[278] announced his decision in the case on October 12, 1999.[279] Although Soh did not find CERD to be directly applicable, "[i]n the absence of Japanese laws covering the treatment of foreigners,"[280] the CERD provisions could "provide standards by which the court can determine discriminatory acts and assure the victim reparation for his/her suffering" under the Japanese Civil Code tort provisions.[281] "Based on [CERD] Article 2(d), [Soh] . . . ruled that discrimination is prohibited at an individual level, and that expelling a customer from the store on the basis of nationality constituted an act of racial discrimination which in itself interfered with public order"[282]—thus constituting a tort under Japanese Civil Code Article 90.[283] Judge Soh was not impressed by Suzuki's arguments about Bortz's behavior, since video surveillance "supported Bortz's claim that she wasn't [acting suspiciously]."[284] The court awarded Bortz her entire request of 1.5 million yen in damages, approximately $14,000 at the time,[285] but did not require that Suzuki apologize.[286] Suzuki chose not to "appeal to a higher court, thus, accepting the District Court's ruling and ending the lawsuit."[287]

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276. *See* French, *supra* note 141. *See generally* Robert Whymant, *Japanese Jeweler to Pay for Insult*, TIMES (London), Nov. 18, 1999 (placing Bortz's encounter in the context of Japanese society, which prides itself on homogeneity and views *gaijin*, "outside persons," with suspicion).

277. *Discrimination Case Against Jewelry Store Owner Begins*, JAPAN TIMES (Tokyo), Oct. 7, 1998; *see also Shop Owner Told to Pay 1.5 Million Yen for Discrimination*, *supra* note 271 (presenting the defendant's claims that he committed the discriminatory act, but did so because he believed the plaintiff was acting suspicious).

278. *See Court Orders Damages in Discrimination Case*, *supra* note 251. *See generally* Hadfield, *supra* note 171 (describing the procedure of the *Bortz* case).

279. *See* French, *supra* note 141 (describing the decision of the judge on October 12, 1999, and positing that the case may one day be looked back on as the Japanese equivalent of Rosa Parks's actions in Montgomery, Alabama); Yamanaka, *supra* note 252.

280. *See* French, *supra* note 141; *cf.* Webster, supra note 132, at 451 (describing Judge Soh's opinion as far-reaching and explaining how Japanese courts can indirectly apply international law in the absence of Japanese law on point).

281. *See* Yamanaka, *supra* note 252; *see also* Robert Whytman, *Japan Faces Its Racism*, AUSTRALIAN, Nov. 19, 1999, World, at 9 (stating that this was the first time that a Japanese court applied the Convention on the Elimination of All Forms of Racial Discrimination, which Japan had ratified in 1995).

282. Yamanaka, *supra* note 252.

283. *See* Shin, *supra* note 139, at 361; *Court Orders Damages in Discrimination Case*, *supra* note 251.

284. *See* Eric Weiner, *Racism in Japan*, NAT. PUB. RADIO, Sept. 4, 2001 (providing the transcript of an interview in which Ana Bortz explains that she was merely window shopping in a jewelry store, not acting suspiciously). *See generally* Hadfield, *supra* note 171 (describing the facts of the case in the context of other cases of foreigners who face discrimination in Japan).

285. *See* Hadfield, *supra* note 171; *see also* French, *supra* note 141 (stating that the court cited Japan's treaty obligations in determining the award of damages).

286. *Cf. Brazilian Woman Sues Shop Owner over Discrimination*, JAPAN ECON. NEWSWIRE, Aug. 5, 1998 (describing the reaction of the defendant shop owner, who claimed that an apology was immediately written by his mother at the time of the incident).

287. Yamanaka, *supra* note 252 (stating that the defendant did not appeal, and describing the result of the case as a landmark victory, unique in Japan's judicial history). *But see* French, *supra* note 141 (claiming that because the judgment was based on international law, it could not be appealed under Japanese law).

b. *McGowan* Case

In September of 2004, African American Steve McGowan, designer and resident of Kyoto, visited an eyeglass shop in Daito City, Osaka Prefecture.[288] While McGowan had previously visited the shop with his Japanese wife, this time he was accompanied by a black South African friend.[289] As McGowan and his friend stood outside the shop talking about the window advertisements, Narita, the shop owner, received a call complaining about the two men.[290] Subsequently, Narita rushed outside as the two were about to enter the shop and demanded that they "[m]ove to the other side of the street[,]" and stop "[t]ouching [his] store window[.]"[291] According to McGowan, Narita also said, with a shooing hand gesture,[292] "I don't like black people!"[293]

McGowan had never heard the derogatory term *kokujin* (black person) before and called his wife to confirm what it meant.[294] The next day, McGowan and his wife returned to the shop to speak with Narita.[295] McGowan's wife asked Narita if he had excluded McGowan because he was a foreigner.[296] Narita responded "that he had a bad impression of black people during a stay in Germany."[297] McGowan decided to sue Narita, claiming "discrimination against black people[.]"[298] In court, both sides presented their allegations and, as a witness,

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288. *See* Debito Arudou, Editorial, *Twisted Legal Logic Deals Rights Blow to Foreigners*, JAPAN TIMES (Tokyo), Feb. 7, 2006; *see also Shop Must Pay Up for Turning Away Black Man*, DAILY YOMIURI (Tokyo), Oct. 19, 2006, at 3.

289. *See* Debito Arudou, *Get On Their Case*, JAPAN TIMES (Tokyo), Nov. 30, 2004, *available at* http://search.japantimes.co.jp/cgi-bin/fl20041130zg.html (describing how McGowan was so impressed by the shop the first time he went with his wife, he later invited his South African friend to visit the shop, leading to the incident that sparked the case); *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.

290. *See Osaka Court Rejects Black American's Discrimination Suit*, MAINICHI SHIMBUN (Tokyo), Jan. 30, 2006; Eric Johnston, *Plaintiff Gets Redress but Not for Racial Bias,* JAPAN TIMES (Tokyo), Oct. 19, 2006.

291. Arudou, *supra* note 289; s*ee also Black American's Lawsuit over Discrimination Nixed*, DAILY YOMIURI (Tokyo), Jan. 31, 2006, at 2 (quoting the defendant who shouted "Get out . . . don't touch the Door!" at the plaintiff).

292. *See* DEBITO ARUDOU, THE STEVE MCGOWAN COURT DECISION: A LOSS FOR HIM, A BAD PRECEDENT FOR EVERYONE (2006), http://www.debito.org/mcgowanhanketsu.html#english (providing translated excerpts of the original opinion); *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.

293. Oscar Johnson, *Suffering Ignorance and Discrimination, Japan's Black Community Struggles to Retain Its Pride*, JAPAN TODAY (Tokyo), Mar. 13, 2006, *available at* http://www.japantoday.com/jp/feature/1066; *Black American's Lawsuit over Discrimination Nixed*, *supra* note 291, at 2.

294. *See* Johnston, *supra* note 290.

295. *Osaka Court Rejects Black American's Discrimination Suit*, *supra* note 290.

296. Arudou, *supra* note 288; *see also* Eric Johnston, *On the Road to Apartheid? Japan and the Steve McGowan Case*, ZNET, Feb. 6, 2006, http://www.zmag.org/content/showarticle.cfm?ItemID=9677 (explaining how the Court held McGowan's wife's use of the term "*gaikokujin*," which means "foreigner," instead of the term "*kokujin,*" which means "black person," against McGowan during trial, because it was unclear that the defendant's actions were the result of a racist motivation).

297. *Osaka Court Rejects Black American's Discrimination Suit, supra* note 290. McGowan, who claimed that during this encounter, Narita repeated that he did not like black people and that McGowan was "making [his] floor filthy." Johnson, *supra* note 290. Narita denied such a statement. *Id.*

298. *See* Arudou, *supra* note 288; *see also* Shia Levitt, *Complaints of Discrimination in Japan*, MARKETPLACE, Aug. 4, 2005 (providing the transcript of an interview with McGowan, in which he explains the defendant's actions and that he decided to sue based on the racist comments).

Narita admitted that "he has a 'thing' about black people," indicating that it was a "part of his personality."[299]

On January 30, 2006, Judge Saga of the Osaka District Court announced his verdict, rejecting McGowan's claims of racial discrimination and dismissing the suit.[300] Saga's analysis was chiefly factual.[301] One of the principal reasons for dismissal was that Saga had "doubts about [McGowan's] level of comprehension of the Japanese language."[302] Although McGowan was able to recite a kanji (Chinese characters used in the Japanese written language) oath in court,[303] Saga could not "trust [McGowan's] accusation over the use of discriminatory remarks."[304] To support this decision, Saga pointed to the fact that McGowan's wife asked Narita about discrimination against foreigners (*gaikokujin*) instead of against black people (*kokujin*), as McGowan had claimed in his complaint.[305] Furthermore, Saga questioned McGowan's Japanese comprehension because of the supposed illogic of McGowan's claim that Narita told him to "'Get out['] . . . [when McGowan and McGowan's] friend were not actually inside the store at the time."[306] Finally, Saga found doubt in McGowan's language comprehension abilities due to the fact that Narita told them "Don't touch the window" when McGowan and his friend were not touching and did not intend to touch Narita's shop window.[307]

Judge Saga also saw McGowan's previous successful experiences with Narita's shop as evidence that Narita did not have a problem with black people.[308] Finally, although Saga acknowledged that Narita had made a shooing hand gesture, which could conceivably be linked to discriminatory action, since McGowan's other testimony had been negated, the gesture itself was not enough to find illegal racial discrimination.[309] Since "there was no evidence [that] the store owner had made discriminatory remarks against blacks and [that] it was questionable whether McGowan had understood what the owner had said[,]" the case would have to be dismissed.[310]

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299. *See* Arudou, *supra* note 288; Johnston, *supra* note 296.

300. *See* Arudou, *supra* note 288; *Black American's Lawsuit over Discrimination Nixed*, *supra* note 291, at 2.

301. *See generally* ARUDOU, *supra* note 292 (citing excerpts of McGowan v. Narita [Osaka D. Ct., Jan. 30, 2006], where the District Court considered McGowan's previous visits to the store, his wife's follow-up visit, and a minor difference in terminology to determine that McGowan misunderstood Narita's actions as discriminatory); Arudou, *supra* note 288 (criticizing the district court for its focus on semantics in deciding the outcome of the case).

302. *Osaka Court Rejects Black American's Discrimination Suit*, *supra* note 290; *Japan: Racial Discrimination Lawsuit Fails*, CSR ASIA WEEKLY, Feb. 2, 2006, at 6.

303. *See* Johnson, *supra* note 293.

304. *Osaka Court Rejects Black American's Discrimination Suit*, *supra* note 290; *see* Eric Johnston, *Man Loses Racial Discrimination Suit Against Shop*, JAPAN TIMES (Tokyo), Jan. 31, 2006, *available at* http://www.debito.org/mcgowanhanketsu.html#japantimes.

305. *See* ARUDOU, *supra* note 292; Johnston, *supra* note 296.

306. ARUDOU, *supra* note 292; *Japan: Racial Discrimination Lawsuit Fails*, *supra* note 302, at 6.

307. *See* Johnson, *supra* note 293.

308. *See* ARUDOU, *supra* note 292; Arudou, *supra* note 289.

309. *See* ARUDOU, *supra* note 292; Johnson, *supra* note 293.

310. *See* Johnston, *supra* note 304.

Following the District Court's decision, McGowan decided to appeal.[311] On appeal, his case was heard by the Osaka High Court.[312] Coming to a decision on October 18, 2006, the Osaka High Court announced that it was reversing the District Court's opinion and ordered Narita to pay 350,000 yen (approximately $3,000) to McGowan in compensation.[313] Presiding Judge Tanaka indicated that the damages were for "McGowan's emotional pain, saying that the entry denial '[was] a one-sided and outrageous act beyond common sense.'"[314]

While Tanaka acknowledged that "McGowan had been deeply upset by [Narita's] . . . gestures and harsh tone[,]"[315] Tanaka did not go so far as to validate McGowan's original complaint.[316] Rather, Tanaka indicated that Narita's remarks were "not enough to be recognized as racially discriminatory," and that "the possibility that [McGowan] misheard [Narita] cannot be eliminated."[317] While Tanaka "avoided ruling [on] whether Narita's words and actions were racially discriminatory," he nevertheless held "the remarks [to be] illegal."[318] Although the decision in this regard was "very, very carefully, vaguely worded[,]" it held Narita's actions collectively to be illegal due to being "outside social norms."[319] One commentator complained that the social norms cited were "unwritten" and unclear; in fact, even the words Tanaka used to say "illegal activities" can also mean "activities not covered by the scope of current laws on the books."[320]

c. *Otaru Onsen* Case

In the early 1990s, after the fall of the Soviet Union, significant trade opened up between Russia and Japan.[321] In particular, the northern island of Hokkaido experienced heavy traffic

311. *See* Johnson, *supra* note 293.

312. *See Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.

313. *See* Johnston, *supra* note 290 (noting that although McGowan recovered damages, the award was small compared with amounts that have been awarded in other discrimination suits, which in turn reflects the court's hesitation to rule that the treatment constituted racial discrimination); *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288 (remarking that McGowan's judgment award of ¥350,000 was significantly less than the ¥5.5 million requested).

314. *African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop*, JAPAN TODAY (Tokyo), Oct. 18, 2006, available at http://turing.freelists.org/archives/club99/10-2006; *Court Admits Emotional Pain, Not Discrimination, in Shop Entry Case*, JAPAN ECON. NEWSWIRE, Oct. 18, 2006.

315. *See Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.

316. *See African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop*, *supra* note 314; *Johnston*, *supra* note 290.

317. *African-American Wins ¥350,000 in Damages for Being Denied Entry into Osaka Shop*, supra note 314; *Court Admits Emotional Pain, Not Discrimination, in Shop Entry Case*, *supra* note 314.

318. Johnston, *supra* note 290.

319. Eric Johnston, *McGowan Court Victory Avoids the Real Issues*, http://www.debito.org/mcgowanhanketsu.html#english (last visited Feb. 27, 2007). *See generally Koreans Win Discrim Case Against Private-Sector Landlord*, http://www.debito.org/mcgowanhanketsu.html#english (last visited Mar. 10, 2007) (noting that discriminatory behavior that does not conform to socially acceptable limits is illegal).

320. Johnston, *supra* note 319 (explaining that there is a dual meaning attributed to "*fuhou koui*" [social norms] that the court has wide latitude to interpret).

321. *See* ARUDOU, *supra* note 1, at 102–3; Ginny Parker, *Japan's "Russian Invasion" Good Deal for Both*, FORT WORTH STAR–TELEGRAM, July 4, 1999 at 24, *available at* 1999 WLNR 1412916 (acknowledging that reformation of the Soviet Union created new avenues for trade between Russia and Japan).

with Russian fishing vessels and did a "booming" trade of consumer goods in exchange for seafood.[322] For example, while the remote port city of Otaru only has a population of 153,000,[323] it annually sees around 30,000 Russian sailors calling to port each year.[324]

Otaru is also notable for its many *onsen*, a hot springs resort version of the traditional Japanese public baths (*sento*).[325] In addition to having become an important family tourism industry in recent decades, traditionally *sento* have represented an important part of Japanese culture, both as a matter of public hygiene and as a means of strengthening communitarian bonds, replete with complicated but expected rules of etiquette.[326] Indeed, in a 1955 case, the Japanese Supreme Court saw fit to take special note of the cultural importance of *sento*.[327] In a case dealing with a *sento* licensing ordinance, the court noted that "[p]ublic baths . . . are welfare facilities of a highly public nature, indispensable to the daily life of the majority of the people."[328] While the spread of in-home bathing has certainly changed the place of the *sento* in Japanese culture, the *sento* is nevertheless still very important to the "public welfare."[329]

Along with the influx of Russian fishing vessels, came the desire of Russian sailors on shore leave to take advantage of Otaru's *onsen* facilities.[330] However, a number of Russian sailors were either ignorant of complex customary public bathing etiquette or uninterested in cultural compliance.[331] For example, there were reports of failure to thoroughly bathe before

322. ARUDOU, *supra* note 1, at 102–3; Yutaka Okuyama, *The Dispute Over the Kurile Islands Between Russia and Japan in the 1990s*, 76 PAC. AFF. 37, 45–46 (2003) (analyzing the improvement in trade between Russia and Hokkaido throughout the 1990s). *See generally* Parker, *supra* note 321 (acknowledging that reformation of the Soviet Union created new avenues for trade between Russia and Japan).

323. Mark Magnier, *City Awash in Controversy Over Hot Springs' Ban on Foreigners,* L.A. TIMES, Feb. 19, 2000 at A2.

324. Magnier, *supra* note 323, at A2; *see also* Parker, *supra* note 321, at 10 (recognizing that Russian sailors converge on Otaru each year in search of economic opportunities); Robert Whymant, *Japanese Bath Ban on Foreigners*, TIMES (London), Feb. 2, 2000 (noting that the 30,000 Russian sailors that invade Otaru every year are primary targets for the ban on foreigners at Otaru's hot springs).

325. *See* ARUDOU, *supra* note 1, at 1–7 (describing the Japanese bathing culture and the differences between *sento* and *onsen*); *see also* Taupo Hot Springs Spa, Japanese Hot Springs, http://www.taupohotsprings.com/?PK_PAGE_ID=113 (last visited Feb. 25, 2007) (describing the essential difference between the Japanese public bath *onsen* and *sento*, in which an *onsen* uses volcanic spring water while a *sento* uses ordinary heated water).

326. *See* ARUDOU, *supra* note 1, at 1–7; *see also* BOYE LAFAYETTE DE MENTE, ETIQUETTE GUIDE TO JAPAN: KNOW THE RULES THAT MAKE THE DIFFERENCE 66–67 (10th ed. 2003) (discussing the etiquette of bathing in a *sento*).

327. *See generally Communal Baths a Vanishing Tradition in Japan* (CNN show broadcast Jan. 1, 1994) (reporting the cultural importance of public bathing in the Japanese way of life for thousands of years).

328. *See* JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948–60 295 (1964).

329. *See* ARUDOU, *supra* note 1, at 1–7 (quoting one Otaru resident for saying that "[Public b]athing is one of the most important things in life"); Magnier, *supra* note 323, at A2.

330. *See* Magnier, *supra* note 2, at 3. "Life is terrible for Russian sailors[, c]ooped up on rusting hulks for weeks without basic amenities[.]" ARUDOU, *supra* note 1, at 102.

331. *See* Whymant, *supra* note 324; *see also* Magnier, *supra* note 323, at A2 (describing the locals' sentiment that the Russian sailors disregard local bathing etiquettes by using soaps in the communal bath, getting drunk and swimming instead of soaking in the water).

getting in the communal waters, taking soap into the communal waters, drinking vodka in the bath house,[332] wearing shoes indoors,[333] and general "rowd[iness.]"[334] A number of Japanese *onsen* customers complained about the Russians' "smell[,]"[335] and unconfirmed rumors began to circulate that some Russian sailors had spread lice.[336] In response to these concerns, and in fear of losing loyal Japanese customers, several of the city's *onsen* began putting up signs excluding all foreigners.[337] Although the chief concern was misbehaving Russians, the owners felt that it would be too difficult to distinguish Russians from other foreigners and, moreover, that banning only Russians "would be discriminatory[.]"[338]

In 1999, upon hearing reports of foreigner exclusion, a group of concerned individuals went to Otaru to investigate, leading to the incident described at the beginning of this article.[339] During that investigation, three Otaru *onsen* were discovered to conduct exclusionary practices.[340] This led a number of interested parties to initiate a broad-reaching and lengthy "antidiscrimination campaign[,] . . . including appeals to the municipal government, the Justice Ministry[,] foreign embassies[, and] the domestic and international press[.]"[341] The campaign was at least somewhat effective, creating a "storm" of national and even international attention on the subject.[342] For example, the activists were able to convince the German Embassy to send a letter to the Otaru mayor complaining about the discrimination.[343] As a result of all of the pressure, the city government "repeatedly asked operators of local bathhouses

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332. Magnier, *supra* note 2, at 3 (describing the various local claims that drunken Russian sailors violated the etiquettes of the bathhouse by bringing in prohibited vodka, making loud noises, wearing shoes indoors and entering the water without first washing); *see also Good Neighbors to Diversity*, JAPAN TIMES (Tokyo), Nov. 18, 2002 (reporting on the complaints of the local Otaru bathhouse that Russian sailors displayed extremely bad manners by drinking alcohol and acting boisterous).

333. Magnier, *supra* note 2, at 3.

334. Jonathan Watts, *Japanese-Only Public Baths to Pay Damages*, GUARDIAN (London), Nov. 12, 2002, at 18 (reporting on the justification of the bathhouse to exclude foreigners for their drunkenness, rowdiness and various violations of bathing etiquettes).

335. Takuya Asakura, *Otaru Racism Controversy Lingers On*, JAPAN TIMES (Tokyo), Feb. 21, 2001; *see also* Stephen Lunn, *Great Unwashed Face a Whiff of Bias*, AUSTRALIAN, Feb. 12, 2001, at 9 (referring to the sentiment of regular Japanese customers regarding the strong smell of Russian sailors as a factor to keep them from returning).

336. Asakura, *supra* note 335; *see also* Michael Hoffman, *Quiet After Otaru Onsen Storm*, JAPAN TIMES (Tokyo), Apr. 22, 2002.

337. *See* Magnier, *supra* note 323, at A2; *see also* Watts, *supra* note 334 (reporting that Yunohana Osen first erected its sign prohibiting foreigners in 1994 for fear of losing loyal Japanese customers).

338. *See* ARUDOU, *supra* note 1, at 33; *see also* Magnier, *supra* note 323, at A2 (reporting that the sign for "Japanese Only" was not intended to be discriminatory, but rather implemented because foreigners/Russians did not follow the rules).

339. *See generally* ARUDOU, *supra* note 1, at 14–27.

340. *See id.* at 30–43.

341. Asakura, *supra* note 335; *cf.* Magnier, *supra* note 323, at A2 (commenting on the Hokkaido city officials' preference that Tokyo bureaucrats, national and foreign news groups, and foreign diplomats not get involved so that the local officials could reach a solution in a less publicized manner).

342. *See* Jeff Kingston, *Bathhouse Pushes a Foreigner into the Doghouse*, JAPAN TIMES, Jan. 30, 2005 (describing Arudou's efforts to stir national and international interest in his discrimination case).

343. *See* Whymant, *supra* note 324. *See generally* Watts, *supra* note 334 (describing the protest from the German Embassy as well as the local government and Russian embassy).

to stop discrimination and also produced and distributed Russian-language posters and flyers explaining Japanese manners at public baths."[344]

Ultimately, two of the three exclusionary Otaru *onsen* changed policies and began accepting foreigners.[345] By this time, one of the activists, American David Aldwinkle, had naturalized in Japan becoming Debito Arudou.[346] On November 28, 2000, Arudou re-visited the remaining offending *onsen*, Yunohana, and tape-recorded the exchange.[347] At first, Arudou is excluded because he is a foreigner.[348] However, upon proving that he is now a Japanese citizen Arudou is nevertheless excluded because he "look[s] foreign."[349] Subsequently, Arudou and two foreign residents who had also been excluded brought suit against Yunohana for discrimination and against the city of Otaru for failing to pass an anti-discrimination regulation.[350] In the complaint, the plaintiffs cited the Constitution of Japan, the CERD treaty, and Japanese Civil Code tort provisions to support their argument.[351]

The Sapporo District Court handed down its decision on November 11, 2002.[352] Presiding Judge Sakai[353] first addressed the plaintiffs' constitutional claim in regards to the charges against Yunohana.[354] Although Article 14 of the Constitution of Japan clearly prohibits discrimination,[355] Sakai states that this constitutional provision only "regulates the relationship

344. Asakura, *supra* note 335; *"Japanese Only" Baths Using Legal Loophole*, DAILY YOMIURI (Tokyo), Mar. 25, 2000, at 2.

345. Asakura, *supra* note 335; Keiko Watanabe, *Otaru Still in Hot Water over Discrimination,* DAILY YOMIURI (Tokyo), May 5, 2001, at 7.

346. *See* Hoffman, *supra* note 336; *see also Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, JAPAN TIMES (Tokyo), Nov. 12, 2002, *available at* http://search.japantimes.co.jp/print/nn20021112a3.html.

347. ARUDOU, *supra* note 1, at 271–76; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346.

348. *See* ARUDOU, *supra* note 1, at 272; *see also* Charles Scanlon, *Bath House in Hot Water*, BBC NEWS (Feb. 1, 2001), http://news.bbc.co.uk/2/low/asia-pacific/1147784.stm (describing the exclusion from the bathhouse of an American-born professor who had adopted Japanese nationality).

349. ARUDOU, *supra* note 1, at 275; Debito Arudou, *Japanese Only: The Otaru Hotspring Case and Discrimination Against "Foreigners" in Japan*, ZNET, Nov. 16, 2004, http://www.zmag.org/content/print_article.cfm?ItemID=6669&sectionID=1.

350. Michel A. Lev, *Crusader-Citizen Takes on Japan: American-Born Activist Seeks Some Semblance of Equality for Non-Natives in a Tradition-Bound Society*, CHI. TRIB., May 8, 2003, at 6, *available at* 2003 WLNR 1538379; *Bathhouse Loses Racism Lawsuit*: *Men Barred at Otaru Bath Awarded 3 Million Yen in Damages, supra* note 346 (reporting that on February 1, 2001 Debito Arudou, Olaf Karthuas of Germany, and Ken Sutherland of the U.S. filed a lawsuit against the bathhouse and the municipality seeking 6 million yen in damages). As a result of this and other activities, Arudou received many harassing calls and even a letter which threatened "We will kill your kids." Asakura, *supra* note 335.

351. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407-8.

352. *See id.* at 407.

353. *See Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages, supra* note 346.

354. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407; Barry Brophy, *The Fight for Equal Protection of the Law: Judgment Could Deal Blow to Discrimination*, JAPAN TIMES (Tokyo), Jan. 17, 2001.

355. *See* KENPŌ, art. 14, para. 1; *see also* HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 111–13 (1997) (discussing the scope of the protections afforded by Article 14 of Japan's Constitution).

between the individual and the [s]tate, and as such is not supposed to directly regulate individual private relationships[.]"[356] Essentially the same argument is applied to the use of international treaties—such treaties merely "regulate[] the relationship between the public authorities and the international responsibilities of a [s]tate" and cannot be applied to Yunohana.[357]

Sakai then examines Yunohana's exclusion of all foreigners as a response to the misbehavior of some foreigners, determining that Yunohana's behavior "lack[s] . . . rationality" and amounts to "unrational discrimination . . . because it went beyond the bounds of what is deemed socially acceptable."[358] As such, the behavior is considered illegal.[359] Because of a perceived violation of the plaintiffs' dignity rights,[360] Sakai applied Japanese Civil Code 710[361] to determine that each of the three plaintiffs will receive one million yen in compensation from Yunohana,[362] approximately equaling $25,000 at that time.[363] However, Sakai rejected the plaintiffs' demands for an apology, ruling that "the Court cannot determine that [p]laintiffs suffered any societal damage to their honor[.]"[364]

The court completely dismissed all of the plaintiffs' claims against the city, finding that Otaru was not "in dereliction of [any] duty" under the CERD treaty.[365] Sakai explained that the duty placed upon Japan by Article 6 of the CERD treaty, detailed previously, is "no more than a political duty, and the [c]ourt interprets this to read that it is not the case where [Otaru] has the specific duty towards each citizen without any other option but to pass an ordinance to outlaw a concrete case of racial discrimination."[366] Moreover, the court found that "CERD

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356. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407.

357. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408. *See generally* SHINICHI FUJII, THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW 355 (1979) (explaining that a treaty does not become an effective domestic law in Japan until the Japanese legislature, the Gikai, enacts a separate domestic enabling law).

358. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408-9; *3 Win Lawsuit Against Discriminatory Bathhouse*, CHI. TRIB., Nov. 12, 2002, at 10, *available at* 2002 WLNR 12687644.

359. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408-9.

360. *See id.* at 410; *see also* MERYLL DEAN, JAPANESE LEGAL SYSTEM 4–5 (2d ed. 2002) (discussing Japanese law's recognition of concerns over "honour" and "loss of face").

361. *See* MINPŌ, art. 710, *reprinted in* ANNOTATED CIVIL CODE OF JAPAN II 274 (J.E. de Becker, trans. 1979) (1909) (stating that compensation must be paid for damage to intangibles such as a person's liberty or reputation); *see* J.E. DE BECKER, THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN I 433 (1979) (1921) (discussing that under Art. 710, pecuniary damages must be paid for any material or immaterial loss suffered whether the loss is to property or not).

362. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407; *High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse*, JAPAN TIMES (Tokyo), Sept. 17, 2004, *available at* http://search.japantimes.co.jp/print/nn20040917a3.html.

363. *See* James Brooke, *Japan: Antiforeigner Discrimination Draws Fine*, N.Y. TIMES, Nov. 13, 2002, at A6, *available at* 2002 WLNR 4439755; *see Hot-Spring Resort Gets Chilling Lesson*, CHI. TRIB., Nov. 12, 2002, at 8, *available at* 2002 WLNR 12687327.

364. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 410; *see also* MINPŌ, art. 710, *reprinted in* ANNOTATED CIVIL CODE OF JAPAN II 274 (J.E. de Becker, trans., 1979) (1909) (explaining the detail regarding the differences between honor and non-property-related tort damages).

365. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 407, 409.

366. *Id.* at 409; *cf. Convention, supra* note 268, art. 6 (obligating signatories to assure that everyone within their jurisdiction has adequate remedies through national tribunals against racial discrimination).

Article 6 . . . makes no concrete reference to" any provisions providing direct remedy for plaintiffs.[367] To the extent that CERD requires any action, "[h]ow measures will be carried out must . . . be left to [Otaru's] discretion."[368] In the present case, Otaru "took several possible measures, bringing about some appropriate results."[369] Therefore, the court reasoned Otaru's actions or lack thereof "cannot [be] rule[d] . . . [to be] illegal."[370]

Subsequent to the Sapporo District Court decision, both the plaintiffs and defendant Yunohana decided to appeal.[371] On September 16, 2004, the Sapporo High Court announced its decision.[372] In essence, the District Court was affirmed on every point.[373] However, Presiding Judge Sakamoto[374] added in regards to the charges against Otaru that under existing Supreme Court case law there is no liability against the government for failure to pass a law.[375] Futhermore, Sakamoto stated that the CERD language indicating that a signatory nation must "by all appropriate means[eliminate] racial discrimination"[376] is "general and abstract" and "do[es] not further provide specific measures."[377] In the sense that "it is not clear . . . [that the CERD] convention . . . oblige[s] the introduction of ordinances[,]" Otaru cannot be liable for any failure to enact such an ordinance.[378] Following the High Court's decision, Arudou's appeal to the Supreme Court was rejected.[379]

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367. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 409. *But see* NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY 72–73 (1970) (indicating that one of the intentions of the CERD was to provide an effective remedy to victims of racial discrimination).

368. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 409; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346 (reporting that the judge said that the city had no obligation under the treaty to "stamp out" racial discrimination).

369. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 409; *Bathhouse Loses Racism Lawsuit: Men Barred at Otaru Bath Awarded 3 Million Yen in Damages*, *supra* note 346.

370. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 409.

371. ARUDOU, *supra* note 1, at 363, 366–67.

372. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 411; *see also* Preliminary Report on the Otaru Onsens Lawsuit: Sapporo High Court Decision Handed Down Sept 16, 2004, http://www.debito.org/highcourtdecisionopinion.html (last visited Feb. 28, 2007) (providing an in-depth analysis of the Sapporo High Court's decision by one of the plaintiffs, Debito Arudou).

373. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 411; *High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse*, *supra* note 362.

374. *See High Court Rejects Compensation Claim over Racial Discrimination at Bathhouse*, *supra* note 362.

375. *See* Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), *reprinted in* ARUDOU, *supra* note 1, at 412.

376. *Convention*, *supra* note 268, art. 2(1)(d); *see also* Ryan F. Haigh, Note, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression*, 5 WASH. U. GLOBAL STUD. L. REV. 187, 199, n.80 (2006) (stating that although the CERD Treaty sets boundaries by which states might fight racial discrimination, the agreement leaves the details of the implementation to states' discretions).

377. Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), *reprinted in* ARUDOU, *supra* note 1, at 412. *But see Convention, supra* note 268, art. 5(f) (providing a list of specific rights that all signatories must ensure pursuant to Article 2 of the CERD, including everyone's entitlement to access any place or service that is intended for use by the general public without discrimination).

378. Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), *reprinted in* ARUDOU, *supra* note 1, at 412-13. *But see Convention, supra* note 268, art. 2(1)(d) (requiring the termination of racial discrimination using "all appropriate means," including "legislation as required").

379. *See* Arudou v. Yunohana (Sup. Ct., Apr. 7, 2005) *reprinted in* ARUDOU, *supra* note 1, at 415-16; *City Off Hook Over Bathhouse Barring of Foreigners*, JAPAN TIMES (Tokyo), Apr. 8, 2005, *available at* http://search.japantimes.co.jp/print/ nn20050408a4.html.

Part IV—Addressing the Adequacy of Current Remedies for Addressing Discrimination

Part III of this article reviewed three cases addressing discrimination in the form of exclusion from private businesses in Japan. In one sense, all three cases can ultimately be seen as victories against discrimination. In another sense, however, the cases arguably present two shortcomings: in *McGowan*, the courts' failure to recognize the defendant's actions against McGowan as racial discrimination and, in *Arudou*, the courts' unwillingness to find the government in any way responsible under international law for the discrimination it allowed to continue in Otaru. This section will address the extent to which existing judicial avenues can be effective against private discrimination in light of Japan's obligations under international law.

Japan is a party to two international treaties, which directly require each signatory to take steps to eradicate discrimination within its borders.[380] One such treaty, previously mentioned, is CERD (International Convention on the Elimination of All Forms of Racial Discrimination).[381] The CERD treaty states that each participating nation "shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group[,] or organization[.]"[382] Additionally, the International Covenant on Civil and Political Rights similarly states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status."[383] In regards to these international law commitments, Japan is currently of the position that it is "fulfilling the obligations," which treaty law places on it via currently existing legal remedies.[384]

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380. Article 2 of the International Covenant on Economic, Social and Cultural Rights also, somewhat indirectly, requires government action in this regard—all signatories "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, politial or other opinion, national or social origin, property, birth[,] or other status." *See* International Covenant on Economic, Social and Cultural Rights, art. 2, *opened for signature* Dec. 19, 1966, 6 I.L.M. 360, 361 (*ratified by Japan* June 21, 1978).

381. *See Convention*, *supra* note 268.

382. *Id.,* art. 2(1)(d).

383. ICCPR*, supra* note 58, art. 26

384. *See* COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶ 4(2) (concluding that Japan has been honoring its duty to eliminate racial discrimination as imposed by Article 2 of CERD); *see also* MINISTRY OF FOREIGN AFFAIRS OF JAPAN, INT'L CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIM. (FIRST AND SECOND REPORT) art. 2, ¶¶ 40–42 (1999), *available at* http://mofa.go.jp/policy/human/race_rep1/ index.html (reporting that, for example, Japanese ministries have conducted educational seminars and research to further their anti-discriminatory stance pursuant to the Japanese Constitution and CERD, and that the Investigation and Treatment Regulations of Human Rights Infringement Incidents and the Civil Liberties Commissioners Law provide redress for racial discrimination).

a. Analysis of Existing Legal Remedies

Because there are no laws prohibiting discrimination in Japan, acts of discrimination are not per se illegal. Nevertheless, victims of discrimination have the option of presenting a number of civil court claims to address their grievances. The following subsections will detail the three types of claims brought in the discrimination cases described above and the standards by which such claims are adjudicated.

i. Constitution of Japan

The Constitution of Japan does have a provision that addresses discrimination. Article 14 states that "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic[,] or social relations because of race, creed, sex, social status[,] or family origin."[385] This provision is actually a modified version of an earlier draft constitution, developed after World War II, which included language directly protecting foreign nationals against discrimination.[386] However, as a result of extensive negotiation between the American occupying forces and the Japanese government, the end product was much less clear in its protection of foreigners.[387]

"Following the defeat of Japan and during the Occupation, the Supreme Commander of the Allied Powers (SCAP), General Douglas MacArthur, directed his staff" to draft a new constitution after soundly rejecting the draft created by the Japanese.[388] The SCAP draft contained one article, SCAP Draft Article 13, which stated that "[a]ll natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic[,] or social relations on account of race, creed, sex, social status, caste[,] or national origin."[389] Furthermore, SCAP Draft Article 13 stated that "[a]liens shall be entitled to the protection of the law."[390] However, a subsequent Japanese edit removed language about national origin from SCAP Draft Article 13 while keeping SCAP Draft Article 14 intact.[391]

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385. KENPŌ, art. 14, ¶ 1.

386. *See* Hamano, *supra* note 9, at 426–27, 433-38; *see also* Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POL. 413, 425 (1999) (stating that protections for foreigners were effectively removed with the exclusion of the alien provision).

387. *See* Kenpō, art. 14, ¶ 1 (providing that "all of the people" are equal before the law); *see* Hamano, *supra* note 9, at 426–27 (recognizing that major provisions of the SCAP Draft were diluted or excluded from the final postwar Constitution after a series of negotiations between the Japanese government and the SCAP).

388. *See* James A. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 L. & CONTEMP. PROBS. 171, 171, 173 (1990) (stating that General Douglas MacArthur was the Supreme Command of the Allied Powers or "SCAP" and that he personally endorsed three provisions to be included in Japan's postwar Constitution); Lynn Parisi, *Lessons on the Japanese Constitution*, JAPAN DIGEST (Nat'l Clearinghouse for United States–Japan Studies, Bloomington, Ind.), Nov. 2002.

389. KOSEKI SHŌICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 114 (Ray A. Moore trans., 1997).

390. *Id.*

391. *See id.* (pointing to a later Japanese version that replaced "national origin" with "family" origin). *See generally* Tadashi Aruga, *The Declaration of Independence in Japan: Translation and Transplantation, 1854–1997*, 85 J. AM. HIST. 1409, 1424 (noting that the Japanese government tried to preserve the original language of the SCAP draft as much as possible in the official English version of the Japanese Constitution).

Critically, this edit also changed the introductory clause "[a]ll natural persons" in SCAP Draft Article 13, which later become Article 14, to read "[a]ll the people[,]" represented by the Japanese word *kokumin*.[392] Somewhat later, Japanese officials were able to negotiate the complete omission of SCAP Draft Article 14.[393] The final step in this progression came several years later in 1950 with the passage of the Law of Nationality.[394] This statute is critical because it gives official legal definition to the word *kokumin*, left intentionally vague in the Constitution of Japan by Japanese officials—now only "holders of Japanese citizenship" are covered under what became Article 14.[395]

Despite these changes, the Japanese Supreme Court has shown some willingness to extend the protections of constitutional human rights privileges to foreign nationals.[396] One case which addressed this principle is *McLean v. Justice Minister* in 1978.[397] In *McLean*, an American citizen was denied extension of a Japanese visa at least in part due to political demonstrations in opposition to Japan's part in the Vietnam War.[398] Ultimately, the court decided that the Minister of Justice had not acted inappropriately in his decision because immigration law gave him broad discretion over visa extensions.[399] Most interestingly, however, the court declared that the constitutional "guarantees of fundamental human rights . . . , with the exception of those rights which by their nature must be limited to the Japanese, apply equally to aliens staying within our country."[400] In *McLean*, while "freedom to engage in political activities" generally applies to aliens,[401] it does so, according to one commentator, "only as far as the

392. *See* SHŌICHI, *supra* note 389, at 114–15; *see also* Aruga, *supra* note 391 (defining *kokumin* as "national people").

393. *See* SHŌICHI, *supra* note 389, at 119–20; Hamano, *supra* note 9, at 436–37; *see also* Gurowitz, *supra* note 386, at 425 (stating that protections for foreigners were effectively removed with the exclusion of the alien provision).

394. *See* SHŌICHI, *supra* note 389, at 179–80; *see also* Hamano, *supra* note 9, at 437.

395. *See* SHŌICHI, *supra* note 389, at 179–80; *see also* Hamano, *supra* note 9, at 439–42 (noting that the Constitution of Japan was denied popular referendum when it came into effect in 1947 and it has so remained to this day).

396. *E.g.,* Judgment Nov. 18, 1964, 18 KEISHŪ 579, 582 (Sup. Ct., Nov. 18, 1964) *excerpt reprinted in* IWASAWA, *supra* note 100, at 85 (ruling that despite Article 14's intended application to only Japanese nationals, it must be construed to include aliens as well in light of Article 7 of the Universal Declaration of Human Rights, which provides that "all . . . are entitled without any discrimination to the equal protection of the law"); *see also* Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RTS. Q. 131, 137 (1986) (stating that the Japanese courts appear to acknowledge protections for aliens).

397. *See* McLean v. Justice Minister, 32 MINSHŪ 7, 1233 (Sup. Ct., Oct. 4, 1978), *reprinted in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 471 (1996).

398. *Id.*; *see* Lawrence W. Beer, *Group Rights and Individual Rights in Japan*, 21 ASIAN SURV. 437, 448 (1981) (explaining that McLean had engaged in lawful and peaceful protest activities, challenging the U.S.-Japan Security Treaty and U.S. involvement in the Vietnam War).

399. *See* McLean v. Justice Minister, 32 MINSHŪ 7, 1233 (Sup. Ct., Oct. 4, 1978), *reprinted in* BEER & ITOH, *supra* note 397, at 478; Beer, *supra* note 398.

400. McLean v. Justice Minister, 32 MINSHŪ 7 (Sup. Ct., Oct. 4, 1978), *reprinted in* BEER & ITOH, *supra* note 397, at 471, 477 (stating that fundamental rights apply to aliens); *see also* Hur, *supra* note 12, at 672–73 (stating that in light of international law, Japan interprets its own constitution as applying to aliens as well as nationals).

401. McLean v. Justice Minister, 32 MINSHŪ 7 (Sup. Ct., Oct. 4, 1978), *reprinted in* BEER & ITOH, *supra* note 397, at 471, 477; *see also* Hamano, *supra* note 9, at 464–65.

Ministry of Justice permits[.]"[402] The court stated that the Minister of Justice's decision would only be overturned if it is "clearly unreasonable."[403]

Regardless of whether the Constitution of Japan protects foreigners from governmental discrimination, it cannot aid a plaintiff in regards to private discrimination. In another case, *Mitsubishi Jushi K.K. v. Takano*,[404] the Supreme Court stated that the human rights' provisions "of the Constitution do not apply directly to mutual relations between private parties."[405] The rationale for applying these constitutional protections only to state action is that "[w]hile in relations between private parties[,] there is a possibility that one's freedom or right of equality can be mutually contradictory or conflicting against others' in actual instances."[406] "[I]n the framework of a modern and free society, the regulation of such conflicts is entrusted as a general rule to private self-government and the law will intervene to regulate only when the mode and extent of the infringement go beyond the socially acceptable limit."[407] This same standard was applied by the courts in the exclusionary cases of the preceding section to determine whether the alleged discriminatory acts were illegal under Japanese tort law.

ii. Civil Code of Japan—Tort Law

Article 1 of the Japanese Civil Code establishes the basis for the private rights of Japanese citizens—"[t]he enjoyment of private rights commences at birth."[408] Article 2 extends such rights to foreigners, with some minor exceptions.[409] However, the Civil Code also sets limits to the exercise of such rights. For example, Article 90 states that an act of an individual under private law "whose object is a matter contrary to public order or good manners and customs[] is void."[410] "[W]hether the object [of such an] act is contrary to public order or good manners and customs is a matter to be decided by the opinion of the [c]ourt."[411]

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402. Hamano, *supra* note 9, at 465; *see also* Hur, *supra* note 12, at 672–73 (discussing the role of the Minister of Justice in determining an alien's rights).

403. *See* McLean v. Justice Minister, 32 MINSHŪ 7 (Sup. Ct., Oct. 4, 1978), *reprinted in* BEER & ITOH, *supra* note 397, at 471, 478 (1996). *But see* Kikuyo Matsumoto, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 96–97 (1993) (suggesting that the rulings of the Minister of Justice will generally stand even in cases where they appear to be unreasonable).

404. Mitsubishi Jushi K.K. v. Takano, 27 MINSHŪ 1536 (Sup. Ct., Dec. 12, 1973).

405. *Id.*

406. *Id.*

407. *Id.*

408. MINPŌ, art. 1, *reprinted in* J.E. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN I 3 (J.E. de Becker, trans., 1979) (1909).

409. MINPŌ, art. 2, *reprinted in* DE BECKER, *supra* note 408, at 4-6 (exceptions include land ownership, becoming public officials, owning stock in Japanese banks, and others).

410. MINPŌ, art. 90, *reprinted in* DE BECKER, *supra* note 408, at 86-89; *see* Takehiro Nobumori, *Aspects of Collective Will of Bondholders Under Japanese Law*, 35 GEO. J. INT'L L. 755, 773 (2004).

411. *See* MINPŌ, art. 90, *reprinted in* DE BECKER, *supra* note 408, at 89; *see also* Hiroko Hayashi, *Sexual Harassment in the Workplace and Equal Employment Legislation*, 69 ST. JOHN'S L. REV. 37, 56–57 (1995) (positing that because the language of Article 90 is vague the courts must use discretion in deciding when there has been a violation of public good).

In cases of alleged discrimination, the Civil Code offers Article 709, stating that "[a] person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence."[412] Article 709 is the most basic provision of the torts section of the Japanese Civil Code.[413] Article 710 further adds that whether or not "the person, liberty[,] or [honor] (reputation) of another is injured or his property rights are violated, the person who is bound to make compensation for damage in accordance with the provisions of [Article 709] must make also compensation even for damage other than that to his property."[414] Therefore, in the case of discrimination, the offending party must pay damages "even when the property of the other party has sustained no loss."[415] In addition to providing money damages, Article 710 also provides an additional remedy in the form of public apology where the injured party's honor has been offended.[416]

How does the court determine when an act is contrary to public order or injurious to a plaintiff's dignity and honor? After analysis of the facts of the case, the judicial standard applied is to determine if the acts in question "infringe[] upon the basic freedoms or equalities of other individuals, or has the danger of doing so, and has been judged as going beyond the limits of what is socially permissible[.]"[417] The Japanese Supreme Court had the following to say:

> While in relations between private parties there is a possibility that one's freedom or right of equality can be mutually contradictory or conflicting against others' in actual instances. But in the framework of a modern and free society, the regulation of such conflicts is entrusted as a general rule to private self-government and the law will intervene to regulate only when the mode and extent of the infringement go beyond the socially acceptable limit.[418]

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412. *See* MINPŌ, art. 709, *reprinted in* DE BECKER, *supra* note 408, at 3; *see also* Scott K. Dinwiddie, *A Shifting Barrier? Difficulties in Obtaining Patent Infringement Damages in Japan*, 70 WASH. L. REV. 833, 846–47 (1995) (restating the general damages provision in Article 709).

413. *See* MINPŌ, art. 709, *reprinted in* DE BECKER, *supra* note 408, at 272-73*; see also* Marcy Sheinwold, *International Products Liability Law*, 1 TOURO J. TRANSNAT'L L. 257, 280 (1988) (describing the elements of a basic torts claim under Article 709).

414. *See* MINPŌ, art. 710, *reprinted in* DE BECKER, *supra* note 408, at 274; *see also* Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT'L L. 141, 159 (1990) (providing the provisions of Articles 709 and 710).

415. *See* MINPŌ, art. 710, *reprinted in* DE BECKER, *supra* note 408, at 274; *see also* Jae-Jin Lee, *Freedom of the Press and Right of Reply Under the Contemporary Korean Libel Laws: A Comparative Analysis*, 16 UCLA PAC. BASIN L.J. 155, 180 (1998) (noting that under the Civil Code a person may be required to make compensations regardless of whether the injury done is to property or reputation).

416. MINPŌ, art. 710, *reprinted in* DE BECKER, *supra* note 408, at 274; *see also* Ilhyung Lee, *The Law and Culture of Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1, 38–40 (2005) (explaining that the Japanese courts accept apologies as an appropriate and constitutional means of redress).

417. Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408; *see also* Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 25 (1996) (reviewing the judicial standard of social permissibility used by Japan to determine injury).

418. Mitsubishi Jushi K.K. v. Takano, 27 MINSHŪ 1536 (Sup. Ct., Dec. 12, 1973).

Ultimately, however, since the standard hinges on a perception of permissible social limits, the outcome of discrimination cases will very much depend on the outlook of the judge or judges in the case.[419] While excluding all foreigners for fear of upsetting regular bathers at an *onsen* may appear to be highly socially inappropriate to one judge, it may appear to another as a reasonable decision by a business trying to deal with an influx of ill-mannered foreigners who are scaring away local customers.

iii. International Human Rights Law Applied Domestically

Article 98 of the Constitution of Japan states that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed."[420] "An overwhelming majority of [Japanese law] scholars take the view that treaties have domestic legal force in Japan."[421] As a result, generally speaking, "litigants can invoke international law before Japanese courts."[422] In fact, if there is a conflict, "[t]reaties . . . prevail over statutes[.]"[423] Therefore, in theory, a plaintiff alleging discrimination in Japanese courts could cite to applicable provisions of international human rights treaties in lieu of domestic law in Japan prohibiting discrimination.

"Even though international law has domestic legal force in Japan, those international human rights instruments which lack a legally binding character are not regarded as having the force of 'law' in Japan."[424] For example, the Osaka High Court has stated that "treat[ies] which require legislative procedures for its contents to be implemented . . . cannot directly become a judgment norm[.]"[425] This interpretation was applied to the CERD treaty in both the *Bortz*[426] and the *Arudou* cases.[427] For example, in *Arudou*, while the court recognized that the CERD treaty has the "force of domestic law[,] . . . it regulates the relationship between the public authorities and the international responsibilities of a State, but does not directly regulate the relationships between individuals[.]"[428]

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419. *See* Hamano, *supra* note 9, at 415–60 (critiquing the lack of judicial independence in the Japanese judiciary and pointing out many reasons why judges might want to maintain a conservative posture when deciding opinions). I have been able to confirm some of Hamano's points of critique in conversations with members of the Japanese judiciary.

420. KENPO, art. 98.

421. IWASAWA, *supra* note 100, at 29; *see also* David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?* 32 COLUM. J. TRANSNAT'L L. 533, 576–77 (1995) (establishing that international laws have full domestic force in Japan).

422. IWASAWA, *supra* note 100, at 28; Jeff Vize, *Torture, Forced Confessions and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 357 (2003).

423. IWASAWA, *supra* note 100, at 27; Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?* 8 EMORY INT'L L. REV. 127, 153 (1994).

424. IWASAWA, *supra* note 100, at 37; *see also* Katharina Heyer, *From Special Needs to Equal Rights: Japanese Disability Law*, 1 ASIAN-PAC. L. & POL'Y J. 7, 3–4 (2007) (remarking that although Japan gives domestic recognition to international law, it has shown reluctance to sign on to certain international agreements).

425. *See* IWASAWA, *supra* note 100, at 57 (quoting Judgment Dec. 19, 1984, 35 GYŌSAISHŪ 2220, 2282-3 (Osaka High Ct., Dec. 19, 1984)); Landis, *supra* note 24, at 76 n.130.

426. *See* Webster, supra note 132, at 451; Yamanaka, *supra* note 252, at ¶¶ 29–30, 34.

427. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408.

428. *Id.*

Although Japanese courts are unwilling to apply international human rights treaty provisions prohibiting discrimination directly to private disputes,[429] "the provisions of these [treaties] may [nevertheless] be considered in the interpretation of tort law."[430] This concept is referred to as the "indirect application" of international law.[431] One advantage to this approach is that even if the language of a treaty merely creates a political duty rather than a direct private right of action, the treaty provisions can still be used indirectly because under such an approach "[t]he legal character of the international instrument is not so important[.]"[432] Particularly in terms of domestic tort law, in determining which actions are void as against public policy, international human rights' provisions can be applied indirectly through the judicial interpretation of Japanese Civil Code Article 90.[433] While some earlier attempts for such indirect application of treaty provisions in tort discrimination cases were unsuccessful,[434] courts in the *Bortz* and *Arudou* cases were willing to apply such an interpretation.[435] In both cases, the courts applied CERD provisions in the factual analysis in order to determine that the defendants' actions were discriminatory, violated public policy, and were actionable under tort law.[436]

b. Human Rights Community Observations on Japan

While the Japanese government feels that it is meeting its obligations under international human rights' treaties via existing tort remedies,[437] a number of domestic and international observers have come to a different conclusion. There have been numerous calls on the Japanese government from various groups for the creation of a domestic anti-discrimination law. This section will briefly address recommendations from both national and international observers.

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429. *See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, *supra* note 14, at ¶ 10 (admitting that CERD is not self-executing, making Japanese courts' reluctance to apply it understandable); Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of all Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19, 36 (2005).

430. FUJIMOTO, *supra* note 13, at 1; *see* Shin, *supra* note 139, at 361.

431. *See* IWASAWA, *supra* note 100, at 82; *see also* Webster, *supra* note 132, at 451 (acknowledging the indirect effect given CERD in the *Bortz* case, where the judge applied internationally derived standards to domestic law since there was no constitutional provision, Supreme Court case, or anti-discrimination statute on point).

432. IWASAWA, *supra* note 100, at 83; *see also Preserving Affirmative Action in Higher Education: Amicus Curiae Brief of NOW Legal Defense Fund for Grutter v. Bollinger*, 23 WOMEN'S RTS. L. REP. 145, 152 (2002) (arguing that non-self-executing treaties can be used indirectly as aids for interpretation of other laws).

433. *See* IWASAWA, *supra* note 100, at 89–90; *see also* Joseph P. Nearey, *Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of World War II?* 15 TEMP. INT'L & COMP. L.J. 121, 142 (2001) (stating that courts have avoided the application of human rights treaties by basing their rulings on tort law).

434. *See* IWASAWA, *supra* note 100, at 91–92.

435. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408–9; Yamanaka, *supra* note 252, at ¶ 34.

436. *See* Arudou v. Yunohana (Sapporo Dist. Ct., Nov. 11, 2002), *reprinted in* ARUDOU, *supra* note 1, at 408–9; Yamanaka, *supra* note 252, at ¶¶ 29–30, 34.

437. *See* COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶ 4 (stating that Japan has been fulfilling its obligation under the Convention to eliminate racial discrimination).

On an international level, in 2001 the Committee on the Elimination of Racial Discrimination (CERD Committee), an arm of the Office of the United Nations High Commissioner for Human Rights which oversees the implementation of the CERD treaty worldwide,[438] issued its observations on Japan.[439] Although the CERD Committee recognized some "[p]ositive aspects" of the Japanese government's approach to discrimination,[440] ultimately the Committee "believe[ed specific legislation is] necessary to . . . outlaw racial discrimination[.]"[441] The Ministry of Foreign Affairs of Japan's response to the CERD Committee report was decidedly "defensive"[442] in tone, taking issue with many of the Committee's findings and generally disregarding the large-scale recommendations.[443]

Following the CERD Committee's report, Doudou Diène, the United Nation's Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, issued a report on Japan in 2006.[444] In his report, "[a]fter having collected and analy[z]ed the views of all parties concerned,"[445] Diène "reached the conclusion that racial discrimination and xenophobia do exist in Japan[.]"[446] As a result, Diène strongly recommended that the Japanese government "adopt[] . . . a national law against racism, discrimination, and xenophobia[.]"[447] While the publication of Diène's report was followed by a flurry of

438. *See* Committee on the Elimination of Racial Discrimination, *Monitoring Racial Equality and Non-Discrimination*, http://www.ohchr.org/english/bodies/cerd/index.htm (identifying the CERD Committee as the body of independent experts that monitors the State Parties' implementation of the Convention on the Elimination of All Forms of Racial Discrimination). *See generally* Rugaiijah Yearby, *Is It Too Late for Title VI Enforcement?—Seeking Redemption of the Unequal United States' Long Term Care System Through International Means*, 9 DEPAUL J. HEALTH CARE L. 971, 973 (2005) (mentioning that private parties can file a complaint to the CERD Committee concerning a member state's violation when there is no meaningful way to address the issue domestically).

439. *See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan*, *supra* note 14, at ¶¶ 4–27 (discussing the positive aspects, concerns, and recommendations for Japan's implementation of the treaty as a State Party).

440. *See id.* at ¶¶ 4–6 (Japan's successes include some legislative and administrative efforts, endeavors to raise awareness about existing human rights' standards, and the dissemination of reports on the implementation of treaties).

441. *Id.* at ¶ 10, 12.

442. *See* IWASAWA, *supra* note 100, at 7; *see also* Patrick Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUM. RTS. L. Rev. 239, 265 n.152 (2005) (noting Japan's disagreement with the Committee's definition of "descent").

443. *See* COMMENTS OF THE JAPANESE GOVERNMENT ON THE CONCLUDING OBSERVATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON MARCH 20, 2000, REGARDING INITIAL AND SECOND PERIODIC REPORT OF THE JAPANESE GOVERNMENT, *supra* note 64, at ¶¶ 1–21.

444. *See Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 225, at ¶ 69. *See generally* Michael J. Dennis, *Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council*, 97 AM. J. INT'L L. 364, 369 (2003) (discussing the appointment of Diene as the new special rapporteur on racial discrimination).

445. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, supra* note 225, ¶ 69; *see also* Eric Johnston, *Racism Rapporteur Repeats Criticism*, JAPAN TIMES (Tokyo), May 18, 2006 (discussing the report, which contained criticisms of the Japanese government as well as a call for the legislature to enact anti-discrimination laws).

446. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, supra* note 225, ¶ 69.

447. *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, supra* note 225, at ¶ 75. *See generally* Wu, *supra* note 96, at 489–90 (proposing that the Japanese government structure a legal system that will address potential incidences of discrimination such as making the citizenship procedure more concrete in order to expand citizenship rights).

criticism and support in Japan, the government made no immediate moves to follow the recommendations.[448]

In addition to foreign pressure on Japan to create an anti-discrimination law, there has also been pressure from domestic groups. For example, in 2004 the Japanese Federation of Bar Associations (JFBA) published a "Declaration Seeking the Building of a Harmonious Multiethnic, Multicultural Society, and the Enactment of Legislation for the Basic Human Rights of Non-National and Ethnic Minorities."[449] In this report, considering in part the denial of entry in "shops and restaurants" for foreigners,[450] the JFBA recommended that the national government "[i]ntroduce legislation to ban racial discrimination[.]"[451] A similar request was made by the Japanese Civil Liberties Union (JCLU) in 2005.[452] In its recommendation for legislation, JCLU proposed a law that not only prohibits discrimination but also "[i]mpos[es] criminal sanctions" for violations.[453]

c. Efficacy of Creating New Anti-Discrimination Legislation

Considering the chorus of voices calling for an anti-discrimination law in Japan, it would seem natural that such a law would at least have been considered on a national level. After all, anti-discrimination laws are quite common in the developed world. This section will discuss the possibility of Japanese anti-discrimination legislation and explore the benefits and pitfalls of such a solution for the problem of racial discrimination in Japan.

i. The Possibility of an Anti-Discrimination Law in Japan

A national law addressing discrimination has in fact already been considered by the Japanese legislature.[454] A draft of a law known as the Human Rights Protection Bill was submitted to the legislature originally in 2002.[455] Subsequently, the draft was dropped in 2003, nearly re-

448. *See* Debito Arudou, Editorial, *Righting a Wrong*, JAPAN TIMES (Tokyo), June 27, 2006; Johnston, *supra* note 445.

449. DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 1. *See generally* Carl F. Goodman, *Japan's New Civil Procedure Code: Has It Fostered a Rule of Law Dispute Resolution Mechanism?* 29 BROOK. J. INT'L L. 511, 604 n.359 (2004) (stating that the JFBA is composed of local Bar Associations and individual lawyers).

450. *See* DECLARATION SEEKING THE BUILDING OF A HARMONIOUS MULTIETHNIC, MULTICULTURAL SOCIETY, AND THE ENACTMENT OF LEGISLATION FOR THE BASIC HUMAN RIGHTS OF NON-NATIONAL AND ETHNIC MINORITIES, *supra* note 13, at 1.

451. *Id.* at 2.

452. *See* FUJIMOTO, *supra* note 13, at 4–5 (2005).

453. *See id.* at 5.

454. *See Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 225, at ¶ 34; *Try Again with Rights Bill*, JAPAN TIMES (Tokyo), Sept. 8, 2005.

455. *See* Hurights Osaka, *Government of Japan to Give up Submission of the Human Rights Protection Bill in the Present Diet Session*, http://www.hurights.or.jp/news/0604/b12_e.html (last visited Mar. 6, 2007) (reporting that the draft human rights protection legislation was originally submitted to the Japanese Diet in 2002). *See generally Media Regulation Bills Spark Heated Debate*, DAILY YOMIURI (Tokyo), Apr. 27, 2002, at 3 (discussing some of the controversy surrounding the proposed bill when it was first introduced to the legislature).

submitted in 2005, and ultimately delayed until at least 2007.[456] The main reason for the uncertainty has been a lack of legislative consensus regarding various controversial provisions.[457]

The Human Rights Protection Bill draft begins by prohibiting "unjust discrimination," taking a flexible approach to discrimination similar to that of the judiciary.[458] One of the draft's chief means of achieving this goal is a series of provisions that propose to establish a Human Rights Commission under the auspices of the Minister of Justice.[459] The Commission's principal responsibilities would be to receive and remedy human rights' grievances and to generally promote human rights' concerns.[460] For the latter responsibility, the bill provides for a veritable army of Human Rights Commissioners, whose duties are to "disseminate the philosophy of respect for human rights[,]" "[t]o endeavo[]r to promote private activities for the protection of human rights[,]"and "[t]o provide counseling on human rights," amongst others.[461]

Upon presentation of a specific discrimination claim, the Commission investigates the accusation[462] employing broad powers of inquiry.[463] If discrimination is found, the Commission may apply any of a series of remedies.[464] General remedy powers include counseling of the victim, providing guidance to those individuals involved in the discrimination, and so on.[465] For certain types of serious discrimination, the Commission also has the power to initiate mediation or arbitration,[466] issue recommendations and publish such recommendations if the

456. *See* Hurights Osaka, *Draft Human Rights Protection Bill Abandoned Due to Diet Dissolution*, http://www.hurights.or.jp/ whatsnew/031010.html (last visited Feb. 23, 2007).

457. *See* Hurights Osaka, *supra* note 455; *see also Koizumi Says Media Bills Will Pass This Session*, JAPAN TIMES (Tokyo), May 9, 2002 (showing that despite political promises to the contrary, many of the contentious issues of the draft bill had not been worked out and that passage was unlikely in 2002).

458. *See* HUMAN RIGHTS PROTECTION BILL (draft), arts. 2–3 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html.

459. *See id.*, arts. 5–20; *cf.* Philip Brasor, *The Free Press Exercise Their Muscles,* JAPAN TIMES (Tokyo), May 13, 2002 (chastising the proposed bill as a Ministry of Justice machination to comply with pressure from the United Nations Human Rights Committee while increasing its authority to censor the media).

460. *See* HUMAN RIGHTS PROTECTION BILL (draft), art. 6 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html.

461. *Id.,* art. 28.

462. *See id.*, art. 38(2). *See generally* MINISTRY OF JUSTICE, ACTIVITIES OF THE HUMAN RIGHTS ORGANS OF THE MINISTRY OF JUSTICE (2005), http://www.moj.go.jp/ENGLISH/HB/hb-01.html (promulgating existing procedure where a human rights investigation can be launched upon receipt of a complaint or by a report in the media).

463. *See* HUMAN RIGHTS PROTECTION BILL (draft), art. 39(1) (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html; *see also id.*, art. 44 (providing for specific instances where special inquiry powers become available and also granting the Commission the ability to levy punitive fines for noncompliance with inquiries and procedure). *See generally* Editorial, *Human Rights Bill Needs Drastic Changes*, DAILY YOMIURI (Tokyo), Apr. 23, 2005, at 4 (attacking the proposed Human Rights Commission for having too much investigatory power, especially the ability to have on-the-spot investigations).

464. *See* HUMAN RIGHTS PROTECTION BILL (draft), arts. 41–42 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html.

465. *See id.*, art. 41(1). *But cf.* Editorial, *Defects in Rights Bill Can't Be Left to Later*, DAILY YOMIURI (Tokyo), Feb. 28, 2005, at 4 (arguing that the remedy provisions of the bill should not be applied to media organizations and newsgathering procedures because it would stifle a free media).

466. *See* HUMAN RIGHTS PROTECTION BILL (draft), arts. 45–59 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html; *Toward a Basic Law on Human Rights*, JAPAN TIMES (Tokyo), May 30, 2001.

offender fails to comply,[467] and in some cases even initiate legal action against the offender.[468] Should legal action be initiated, however, no special powers or remedies are granted to the Commission.

Despite the fact that the Human Rights Protection Bill does not per se prohibit racial discrimination, it has nevertheless garnered some degree of support.[469] It has also received severe criticism from a wide array of sources. For example, on one hand, Amnesty International has argued that to be effective the Human Rights Commission must be autonomous and distinct from the Ministry of Justice.[470] On the other hand, others have criticized the draft as defining human rights' violations too broadly, for providing overly extensive powers of investigation, and for failing to establish a provision that would prohibit non-nationals from sitting on the Commission.[471]

While the creation of a national anti-discrimination law is certainly one approach, another option would be the establishment of a similar local ordinance. In 2005, for example, the Tottori prefecture "approved an ordinance . . . that [would] . . . protect people from racial discrimination and other human rights violations[,]" a first for Japan.[472] Similarly to the national law draft, the Tottori ordinance "establish[ed] a five-member committee to deal with complaints about rights violations."[473] After investigation, the committee could advise offenders to remedy their actions and, should compliance be lacking, the committee may "disclose the names of the alleged violators."[474] Additionally, the committee has the power to levy fines of up to 50,000 yen.[475]

Although the Tottori ordinance perhaps showed a promising start, it did not do so without criticism. For example, some claimed that the law gave too much arbitrary power to the

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467. *See* HUMAN RIGHTS PROTECTION BILL (draft), arts. 60–61 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html; Editorial, *Protect Freedom of the Press*, DAILY YOMIURI (Tokyo), Mar. 20, 2002, at 8.

468. *See* HUMAN RIGHTS PROTECTION BILL (draft), arts. 62–63 (Japan), http://www.jca.apc.org/jhrf21/eng/hrpb.html.

469. *See* FUJIMOTO, *supra* note 13, at 4; *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, *supra* note 225, at ¶ 34.

470. *See* Press Release, Amnesty Int'l, Japan: Serious Concerns over Human Rights Bill (Nov. 11, 2002) http://web.amnesty.org/library/Index/engASA220082002; *see also U.N. Body Voices Concern About Human Rights Bill*, DAILY YOMIURI (Tokyo), July 3, 2002, at 2 (reporting that the United Nations High Commissioner had concerns that the proposed human rights committee would be too closely affiliated to the Ministry of Justice and would therefore not comply with the U.N. resolution).

471. *See* Editorial, *Revision Essential to Human Rights Bill*, DAILY YOMIURI (Tokyo), June 7, 2005, at 4 (arguing that the draft bill must be revised to better define the violations and to place safeguards to prevent political abuses and overbroad application); *see also* Editorial, *Start From Scratch on Human Rights Bill*, DAILY YOMIURI (Tokyo), July 25, 2005, at 4 (arguing that the proposed legislation is so fundamentally flawed that it must be rewritten from scratch to prevent being used as an overly powerful political weapon).

472. *See* Debito Arudou, Editorial, *How to Kill a Bill: Tottori's Human Rights Ordinance Is a Case Study in Alarmism,* JAPAN TIMES (Tokyo), May 2, 2006; *Tottori Rights Law a First but Irks Critics*, JAPAN TIMES (Tokyo), Oct. 13, 2005.

473. *Tottori Rights Law a First but Irks Critics*, *supra* note 472.

474. *Tottori Rights Law a First but Irks Critics*, *supra* note 472; *Tottori Rights Ordinance Dies a Credibility Death, Prefecture Cites Lack of Support from Bar,* JAPAN TIMES (Tokyo), Oct. 25, 2006.

475. *See* Arudou, *supra* note 472; *Tottori Rights Law a First but Irks Critics, supra* note 472.

committee in determining which acts constitute human rights violations.[476] Following the ordinance's enactment, however, came a "deluge" of criticism and concern from citizens and the media.[477] In addition to the previous complaints, many feared that the disclosure provisions could infringe on the right to privacy and granted too much judicial power in an administrative arm of the government.[478] Ultimately, these criticisms became too much for the prefecture and in March of 2006, "the Tottori Prefectural Assembly voted unanimously to suspend the ordinance indefinitely."[479]

ii. Preference for a Consensus-Building Model

Based on the above-mentioned examples, an argument could be made that Japan is not ready for a law prohibiting racial discrimination or even one providing more serious human rights oversight. Could this in part be based on a cultural preference not for legislation or litigation but rather for an alternative dispute resolution model? This section will explore the idea that the Japanese would prefer to resolve the problem of racial discrimination through consensus-building rather than taking a more hard-line approach.

Regardless of the feelings of Japan as a whole, the Japanese government clearly does not see legislation as the appropriate solution to the problem of discrimination. In general, "[t]he attitude of [the Japanese government] towards law-making and supervision in [the area of human rights] is conspicuously defensive in nature."[480] In regards to the exclusion of foreigners from private businesses, the government has stayed true to this general nature. For example, when Ana Bortz called upon the government to create an anti-discrimination law following the *Bortz* decision, the Hamamatsu mayor responded by saying:

> I do not intend to legislate such an ordinance, but I do agree that racial discrimination should not be tolerated. I will make every effort to eliminate it short of legal enforcement. As for causes of racial discrimination, I think that Japanese people may not be used to interacting with foreigners because they have long lived in an island country. Therefore, I believe that[] if the Japanese come to know well about foreign residents in Hamamatsu, their ideas and their activities, this will eventually lead to better understanding of them among Japanese.[481]

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476. *See Tottori Rights Law a First but Irks Critics, supra* note 472; *Tottori to Shelve "Vague" Human Rights Ordinance,* JAPAN TIMES (Tokyo), Mar. 25, 2006.

477. *See* Arudou, *supra* note 472; *see also Tottori Rights Ordinance Dies a Credibility Death, Prefecture Cites Lack of Support from Bar,* JAPAN TIMES (Tokyo), Oct. 25, 2006 (citing lack of support from the Tottori Bar Association, as well as criticism from scholars and a flood of phone calls and e-mails from protesters as the reason for suspending the bill).

478. *See* Arudou, *supra* note 472.

479. Arudou, *supra* note 472; *see also Tottori to Shelve "Vague" Human Rights Ordinance*, *supra* note 476 (explaining that the Tottori Assembly passed a bill to suspend the ordinance indefinitely so that authorities have time to examine actual rights violations in the prefecture and to determine how to better address them).

480. IWASAWA, *supra* note 100, at 5.

481. Yamanaka, *supra* note 252.

Time and time again, this same approach was mirrored in the efforts of the Otaru government in the lead-up to the *Otaru Onsen* lawsuit. Otaru's first official response to a complaint about the exclusionary *onsen* indicated only a willingness to "coordinate efforts with other related administrative organs and ask again and again that management improve th[e] situation[,]" despite "sincere[] regret" about the hurt feelings of those who had been excluded.[482] An Otaru City Assemblyman was unwilling to take action without first "understand[ing] public opinion."[483] The Otaru mayor stated more bluntly that discrimination against foreigners "is not a problem that can be solved by . . . establishing an ordinance."[484] In response to pressure, the governor of Hokkaido responded:

> We do not believe that establishing an ordinance hastily patched together without the input of each party to the dispute is the best way to reach a solution. So we believe it is necessary to start getting input from every city, town, and village, in solidarity with those affected, and from now on take this up prudently with a view to reaching a solution.[485]

According to Japan's Justice Ministry, "discrimination is 'a matter of the heart' and cannot be solved through legal remedies."[486] Following this general principle, Vice Justice Minister Kono stated in 2006 that "[e]ven if [the Japanese government] were to pass [a national law outlawing racial discrimination], Japanese attitudes towards foreigners wouldn't change. It's more important to change the culture of Japanese society to one that is accepting of foreigners."[487] The general Japanese preference for gradualism as a vehicle for societal change is typified by the Japanese aphorism "Don't awaken the sleeping child."[488] One commentator has stated that this statement "reflects a widespread belief that meaningful change must be shaped by evolution, rather than revolution, through which the public builds a consensus."[489]

"From administrative guidance to trade association cartels, informal, consensual methods of regulation and coercion have seemed to constitute the predominant mechanism of social and

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482. *See* ARUDOU, *supra* note 1, at 54–55 (noting that the Otaru mayor later declared the intention to "redouble [the city's] efforts to tell [the discriminating *onsen*] to improve th[e] situation"). *But see City Off Hook Over Bathhouse Barring of Foreigners*, *supra* note 379 (stating that despite the fact that the local government has no duty to enact specific ordinances against racial discrimination, the Otaru government did request that the bathhouses stop rejecting foreigners).

483. *See* ARUDOU, *supra* note 1, at 87, 127 (also noting that a consensus-based approach was also applied by two of the offending *onsen* in the form of a customer poll to determine feelings on allowing foreigners to bathe with the locals). *But see* Hoffman, *supra* note 336 (explaining that despite a 1999 survey showing that a majority of visitors preferred not to bathe with foreigners, the Osupa bath dropped its "Japanese Only" policy).

484. ARUDOU, *supra* note 1, at 210.

485. *Id*. at 237.

486. *See* Madison, *supra* note 31, at 208.

487. *See* Johnston, *supra* note 159.

488. *See* Knapp, *supra* note 39, at 145.

489. *See* Knapp, *supra* note 39, at 145–46; *see also* Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change,* 89 COLUM. L. REV. 604, 605 (1989) (discussing Japan's belief that a change in the social fabric is best achieved not suddenly through imposition of force from within, but rather incrementally, on a voluntary basis through a series of graduated steps).

economic ordering" in Japan.[490] The "extent of [Japan's] dependency"[491] on consensus results from Japan's fundamental understanding of its own "communitarian orientation."[492] "[I]n Japan, the sense of community . . . has required that power be widely shared" because "communities are best maintained by sharing power as well as gains."[493] As a reflection of this distribution of power, a consensus-based dispute resolution model gives "each participant a voice in decisions[,]" as opposed to "[m]ajoritarian rule, [which] empowers only those who hold the voting balance."[494]

While consensus-building may be a "cumbersome" process,[495] it is nevertheless regularly employed on a small scale in the Japanese courts in the uniquely Japanese judicial format known as conciliation.[496] Conciliation is a dispute settlement method that predates the introduction of Western legal concepts and involves a judge and two community members whose purpose is to encourage voluntary compromise.[497] Conciliation, as opposed to direct litigation, is so favored by the Japanese government that when conciliation was formalized into the modern Japanese judicial system in 1951, it was determined that "the judiciary's primary function . . . is to encourage conciliation."[498]

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490. JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 198 (1991).

491. *Id.*

492. Haley, *supra* note 202, at 4 (noting that Japan's solution for cumbersome community decision-making is to delegate the responsibility to the many communities that each claim a degree of autonomy and decision-making authority).

493. *Id*.

494. Haley, *supra* note 202, at 4; *see also* Martha Jean Baker, *The Different Voice: Japanese Norms of Consensus and "Cultural" Feminism,* 16 UCLA PAC. BASIN L.J. 133, 137 (1997) (discussing Japan's use of consensus dispute resolution as a means of minimizing the possibility that one person or group will be able to use the system to dominate others).

495. *See* Haley, *supra* note 202, at 4.

496. *See* KENNETH L. PORT, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 458 (1st ed. 1996) (remarking on the implementation of consensus-building in the Japanese judicial process through the system of conciliation); *see also* Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313, 367 (2006) (commenting that while Japanese people will go to court when necessary, the government is more interested in ensuring that Japanese morals and not law govern dispute resolution, and so the use of extrajudicial conciliation is encouraged); Robert G. Kondrat, Comment, *Punishing and Preventing Pollution in Japan: Is American Style-Criminal Enforcement the Solution?* 9 PAC. RIM L. & POL'Y J. 379, 394 n.106 (2000) (discussing the support for conciliation in Japan and noting that, like the American system of litigation, conciliation can also take a great deal of time).

497. *See* PORT, *supra* note 496; *see also* Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in-Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 968–70 (2004) (explaining the different parties involved in the conciliation process).

498. Lynn Berat, *The Role of Conciliation in the Japanese Legal System*, 8 AM. U. J. INT'L L. & POL'Y 133 (1992), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 450 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003); *see also* David Broiles, *When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law and Values,* 1 TEX. WESLEYAN L. REV. 109, 133–34 (1994) (discussing the preference for conciliation in Japan, and the fact that it is inhibiting the development of court-made commercial and civil law).

In addition to the mandate to the Japanese judiciary, there appear to be elements within Japanese culture that also seek to avoid direct litigation,[499] although this should not be read to indicate that litigation is necessarily uncommon.[500] However, regardless of how common litigation actually is in Japan, there is nevertheless a general belief that "good people neither trouble nor are troubled by the law."[501] Feelings in this regard are certainly not diminished when the source of the litigation in question is a claim of discrimination. For example, an official of the Tokyo Metropolitan Government's Foreign Residents' Advisory Center specifically advised against bringing suit to combat discrimination.[502] This sentiment was repeated by a spokeswoman of the Tokyo Bar Association, who stated that "Filing anti-discrimination lawsuits is not the way these problems are solved in Japan."[503] Indeed, "virtually all discrimination suits are settled out of court[.]"[504]

A Japanese disinclination to see litigation or legislation as the solution for racial discrimination does not however mean that the Japanese are therefore disinclined to solve the problem altogether. A powerful but informal society-based set of rules of "conduct which function[] for the maintenance of the social order" exists in Japan and is referred to as *giri*.[505] The preference for employing the rules of *giri* for the resolution of private disputes regarding discrimination has even been recognized by the Japanese Supreme Court, at least where the discrimination in question is not altogether unreasonable.[506] *Giri* can be defined as the "duty . . . of a person who is bound to behave in a prescribed way toward a certain other person."[507] Reflecting a traditional disinclination to litigate, the rules of *giri* prevent a wronged individual from demanding fulfillment of a social obligation; rather resolution is based on self-enforcement, as required by societal notions of honor.[508] There is a fear that if legislation attempts to penetrate the honor-bound duties of mutual obligation governing interpersonal relationships, "execution [of *giri*]

499. *See* Harold See, *The Judiciary and Dispute Resolution in Japan: A Survey*, 10 FLA. ST. U. L. REV. 339 (1982), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 439 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003) (discussing the social stigma that is associated with being involved in a court proceeding, and noting this as a reason for the emphasis on dispute resolution); *see also* Margaret A. Boulware et al., *An Overview of Intellectual Property Rights Abroad*, 16 HOUS J. INT'L L. 441, 490 (1994) (noting that a driving force in Japanese culture is the avoidance of open conflict and the resolution of disputes without litigation).

500. *See* John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 108–22 (Kenneth L. Port & Gerald Paul McAlinn eds., 1st ed. 1996). *See generally* J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 1, 118–19 (1988) (discussing Japanese perceptions of litigation and litigation rates).

501. See, *supra* note 499, *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 439 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003).

502. Yates, *supra* note 162.

503. *Id.*

504. *Id.*; *see also* John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 J. JAPANESE STUD. 2, 265–68 (1982) (discussing the scarcity of meaningful sanctions or effective legal remedies in Japanese law, which in turn encourages out-of-court dispute resolution).

505. YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 174 (Anthony H. Angelo ed. & trans. 1976); *see* R.E. Watts, *Briefing the American Negotiator in Japan*, 16 INT'L LAW. 597, ¶¶ 12–14 (1982).

506. *See* Mitsubishi Jushi K.K. v. Takano, 27 MINSHŪ 1536, 1536 (Sup. Ct., Dec. 12, 1973).

507. NODA, *supra* note 505, at 175; *see also* Madison, *supra* note 31, at 189–90 (noting that *giri* or obligation defines every relationship so that all followers know what to expect in interpersonal Japanese relations).

508. *See* Watts, *supra,* note 505, ¶ 15.

would no longer depend on the mental attitude of the person under the obligation" and the social order based on mutual self-enforcement might collapse.[509]

The above commentary is not meant to suggest, however, that the rules of *giri* are "something static."[510] Rather, *giri* "is dynamic and constantly changing[.]"[511] As "Japanese attitude[s] . . . continue to become more Westernized[,]"[512] it is natural that the social customs demanded by the rules of *giri* will likely eventually grow to encompass the self-enforcement of anti-discrimination norms. In this regard, Japanese governmental efforts to push for societal consensus that discrimination against foreigners is undesirable, in place of simply legislating such a norm, can be seen as an effort to gradually reach the same end as legislation but at the same time uphold traditional Japanese modes of self-regulation.

Furthermore, some commentators have warned that pressure from outsiders for the immediate creation of an anti-discrimination law could ultimately have a harmful effect, such as "foster[ing] further resentment, entrench[ing] opposition, and even promot[ing] a backlash against those already present in Japan."[513] Gregory Clark, an Australian long-time resident of Japan and commentator on Japanese society, has pointed out that despite some "ugly" "anti-foreign sentiment[,]" "Japan can be remarkably open and fair."[514] According to Clark, "[o]ver the years, the Japanese have evolved a value system that for all its faults has created the advanced and reasonably stable society that most [foreigners in Japan] have come to enjoy."[515] "To demand that Japanese observe [a Western] value system, while pouring scorn on [the Japanese value system]," he states, "is the worst kind of racism."[516]

iii. Analysis

There are many attractive elements of Japan's traditional consensus-building approach as applied toward the resolution of racial discrimination. Hamamatsu's mayor is probably right to suggest that a gradual approach, relying on time and exposure to foreigners, will do more to cure the root cause of discrimination than an anti-discrimination law.[517] The Sapporo High Court, in the *Arudou* case, was correct to point out that "[e]ven if Otaru City [had] officially

509. *See* NODA, *supra* note 505, at 179.

510. *Id.* at 183 (recognizing that *giri* means something different to the younger members of the Japanese community than it does the older as Japanese attitudes change).

511. *Id.*

512. *Id*.

513. Yamaga-Karns, *supra* note 12, at 571–72.

514. Clark, *supra* note 257; *see also* Gregory Clark, Editorial, *Problematic Global Standards*, JAPAN TIMES (Tokyo), Nov. 1, 1999, at 21 (discussing the pluses and minuses of Japanese standards and noting that there are pluses for every minus).

515. Clark, *supra* note 514, at 21; *see also* Clark, *supra* note 257 (identifying aspects of Japanese society that benefit foreigners).

516. Clark, *supra* note 514, at 21; *see also* Clark, *supra* note 257 (recognizing differences between Japanese and Western value systems and noting that Japanese values may be unfairly characterized as racist).

517. *See* Yamanaka, *supra* note 252, at ¶¶ 28–45; *see also* Howard W. French, *Westerner Crusades Against Discrimination in Japan; Fights Injustice Against Foreigners and Finally Becomes a Citizen,* S.F. CHRON., Dec. 3, 2000, at A20 (noting that a national discussion is underway in Japan about opening the country to more foreign immigration).

declared that racial discrimination is illegal, . . . it is unclear that th[is] measure[] would have had any effect in stopping this case of refusals."[518] Most would agree that a nation that disfavors discrimination at its core is preferable to one that merely avoids engaging in discrimination due to the requirements of law.

Be that as it may, there are nevertheless elements of the "gradual approach [that] warrant[] critical examination."[519] Chiefly, under this approach "victims of discrimination must internalize their grievances and patiently await future improvements" without any realistic or reliable timetable.[520] Should someone experience racial discrimination, which can understandably be a humiliating experience, Japanese law is not necessarily on the victim's side.[521] If the victim decides to bring a civil suit, there is no guarantee of victory.[522] Although McGowan was able to present arguably convincing evidence of racial discrimination, for example, he nevertheless lost at the trial level and only prevailed upon appeal.[523]

Even before deciding whether or not to bring suit, one must consider that litigation in Japan can be particularly expensive. "[P]laintiffs . . . must pay large retainers for attorneys' fees and filing fees at the beginning of the case."[524] For example, McGowan's complaint requested 5.5 million yen in damages,[525] but typical attorney fees can range from 7 to 14 percent of such an amount.[526] Furthermore, court costs for such a lawsuit would amount to 27,500 yen.[527] If attorney fees are set at 14 percent, even at the district court level, McGowan would be faced with 797,500 yen out-of-pocket costs. McGowan's award, however, was only 350,000 yen,

518. Arudou v. Yunohana (Sapporo High Ct., Sept. 16, 2004), *reprinted in* ARUDOU, *supra* note 1, at 413.

519. Knapp, *supra* note 39, at 144–45 (describing the principle of gradualism cherished by Japanese culture, which states that meaningful change must be shaped by evolution, rather than revolution, through which the public builds consensus). *See generally* Helen A. Goff, *Glass Ceilings in the Land of the Rising Sons: The Failure of Workplace Discrimination Law and Policy in Japan,* 26 L. & POL'Y INT'L BUS. 4, 1147, ¶¶ 25–35 (1995) (recognizing shortcomings of the gradual approach to change in discrimination law and policy as exemplified by the Equal Employment Opportunity Law).

520. Knapp, *supra* note 39, at 144–45.

521. *See generally* Sam Jameson, *Japan's "Untouchables" Suffer Invisible Stain: Class: Facing Discrimination Solely Because of Their Ancestors' Birthplace, BURAKUMIN Hope that Society Will Finally Forget the Past*, L.A. TIMES, Jan. 2, 1993, at A24 (describing the discrimination against *burakumin* despite laws enacted to protect them and widespread recognition of the practice).

522. *See* Haley, *supra* note 504, at 265–68 (discussing the scarcity of meaningful sanctions or effective legal remedies in Japanese law).

523. Johnston, *supra* note 290.

524. Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation in Japan: A Structural Analysis,* 25 INT'L LAW. 443 (1991), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 107 (Kenneth L. Port ed., 1st ed. 1996).

525. *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288.

526. Yamanouchi & Cohen, *supra* note 524, *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 105 (Kenneth L. Port ed., 1st ed. 2003); *see also* Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1436, 1457 (1994) (demonstrating the disincentives of Japanese litigation due to the extent of attorney's fees and other litigation costs).

527. *See* Yamanouchi & Cohen, *supra* note 524, *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 107 (Kenneth L. Port ed., 1st ed. 2003) (calculating that a claim amounting to more than 3 million yen would require court fees of 1,000 yen for each 200,000 yen claimed); *see also* Phil Rothenberg, Note, *Japan's New Product Liability Law: Achieving Modest Success*, 31 LAW & POL'Y INT'L BUS. 453, 510 (2000) (explaining that court filing fees, like attorney's fees, deter litigation in Japan).

and he was granted that only on appeal.[528] Although Bortz and the plaintiffs in the *Otaru Onsen* case were awarded more, their personal risk of loss was nevertheless great. It is not surprising, then, that most discrimination cases, if pursued at all, are settled out of court.[529] As a result, such cases are unlikely to receive much national attention, if any.

On the one hand, it cannot be denied that the population of foreigners in Japan is on the rise, in an apparently continuing trend.[530] As a result, most Japanese are bound to have some degree of increased exposure to non-Japanese in their day-to-day lives. However, on the other hand, only the rarest cases of discrimination against foreigners receive national attention and at the same time foreigners are increasingly represented as a chief source of elevating Japanese crime in the media.[531] As mentioned previously, polling has indicated that the Japanese are evenly divided on whether foreigners are a good or bad influence on Japan.[532] Considering this, there seems to be little motivation for the Japanese to open themselves up to the kind of meaningful interaction with foreigners that could lead to diminished prejudice. In other words, the gradualism approach could end up being very gradual indeed.

Since the *Otaru Onsen* case, Debito Arudou has been planning a new series of discrimination suits, which aim to find the national government civilly liable for failing to act on the political duty required by international human rights' treaties.[533] This suit aims to take advantage of new Supreme Court precedent, which holds that "the lack of a law upholding constitutionally guaranteed rights is now considered legally-actionable negligence[.]"[534] This Supreme Court decision overturned old case law which the High Court had used in defense of Otaru in

528. *Shop Must Pay Up for Turning Away Black Man*, *supra* note 288. *See generally* Johnston, *supra* note 290 (affirming that the amount awarded to McGowan was comparably smaller than the amount awarded in other discrimination suits).

529. *See* Kiyoko Kamio Knapp, Article, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 118 (1995); *see also* Yates, *supra* note 162 (remarking that most discrimination suits in Japan settle out of court because of the difficulty in proving discrimination).

530. BEER & MAKI, *supra* note 16, at 155; *Census Confirms Nation in Era of Population Decline*, NIKKEI WEEKLY (Tokyo), Nov. 6, 2006.

531. *See* Arudou, *supra* note 230; *see also Homestays Help Eradicate Biases Against Foreigners*, JAPAN ECON. NEWSWIRE, Jan. 2, 2004 (revealing that the media, like the police and the government, tend to highlight crimes allegedly committed by foreigners).

532. *Japanese Divided on Whether Foreigners Are Good Influence*, *supra* note 213.

533. *See* ARUDOU, *supra* note 1, at 387–92. *See generally* Statement on the Lawsuit Against Japan's National Government to be Filed in 2006 in Tokyo District Court When We Have Some More Plaintiffs on Board, http://www.debito.org/kunibengodanenglish.html (last visited Feb. 24, 2007) (claiming that the Japanese national government violated the International Convention on the Elimination of All Forms of Racial Discrimination).

534. ARUDOU, *supra* note 1, at 389; Statement on the Lawsuit Against Japan's National Government to be Filed in 2006 in Tokyo District Court When We Have Some More Plaintiffs on Board, *supra* note 533.

the *Otaru Onsen* case.[535] The ultimate goal, of course, is to add the voice of the judiciary to the chorus calling for anti-discrimination legislation in Japan.[536]

Before dismissing the idea of a new human rights law in Japan because of arguments that it would be disrespectful to Japan's traditional culture, it is important to first consider the likely effect of such a law. Would it necessarily be as broad as critics fear? Analysis of the works of John Owen Haley, an influential Japanese legal scholar, suggests otherwise.

Haley is arguably most well-known for his book *Authority Without Power: Law and the Japanese Paradox*.[537] In it, Haley describes a pervasive system in Japan of extensive governmental authority to legislate but a "remarkably weak" "capacity to coerce and compel[.]"[538] For example, Japanese courts lack "judicial contempt powers or the usual penal analogies found in most continental legal systems," and administrative officials are "rarely equipped . . . with effective coercive powers." In fact,

> [f]or administrative officials, the consequence is the necessity to obtain assent by those affected in the formulation of public policies and to bargain for compliance in their implementation. Japanese judges . . . similarly recognize that compliance with legal rules, and even court orders, is more voluntary than coerced. Hence, they too seek consensual responses in law enforcement.[539]

Due to this dichotomy, "legal sanctions [functionally] are remarkably weak in Japan as compared to either common law or other civil law systems."[540] As a telling example, Japan's Equal Employment Opportunity Law merely imposes a "'duty to endeavor' not to discriminate" against women, while "conspicuously lack[ing real] prohibitory language[.]"[541]

However, that is not to suggest that legislation has little effect on Japanese society. Rather, "[l]aw [can serve to] structure[] the [everyday] behavior of people in Japan[.]"[542] This is possi-

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535. *See* Judgment Concerning Whether or Not the Public Offices Election Law (Before Amendment by Law No. 47 of 1998) Was in Violation of Article 15(1) and (3), Article 43(1), and the Proviso of Article 44 of the Constitution for the Reason That It Completely Precluded Japanese Citizens Residing Abroad from Voting in National Elections at the Time of the General Election of Members of the House of Representatives Held on October 20, 1996, 59 MINSHŪ 7 (Sup. Ct., Sept. 14, 2005). *See generally Counting the Overseas Vote*, JAPAN TIMES (Tokyo), Sept. 20, 2005 (referring to the Supreme Court's finding that the omission by the Japanese legislature to ensure voting equality, by failing to enact legislation to allow Japanese citizens living abroad to vote, was unlawful).

536. *See* ARUDOU, *supra* note 1, at 388.

537. *See* HALEY, *supra* note 490, at 198 (emphasizing that in Japan, the legitimacy of its government is based on creating consensus rather than seeking methods for command and coercion).

538. *See id.* at 14. *See generally Improving the Sources of Growth and Higher Living Standards*, OECD ECON. SURVEYS—JAPAN, Jan. 1, 2003, at 99 (stressing the weakness in enforcing legislation by Japan's regulatory authority).

539. John O. Haley, *Dispute Resolution in Japan: Lessons in Autonomy*, 17 CAN.-U.S. L.J. 443 (1991), *reprinted in* COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 448 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003).

540. *Id.*; *see* Haley, *supra* note 504.

541. *See* PORT & MCALINN, *supra* note 500.

542. MARK D. WEST, LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES 268 (2005).

ble within the context of traditional self-regulation of interpersonal relationships because "formal law making and law-enforcing processes—whether legislative, bureaucratic, or judicial—function in large measure as consensus-building processes rather than avenues for command and coercion."[543] Therefore, so long as there is sufficient "adequacy of processes for creating consensus" in the legislative process,[544] "social recognition that legal rules do reflect consensus[] gives them a special influence."[545] In short, laws can "serve[] as a means for legitimating norms[,] . . . . both shap[ing] and reflect[ing] consensus."[546]

With an adequate legislative process, a new law prohibiting racial discrimination could prove most effective not in direct enforcement, but rather by working to change the rules of *giri* in regards to interpersonal relations with foreigners. While such a law would not likely change hardened minds, it could nevertheless work to encourage meaningful interaction between Japanese and foreigners. For example, if prohibition of racial discrimination were incorporated into the rules of *giri*, as encouraged by consensus-reflecting legislation, honor and self-regulation would require that nearly all exclusionary Japanese Only signs would be brought down voluntarily. By encouraging the Japanese not to build walls between themselves and foreigners, the resulting interactions will likely go a long way toward building a mutual understanding.

Conclusion

Most of Japan's leadership recognizes that racial discrimination within its borders reflects poorly on the nation and would certainly like to see it stopped. So too would the many foreigners who experience discrimination at the hands of prejudicial private business owners. The question, then, is not whether anti-discrimination measures are necessary in Japan, but rather which measures would be both the most effective and the least disruptive to the traditional Japanese social order at the same time. Although many would argue that anti-discrimination legislation would be unacceptably damaging to preferred traditional dispute settlement methods and for Japanese society as a whole, analysis of the function and role of law in Japanese society suggests that such legislation might be most effective by subtly working to change traditional rules of conduct rather than by jarring traditional rules of conduct via direct enforcement.

At the same time, *some* effective and reliable means of combating blatant discrimination would surely be welcomed by discrimination victims who had been told again and again by society that it is best not to upset the delicate social balance by seeking justice against individuals unwilling to self-regulate their prejudicial behavior. Furthermore, it is important not to for-

543. *See* HALEY, *supra* note 490, at 198. *See generally* Clifford C. Clarke & G. Douglas Lipp, *Conflict Resolution for Contrasting Cultures: Multinational Companies*, 52 TRAINING & DEV. 20 (1998) (demonstrating the applicability of consensus-building processes).

544. *See* HALEY, *supra* note 490, at 198.

545. *Id.* at 199; *see also* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 967 (1984) (establishing that societal consensus in the legal process is reflected in the enjoyment of rights by the Japanese people).

546. HALEY, *supra* note 490, at 199; *see also* John O. Haley, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia: Comment: Law and Culture in China and Japan: A Framework for Analysis*, 27 MICH. J. INT'L L. 895, 899 (2006) (reasoning that legal norms reflect widely shared community interests and values that build on consensus and shape the structure of political authority).

get that such legislation could also greatly benefit Japan's traditional minorities, such as the Ainu, Burakumin, and *zainichi* Koreans, for whom the approach of gradualism has not sufficiently alleviated the suffering they have experienced due to discrimination.

Ultimately, the most difficult challenge in drafting an effective anti-discrimination law would be doing so with a sufficiently adequate appearance of consensus-building in the legislation process. Realistically, such a challenge would likely result in a law more similar to the short-lived Tottori ordinance, creating modest human rights oversight rather than the sharp distinctions and heavy sanctions found in the anti-discrimination laws of most developed countries. Nevertheless, even a committee like the one in Tottori can have teeth, albeit somewhat dulled, with which to combat discrimination amongst private individuals when discriminating individuals are unwilling to recognize the evolved social consensus prohibiting discrimination that the new law would help to build. Undoubtedly, discriminatory signs would gradually come down,[547] discrimination victims could seek redress, and traditional social customs would continue to change. This would, at least, be a step in the right direction.

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547. *See* Yamanaka, *supra* note 252 (reporting that after the *Bortz* decision, for example, one commentator noted that "signs reading, 'No Foreigners Allowed,' disappeared from the city's stores and bars"). *But see* Moshavi, *supra* note 172 (suggesting that signs forbidding foreigners are still posted due to crime prevention measures targeting foreigners)

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Sung Hwan Co., Ltd. v. Rite Aid Corp.

850 N.E.2d 647 (N.Y. 2006)

In an action to enforce a money judgment obtained by a foreign company against a domestic company, the Court of Appeals of New York held that the fact that New York does not recognize an economic loss tort did not foreclose the use of Rule 302(a)(3) as a basis by a foreign court to exercise personal jurisdiction over the domestic company.

I. Holding

In *Sung Hwan Co., Ltd. v. Rite Aid Corp.*,[1] the Court of Appeals of New York reversed the order of the Appellate Division[2] and denied defendant's motion to dismiss the complaint for lack of personal jurisdiction. The court held that although Korean law appeared more expansive than New York law, that was no reason to preclude enforcement of a judgment based on the Korean court's exercise of personal jurisdiction over the defendant.[3] Because a tortious act committed by defendant out-of-state, in which defendant failed to test its products for contaminants before shipment, resulted in economic injury via loss of business in-state, the Korean court's exercise of personal jurisdiction was analogous to situations previously held sufficient for jurisdiction under New York law.[4] The court held that, since the Korean court's exercise of jurisdiction comported with New York principles of personal jurisdiction, the money judgment obtained in Korea should be enforced in New York, because it was not otherwise repugnant to public policy or to the notion of fairness.[5]

II. Facts and Procedural Posture

Defendant is Rite Aid Corporation, which purchased Thrifty Payless, Inc., an ice cream manufacturer.[6] Plaintiff is Sung Hwan Co., a Korean company that operates a chain of Thrifty brand ice cream stores in Korea.[7] Plaintiff sought to enforce a foreign money judgment that was awarded by the District Court of Seoul, Republic of Korea, under CPLR Article 53—Recognition of Foreign Country Money Judgments.[8]

Plaintiff contracted with Sangshin Trading Co., a Korean exporter/importer of dairy products, to purchase Thrifty ice cream for sale in its stores.[9] Sangshin initially entered into an agreement with Thrifty Payless, Inc., to purchase Thrifty ice cream, in which "Sangshin would

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1. 7 N.Y.3d 78, 850 N.E.2d 647, 817 N.Y.S.2d 600 (2006).
2. 786 N.Y.S.2d 18 (N.Y. App. Div. 2004).
3. *Sung Hwan*, 7 N.Y.3d at 85.
4. *Id.*
5. *Id.*
6. *Id.* at 80–81.
7. *Id.*
8. *Id.* at 80; *see also* Uniform Foreign Money-Judgments Recognition Act, N.Y. CPLR art 53. (McKinney 2007).
9. *Id.* at 80–81.

accept delivery of the ice cream in California and . . . it would be resold only in Korea."[10] Upon entering the market, plaintiff enjoyed profitable sales of Thrifty ice cream in Korea, with gross sales that peaked at over $7 million in 1996 from approximately $50,000 in 1995.[11] But sales rapidly declined when the Korean government revealed the ice cream was contaminated with listeria, leading to recalls and subsequent halting of sales of Thrifty brand ice cream.[12] Although it suffered significant losses in business, plaintiff's plea for assistance from Thrifty initially went unanswered.[13] Following a letter seeking compensation for loss of business, defendant Rite Aid, as owner of Thrifty, responded with proposed settlement negotiations that never resulted in a resolution.[14]

After defendant failed to respond to plaintiff's complaint, a default judgment was entered against defendant in the District Court of Seoul in Korea in response to a complaint seeking "Liability for Damages Based Upon Torts" for 5.5 billion Korean won (approximately $5 million).[15] Plaintiff then sought to enforce the judgment in New York under CPLR Article 53, but the Supreme Court granted defendant's motion to dismiss the complaint.[16] The Appellate Division affirmed for lack of personal jurisdiction over defendant, thus barring the entry of a New York judgment based on the judgment obtained in Korea.[17]

III. The Court's Analysis

As a general matter, "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts."[18] New York courts have recognized foreign judgments under the doctrine of comity, unless there was a showing of fraudulent procurement of the judgment or that recognition of the judgment would be contrary to public policy.[19] Based on this principle, New York enacted CPLR Article 53, the Uniform Foreign Money-Judgments Recognition Act, to promote efficiency through reciprocal enforcement of New York judgments abroad and foreign judgments in New York.[20] Article 53 is generally applicable to foreign judgments that are conclusive—judgments that were rendered under a system that provided impartial judicial procedures compatible with the requirements

10. *Id.* at 80.

11. *Id.* at 81.

12. *See id.* (revealing that the Korean government initially found two flavors of Thrifty brand ice cream to be contaminated with listeria and the Korean Food and Drug Administration eventually discovered listeria in six flavors of the ice cream).

13. *Id.*

14. *Id.*

15. *See id.* (stating that the Korean court found defendant's conduct to be tortious under Korean law, in that defendant had a duty of care to test the ice cream for listeria, amongst other contaminants, and that defendant's breach of that duty was negligent, causing damages).

16. *Id.* at 82.

17. *Id.*

18. *Id.* (quoting CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 100 N.Y.2d 215, 221 (2003)).

19. *Id.* (citing Greschler v. Greschler, 51 N.Y.2d 368, 376 (1980)); *see also* Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 13 (1964) (stating that refusals to enforce judgments are rare and that a refusal is proper where a judgment is "inherently vicious, wicked or immoral, and shocking to the prevailing sense").

20. *Id.* (citing *CIBC Mellon Trust*, 100 N.Y.2d at 221).

of due process of law.[21] The Court of Appeals first determined whether the criteria in CPLR Article 53 were met and, if so, whether the enforcement of the foreign judgment would be repugnant to the notion of fairness.[22] Upon holding that article 53 was satisfied and that the enforcement of the foreign judgment would not be repugnant to the notion of fairness, the court concluded that the foreign judgment should be enforced under "well-settled comity principles," without further analysis of the underlying proceeding.[23]

First, New York courts typically use the framework of CPLR 302, New York's long-arm statute, when making a CPLR Article 53 determination.[24] When none of the six bases for jurisdiction under CPLR 5305(a) is sufficient to find personal jurisdiction, CPLR 302 is used to establish whether a foreign court's jurisdiction over a judgment debtor is proper.[25] In relevant part, CPLR 302(a) states that

> a court may exercise personal jurisdiction over any non-domiciliary, . . . who in person or through an agent . . . (3) commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.[26]

Second, New York courts allow for jurisdiction to be based on the commission of a tortious act "out of the state" that causes injury "within the state."[27] Because, for this purpose, Korea is "the state" referred to in CPLR 302(a)(3), the issue turns on whether the plaintiff sufficiently claimed that the defendant committed "a tortious act" outside Korea, thereby causing injury within Korea.[28] The Korean court ruled that defendant negligently breached its duty of care when it failed to properly test the products for contaminants before shipment, thus causing plaintiff to lose inventory and business in Korea.[29] Defendant contended that no tortious act occurred, since New York does not allow recovery of economic damages based on negli-

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21. *Id.*

22. *Id.* at 83.

23. *Id.*

24. *Id.*

25. *Id.* at 82–83 (citing CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 296 A.D.2d 81, 96–97 (1st Dep't 2002); Wimmer Canada Inc. v. Abele Tractor & Equipment Co., Inc., 299 A.D.2d 47, 49–50 (3d Dep't 2002); Porisini v. Petricca, 90 A.D.2d 949, 950 (4th Dep't 1982)); *see also* N.Y. CPLR 5305(b) (providing that New York courts can look to other bases of jurisdiction in recognizing the validity of a foreign judgment).

26. *Id.* at 83*; see also* N.Y. CPLR 302(a)(3); *see also* LaMarca v. Pak-Mor Manufacturing Co., 95 N.Y.2d 210, 214 (2000) (identifying five elements for finding jurisdiction under CPLR 302(a)(3)(ii): (1) "that defendant committed a tortious act outside the State"; (2) "that the cause of action arises from that act"; (3) "that the act caused injury to a person or property within the State"; (4) "that defendant expected or should reasonably have expected the act to have consequences in the State"; and (5) "that defendant derived substantial revenue from interstate or international commerce").

27. *Id.* at 84.

28. *Id.*

29. *Id.*

gence and, accordingly, does not come within the reach of CPLR 302(a)(3).[30] But the court held defendant erroneously focused on the remedy plaintiff sought, specifically, damages for economic loss, in claiming no tortious act occurred.[31] Citing *Sybron Corp. v. Wetzel*,[32] the court affirmed that CPLR 302 does not restrict the types of tortious acts applicable to personal injury, property damages, or other noncommercial torts.[33] As in *Sybron*, where the court held a tortious act committed out-of-state causing injury, via loss of business in-state, was sufficient to accord personal jurisdiction; the court here also held the same as applied to plaintiff's claims.[34] Hence, the court held that, for the purposes of establishing long-arm jurisdiction, a tort should be defined broadly to cover economic injury.[35]

Third, upon concluding that the criteria under CPLR Article 53 were met, the court finally determined whether enforcement of the foreign judgment would be repugnant to the notion of fairness.[36] Although recovery for a purely economic loss resulting from a tort is not recognized in New York, the court, nevertheless, held that the enforcement of plaintiff's judgment obtained in Korea would not be repugnant to either public policy or the notion of fairness.[37] Refusal to recognize such a recovery would only undermine the doctrine of comity, by interfering with the acts of the legislative or judicial institution of a foreign jurisdiction.[38]

In denying defendant's motion to dismiss for lack of personal jurisdiction, the court concluded that the fact that Korean law was more expansive than New York law concerning the recovery of economic losses under a tort theory did not preclude the Korean court's exercise of personal jurisdiction over defendant, for purposes of CPLR 302(a)(3).[39]

IV. Conclusion

Recognition and enforcement of money judgments rendered by foreign courts are justified in light of well-settled comity principles. Those that are affected by enforcement of these judgments include, in addition to the litigants, the country that rendered the judgment, the country that is being asked to enforce the judgment, and the overall international system.[40] Enforcement of foreign judgments protects complainants in assuring adequate recovery for their losses, when they otherwise might not be able to be compensated in situations where foreign companies contract with each other. Where problems arise and the lack of assistance from

30. *Id.*

31. *Id.*

32. 46 N.Y.2d 197, 205 (1978).

33. *Sung Hwan*, 7 N.Y.3d at 85.

34. *Id.* (citing Sybron Corp. v. Wetzel, 46 N.Y.2d 197, 204–5 (1978)).

35. *Id.*

36. *Id.*

37. *Id.* (citing *Greschler*, 51 N.Y.2d at 376); *cf.* Loucks v. Standard Oil Co., 224 N.Y. 99, 110–11 (1918) (reasoning that the fact that a foreign court recognizes a right where New York does not is not enough to foreclose plaintiff's chances of recovery).

38. *Id.* (citing Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

39. *Id.*

40. *See* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?* 88 MINN. L. REV. 783, 798 (2004).

other parties to an agreement persists, the need for protective measures to accord proper relief to foreign companies that engage in international commerce is apparent. As was the case here, the absence of protective measures would effectively present a disincentive for foreign companies to contract.

In response, the Uniform Foreign-Money Judgments Act was adopted by many states, indicating a general consensus among the states as to the proper recognition and enforcement rules to be applied to foreign judgments.[41] This Act was adopted to promote greater recognition of United States judgments in foreign jurisdictions.[42] New York accordingly enacted the Uniform Foreign-Money Judgments Recognition Act, which was embedded in CPLR Article 53, in hopes that New York judgments would be given deference in foreign jurisdictions.

The Court of Appeals of New York concluded that the District Court of Seoul sufficiently satisfied personal jurisdiction under New York law over defendant to have the Korean judgment enforced in New York. The Court held that defendant's argument, that New York does not recognize the imposition of liability for economic loss based on tort, was immaterial. While CPLR 302 does not limit the kinds of tortious acts that must be committed in order to accord personal jurisdiction, the refusal by New York to recognize such an imposition of liability does not foreclose the Korean court's exercise of jurisdiction over defendant. Since the Korean court's exercise of jurisdiction comported with New York principles of personal jurisdiction, by satisfying CPLR Article 53, the money judgment awarded by the Korean court was held to be enforceable in New York because it was not otherwise repugnant to public policy or to the notion of fairness.

In holding that the Korean court had properly exercised jurisdiction under New York law, the court correctly concluded that the difference in the substantive tort law between the two jurisdictions should not disqualify the Korean court's exercise of personal jurisdiction over defendant. To hold otherwise, a foreign-company litigant with a meritorious claim would be denied the remedy that the company so properly deserves. There is no reason for refusing to recognize and enforce a foreign judgment, when the principles of law in which it is based comport with a state's laws and enforcement of which would not be repugnant to public policy or offensive to the notion of fairness.

Louisa Chan

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41. *See* Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 252 (2004).

42. *Id.*

Schonfeld v. Bush

2006 N.Y. Misc. LEXIS 3151, 236 N.Y.L.J. 81 (Sup. Ct. 2006)

In an action governed by Hong Kong law, the court denied the defendant's motion for summary judgment, holding that Hong Kong law required a trier of facts to determine whether a partnership existed, that Hong Kong law recognized a duty of loyalty, and that Hong Kong law, although not identical to New York law, did have requirements sufficiently analogous to the implied covenant of good faith and fair dealing for a claim to proceed on that basis.

I. Holding

In *Schonfeld v. Bush*,[1] the Supreme Court of New York, New York County, denied the defendant Fredy Bush's motion for summary judgment dismissing the causes of action for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. Applying Hong Kong law, which the parties agreed governed the case, the court held that, under Hong Kong law, the question whether there is a partnership is generally a matter for the trier of fact to determine and could not be determined on papers alone.[2] It also held that Hong Kong law did acknowledge a fiduciary duty, even in the absence of an established partnership.[3] In addition, the court held that the precise manner in which the defendant breached the fiduciary duty and the damages that resulted were for a trial court to determine.[4] Finally, the court rejected the defendant's claim that Hong Kong law did not recognize an implied covenant of good faith.[5] Rather, it determined that Hong Kong law contains a similar enough concept, namely, that a party must not only avoid frustrating the performance of a contract, but must actively perform, so as to accomplish the purpose of the contract.[6]

II. Facts and Procedural History

Schonfeld's action for breach of fiduciary duty and breach of the implied covenant of fair dealing[7] against the defendant, Fredy Bush, arose out of an unsuccessful attempt by the parties to launch an all-financial-news channel in China and elsewhere.[8] The parties first met in 2003 and discussed the possibility of launching the news channel, a project that Schonfeld had undertaken for over a year.[9] In June 2003, Schonfeld and Bush executed an agreement, which

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1. Schonfeld v. Bush 2006 N.Y. Misc. LEXIS 3151, 236 N.Y.L.J. 81 (Sup. Ct. 2006).
2. 2006 N.Y. Misc. LEXIS 3121 at *6.
3. 2006 N.Y Misc. LEXIS 3151 at *6.
4. *Id.* at *7.
5. *Id.*
6. *Id*. at *8
7. *See generally* Dalton v. Educ. Testing Serv., 87 N.Y.2d 384 (1995) (providing the standard for New York's implied covenant of good faith); *see generally* Meinhard v. Salmon, 249 N.Y. 458 (1928) (creating the standard for New York's duty of loyalty).
8. *Schonfeld*, 2006 N.Y. Misc. LEXIS 3151 at *2.
9. *Id.*

Bush initially called a letter of intent.[10] The agreement provided that the parties would establish a Chinese-language financial-news channel. The company would be formed under Hong Kong law and each party would control half the company. In addition, the board of directors would be jointly nominated by the parties.[11] The agreement also stated that the parties would jointly agree on the company's business plans for the first three years of operation. It then assigned each of parties certain responsibilities. Schonfeld was given the tasks of designing the content packages, putting a team in place for managing the operations of the company, and raising the startup financing.[12] Bush's primary responsibilities were approaching and negotiating with broadcasters.[13] The agreement included a 30-days notice termination clause, but did not include a merger clause.[14]

The parties then carried out their delegated responsibilities for over a year.[15] During that time, the parties communicated via e-mails, in which Bush stated that the two of them were partners and that the deal involved both of them.[16] However, at some point the partnership broke down. Schonfeld contends that Bush did not inform him when the company was formed, failed to issue him his interest in the company, and did not allow him to choose members of the board of directors.[17] Bush, on the other hand, claims that she had rightfully terminated the relationship.

Schonfeld brought suit against Bush in New York, maintaining that Bush owed him fiduciary duties not only as a partner, but also on the basis that he and Bush had divided the work between them, and trust and loyalty were essential to their relationship.[18]

Bush sought summary judgment dismissing the causes of action. There were three bases for the motion. First, under Hong Kong law, the agreement did not create a partnership.[19] Second, Hong Kong Law would not recognize an independent fiduciary duty in the context of this case.[20] Finally, Hong Kong law would not recognize an implied covenant of good faith and fair dealing.[21]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. 2006 N.Y. Misc. LEXIS 3151 at *2.
16. *Id.* at *3.
17. *Id.* at *4.
18. *Id.*
19. *Id.* at *1.
20. *Id.*
21. *Id.*

III. The Court's Decision

A. The Partnership

The court first addressed the issue whether a partnership existed between the parties. The defendant argued that no partnership was created.[22] Relying on language in the written agreement, Bush claimed that the relationship between the parties extended only to create a company to launch the financial news channel.[23] Schonfeld contended that there was much preliminary work to be done before it made sense to organize a company.[24] Thus, he argued that during the year and half before the company was formed the parties worked as partners toward creating a business.[25] The court pointed out that both parties agreed that, under Hong Kong law, the nature of the relationship is paramount to the title given to it by parties.[26] It also emphasized that the parties referred to each other as partners in e-mails and that the agreement did not contain a merger clause.[27] Thus, the court determined that it would be possible for a jury to conclude, based on the division of labor, the manner in which Bush referred to Schonfeld, and Schonfeld's understanding of their relationship, that a partnership existed. Relying on the parties' expert witnesses, the court held that while there were no Hong Kong cases directly on point, the question whether a partnership existed is for the trier of fact to determine.[28] To do so, the court ordered that a trier of fact would have to consider all the evidence regarding their relationship.[29]

B. Fiduciary Duty Claim

The defendant's argument regarding the breach of fiduciary duty claim had two major prongs. First, the defendant claimed that Hong Kong law did not recognize fiduciary duties in the absence of a partnership.[30] Second, the defendant argued alternatively that, even if she did owe a fiduciary duty, she could not have breached it by failing to go forward with the project, because she could not proceed after terminating her relationship with the plaintiff.[31] The court rejected both arguments.

With regard to the first argument, the court bluntly stated that even if there was no partnership, under Hong Kong law parties have a fiduciary duty to each other.[32] In response to the

22. *Id.* at *5.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at *6.
29. *Id.*
30. *Id.*
31. *Id.* at *7.
32. *Id.* The court added that such a circumstance is unusual in the absence of a special relationship and that it was the job of a trier of fact to determine whether such a relationship existed.

second argument, the court stated that the defendant's claims were uncompelling,[33] because the breach of fiduciary duty was not based solely on the failure to move forward with the TV station project.[34] Rather, it was based on the entire manner in which Bush dealt with funding and opportunity to move forward, as well as her exclusion of Schonfeld, who had invested more than a year of work into the project.[35] The court concluded this issue by declaring that the precise manner in which Bush allegedly breached her fiduciary duty, as well as the damages to be awarded, were for the trial court to determine.[36]

C. Covenant of Good Faith Claim

Finally, the court rejected the defendant's motion to dismiss the claim of breach of an implied covenant of good faith.[37] The court used the defendant's expert testimony against him.[38] The defendant's expert witness presented the Hong Kong volume of the treatise *Chitty on Contracts*, which the court interpreted as containing a principle that, while not identical to New York's obligation of good faith, was analogous to it.[39] The treatise emphasizes that not only must the parties avoid frustrating the performance of a contract, they must also actively perform so as to accomplish the purpose of the contract. According to the court, this principle is sufficiently similar to the implied covenant of good faith observed in New York to allow a claim to proceed on that basis.[40]

IV. Conclusion

New York has been willing to apply Hong Kong law in cases where the parties request it and it is on point.[41] In the present case, the court dismissed the defendant's motion for summary judgment to dismiss the action and declared that Hong Kong law was similar enough to New York law to allow the trial to proceed. Essentially, the court decided that a square peg looked round enough to fit through a round hole. In doing so, however, it arrived at a correct decision.

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at *7–*8; *see generally* Dalton v. Educ. Testing Serv., 87 N.Y.2d 384 (1995) (stating that the covenant of good faith in New York requires partners to carry out any promises that a reasonable person in the position of the promisee would be justified in understanding were included in their agreement).

38. *Schonfeld*, 2006 N.Y. Misc. LEXIS 3151 at *8.

39. *Id.* (providing the text of the treatise, which states, "where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect").

40. *Id.*; *compare Dalton*, 87 N.Y.2d at 390 (explaining that, in New York, the covenant of good faith includes a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract).

41. *See* Windsor Indus., Inc. v. EACA Int'l Ltd., 548 F. Supp. 635, 638 (S.D.N.Y. 1982) (applying Hong Kong law with regard to breach of warranties); *see also* Reid v. Ernest & Young Global Ltd. et al., 2006 N.Y. Misc. LEXIS 3603 at *9 (Sup. Ct. 2006) (stating that "this Court is fully capable of applying Hong Kong Law).

The premise of the fiduciary duty of loyalty and the covenant of good faith is to ensure that partners in business ventures give preference to the interests of the corporation and their partners over their own. Under New York law, partners owe each other a duty that is stricter than the marketplace and should conduct themselves with the punctilio of the most sensitive honor.[42]

Even though it seems that the court very generously interpreted and applied the Hong Kong law, it appears that Bush's alleged conduct would not be acceptable under New York law. In one case, the court held that the defendant breached her fiduciary duty of utmost loyalty by failing to include her partner in a writing exercise that was part of their partnership agreement and by failing to give his partner all requested financial information.[43] Similarly, in this case, Bush allegedly excluded Schonfeld from the corporation and failed to honor promises that Schonfeld would understand as part of the original agreement and subsequent e-mails.

Therefore, despite the court's broad interpretation of the Hong Kong law, it appears that it made the proper decision to dismiss the summary judgment charge and to allow Schonfeld to have his day in court.

Aaron Palash

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42. *Meinhard*, 164 N.E. at 547.

43. *See* Smith v. Brown and Jones, 633 N.Y.S.2d 436 (1995).

In re Rivastigmine Patent Litigation

2006 U.S. Dist. LEXIS 84737 (S.D.N.Y. Nov. 22, 2006)

In the absence of an express absolute evidentiary privilege comparable to the U.S. attorney-client privilege in Swiss law, such a privilege cannot be extended to communications between a company and its Swiss patent agents and in-house counsel.

I. Holding

In *In re Rivastigmine Patent Litigation,*[1] the United States District Court for the Southern District of New York denied the plaintiffs' motion to reconsider the magistrate's finding[2] that, under Swiss law, an attorney-client privilege did not extend to communications between plaintiffs and their Swiss patent agents and in-house counsel[3] but remanded for fuller explanation the portion of the magistrate's ruling compelling production of certain communications received or authored by a U.S. patent agent.[4] With respect to the communications involving Swiss patent agents and in-house counsel, the court found that the magistrate did not abuse his discretion and declined to find the magistrate's ruling "clearly erroneous or contrary to law."[5]

II. Facts and Procedural Posture

Plaintiffs, Novartis Pharmaceuticals Corporation, Novartis AG, Novartis Pharma AG, Novartis International Pharmaceutical Ltd., and Proterra AG (collectively, "Novartis" or "Plaintiffs"), manufactured and owned the patent rights for rivastigmine tartrate, which they sold under the brand name "Exelon" for the treatment of Alzheimer's-related dementia.[6] Defendants, Dr. Reddy's Laboratories, Ltd., Dr. Reddy's Laboratories, Inc., and Sun Pharmaceutical Industries, Ltd. (collectively, "Defendants"), sought approval from the U.S. Food and Drug Administration to market generic forms of Exelon.[7] Plaintiffs subsequently filed individual patent infringement actions against Defendants, which were then consolidated before the Southern District of New York.[8] Both Plaintiffs and Defendants agreed that Swiss law governed. The parties then engaged in pre-trial discovery and brought several disputes before Magistrate Judge James C. Francis IV,[9] which he resolved in the August 8, 2006, order.[10] Plaintiffs

1. 2006 U.S. Dist. LEXIS 84737 (S.D.N.Y. Nov. 22, 2006).
2. 2006 U.S. Dist. LEXIS 54945 (S.D.N.Y. Aug. 8, 2006).
3. In re Rivastigmine Patent Litigation, 2006 U.S. Dist. LEXIS 84737 at *33.
4. *Id.* at *34.
5. 28 U.S.C. § 636(b)(1)(A) (2007).
6. 2005 U.S. Dist. LEXIS 7167 at *5–6.
7. *Id.*
8. In re Rivastigmine Patent Litigation, 360 F. Supp. 2d 1361 (Jud. Pan. Mult. Lit. 2005).
9. 2006 U.S. Dist. LEXIS 54945 at *2–5.
10. 2006 U.S. Dist. LEXIS 84737 (identifying In re Rivastigmine Patent Litigation, 2006 U.S. Dist. LEXIS 54945, as the "August 8, 2006 order").

then brought a motion for reconsideration of two portions of the discovery decision from the order.[11]

In that decision, Magistrate Francis granted in part a motion filed by Defendants to compel production of certain communications between Novartis and their Swiss patent agents and Swiss in-house counsel[12] (the "Swiss Motion documents").[13] Novartis claimed attorney-client privilege for these documents, but the magistrate held that, under Swiss law, communications between Novartis employees and Swiss patent agents or Swiss in-house counsel were not covered by attorney-client privilege.[14] Magistrate Francis also compelled production of certain communications between Novartis and Thomas McGovern,[15] a U.S. patent agent supervised by American attorneys (the "McGovern documents").[16] The asserted rationale was that although some communications with McGovern might qualify as privileged under U.S. attorney-client privilege, these particular documents did not reflect confidential communications and therefore were not privileged.[17]

Plaintiffs based their claim of attorney-client privilege for the "Swiss Motion documents" primarily on three Swiss statutes:[18] Article 116 of the Basel-City Code of Civil Procedure,[19] Article 162 of the Swiss Penal Code,[20] and Article 321(a) of the Swiss Federal Code of Obliga-

11. *Id.*

12. 2006 U.S. Dist. LEXIS 54945 at *117.

13. 2006 U.S. Dist. LEXIS 84737 at *5.

14. *Id.* at *6.

15. 2006 U.S. Dist. LEXIS 54945 at *120–23.

16. 2006 U.S. Dist. LEXIS 84737 at *7.

17. *Id*. at *8.

18. *Id.*

19. *Id*. at *9. Basel-City Code of Civil Procedure § 116 provides in full:

> Testimony may be denied by:
>
> > 1. those who would have to speak to their detriment or disgrace in the taking [of the testimony]
> >
> > 2. clergy members, doctors, attorneys, notaries, a child's counsel according to Article 146 ZGB, as well as those contracted by the complaint body (ombudsman), in reference to facts that were learned in the exercise of their profession and which by their nature are to be kept secret
> >
> > 3. members and secretaries of the cantonal arbitration boards for questions of discrimination, concerning legal disputes negotiated before the arbitration board.

20. *Id*. at *10. Article 162 of the Swiss Penal Code provides in full:

> > He who betrays a manufacturing or commercial secret that he is bound, by legal or contractual duty, to keep, who makes use of this secret of himself or others, will, upon request, be punished with imprisonment or a monetary fine

tions.[21] Additionally, Plaintiffs cited several other Swiss statutes,[22] which Magistrate Francis considered in reaching his decision.[23]

Magistrate Francis held that, under Swiss law, communications between Novartis employees and Swiss patent agents or Swiss in-house counsel were not covered by attorney-client privilege.[24] He noted that U.S. courts are currently unsettled on the issue of whether Swiss law extends attorney-client privilege to Swiss patent agents and in-house counsel,[25] distinguish-

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21. *Id*. Article 321(a) of the Swiss Code of Obligations provides in full:

> In the course of the employment relationship, the employee shall not make use of or inform others of any facts to be kept secret, such as, in particular, manufacturing or business secrets that come to his knowledge while in the employer's service. Also, after termination of the employment relationship, he shall continue to be bound to secrecy to the extent required to safeguard the employer's legitimate interests.

22. *See* 2006 U.S. Dist. LEXIS 84737 at *11–12. These statutes include Article 109 of the Basel-City Code of Civil Procedure, Article 16 of the Swiss Federal Act of Administrative Procedure, and Article 42 of the Federal Act Regarding Federal Civil Procedure (BZT). *See also infra* text accompanying note 49.

Basel-City Code of Civil Procedure § 109 provides:

> A party is required to produce the following documents in their possession, at the request of and for the benefit of the opposing party:
>
> 1. documents created for the stated or obvious purpose of serving as evidence between the parties;
>
> 2. documents which, under the circumstances of the particular case, belong in the hands of the opposite party and have come into possession of the respective party by coincidence or abuse;
>
> 3. its books of account;
>
> 4. the correspondence conducted between the parties with regard to the respective transaction.
>
> If a party disputes the duty to furnish the documents in its possession, the court decides the matter after having heard the parties.

Article 16 of the Swiss Federal Act of Administrative Procedure provides:

> 1. The right to refuse to give testimony is determined by Article 42, Paragraphs 1 and 3 of the Federal Act on Federal Civil Procedure (BZP).
>
> 2. The bearer of a professional or trade secret, in the sense of Article 42, [§] 2 BZP, may refuse to testify, insofar as another federal law does not require him to testify.

Article 42 of the Federal Act Regarding Federal Civil Procedure (BZP) provides:

> 1. The giving of testimony may be refused . . .
>
> (b) by the persons named in Penal Code Art. 321, Section 1, with regard to facts, which pursuant to such provision come within professional secrecy, insofar as the holder of the right has not consented to disclosure of the confidential matter.
>
> 2. The judge may exempt witnesses from disclosure of other professional secrets as well as of a trade secret if, even with observance of the security measures under Article 38, their interest in confidentiality outweighs the interest in disclosure of the party going forward with the proof.

23. 2006 U.S. Dist. LEXIS 84737 at *10–11.

24. 2006 U.S. Dist. LEXIS 54945 at *10–24.

25. *Id.* at *23 (citing Variable-Parameter Fixture Dev. Corp. v. Morpheus Lights, 1992 U.S. Dist. LEXIS 12272, 1992 WL 203865, at *1 (S.D.N.Y. Aug. 12, 1992) (finding status of privilege under Swiss law unclear); Burroughs Wellcome Co. v. Barr Laboratories, Inc., 143 F.R.D. 611, 624 (E.D.N.C. 1992) (finding letter from Swiss patent attorney to European patent attorney privileged on the basis of unopposed declaration).

ing between mere professional obligations to protect business secrets and the U.S. attorney-client evidentiary privilege.[26] Further, Magistrate Francis found that none of the Swiss statutes offered by Plaintiffs established an absolute privilege for Swiss patent agents comparable to the U.S. attorney-client privilege.[27] Although patent agents might face sanctions for violating secrecy obligations, Magistrate Francis found no case or statute supporting the concept that such sanctions are equivalent to an absolute testimonial privilege.[28] Moreover, the limited portions of the statutes available to the court in English translations suggested that Swiss patent agents have only an ethical obligation to protect professional secrets.[29] Magistrate Francis found that Swiss in-house counsel are not encompassed within Swiss attorney-client privilege laws, because "their lack of independence from the client obviates the necessity for the privilege to facilitate the giving of objective legal advice."[30]

Magistrate Francis found that U.S. attorney-client privilege[31] extended to the "McGovern documents." Since licensed U.S. attorneys Gerald Sharkin, Robert Honor, and Melvyn Kassenoff generally supervised McGovern's patent prosecution work, under U.S. law, an evidentiary privilege could extend to confidential communications by McGovern relating to any supervised patent prosecutions. However, upon an *in camera* review, Magistrate Francis held that McGovern documents number 207 and number 209 were not privileged, or were only partially privileged, because they did not reflect, or only partially reflected, confidential communications.[32]

III. Standard of Review

The law in 28 U.S.C. § 636(b)(1)(A) provides that a judge may reconsider any pretrial matter assigned to a magistrate where the magistrate judge's order is found to be "clearly erroneous or contrary to law."[33] This "clearly erroneous[34] or contrary to law"[35] standard governs a trial court's review of a magistrate's order regarding a discovery dispute.[36] Magistrate judges are

26. *Id.*

27. *Id.*

28. *Id.* at *77.

29. *Id.*

30. 2006 U.S. Dist. LEXIS 84737 at *16 (quoting *In re Rivastigmine,* 2006 U.S. Dist. LEXIS 54945 at *16).

31. *Id.*

32. *Id.* at *111.

33. 28 U.S.C. § 636(b)(1)(A) (2007).

34. A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Gualandi v. Adams, 385 F.3d 236, 240 (2d Cir. 2004) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

35. An order is "contrary to law" when it fails to apply or misapplies relevant statutes, case law, or rules of procedure. Collens v. City of New York, 222 F.R.D. 249, 251 (S.D.N.Y. 2004).

36. Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990)

afforded broad discretion in nondispositive matters.[37] Reversal is appropriate only if their discretion is abused.[38]

IV. Discussion

A. Swiss Motion Documents

In the instant case, both parties agreed that Swiss law governed the "Swiss Motion documents." Therefore, the question turned on whether Magistrate Francis's ruling that Swiss law does not provide a privilege comparable to the attorney-client privilege was "clearly erroneous or contrary to law."[39] Magistrate Francis correctly noted that it is "unsettled" whether Swiss law recognizes a privilege for patent agents comparable to U.S. attorney-client privilege.[40] Therefore, it was proper for Magistrate Francis to undertake his own analysis. The very fact that the governing law at issue is unsettled makes it difficult to overturn Magistrate Francis's reasoning as "clearly erroneous" or "contrary to law";[41] in the absence of clear guidance on privilege, a finding of no privilege is not clearly erroneous.

The "Swiss Motion Documents" raised the question whether Swiss law provides a privilege comparable to the U.S. attorney-client privilege for Swiss patent agents and Swiss in-house counsel.

1. Patent Agents

The magistrate's holding[42] that Swiss law does not provide a privilege comparable to the attorney-client privilege for patent agents rested on the distinction between a professional secrecy obligation and an evidentiary privilege.[43] Whereas the professional secrecy obligation is a professional's ethical obligation to his client, the privilege is an absolute evidentiary privilege of non-disclosure.[44]

In distinguishing the two, Magistrate Francis recognized that, under a typical professional secrecy obligation, "a court may order disclosure if it determines that the need for the informa-

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37. FED. R. CIV. P. 72(a).

38. 2006 U.S. Dist. LEXIS 84737 at *33 (citing Am. Stock Exch., LLC v. Mopex, Inc., 215 F.R.D. 87, 90 (S.D.N.Y. 2002)).

39. *Id.* at *19.

40. *Id.* at *18 (referring to, *e.g.*, Eisai Ltd. v. Dr. Reddy's Labs., Inc., 406 F. Supp. 2d 341, 342–43 (S.D.N.Y. 2005); Astra Aktiebolag v. Andrx Pharms., Inc., 208 F.R.D. 92, 98 (S.D.N.Y. 2002); Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 1998 U.S. Dist. LEXIS 4213 at 2-3 (S.D.N.Y. 1998)) (*Bristol-Myers I*).

41. *Id*. at *20.

42. Under FED. R. CIV. P. 44.1, the court's determination of an issue of foreign law "shall be treated as a ruling on a question of law." The Rule also provides that "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Rule 44.1, adopted in 1966, explicitly changed the Federal Rules so that the Court "may do its own research on foreign law, just as it customarily always has done on issues of domestic law." *Id.* at *28 (quoting C.A. WRIGHT & A.R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2444 (2007)).

43. *Id*. at *21.

44. *Id*. (referring to *In re Rivastigmine,* 2006 U.S. Dist. LEXIS 54945 at *75).

tion is sufficient to outweigh the secrecy obligation," while "the privilege, in contrast, is absolute and inviolate."[45] Therefore, professional secrecy obligations fail to meet Dean Wigmore's classic formulation of attorney-client privilege.[46] Because a court may order disclosure, professional secrecy obligations do not absolutely protect the communication from disclosure.[47]

The Swiss statutes proffered by Plaintiffs created at most a professional secrecy obligation for patent agents, not an absolute evidentiary privilege comparable to the U.S. attorney-client privilege. Article 321(a)(4) of the Swiss Code of Obligations provides that an employee "shall not . . . inform others of any facts to be kept secret, such as . . . business secrets." On its face, the statute does not answer the question whether a patent agent can refuse to disclose "business secrets" if so compelled by a court.[48] Article 16 of the Swiss Federal Act of Administrative Procedure does provide that "the bearer of a professional or trade secret, in the sense of Article 42, [Section] 2 BZP,[49] may refuse to testify," but then qualifies that privilege by stating "insofar as another federal law does not require him to testify."[50] Article 42, section 2 of the Federal Act Regarding Federal Civil Procedure further provides that "[t]he judge may exempt witnesses from the disclosure of other professional secrets as well as of a trade secret. . ." if "their interest in confidentiality outweighs the interest in disclosure. . . ."[51] Article 116 of the Basel-City Code of Civil Procedure appears to provide a privilege against testifying, although not against document production, for certain professions, as to facts "learned in the exercise of their profession and which by their nature are to be kept secret." However, the magistrate held, this privilege does not extend to patent agents.[52]

Magistrate Francis found that the Swiss statutes do not provide a privilege comparable to attorney-client privilege for patent agents, noting that no privilege can be implied where it is not specifically provided for by the relevant foreign law.[53] Therefore, Magistrate Francis's ruling regarding the "Swiss Motion Documents" was upheld by the court.

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45. 2006 U.S. Dist. LEXIS 84737 at *22 (referring to *Bristol-Myers I*, 1998 U.S. Dist. LEXIS 4213, at *7-8; Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 188 F.R.D. 189, 199-200 (S.D.N.Y. 1999) (*Bristol-Myers II*))

46. *Id.* (referring to *Bristol-Myers II)*, 188 F.R.D. 189, 199 (stating the requirements, as formulated by Dean Wigmore, that where (1) legal advice is sought (2) from a professional legal advisor in his capacity as such, (3) a communication relating to that purpose, (4) made in confidence (5) by the client (or attorney), (6) is at his instance permanently protected (7) from disclosure by himself or the legal advisor, (8) except if the privilege is waived).

47. *Id.*

48. *Id.* at *23.

49. BZP is the abbreviation for Bundesgesetz über den Bundeszivilprozess, which means Federal Statute on Federal Civil Procedure or Federal Act Regarding Federal Civil Procedure. For the purposes of this article, BZP refers to Federal Act Regarding Federal Civil Procedure. *See also supra* text accompanying note 22.

50. *Id*. at *24.

51. *Id*.

52. 2006 U.S. Dist. LEXIS 84737 at *27 (citing *In re Rivastigmine,* 2006 U.S. Dist. LEXIS 54945 at *77).

53. *Id*. at *29. Astra Aktiebolag v. Andrx Pharms., Inc., 208 F.R.D. 92, 100 (citing Alpex Computer Corp. v. Nintendo Co., 1992 U.S. Dist. LEXIS 3129, 1992 WL 51534, at *2 (S.D.N.Y. 1992)). *See also In re Rivastigmine* at *78 ("In this case . . . the absence of privilege results not from the lack of comparability of the Swiss and U.S. legal systems, but from the fact that Swiss law specifically excludes the documents at issue from the privilege it recognizes.").

2. In-House Counsel

Magistrate Francis further held that Swiss law does not provide a privilege analogous to U.S. attorney-client privilege for in-house attorneys and patent agents.[54] The holding rested on treatises summarizing Swiss law, as well as policy concerns that because in-house counsel lack independence from the client, the need for an attorney-client privilege to facilitate objective legal advice is obviated.[55] The court held, after review, that the holding did not appear to be "clearly erroneous or contrary to law," so Magistrate Francis's ruling regarding Swiss in-house counsel stands.[56]

B. McGovern Documents

Magistrate Francis generally held that confidential communications authored or received by patent agent McGovern could be privileged under U.S. attorney-client privilege, since McGovern was supervised by a U.S. attorney during his participation in the communications at issue.[57] However, on *in camera* review, Magistrate Francis held that certain communications, specifically documents number 207 and number 209, were "not privileged, or [were] only partially privileged, because they [did] not reflect, or only partially reflect[ed], confidential communications."[58] Given the long procedural history of privilege disputes and the individualized inquiry of the documents called for, the court declined to review Plaintiffs' motion for reconsideration of Magistrate Francis's opinion without a fuller explanation of the grounds on which the August 8, 2006 opinion stood. Consequently, the court remanded the issue whether documents number 207 and number 209 are privileged to Magistrate Francis for a fuller clarification and explanation of the grounds underlying his ruling regarding those two documents.[59]

V. Conclusion

In an area where the law is unsettled, a rigorous analysis is especially warranted. The most significant issue was determining which law to apply at an intersection of Swiss law and U.S. law. The standard of review is likewise important, because it cabins or extends the authority of the reviewing court. In the instant case, the standard of review was abuse of discretion and the magistrate's ruling could be overturned only if found to be "clearly erroneous or contrary to law."

At a time when information is the new currency, the absolute and inviolable nature of the U.S. attorney-client privilege is a sought-after commodity of profound importance for those asserting the privilege. Where businesses rise and fall on the continued secrecy and strength of

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54. *Id*. at *30.

55. *Id*. (referring to Robert Furter & Michael Kramer, *In-House Counsel and the Attorney-Client Privilege: A Lex Mundi Multi-Jurisdictional Survey* 66-67 (2004), *available at* http://www.lexmundi.com/images/lexmundi/PDF/AttyClient/Switzerland).

56. *Id*.

57. *Id*. at *32 (referring to *In re Rivastigmine* at *81; *see* Golden Trade v. Lee Apparel Co., 143 F.R.D. 514, 518).

58. 2006 U.S. Dist. LEXIS 84737 at *32.

59. *Id*. at *32–33.

trade secrets and patents, it is understandable that they would resist forced disclosure of such proprietary information. As a matter of comity, courts look to the law of the country where a patent application is pending to examine whether that country's law provides a privilege comparable to the U.S. attorney-client privilege.[60] Policy considerations militate against implying an absolute evidentiary privilege where the applicable foreign law has not created it and U.S. courts are unwilling to imply or invent the privilege on an ad hoc basis.[61]

The attorney-client privilege does not exist in its U.S. form in many legal systems; in some, it does not exist at all. Recent developments in the U.S. and overseas hint at a weakening of the attorney-client privilege generally, given the advent of electronic communications and inadvertent waiver doctrine.[62] In Europe, the European Commission's decision in *AM & S*[63] gave effect to principles of confidentiality in the European Community. [64] While confidentiality protections exist in both the United States and the European Union, the scope of protection differs significantly. In the U.S., the attorney-client privilege includes in-house counsel. In the European Union, however, it does not.[65] More generally, while both the common law and civil law traditions acknowledge the fundamental duty of an attorney to maintain confidentiality of client information,[66] the common law and civil law traditions offer differing conceptions of the attorney-client privilege, which creates uncertainty in situations where international law governs.[67] In some legal systems, notably Japan, the attorney-client privilege does not exist at all.[68]

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60. 2006 U.S. Dist. LEXIS 84737 at *18.

61. *Id*.

62. *See generally* Molly McDonough, *Flying Under the Radar: After Percolating Quietly, These Legal Issues May Grab Headlines in 2005,* 91 A.B.A.J. 34, 34 (2005) (discussing the weakening of the attorney-client privilege); s*ee generally* Chris Lombardi, *Preserving Privilege: Section Says European Ruling Hinders In-House Lawyers at Foreign Companies,* 89 A.B.A.J. 70, 70 (2003).

63. AM & S Europe Ltd. v. Commission of the European Community, 1982 E.C.R. 1575 (May 18, 1982) (holding by the European Court of Justice that the attorney-client privilege does not apply to in-house counsel or retained counsel from outside the member states of the European Union, which then numbered six).

64. *See generally* J. Triplett Mackintosh & Kristen M. Angus, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 INT'L LAW. 35, 35 (2004) (comparing the attorney-client privilege in the U.S. and the European Union).

65. *See generally* Mark I. Harrison & Mary Gray Davidson, *Global Legal Practice: The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers,* 22 PENN ST. INT'L L. REV. 639, 651 (2004) (recognizing that various countries have different conceptions of the scope of the attorney-client privilege).

66. *See* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-first Century,* 21 FORDHAM INT'L L.J. 1239, 1277–86 (1998) (discussing the differences between domestic and international conceptions of the application of the attorney-client privilege with respect to in-house counsel).

67. *See generally* Javier H. Rubinstein, *Perspectives: International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions,* 5 CHI. J. INT'L L. 303, 306–8 (2004) (describing the different conceptions of privilege in common law and civil law traditions with respect to international arbitration).

68. *See* Jason Marin, Note, *Invoking the U.S.* Attorney-Client Privilege: *Japanese Corporate Quasi-Lawyers Deserve Protection in U.S. Courts Too*, 21 FORDHAM INT'L L.J. 1558, 1561–69 (1998) (noting that the Japanese legal system does not recognize the attorney-client privilege).

The magistrate court's decision represented recognition that this is an unsettled area[69] in U.S. courts. U.S. courts that have considered the issue have not done so in detail.[70] Consequently, the magistrate court took a narrow position that cannot be said to be "clearly erroneous or contrary to law," thereby allowing later cases to develop a considered jurisprudence over time. With regard to the "Swiss Motion documents," the magistrate court distinguished between patent agents and in-house counsel. It rested the holding that Swiss law does not provide a privilege comparable to the U.S. attorney-client privilege for patent agents on the distinction between a professional secrecy obligation and an evidentiary privilege,[71] and based the holding that Swiss law does not provide a privilege comparable to the U.S. attorney-client privilege for in-house counsel on treatises summarizing Swiss law[72] and policy concerns.[73] Because neither of these holdings can be shown to be "clearly erroneous or contrary to law," the reviewing court held that Magistrate Francis did not abuse his discretion in finding that under Swiss law, attorney-client privilege does not extend to the "Swiss Motion documents,"[74] and denied Plaintiffs' motion to reconsider that portion of Magistrate Francis's decision. With regard to the "McGovern documents," the reviewing court remanded the issue of whether Documents 207 and 209 are privileged for a fuller explanation.[75]

The question remains open whether U.S. courts may imply the U.S. attorney-client privilege where it is not specifically provided for by the relevant foreign law when interpreting foreign law. The court's holding that the magistrate's holding was not "clearly erroneous or contrary to law" does not address whether the magistrate's holding that U.S. attorney-client privilege cannot be implied where not specifically provided for by the relevant foreign law is definitive; rather, it states only that the magistrate's holding was not an abuse of discretion. On different facts, other courts may hold differently with respect to the privilege. More time is needed for this issue to percolate in the courts before a definitive answer can be had.

Samantha Chung

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69. 2006 U.S. Dist. LEXIS 84737 at *20.

70. *Id*. *See also supra* text accompanying note 25.

71. *Id*. at *21.

72. *Id.* at *30–31.

73. *Id.*

74. *Id.* at *33.

75. *Id.*

Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara

465 F. Supp. 2d 283 (S.D.N.Y. 2006)

Motion granted for an injunction restraining the adverse party from filing foreign proceedings where it filed parallel proceedings in bad faith and to obstruct justice in the same dispute in foreign courts after final judgments had been entered by courts in the United States.

I. Holding

In *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,[1] the United States District Court for the Southern District of New York granted a motion for an anti-suit injunction by Petitioner Karaha Bodas Company (KBC) against Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina").[2] The court also issued a declaratory judgment which stated that the funds turned over to KBC in satisfaction of the judgments entered by the court were the property of KBC, who could freely use or dispose of the funds.[3] Both KBC and Pertamina are foreign corporations having substantial connections or assets in the United States.[4] Upon losing its case in the United States, Pertamina had filed a parallel action in a foreign court disputing the same controversies with KBC.[5] The court noted that simultaneous parallel proceedings in foreign forums are usually allowed in consideration of international comity.[6] However, where, as here, a parallel foreign proceeding is filed after final judgments on the same issues have been entered by courts in the United States, a court should weigh other policy considerations, including protection of the court's own jurisdictions and prevention of injustice, against international comity to decide whether to allow a litigant to file the parallel foreign proceeding.[7] Here, the final judgments, which had already been entered by courts in the United States, would in effect be set aside if Pertamina prevailed in its new foreign actions.[8] Also, Pertamina did not prove that gross injustice would result if it were not allowed

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1. 465 F. Supp. 2d 283 (S.D.N.Y. Dec. 8, 2006) [hereinafter *KBC v. Pertamina*].
2. *Id.* at 284.
3. *Id.* at 301.
4. *Id.* at 284.
5. *Id.* at 299 (indicating that when the Cayman Islands action was brought, the legal proceedings in the United States between Pertamina and KBC were virtually concluded in KBC's favor).
6. *Id.* at 295 (citing a line of cases in which parallel proceedings regarding the same issues were brought simultaneously in the United States and a foreign forum, and explaining that such parallel proceedings were "ordinarily tolerable" in recognition of foreign courts' adjudicatory authority).
7. *Id.* at 295 (reasoning that where a proceeding disputing the same issues is brought in a foreign forum after the final judgment on such issues has been entered by a court in the United States, the foreign court that hears the proceeding is no longer entitled to comity if it was used by the litigant to impede the American court's jurisdiction).
8. *Id.* at 300 (contemplating that if Pertamina were successful in the Cayman Islands action, KBC's remedies under the American court's judgments would be undone).

to file a new action on the same issues.[9] In fact, the evidence showed that Pertamina filed the parallel foreign proceeding in bad faith.[10] Therefore, after weighing these policy considerations, the court granted KBC's motion for an anti-suit injunction restraining Pertamina from filing parallel proceedings in foreign forums.[11]

II. Background and Procedural Posture

KBC brought a breach-of-contract action against Pertamina in an Arbitration Tribunal in Switzerland (Swiss Tribunal).[12] This breach-of-contract action eventually evolved into complicated litigations that can be roughly divided into three stages. In the first stage, KBC filed a breach-of-contract claim in the Swiss Tribunal following Pertamina's breach. The Swiss Tribunal found Pertamina liable for the breach and awarded damages for KBC.[13] In the second stage, KBC, the judgment creditor, sought to enforce and collect the damages awarded by the Swiss Tribunal in countries where Pertamina's assets were located.[14] In the third stage, Pertamina attempted to frustrate KBC's enforcement of the Award by the Swiss Tribunal by bringing new collateral proceedings to attack the validity of the Award.[15] The motion before the court was filed by KBC to enjoin Pertamina from pursuing the third stage of litigation.[16]

A. First Stage—Breach of Contract

KBC is a Cayman Islands limited liability company formed by two American power companies and other investors.[17] Pertamina is an oil and gas company owned and controlled by the Republic of Indonesia.[18] In 1994, KBC and Pertamina executed two contracts establishing a joint venture for exploration of geothermal energy resources in West Java, Indonesia.[19] However, Indonesian Presidential Decrees suspended the projects in 1997.[20] Following the suspension, KBC commenced arbitration proceedings in the Swiss Tribunal in April 1998, alleging

9. *Id.* at 285, 297 (finding that the issue of the possible misrepresentation was before the Swiss Tribunal and that Pertamina had many earlier opportunities to bring up that issue).

10. *Id.* at 298–99 (concluding that the objective of the Cayman Islands action was to "frustrate the consummation of the long and difficult litigation in the United States").

11. *Id.* at 295–96 (discussing the considerations of international comity, protection against abusive foreign litigations, and protection of American courts' jurisdiction).

12. *Id.* at 284.

13. *Id.*

14. *Id.* at 286.

15. *Id.* at 288, 296.

16. *Id.* at 290.

17. *Id.* at 284.

18. *Id.*

19. *Id.*

20. *Id.*

breach of contract by Pertamina.[21] In December 2000, the Swiss Tribunal awarded $261.1 million to KBC (the "Swiss Arbitral Award");[22] Pertamina's appeal to the Swiss Supreme Court was denied in February 2001 for failure to timely pay court fees.[23]

B. Second Stage—Enforcement of the Arbitral Award

Although Pertamina's assets were located in countries other than Switzerland, the contracts between KBC and Pertamina specified Switzerland as the forum for contract disputes arbitration.[24] Therefore, after winning a favorable judgment in the designated Swiss Tribunal,[25] KBC sought to enforce the judgment in the courts of countries where Pertamina's assets were located,[26] including the United States District Court for the Southern District of Texas.[27]

In December 2001, the United States District Court for the Southern District of Texas granted summary judgment in favor of KBC to confirm the Swiss Arbitral Award.[28] Pertamina then appealed the summary judgment to the Fifth Circuit[29] and simultaneously moved, in the Texas district court, to set aside the judgment pursuant to Federal Rules of Civil Procedure (hereinafter Fed. R. Civ. P.) 60(b).[30] The motion to set aside the judgment was denied by the Texas district court.[31] On appeal, the Fifth Circuit affirmed both the Texas district court's summary judgment and denial for motion to set aside the judgment.[32] In October 2004, the United States Supreme Court denied *certiorari*.[33]

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21. *Id*
22. *Id.*
23. *Id.* at 285.
24. *See* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d. 274, 282 (5th Cir. 2004).
25. *See KBC v. Pertamina*, 465 F. Supp. 2d 283, 284.
26. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 285–86 (describing that, other than in the United States, KBC had filed proceedings to confirm and register the Swiss Arbitral Award in Hong Kong, Singapore, and Canada); *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936 (S.D. Tex. 2001); *see also* Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2003] H.K.E.C. 511 (C.F.I.); *see also* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2005] A.W.L.L. 627.
27. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 298 (finding that more than 99% of the Swiss Arbitral Award was to be collected from Pertamina's assets in the United States, as Pertamina's assets in Hong Kong, Singapore, and Canada together amounted to only less than 1% of the Swiss Arbitral Award); *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936.
28. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936.
29. *KBC v. Pertamina*, 465 F. Supp. 2d 283, at 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274.
30. *KBC v. Pertamina*, 465 F. Supp. 2d 283, at 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490 (S.D. Tex 2003).
31. *KBC v. Pertamina*, 465 F. Supp. 2d 283, at 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490.
32. *KBC v. Pertamina*, 465 F. Supp. 2d 283, at 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274.
33. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 285; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 543 U.S. 917 (2004).

In early 2002, KBC received the Texas district court's permission to register that court's favorable summary judgment in other judicial districts in the United States.[34] Subsequently, in February 2002, KBC registered its Texas district court judgment with, and commenced execution proceedings in, the United States District Court for the Southern District of New York.[35] Notices to restrain funds were served with respect to 24 trust accounts maintained in Pertamina's name at several banks within the Southern District of New York following the execution proceedings.[36] However, reimbursement to KBC was stayed, because the Ministry of Finance of the Republic of Indonesia (the "Ministry") claimed that it owned parts of the restrained funds.[37]

After lengthy litigations regarding the ownership of the funds in the 24 restrained bank accounts, the court's April 2002[38] and October 2004[39] judgments finally sorted out the funds in these accounts that were owned by Pertamina and ordered Pertamina to turn over the amount of the judgment owed to KBC with interest.[40] The Second Circuit affirmed in March 2006.[41] In October 2006, the Supreme Court denied Pertamina's petitions for *certiorari*.[42]

C. Third Stage—Renewed Attempt to Nullify the Results of Prior Litigations

Pertamina made two attempts to attack judgments by courts in the United States by filing parallel legal proceedings in foreign courts. The first attempt was made after the Texas district court's summary judgment for KBC.[43] The second attempt, which triggered the present motion before the court, was made after the Second Circuit affirmed the court's order that Per-

34. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 286 (explaining that, although Pertamina could have filed a *supersedeas* bond to obtain a stay of the permission for KBC to register the Texas district court's judgment in other courts pending Pertamina's appeal to the Fifth Circuit and the United States Supreme Court from the Texas district court's summary judgment, Pertamina had declined to do so); *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2002 WL 32107930, 2002 U.S. Dist. LEXIS 3980 (S.D. Tex. 2002).

35. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 286.

36. *Id.* at 286.

37. *Id.* at 286–87 (noting that the Ministry argued that it owned the funds in the restrained accounts and that Pertamina owned only a portion of the restrained assets).

38. *Id.* at 287 (finding that the 15 of the 24 accounts in question contained both funds owned by the Ministry and "Retention Fees" paid out to, and therefore owned by, Pertamina; explaining that "Retention Fee" was income earned by Pertamina for undertaking projects that benefited the Indonesian government).

39. *Id.* (concluding that funds in the remaining nine of the 24 accounts in question belonged to Pertamina).

40. *Id.*

41. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 287; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002); *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2006 WL 565694 (2d Cir. 2006).

42. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 287; *see also* Ministry of Fin. of the Republic of Indon. v. Karaha Bodas Co., L.L.C., 539 U.S. 904 (2003); *see also* PT Pertamina (Persoro) v. Karaha Bodas Co., L.L.C., 127 S. Ct. 129 (2006).

43. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296 (stating that after the Texas district court found for KBC, Pertamina filed a parallel proceeding in Indonesian courts).

tamina turn over funds to KBC, and while Pertamina's petition for *certiorari* was still pending.[44]

Pertamina made its first attack on judgments by courts in the United States in March 2002, after the Texas district court's summary judgment in favor of KBC, by seeking to annul the Swiss Arbitral Award in Indonesian courts.[45] In response, KBC sought a temporary restraining order from the Texas district court to enjoin Pertamina from pursuing the legal proceedings in Indonesia.[46] The Texas district Court granted KBC's motion,[47] but the Fifth Circuit reversed, holding that KBC's motion for injunction should be denied based on the balance of international comity and the court's authority to enforce its judgment.[48] The Fifth Circuit reasoned that simultaneous proceedings in different countries regarding the same issues were permissible in consideration of international comity.[49] At the time, the litigation between KBC and Pertamina was still in process in the United States, so Pertamina's actions in Indonesian courts were considered "simultaneous" with its litigation in the United States, and therefore should be allowed.[50] Furthermore, the United States courts have discretion to enforce their judgments even if the foreign court comes to an opposite conclusion in parallel proceedings;[51] thus, allowing Pertamina to pursue its Indonesian proceedings posed no real threat to the enforcement of KBC's judgment in the United States.[52]

In August 2006, KBC moved to sanction Pertamina and its lawyers, in response to Pertamina's threat to attack judgments by courts in the United States for a second time by filing collateral foreign proceedings.[53] At this point, Pertamina's petition for *certiorari* regarding New

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44. *Id.* at 288.

45. *Id.* at 284–85 (noting that eventually the Indonesian Supreme Court held against Pertamina).

46. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 470 (S.D. Tex. 2002).

47. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296; *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 264 F. Supp. 2d 470.

48. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 371 (5th Cir. 2003) (explaining that the court should weigh the concerns of frivolous foreign litigations against the considerations of international comity when deciding whether to grant an anti-suit injunction that was to be applied to foreign jurisdictions).

49. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 372–74 (holding that the court should allow the parallel proceeding in Indonesian courts to proceed in consideration of international comity that counseled for the respect of a foreign sovereign's competent jurisdiction, especially where the disputes were not purely domestic of the United States).

50. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296 (explaining that an important factor behind the Fifth Circuit's ruling was the timing when Pertamina's parallel proceedings in Indonesian courts were filed); *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 373–74 (suggesting that forum shopping in courts of different countries should be allowed in recognition of each sovereign's jurisdictional competence).

51. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 296; *see also* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 370.

52. *KBC v. Pertamina*, 465 F. Supp. 2d 283–85, 296 (noting that ultimately the Indonesian Supreme Court held against Pertamina in March 2004); *see also* Karaha Bodas Co., L.L.C., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 370.

53. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 287–88.

York federal courts' unfavorable holdings was already pending in the United States,[54] and all parties expected the Supreme Court of the United States to deny *certiorari*.[55] During the hearing of KBC's motion to impose sanction, the district court explicitly questioned Pertamina whether it intended to file further litigation if the Supreme Court of the United States denied *certiorari*.[56] In response, Pertamina assured the court that it would raise no further issues and would promptly pay judgments owed to KBC if the Supreme Court of the United States denied *certiorari*.[57]

Nevertheless, Pertamina commenced parallel foreign proceedings in the Grand Court of the Cayman Islands on September 15, 2006, to attack the judgments by courts in the United States the second time.[58] Again, Pertamina sought to annul the Swiss Arbitral Award, but this time alleged "new evidence" that would show KBC defrauded the arbitration proceedings in the Swiss Tribunal.[59] Pertamina alleged in its Cayman Islands action that KBC overstated the size of geothermal resources during the Swiss arbitral proceeding and that the overstatement amounted to fraud that should vitiate the Swiss Arbitral Award.[60] Pertamina sought an injunction enjoining KBC from disposing of the funds collected in satisfaction of the Swiss Arbitral Award, including the funds collected in New York, and an injunction restraining KBC from prosecuting any proceedings to enforce the Swiss Arbitral Award.[61]

On September 21, 2006, KBC filed this motion before the district court, seeking an injunction prohibiting Pertamina from pursuing its Cayman Islands action and from filing similar actions in other jurisdictions.[62]

III. The Court's Analysis

The court found that there were three issues to be resolved in deciding whether KBC's anti-suit injunction should be granted. First, the court started its analysis by determining the nature of the Cayman Islands Action.[63] If the Cayman Islands action concerned different issues from those already litigated in the United States, anti-suit injunctions could not be granted.[64] Second, after finding that the Cayman Islands action was in effect a re-litigation of the same issues already decided by the Swiss Tribunal and the courts in the United States,[65] the court proceeded to evaluate whether Pertamina was entitled to an independent action to overturn

54. *Id.* at 298.

55. *Id.* at 287–88, 298.

56. *Id.*

57. *Id.*

58. *Id.* at 288.

59. *Id.* at 289.

60. *Id.*

61. *Id.*

62. *Id.* at 290.

63. *Id.* at 291–93.

64. *Id.* at 300 (explaining that Pertamina would be allowed to seek an order from the Cayman Islands court to attach KBC's assets for reasons other than disputes concerning the Swiss Arbitral Award).

65. *Id.* at 292–93.

final judgments.[66] Because Pertamina was not entitled to an independent action to overturn the final judgments for failing to satisfy various applicable legal standards,[67] the court continued to the third issue: that is, whether an anti-suit injunction as applying to foreign legal actions should be granted in light of certain policy considerations, including international comity, protection of the court's jurisdiction, and prevention of injustice.[68]

A. The Nature of the Action Filed in the Cayman Islands Court

Pertamina claimed that the action in the Cayman Islands was not an attempt to frustrate the judgment in the United States, but instead was to litigate a new and different claim.[69] However, the court disagreed.

The court found that Pertamina's main allegation in the Cayman Islands action was that the judgment rendered by the Swiss Arbitral Tribunal should be vitiated, because KBC had committed fraud during the proceeding.[70] The court noted that Pertamina's alleged newly discovered fraud was misrepresentation of the size of possible geothermal energy resources concerning the breached contracts, but this issue was considered by the Swiss Tribunal in determining the amount of damages.[71] Also, the alleged "new evidence" had been in Pertamina's possession for at least four years.[72] Therefore, the court did not believe that Pertamina had a new cause of action based on newly discovered fraud.[73]

Moreover, the damages sought by Pertamina in its Cayman Islands proceeding were the amount of the Swiss Arbitral Award plus the interest accrued.[74] Further, Pertamina sought an injunction from the Cayman Islands court enjoining KBC from using or disposing of the funds turned over to it by Pertamina pursuant to the order of the United States courts in satisfaction of the Swiss Arbitral Award, and from making further attempts to collect the Award.[75] The court noted that if the Cayman Islands action concerned a wholly different matter unrelated to the judgment rendered by the Swiss Tribunal, Pertamina could properly seek an injunction restraining KBC from disposing its assets to secure that KBC would have sufficient funds to

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66. *Id.* at 293–94.

67. *Id.* at 296–98 (finding that Pertamina did not satisfy Fed. R. Civ. P. 60(b)(3) requirements for setting aside a final judgment by an independent new action).

68. *Id.* at 294–96 (examining various policy considerations for the issuing of anti-suit injunction as applying to foreign courts).

69. *Id.* at 291.

70. *Id.* at 285–86, 291.

71. *Id.* at 285.

72. *Id.* at 297 (noting the alleged "new evidence" was the documents turned over to Pertamina by KBC either in March 2001 according the KBC or in November 2002 according to Pertamina).

73. *Id.* at 291, 300 (concluding that the Cayman Islands action was Pertamina's abusive litigation tactics rather than any new action of fraud).

74. *Id.* at 291.

75. *Id.* at 292.

satisfy a possible future judgment.[76] However, the issue raised by Pertamina before the Cayman Islands court was the validity of the Swiss Arbitral Award, not any other unrelated matter.[77]

The court reasoned, therefore, that Pertamina's Cayman Islands proceeding did not concern a new cause of action, but was to re-litigate the same issues that had been decided in the Swiss Tribunal and confirmed in the United States courts.[78] The court pointed out that "[t]he Cayman Islands action is what it is, and labels do not change it."[79] Allowing Pertamina to pursue the Cayman Islands proceeding or similar proceedings in other foreign courts would in effect allow Pertamina to interfere with the mechanisms of the court by collaterally nullifying the court's judgments.[80]

B. Grounds That Can Set Aside a Final Judgment

After concluding that the Cayman Islands action in effect sought to vitiate the Swiss Arbitral Award and consequently to set aside the judgments by the courts in the United States that confirmed the Swiss Arbitral Award, the court then considered the permissible grounds on which a final judgment can be overturned.[81] The court held that a strict standard applied if a final judgment was to be overturned.[82] A party seeking to set aside a judgment using collateral attack has two possible grounds. The first ground is based on the concept of "fraud on the court,"[83] while the second ground is an ordinary independent action for "fraud, misrepresentation, or other misconduct of an adverse party" as allowed by Fed. R. Civ. P. 60(b)(3).[84]

Because Pertamina never alleged that KBC practiced "fraud on the court,"[85] the district court turned to the second ground that could permit a final judgment to be overturned by collateral proceedings, that is, a motion based on Fed. R. Civ. P. 60(b)(3).[86] A 60(b)(3) motion will be granted only where the moving party shows that "the adverse party engaged in fraud or other misconduct,"[87] that the misconduct "prevented the moving party from fully and fairly presenting his case,"[88] created an injustice "sufficiently gross to demand a departure from rigid

76. *Id.* at 292–93.

77. *Id.* at 293.

78. *Id.*

79. *Id.* at 291.

80. *Id.* at 293.

81. *Id.* at 293–94.

82. *Id.* at 294 (citing United States v. Beggerly, 524 U.S. 38 (1998) (noting that, under normal circumstances, rigid adherence to the doctrine of *res judicata* is required)).

83. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 293.

84. *Id.*

85. *Id.* at 293–94, 296–97 (explaining that "fraud on the court" refers to fraud aimed at spoiling the functions of the court, such as "bribery of a judge, jury tampering, or fabrication of evidence; finding that Pertamina did not allege that KBC committed any act amounted to "fraud on the court").

86. *Id.* at 297.

87. *Id.* at 293.

88. *Id.*

adherence to the doctrine of res judicata,"[89] and that there is no other adequate remedy at law.[90]

The court noted that although Pertamina alleged KBC's misrepresentation on the issue of damages, the misrepresentation did not prevent Pertamina from fully and fairly presenting its case before the Swiss Tribunal, because the issue of KBC's possible overestimation of damages was before the Swiss Tribunal.[91]

Furthermore, Pertamina was not without other legal remedies than filing an independent action in the Cayman Islands or other foreign forums. Pertamina's alleged new evidence of fraud was the documents voluntarily turned over to Pertamina by KBC in either March 2001 or November 2002.[92] Whether these documents, the alleged "new evidence" of misrepresentation regarding the issue of damages, were turned over to Pertamina in March 2001 or November 2002, Pertamina still had time to bring the issue before the Texas district court for proper remedies.[93] Although Pertamina alleged that it did not discover KBC's misrepresentation because it "did not look at the documents until August 2005,"[94] that fact, even if true, only showed Pertamina's lack of due diligence.[95] There could be no justification for Pertamina's three-year delay in looking at the documents in its possession, because as early as 2002 or before Pertamina was already aware of the possibility of misrepresentation with respect to KBC's damages.[96] Moreover, even assuming that Pertamina was justified in failing to look at the documents for three years, there is no justification for Pertamina's failure to put the issue of "new evidence" discovered in August 2005 before the Second Circuit when it was considering Pertamina's appeal.[97] Additionally, even when Pertamina filed its petition for *certiorari* in the Supreme Court, it did not raise the "new evidence" issue before any court in the United States.[98] Therefore, Pertamina had voluntarily forgone other legal remedies.

Besides, the circumstances strongly suggested that Pertamina's delay in bringing up the issue of fraud and alleged new evidence had no good-faith basis, but rather was a deliberate tac-

89. *Id.* at 294 (citing United States v. Beggerly, 524 U.S. 38).

90. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 294; *see also* Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 71 (2d. Cir. 1990).

91. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 285, 296–97 (finding that although Pertamina did not literally present a claim of fraud to the Swiss Arbitral Tribunal, the Arbitral Tribunal considered the quantity of geothermal resources as related to the contracts between KBC and Pertamina and recognized the possibility that KBC might overestimate its damages, and such consideration contributed to an award of damages substantially less than sought by KBC).

92. *Id.* at 297 (describing that KBC claimed that the documents were turned over in March 2001, but Pertamina claimed that the documents were not turned over until November 2002).

93. *Id.* (noting that Pertamina had one year from December 2001 to file a motion pursuant to Fed. R. Civ. P. 60(b)(3) to set aside the judgment in the Texas district court).

94. *Id.*

95. *Id.*

96. *Id.* (finding that Pertamina had raised the possibility that KBC misrepresented its damages before the Swiss Arbitral Tribunal in 2002).

97. *Id.* at 297–98.

98. *Id.*

tic to protract the enforcement of the Swiss Arbitral Award.[99] Significantly, even the Cayman Islands action was not timely brought as soon as "new evidence" was discovered.[100] Instead, Pertamina waited to file the Cayman Islands action until the legal proceedings in the United States were almost concluded, in order to postpone the payment of judgments to KBC for the longest possible time.[101] The court noted that if Pertamina had sought to litigate fairly and directly, it would have brought the claim based on "new evidence" in a timely fashion.[102]

In addition, just less than a month before Pertamina filed the Cayman Islands action, Pertamina answered orally and in writing to the court, in the context of KBC's motion to sanction Pertamina and its lawyers, that if the Supreme Court denied the pending petition for *certiorari*, Pertamina would not file further proceedings and would promptly pay judgments owed to KBC.[103] Nevertheless, the evidence showed that Pertamina apparently was already preparing for the Cayman Islands action when it made that assurance to the court.[104] Statements by Pertamina's Finance Director to a prominent Indonesian newspaper, that the Swiss Arbitral decision "could no longer be disputed" and that the Cayman Islands action was really Pertamina's effort to "buy time," further proved that the Cayman Islands action was filed in bad faith.[105]

Because Pertamina could not show that it was prevented from fairly presenting its cases and therefore suffered gross injustices, and had declined to pursue other available remedies at law, the court found that Pertamina was not entitled to have the judgments overturned by an independent action pursuant to Fed. R. Civ. P. 60(b)(3). However, Pertamina did not bring a 60(b)(3) action in the United States, but instead chose to collaterally attack judgments of the Swiss Tribunal and the United States courts in the Cayman Islands court.[106] Therefore, after the court determined that Pertamina was not entitled to have the final judgments overturned, the court also had to decide whether it had authority to issue an anti-suit injunction against Pertamina's filing of collateral attacks in foreign courts.[107]

C. Court's Authority to Issue an Anti-Suit Injunction

The court found that in deciding whether an anti-suit injunction against the filing of legal actions in foreign courts should be issued, it should balance the policy considerations of international comity and the need to protect its own jurisdictions.[108] As to international comity, a court in the United States normally will not issue an injunction preventing the parties from filing parallel proceedings simultaneously in foreign courts because of the recognition that for-

99. *Id.* at 298–99.

100. *Id.* at 298.

101. *Id.*

102. *Id.*

103. *Id.* at 287–88.

104. *Id.* at 288–89 (finding that the circumstances strongly suggested that Pertamina deliberately concealed from the court its plan to file the Cayman Islands action).

105. *Id.* at 298.

106. *Id.* at 294.

107. *Id.* at 294–96.

108. *Id.* at 294.

eign forums also have authority to adjudicate the case.[109] As to parallel proceedings that are filed after a judgment has been entered in a court in the United States, filing of a parallel proceeding in a foreign court becomes more likely "a misuse of the foreign court to evade the American judgments."[110] Therefore, the consideration of international comity, meaning a cursory recognition of the foreign forum's parallel adjudicatory authority, no longer weighs against issuance of an anti-suit injunction against legal proceedings in foreign forums.[111] Where a parallel proceeding is filed in a foreign court after a court in the United States had entered a final judgment on the same issue, a court is free to "protect the integrity of its judgments by preventing their evasion through vexatious or oppressive re-litigation."[112] Therefore, "some showing of harassment, bad faith or other equitable circumstance was sufficient to support enjoining foreign litigation."[113]

In this case, the court treated the Cayman Islands action as filed after the conclusion of the litigation on the matter in the United States.[114] Pertamina filed the action in the Cayman Islands on September 15, 2006, after the Second Circuit ruled against it, and a decision on Pertamina's *certiorari* petition was to be rendered in early October 2006, for which a denial was expected.[115] Therefore, in effect, there were no remaining issues left before the courts in the United States with regard to the enforcement of the Swiss Arbitral Award.[116] Furthermore, Pertamina could have filed an action in the Cayman Islands court much earlier, either as early as 2001 or 2002, when Pertamina should have discovered the "new evidence," which was allegedly to be the basis of Pertamina's Cayman Islands action, or when Pertamina claimed to actually discover the "new evidence" in 2005. For that reason, Pertamina was not treated unfairly if the court considered the Cayman Islands action filed after the conclusion of legal proceedings on the matter in the United States.[117]

Since the Cayman Islands action was filed after the proceedings regarding the same matter had come to a conclusion in the United States, some showing of bad faith or intent to frustrate the judgments by the courts in the United States would permit the court to enjoin Pertamina from filing that action. The court noted that evidence strongly suggested that Pertamina filed the Cayman Islands proceeding to delay "the consummation of the long and difficult litigation in the United States."[118] First, Pertamina's complaint in its Cayman Islands action raised basically the same issues that were considered by the Swiss Tribunal and the courts in the United States, so that Pertamina's alleged "new claim" in effect had no substance.[119] Second, Pertam-

109. *Id.* at 295.

110. *Id.*

111. *Id.*

112. *Id.* (quoting Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 928 (D.C. Cir. 1984)).

113. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 294–95 (citing Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118, 131 (S.D.N.Y. 1997)).

114. *KBC v. Pertamina*, 465 F. Supp. 2d 283, 298.

115. *Id.*

116. *Id.*

117. *Id.* at 298.

118. *Id.* at 298–99.

119. *Id.* at 299.

ina's action seeking an injunction from the Cayman Islands court, which would prevent KBC from using or disposing of the funds received to satisfy the Swiss Arbitral Award that was affirmed by the courts of the United States, was really an attempt to undo American courts' judgments.[120] Third, Pertamina deliberately delayed the filing of the Cayman Islands action until the last moment, when the proceedings in the United States were coming to their conclusion, instead of bringing the claim in a timely fashion.[121] Therefore, the court found that the Cayman Islands action was a bad faith attempt to interfere with the jurisdiction of the courts in the United States, so an injunction should be properly issued to enjoin Pertamina from prosecuting the Cayman Islands action or any new action in any foreign forum.[122]

IV. Conclusion

The court's ruling recognized Pertamina's ploy throughout the eight-year-long litigation.[123] The court bluntly pointed out that Pertamina attempted to re-litigate the same issue by labeling it a "new claim," that Pertamina's decisions to raise or decline to raise claims were aimed at delaying the payment of the Swiss Arbitral Award for the longest possible time, and that Pertamina would have litigated in a more straightforward and direct fashion if its moves were made in good faith.[124] The court's criticism of overreaching gamesmanship in legal proceedings was revealed in its opinion.[125] Indeed, abusive litigation tactics not only interfere with the courts' dispute-solving and fact-finding functions, but also waste resources and undermine respect for the rule of law.[126] The court's ruling in this case manifested that legal proceedings should be prosecuted honestly, and that courts are tribunals for resolving disputes, rather than fields for playing abusive litigation tactics.[127]

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120. *Id.*

121. *Id.* at 298.

122.. *Id.* at 300–301.

123. *Id.* at 284 (indicating that KBC commenced the breach-of-contract action in the Swiss Tribunal in 1998, which was eight years before the present anti-suit injunction before the court).

124. *Id.* at 298–99.

125. *See also* Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, n.254 (2004) (maintaining that the victims of gamesmanship in litigation are often those without sufficient financial and emotional resources and that gamesmanship thus works to discourage the underprivileged from bringing meritorious claims).

126. *See* Ashley L. Belleau, *A Critique of the "New" Discovery Rules*, 42 FED. LAW. 36, 37 (1995) (observing that gamesmanship in litigations consumes increasing amounts of time from lawyers and judges); *see also* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 610 (2004) (asserting that some procedural rules encourage gamesmanship, waste resources, and undermine respect for courts and the rule of law); *see also* Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289, 296 (2007) (arguing that the society ultimately bears the burden of gamesmanship and bad faith tactics in litigation, as litigation expenses amount to 2% of the gross national product of the United States).

127. *See* Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 318 (1998) (observing that restraining gamesmanship in litigation can help facts to be fully developed); *see also* Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 205–9 (1994) (lamenting that gamesmanship, including improper forum shopping, frivolous motions, and protracting strategies, even within the procedural rules, unfairly turned litigations into battles of wits rather than searches for the truth).

DiChiara v. Ample Faith Investments Ltd.

2006 U.S. Dist. LEXIS 85972 (S.D.N.Y. Nov. 29, 2006)

Allegations including a broad contractual choice of New York law and jurisdiction were sufficient to survive a motion to dismiss for lack of personal jurisdiction over the defendants, based on *forum non conveniens*, international comity, and failure to join an indispensable party.

I. Holding

In *DiChiara v. Ample Faith Investments Ltd.*,[1] the United States District Court for the Southern District of New York denied the defendants' motion to dismiss based on lack of personal jurisdiction over the defendants, *forum non conveniens,* international comity, and for failure to join an indispensable party.[2] Plaintiff DiChiara, who claimed ownership of a 3% stake in a Delaware corporation,[3] brought actions for breach of fiduciary duty, common law unjust enrichment, and common law conversion against the defendants, the corporation's majority stock owners.

The court disagreed with all of the defendants' positions. The court construed the broad language of the forum selection provision in the Stockholder's Agreement that the defendants entered into, and to which the plaintiff claimed he was a party,[4] to establish personal jurisdiction over the defendants.[5] The court also rejected each of the defendants' claims that Hong Kong was a more appropriate forum in which to litigate the case.[6] The doctrine of *forum non conveniens* did not compel the dismissal of the suit, because the court gave strong deference to the plaintiff's selection of his home jurisdiction and the interest the federal court had in the determination of the suit.[7] Additionally, the court held that the doctrine of international comity was inapplicable[8] and found the defendants' misuse of the "first filed" rule equally unpersuasive.[9] Finally, the court determined that the defendants' parent company was not a necessary party under Rule 19.[10]

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1. 2006 U.S. Dist. LEXIS 85972 (S.D.N.Y. Nov. 29, 2006).
2. *Id.* at *30.
3. *Id.* at *23.
4. *Id.* at *5.
5. *Id.* at *15.
6. *Id*. at *1.
7. *Id.* at *18–23.
8. *Id.* at *25.
9. *Id.* at *30. The defendants failed to recognize that the "first filed" rule applies only when the actions at issue are filed in two separate U.S. federal courts. This was not the case here, and the defendants pointed to no cases where this rule was applied to dismiss a domestic case in favor of a foreign one. *Id.*
10. *Id.* at *28.

II. Facts and Procedure

In late 1999 or early 2000, the plaintiff, Anthony DiChiara ("DiChiara"), began working as an outside consultant for a Hong Kong–based optical products company named Moulin Global Eyecare Holdings Limited ("Moulin").[11] On November 12, 2004, after a few years of service helping Moulin with its investment and acquisition efforts, DiChiara entered into a Term Sheet Agreement ("Term Sheet") with Moulin's then CEO, Cary Ma.[12] Under the Term Sheet, DiChiara agreed to serve as Moulin's general counsel, chief administrative officer, and executive vice president of strategic planning.[13] For his service, DiChiara was to be paid a base salary and a bonus, which was conditioned upon Moulin's successful acquisition of Eye Care Centers of America ("ECCA").[14]

Moulin's planned acquisition of ECCA was structured with the use of an investment vehicle, ECCA Holdings Corporation ("ECCA Holdings").[15] Moulin was to acquire a 56.5% equity stake in ECCA Holdings, which would be owned not directly by Moulin, but through one of Moulin's wholly owned subsidiaries, defendant Ample Faith.[16] DiChiarra's bonus was to include a stock option to purchase 3% of the common shares of ECCA Holdings at a 90% discount to the fair market value, leaving Moulin with a 53.5% stake in ECCA Holdings.[17]

On February 2, 2005, Ample Faith and the other potential stockholders of ECCA Holdings entered into a Stockholder's Agreement ("Stockholder's Agreement").[18] Among other things, the parties to the Stockholder's Agreement consented to the application of New York law and agreed to the non-exclusive jurisdiction of New York courts over disputes "arising under or relating to" the agreement.[19] While DiChiara was not a party to the Stockholder's Agreement at its inception, he claimed that he became a party to it by later executing a joinder.[20]

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11. *Id.* at *2.
12. *Id.*
13. *Id.* at *2–3. The Term Sheet also stipulated that DiChiara and Moulin would later negotiate "a definitive employment agreement"; however one was never executed. *Id.* at *3.
14. *Id.* The defendants contend that DiChiara's compensation package was not approved by Moulin's board of directors. *Id.*
15. *Id.* at *3.
16. *Id.*
17. *Id.*
18. *Id.* at *4.
19. *Id.* The court quoted the pertinent part of the agreement to read:

    > THE INTERPRETATION AND CONSTRUCTION OF THIS AGREEMENT, AND ALL MATTERS RELATING HERETO, SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK. . . . Each of the Parties hereby irrevocably acknowledges and consents that any legal action or proceeding brought with respect to any of the obligations arising under or relating to this Agreement may be brought in the courts of the State of New York, County of New York or in the United States District Court for the Southern District of New York and each of the Parties hereby irrevocably submits and accepts with regard to any such action or proceeding . . . the non-exclusive jurisdiction of aforesaid courts.

    Id. at *4–5.
20. *Id.* at *5.

On March 1, 2005, the ECCA acquisition closed.[21] DiChiara became president of ECCA Holdings and was named a member of the board.[22] Shortly thereafter, DiChiara and Ma entered into a Stock Purchase Agreement (the "SPA"). The SPA stipulated to grant DiChiara a 3% stock interest in ECCA Holdings outright, rather than requiring DiChiara to purchase the stock.[23] The defendants claimed that at the time a 3% stake in ECCA Holdings was worth more than $5 million.[24]

The following month, Moulin's auditors suspended their audit of the company books from the previous year and then formally resigned, which halted the trading of Moulin's stock on the Hong Kong Stock Exchange.[25] The auditors claimed that they did not have adequate access to records and raised question about the legitimacy of Moulin's transactions and whether Moulin had "proper internal controls."[26] This prompted Moulin's creditors to hire another auditor to review the company's books.[27] By June, the creditors' audit revealed pervasive accounting irregularities dating back to 2000, which had concealed Moulin's true debt from the financial markets.[28]

Thereafter, a group of banks initiated a "winding up" proceeding, the equivalent of a U.S. bankruptcy action, in Hong Kong's High Court.[29] The court issued a provisional liquidation order against Moulin and named Roderick Sutton ("Sutton") and Desmond Chiong ("Chiong") of Ferrier Hodgson Limited as provisional liquidators.[30] Sutton and Chiong took control of Moulin and its subsidiaries, including the defendant Ample Faith.[31] Sutton also replaced Ma on the board of ECCA Holdings.[32]

While this was occurring in Hong Kong, on May 19, DiChiara was in attendance at ECCA Holding's first board of directors meeting, which was held in Napa, California. DiChiara claimed that at this meeting several stock certificates were issued, including Certificate No. 3, representing a 3% stake in ECCA Holdings, in the name of DiChiara.[33] DiChiara contended that these stock certificates were then gathered by White & Case LLP, the firm that was representing Moulin, and taken somewhere for safekeeping.[34] Defendants claimed that no stock certificates were issued at this meeting and instead DiChiara was told that his certificate

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21. *Id.*
22. *Id.*
23. *Id.* at *5.
24. *Id.*
25. *Id.* at *6.
26. *Id.*
27. *Id.*
28. *Id.* at *7.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at *7–8.
34. *Id.* at *8.

could not be issued until Ample Faith endorsed its certificate, which would then reflect the transfer of part of its ownership to him.[35]

In September 2005, Sutton contacted DiChiara and informed him that he did not plan to recognize DiChiara's purported 3% share in ECCA Holdings.[36] Sutton claimed that Moulin never possessed the authority to transfer any shares in ECCA Holdings, since Ample Faith was the true owner of the 56.5%.[37] On September 15, DiChiara was removed from the board of directors of ECCA Holdings and his seat was filled by Chiong.[38] Sutton directed that Stock Certificate No. 3 be marked "Canceled."[39] After DiChiara issued multiple requests for his Stock Certificate, Sutton wrote him on November 17 to inform him that his Stock Certificate was canceled and that the entire 56.5% interest in ECCA Holdings had been transferred to Ample Faith's wholly owned subsidiary, defendant Offer High.[40]

In January 2006, Moulin began efforts to sell its purported 56.5% interest in ECCA Holdings.[41] On April 20, 2006, acting through its liquidators, Moulin filed an action against DiChiara in the Hong Kong High Court to declare, among other things, the Term Sheet and the SPA void.[42] On May 19, DiChiara filed this action against Ample Faith and Offer High in the Southern District of New York.[43] DiChiara alleged that the defendants wrongfully canceled Certificate No. 3 and thereby appropriated his ownership in ECCA Holdings.[44]

III. The Court's Analysis

A. Personal Jurisdiction

Where, as in this case, there has not been discovery, the plaintiffs bear only the burden of making "legally sufficient allegations of jurisdiction" to withstand a motion to dismiss for lack of personal jurisdiction.[45] DiChiara based the court's jurisdiction over the defendants solely on the Stockholder's Agreement, by which the parties consented to the New York court's jurisdiction.[46] The defendants argued that while personal jurisdiction can be conferred by a party's contractual consent, here the provision in the Stockholder's Agreement was irrelevant because

35. *Id.*

36. *Id.*

37. *Id.* DiChiara claimed that this was a drastic change in the position of Sutton, who had repeatedly recognized DiChiara's stake in ECCA Holdings in prior communications. *Id.* at *8 n.5.

38. *Id.* at *9.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at *9.

43. *Id.* at *10.

44. *Id.*

45. *Id.* (quoting In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003)).

46. *Id.* *11–12.

DiChiara's claims did not "arise under or relate to" the agreement.[47] DiChiara contended that the broad language of the Stockholder's Agreement's jurisdiction clause was not limited to breach of that contract.[48] Rather, the contract's clause was expansive enough to include tort claims, such as those he brought.[49]

The scope of the jurisdiction provision was construed by applying New York law,[50] under which the analysis of the scope of a jurisdiction provision "turn[s] on the precise language used in the contract."[51] While New York courts have found that a clause stating that the "contract shall be governed by the laws of the State of New York" does not include causes of action sounding in tort, the Second Circuit held that a provision stating that English courts have "exclusive jurisdiction to settle any dispute . . . arising out of or relating to" the business transactions between two parties includes much more than "allegations for contractual violations."[52] Because the language in the Stockholders agreement was "of the more expansive variety," the court found that DiChiara's claims were encompassed by the jurisdiction provision.[53] The court reasoned that DiChiara's claim for breach of fiduciary duty implicated an obligation under the Stockholder's Agreement.[54] Furthermore, DiChiara's conversion and unjust enrichment claims could not be examined without considering his joinder claim to the Stockholder's Agreement.[55]

B. *Forum Non Conveniens*

In its analysis of the defendants' *forum non conveniens* claim, the court referred to the Second Circuit's three-part analysis outlined in *Norex Petroleum Ltd. v. Access Industries, Inc.*[56] The court began with the presumption that the plaintiff's forum was to be afforded a substantial degree of deference.[57] The court was guided by the nine factors that the Second Circuit identified as relevant to determine whether a plaintiff's choice of forum is for legitimate reasons and thereby the degree of deference the court will afford the plaintiff's choice.[58] It was noted that

47. *Id.* at *12. The defendants submitted that DiChiara's claim fell outside the scope of the Stockholder's Agreement, which only pertained to the management of ECCA Holdings and relationships among stockholders. The defendants claimed the only document that might concern DiChiara's rights to equity in ECCA Holdings was the SPA, which had a forum selection clause requiring all disputes to be litigated in California. *Id.*

48. *Id.* at *12.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (quoting Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1359, 1361 (2d Cir. 1993)).

53. *Id.* at *14.

54. *Id.*

55. *Id.*

56. *Id.* at *16 (citing Norex Petroleum Ltd. v. Access Industries, Inc., 416 F.3d 146, 153 (2d Cir. 2005) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947)). First, the court considers the degree of deference to accord the plaintiff's choice of forum. Second, the court considers whether the forum that the defendants chose is adequate to adjudicate the dispute. Finally, the court balances the private and the public interests that are implicated by the choice of forum. *Id.*

57. *Id.* at *17.

58. *Id.* at *17-18.

DiChiara lived in neighboring New Jersey and that the defendants agreed to New York's jurisdiction in the Stockholder's Agreement.[59] Furthermore, the defendants neither showed nor argued that New York's laws were particularly favorable to DiChiara, that any of the parties would be viewed favorably or unfavorably by a New York jury, or that continuing with the litigation in New York would be particularly expensive for the defendants.[60]

Because the court determined that DiChiara's forum was to be given deference, the defendants had the burden of proving that Hong Kong was an adequate forum and that the "ends of justice," as measured by the public and private factors, dictated that the court must dismiss this action.[61] The court found that the defendants failed to show "the level of oppressiveness required to overturn a U.S. plaintiff's choice of [his] home forum."[62] The defendants argued that there were a number of private factors that indicated Hong Kong was a better forum.[63] The majority of the necessary witnesses in this suit resided in Hong Kong or China and they could not be compelled to come testify in the U.S.[64] They also claimed that most of the relevant events occurred in Hong Kong and that much of the necessary evidence remained there.[65]

The court was not persuaded by the reasons set forth by the defendants.[66] The court noted that the first board meeting of ECCA Holdings took place in the U.S.[67] The court was also unmoved by the defendants' claim that the witnesses would not be amenable to traveling to the U.S. for this litigation.[68] In fact, the court found that there were reasons that these witnesses would be willing to come to testify,[69] including the fact that a number of the witnesses were presumably involved in international business and were accustomed to traveling.[70] The court was equally unimpressed by the public interests that the defendants set forth as requiring that the suit be litigated in Hong Kong.[71]

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59. *Id*.

60. *Id*. at *18-19.

61. *Id.* at *20.

62. *Id*.

63. *Id.* at *21. The private factors that the court considers include the "relative ease of access to sources of proof; availability of compulsory process for attendance of the unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at *20–21 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

64. *Id*.

65. *Id*.

66. *Id*. at *23.

67. *Id*. at *21.

68. *Id*.

69. *Id*. at *21-22.

70. *Id*. at *21–22.

71. *Id* at *22. The public interest factors that the court considers include: "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id* at *22 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

C. Comity

The court explained that the doctrine of international comity is "the recognition that one nation allows [during proceedings] within its territory [ ] the legislative, executive, or judicial acts of another nation."[72] The doctrine affords American courts an option to dismiss an action based on the existence of a foreign proceeding or judgment.[73] The court stated that multiple proceedings are rarely a problem, except where there are parallel bankruptcy proceedings.[74] However, that was not the case here.[75] The court cited the decision of the United States Bankruptcy Court for the Northern District of California, which determined that "the total outstanding shares of capital stock of ECCA . . . are not property of Moulin or its estate."[76] Moreover, the defendants did not indicate that there were any "exceptional circumstances" that would require the court to refuse jurisdiction, based on comity, outside of the context of a bankruptcy proceeding.[77]

D. Failure to Join Moulin

The court applied the analysis set forth in Rule 19 to evaluate the defendants' Rule 12(b)(7) motion to dismiss for failure to join Moulin as a necessary party under Rule 19 and determined that Moulin was not a necessary party.[78] Moulin no longer owned an interest in ECCA Holdings.[79] Therefore, there was no reason that complete relief could not be afforded.[80] Moulin's only stake in this action was through its ownership of defendants Ample Faith and Offer High.[81] Thus, Moulin's interests were found to be identical to the defendants' and therefore would be protected.[82] The court continued its analysis, finding that even if Moulin was a necessary party, it was not indispensable, because it is not clear that Moulin would be prejudiced by not allowing it to contest the validity of the SPA and the Term Sheet.[83] The court commented that DiChiara's claims did not center on those agreements, but on the contention that he was issued shares of ECCA Holdings that were later wrongfully canceled.[84]

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72. *Id*. at *23.

73. *Id*. at *24.

74. *Id*. at *24.

75. *Id*.

76. *Id*.

77. *Id*. at *25.

78. *Id* at *28. Rule 19 sets forth a two-part analysis, which first requires the court to determine that the party not joined is a "necessary" party under Rule 19(a). If the party is found to be necessary, the court must determine whether that party is "indispensable" under Rule 19(b). FED. R. CIV. P. 19

79. *Id*.

80. *Id*.

81. *Id*. at *28.

82. *Id*.

83. *Id*. at 29.

84. *Id*

IV. Conclusion

The court's reasoning pertaining to the doctrine of *forum non conveniens*, the doctrine of international comity, the first filed rule, and the plaintiff's failure to join Moulin was grounded in well-established principles of federal law. In contrast, the court's interpretation of the forum selection clause was not based on as solid principles.[85] The court's reasoning that the defendants had consented to the jurisdiction of New York and that the plaintiff's claim arose out of this contract, to which the plaintiff was alleged to be a party, was a fair decision. Although not binding on New York courts,[86] this decision provides guidance in an area of New York law that lacks clarity.[87]

Delano Ladd

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85. See text at notes 1-55 *supra*.

86. *See* Flanagan v. Prudential-Bache Sec., Inc. 67 N.Y.2d 500, 507–8 (1986) (declining to follow the Second Circuit's construction of an arbitration provision in a collective bargaining agreement).

87. *See* Fin. One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 335 (2d Cir. 2005) (stating that New York provides little guidance when determining whether a forum selection clause is broad enough to include "extra-contractual" claims).

Commission v. Spain

Case C-503/03, 2006 E.C.R. I-01097 (Jan. 31, 2006)

Spain failed to fulfill its obligations under Articles 1 to 3 of Council Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals by refusing entry without investigation of the alien spouses of Member State nationals

I. Holding

In *Commission v. Spain*,[1] the European Court of Justice held that the Kingdom of Spain failed to fulfill its obligations under Council Directive 64/221/EEC.[2] by refusing entry into the territory of the states party to the Agreement on the Gradual Abolition of Checks at Their Common Borders ("Schengen Agreement")[3] of two nationals of a third country who are the spouses of Member State nationals.[4] The sole ground for such refusal was that alerts had been entered in the Schengen Information System ("SIS") for the purpose of refusing them entry,[5] without first verifying[6] whether the presence of those persons constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society,[7] In addition

1. Case C-503/03, Commission v. Spain, 2006 E.C.R. I-01097 (Jan. 31, 2006) [hereinafter *Commission v. Spain*].

2. *Id. See also* The Schengen Agreement, OJ 2000L239/13 (June14, 1985). *See also* R. Victoria Lindo, Note, *The Trafficking of Persons in the European Union for Sexual Exploitation: Why it Persists and Suggestions to Compel Implementation and Enforcement of Legal Remedies in Non-Complying Member States*, 29 B.C. INT'L COMP. L. REV. 135, 139 (2006) (explaining that the Schengen Agreement of 1985, which created the Schengen Area, permits travelers and citizens legally present in the European countries that are party to the Agreement to move about freely without having to show passports when crossing internal borders).

3. *Id. See also* the Schengen Agreement, OJ 2000L239/13 (June 14, 1985).

4. *Id. See also id.* ¶ 16 (noting that according to Article 96 of the CISA, with the exception of family members of European Union citizens who have third-country nationality and are entitled to enter and reside in a Member State pursuant to a decision made in accordance with the Treaty Establishing the European Community, persons who are covered by Community law should not in principle be placed on the joint list of persons to be refused entry). *See generally* The Convention for the Implementation of the Schengen Agreement ("CISA"), June 16, 1990, OJ 2000 L239/19 (1990). *See generally* The Treaty Establishing the European Community (Mar. 25, 1957), *available at* http://www.hrea.org/erc/Library/hrdocs/eu/Amsterdam-treaty.pdf.

5. *Id.* ¶ 11 (citing Title IV of the CISA, which states that SIS is to consist of a national section in each of the Contracting Parties and a technical support function, to allow national authorities to have access to alerts on persons and property for the purposes of border checks, and other police and customs checks carried out within the country, and in the case of alerts issued for the purposes of refusing entry for the purposes of issuing visas and residence permits).

6. *Id.* ¶ 14 (referring to Article 105 of the CISA, which states that the state issuing the alert is to be responsible for ensuring that the data entered in the SIS is accurate, up-to-date and lawful, and also noting only that state is authorized to modify, add to, correct or delete data it has entered).

7. *Id.* ¶ 12 (citing Article 96 of the CISA, which governs alerts for the purpose of refusing entry stating that data for aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts, and decisions may be based on a threat to public policy, or public security, or to national security, which the presence of an alien in national territory may pose); *see also* The Schengen Acquis, Art. 96 (June 19, 1990), *available at* http://europa.eu.int/eurlex/lex/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML.

to a finding of failure to fulfill its duties, the court also directed that Spain be ordered to pay the costs[8] of the Commission.[9]

While the court's conclusion was based on the evidence proving that the Kingdom of Spain did not seek to verify the information that it received from the SIS,[10] it did note that the issuing state bears responsibility for the amount and validity of the information available.[11] However, the Court made it clear that ultimately the state that is relying on the information from an SIS report bears the burden of requesting additional information from the issuing state in order to make an informed decision.[12]

With regard to the second complaint, criticizing the authorities for failing to indicate the grounds of public policy and public security on which they relied in order to refuse Mr. Farid and Mr. Bouchair entry into Spanish territory,[13] the Court held it did not need to issue a ruling.[14] The Court held that because the failure of the Kingdom of Spain to fulfill its obligations under Directive 64/221 was the only fact constituting the infringement of Community law alleged by the Commission, there was no need to rule on the second complaint.[15]

II. Background and Procedural Posture

On February 5, 1999, Mr. Farid arrived on a flight from Algeria at Barcelona Airport, where he was refused entry into the Schengen Area.[16] Mr. Farid was refused entry at this time because he was the subject of an alert issued for the purposes of refusing him entry, introduced into SIS by a declaration of the Federal Republic of Germany.[17] Mr. Farid was the spouse of a Spanish national and lived with his family in Dublin.[18] Additionally, a visa application submitted on September 17, 1999, at the Spanish consulate in Dublin, was rejected on December 17, 1999, for the same reason.[19]

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8. *Id.* ¶ 64 (relying on Article 69(2) of the Rules of Procedure, which state that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings).
9. *Id.*
10. *Id.* ¶ 59.
11. *Id.* ¶ 56 (noting that the state issuing the alert should provide supplementary information to the consulting state to enable it to gauge the gravity of the threat that the person for whom an alert has been issued is likely to represent).
12. *Id.* ¶ 58.
13. *Id.* ¶ 60.
14. *Id.* ¶ 63.
15. *Id.*
16. *Id.* ¶ 23.
17. *Id. See also* http://www.eurovisa.info/SchengenCountries.htm (noting that the Schengen Countries are: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Italy, Greece, Luxembourg, Netherlands, Norway, Portugal, Spain and Sweden).
18. *Id.*
19. *Id.*

Mr. Bouchair, who was living in London with his wife, a Spanish national,[20] was preparing to go on a holiday with her to see family[21] when he was refused a visa by the Spanish Consulate in London.[22] Mr. Bouchair's first application was rejected on May 9, 2000, on the ground that he did not satisfy the conditions of Article 5(1) of The Convention for the Implementation of the Schengen Agreement ("CISA").[23] Moreover, a second application was refused on June 19, 2003, because, as in Mr. Farid's case, an alert had been issued by the Federal Republic of Germany for the purposes of refusing him entry.[24]

The SIS alert that Spain relied on in rejecting both Mr. Farid and Mr. Bouchair did not contain any explanation for the existence of the alert.[25] Additionally, both men were able to produce proof that they were in fact the spouses of Member State nationals.[26] Despite all of this, the Spanish government merely took note of the fact that an SIS alert existed[27] and issued an automatic refusal, as required by the CISA rules.[28]

After the filing of the two complaints from the Algerian nationals, the Commission instituted the pre-litigation procedure. The Spanish government confirmed the account of the facts, as requested by the Commission;[29] however, it denied that the administrative practice complained of was contrary to Directive 64/221.[30] In response to the Spanish government's position, the Commission instituted the present proceeding.[31] Throughout this proceeding, the Spanish government maintained that the action should be dismissed and the Commission should be ordered to pay the costs[32] because the procedure followed by the Spanish officials

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20. *Id.* ¶ 24.
21. *Id.*
22. *Id.*
23. *Id. See also* ¶ 9 (explaining that Article 5(1) of CISA governs the entry of aliens into States that are party to the Schengen Agreement and requires that aliens be granted entry for a stay not exceeding three months on the condition that they are not a person for whom an alert has been issued for the purposes of refusing entry. In addition, Article 5(1) requires that any alien who does not meet the requirements must be refused entry into States, unless a State considers it necessary to derogate from that principle for humanitarian reasons, grounds of national interest, or due to international obligations). *See generally* The Convention for the Implementation of the Schengen Agreement ("CISA"), OJ 2000 L239/19 (June 16, 1990).
24. *Id.*
25. *Id.* ¶ 25; *see also id.* ¶ 53 (stating that Article 94(i) of the CISA expressly authorizes the reason for the alert to be stated).
26. *Id.* ¶ ¶ 23, 24.
27. *Id.* ¶ 54 (noting that the Spanish authorities merely recorded the existence of alerts in the SIS issued for the purposes of refusing admission, which did not contain any indication of the reasons for those alerts, in order to refuse entry into the Schengen area).
28. *Id.* ¶ ¶ 37, 38 (remarking that the automatic refusal reflects the principle of cooperation between the Contracting states; however, the automatic refusal does not distinguish whether or not the alien is married to a Member State national).
29. *Id.* ¶ 26 (explaining that Spain replied on the letter of the Commission requesting its observations on the complaints).
30. *Id.* ¶ 26.
31. *Id.* ¶ 27.
32. *Id.* ¶ 28.

complied with the provisions of the CISA and therefore cannot be contrary to Community law.[33]

III. The Court's Analysis

A. Compatibility with Community Law

The Court began its analysis by defining the relationship between the CISA and Community law on freedom of movement for persons.[34] Prior to the integration of the Schengen *acquis*[35] into the framework of the European Union, the provisions of the CISA were to apply only insofar as they were compatible with Community law.[36] Upon creation of the Schengen Protocol, this concept was reproduced within it, requiring that the provisions of the Schengen *acquis* are applicable only if and to the extent they are compatible with European Union and Community law.[37]

Ultimately, the court stated that the compliance of an administrative practice with the provisions of the CISA may justify the conduct of the competent national authorities only insofar as the application of the relevant provisions is compatible with the Community rules governing freedom of movement for persons.[38] The Spanish government argued that its authorities acted in compliance with the mechanism laid down by the CISA in both cases in question when it issued the automatic refusals.[39] However, the Court took issue with the impact of the automatic refusal.[40]

B. Rights of Third-Country Nationals

The Commission argued that, according to settled case law, access to the territory of a Member State may be refused to a citizen of the European Union or a member of his family only where the person concerned represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[41] The Court recognized the importance of ensuring the protection of family life by eliminating obstacles to the exercise of fundamental freedoms

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33. *Id.* ¶ 30

34. *Id.* ¶ 32.

35. *Id.* ¶ ¶ 6, 7; *see also* Europa.eu, Justice and Home Affairs—Freedom, Security and Justice, *Abolition of Internal Borders and Creation of a Single EU External Frontier*, *available at* http://ec.europa.eu/justice_home/fsj/freetravel/frontiers/fsj_freetravel_schengen_en.htm (last visited July 5, 2007) (defining the Schengen *acquis* as the European Union's "institutional and legal framework" adopted under the Schengen Convention that sets forth the requirements countries must fulfill in order to join the European Union. The Schengen *acquis* incorporates the rules of the Schengen Convention; the 1985 Schengen Agreement; the accession protocols with Italy, Spain, Portugal, Greece, Austria, Denmark, Finland and Sweden; and the resolutions and declarations adopted by the Schengen bodies, including the gradual abolition of controls at international borders).

36. *See Commission v. Spain,* ¶ 33.

37. *Id.* ¶ 34.

38. *Id.* ¶ 35.

39. *Id.* ¶ 36.

40. *See supra* note 27.

41. *See Commission v. Spain*, ¶ 39 (citing Case 36/75 *Rutili* 1975 E.C.R. 1219, ¶ 28; Case 30/77 *Bouchereau* 1977 E.C.R. 1999, ¶ 35).

guaranteed by the European Community Treaty,[42] and noted the legislators' work to expand the regulations and directives on freedom of movement for persons.[43] Furthermore, while the Court acknowledged that Member States may require an entry visa for the Member State national's spouse who is a third-country national, the Member States must accord every facility for obtaining this visa.[44]

It is settled that the third-party national derives from his or her status as spouse of a Member State national the right to enter the territory of the Member States or to obtain a visa for that purpose.[45] However, these rights are not unconditional.[46] Pursuant to Community law, Article 2 of Directive 64/221, Member States are able to prohibit nationals of other Member States or their spouses who are nationals of third countries from entering their territory on the ground of public policy or public security.[47] Furthermore, the Community legislation places strict limits on the Member States' reliance on such grounds in refusing entry.[48] Consequently, in the case of nationals of a third country who are the spouses of Member State nationals, this strict interpretation also serves to protect their right to respect for their family life.[49]

The Court emphasized the public policy exception and noted that it has always viewed it as a derogation from the fundamental principle of freedom of movement for persons, which must be interpreted strictly.[50] It was also noted that the concept of public policy within the meaning of Article 2 of Directive 64/221 does not correspond to that in Article 96 of the CISA.[51] Despite this strict interpretation that Member States must undertake in order to refuse entry or a visa to third-country nationals, the Court made it clear that there was still a risk of exclusion, especially when an alert had been issued for the purposes of refusing him entry.[52] In principle, under the CISA, entry into the Schengen Area or issuance of a visa for that purpose

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42. *Id.* ¶ 41.
43. *Id.*
44. *Id.*
45. *Id.* ¶ 42.
46. *Id.* ¶ 43.
47. *Id.*
48. *Id.* ¶ 44 (stating that the measures taken on grounds of public policy or public security are to be based exclusively on the personal conduct of the individual concerned, and that previous criminal convictions are not in themselves to constitute grounds for the taking of such measures).
49. *Id.* ¶ 47 (citing to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).
50. *Id.* ¶ 45 (also noting that the scope of this public policy exception cannot be determined unilaterally by Member States).
51. *Id.* ¶ 48 (citing Article 96(2)(a) of the CISA, which allows an alert in the SIS for the purposes of refusing entry based on a threat to public policy where the person concerned has been convicted of an offense carrying a penalty involving deprivation of liberty of at least one year, or if he has been subject to a measure based on a failure to comply with national regulations on the entry or residence of aliens without any specific assessment of the threat that person represents, unlike the rules of Directive 64/221, as interpreted by the court, which require such an assessment).
52. *Id.* ¶ 50.

cannot be allowed for an alien for whom an alert has been entered for the purpose of refusing entry.[53]

C. When an SIS Report Can Be Issued

The Court concluded that a Contracting State may issue an alert for a national of a third country who is the spouse of a Member State national only after establishing that the presence of that person constitutes a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of Directive 64/221.[54] The effect of the report in SIS, with respect to a national of a third country who is the spouse of a Member State national, is to constitute evidence that there is a reason to justify refusing him entry.[55] However, this evidence, the report, must be corroborated by information that allows the member nation consulting the SIS to make the appropriate assessment before refusing entry.[56]

D. Burden on State Consulting SIS Reports

The underpinning of the Schengen *acquis* is the principle of genuine cooperation.[57] This implies that the state consulting the SIS should give due consideration to the information provided by the state issuing the alert. Alternatively, it implies that the issuing state should make supplementary information available to the consulting state to enable it to gauge the gravity of the threat presented by the person for whom the alert has been issued.[58] The Court concluded that the Spanish authorities were not justified in refusing entry to Mr. Farid and Mr. Bouchair without having first verified whether their presence constituted a genuine threat to public policy or public safety.[59] The Court also noted how the Spanish authorities merely acknowledged the existence of the SIS reports, which did not include any indication as to the reason they had been issued, and automatically refused entry.[60]

As part of the SIS system used in refusing entry and a visa for Mr. Farid and Mr. Bouchair, the SIRENE[61] network was established specifically to provide information to national authorities faced with difficulties enforcing an alert.[62] The amount of time allowed for providing such

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53. *Id.* ¶ 49.

54. *Id.* ¶ 52.

55. *Id.* ¶ 53.

56. *Id.*

57. *Id.* ¶ 56.

58. *Id.*

59. *Id.* ¶ 55.

60. *Id.* ¶ 54.

61. *See* The Schengen Acquis and its Integration into the Union, *available at* http://europa.eu/scadplus/leg/en/lvb/l33020.htm (explaining that SIRENE (Supplemental Information Request at National Entry), supplements the national and central systems which make up the information system that allows all members of the Schengen Area to access the necessary data).

62. *See Commission v. Spain,* ¶ 57 (noting that the SIS operating manual states that the system must enable requests for information made by the other contracting parties to be answered as soon as possible, at most within twelve hours).

information varies depending on the situation, but must be reasonable.[63] In the specific situation of a border crossing, when the authorities have identified a national of a third country, who is the spouse of a citizen of a Member State and the subject of an alert entered in SIS for the purpose of refusing entry, and they have requested information from the state that issued the alert, they must receive that information promptly.[64]

IV. Conclusion

The European Court of Justice concluded that the Kingdom of Spain did not fulfill its duties when it automatically refused entry into its territory based on a report in the SIS. While the Court clearly laid out all of the instances when a Member State may be free to refuse entry into its territory and stated its support for the public policy exception, it made it clear that the Spanish authorities had a duty to inquire further into the SIS report before they refused a visa and entry to Mr. Farid and Mr. Bouchair.

Based on this reasoning, the Court reached a fair decision in requiring the Spanish government to investigate further before acting. However, there is no mention of the responsibilities of the German authorities that issued these SIS reports.[65] While it is true that Spain should not have acted without further information regarding the reasoning behind the SIS report, the German government must be held responsible to ensure that the SIS report entered is complete, as it initiated the report that led to Spain's refusal of entry. The burden cannot be placed entirely on the Member State that is relying on the SIS report. If the reports are more accurate and detailed at the beginning, it will decrease the chances of uncertainty.

Since the Court's decision in *Commission v. Spain*[66] the parties to the Schengen Agreement have undertaken the development of a new version of SIS, referred to as the SIS II.[67] A report issued by the House of Lords[68] reaffirms the EU and the UK's commitment to the use of the SIS system.[69] However, the discussion surrounding the development of the SIS II has been concerned with the lack of transparency associated with the SIS.[70] Additionally, the House of

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63. *Id.* ¶ 58 (acknowledging that the reasonable amount of time permitted may be assessed differently according to whether it is a visa application in question or a crossing of a border).

64. *Id.*

65. *See* Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L.J. 215, 224 (noting that the Schengen agreement places the burden of assessing the SIS reports and subsequent adjudication of appeals on the receiving state).

66. Case C-503/03, 2006 E.C.R. I-01097 (Jan. 31, 2006).

67. *See* Schengen Information System II (SIS II) Report with Evidence, House of Lords, Ninth Report of Session 2006–7, ¶ 20 (March 2, 2007) *available at* http://www.publicationsparliament.uk/pa/ld200607/ldselect/ldeucom/49/49.pdf (acknowledging that the development of the SIS II was undertaken to accommodate the new members of the EU as well as to expand the amount and type of information contained within the SIS).

68. *Id.*

69. *Id.* ¶ 30 (ordering that the UK put more resources into preparing the national connection to the SIS II so that the UK can participate as early and fully as possible as soon as the central system is complete).

70. *Id.* ¶ 38 (imploring the EU to provide a full impact assessment and legislative explanatory memorandum as the project is developed, not only to the EU national experts and institutions but to all of those affected). *See also id.* ¶ 52 (requiring the UK government to periodically publish public reports on planned and actual impact on the UK to ensure effective Parliamentary scrutiny of all UK participation).

Lords report also discusses communication between member states regarding the use of the alert system, in order to maintain accurate statistics about each Member State and the effectiveness of the system.[71] The SIS II will also increase the amount and type of information that is included in each report.[72] Currently SIS allows Member States to exchange only a summarized version of the data in a European Arrest Warrant (EAW), whereas SIS II will provide for the exchange of the full text of EAWs.[73]

The House of Lords also addresses the severe financial impact that SIS II will have on all Member States.[74] Not only are there costs involved in developing and implementing such a system,[75] but there will be additional costs resulting from the effectiveness of the system.[76] Whether or not SIS II will be entirely effective and whether all Member States will be able to successfully meet these financial burdens remains to be seen.

Amanda J. D'Orazi

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71. *Id.* ¶ 68 (requiring that each Member State regularly publish statistics regarding the number and types of alerts and hits per Member State, the use of the SIRENE system for supplementary information exchanged by each Member State, and the actions taken following a hit for each type of hit and each Member State). *See also id.* ¶ 100 (requesting that the Commission publish a list of what authorities have access to SIS II data and for what purposes, as well as a list of authorities that will be able to input data into SIS II and the circumstances under which they will be able to do so).

72. *Id.* ¶ 57 (noting that the main development in the SIS II is the inclusion of biometric data, specifically fingerprint and photographic data, and eventually DNA profiles and retina scans).

73. *Id.* ¶ 77.

74. *Id.* ¶¶ 32–33, 77 (discussing the various financial impacts the SIS II will have on Member States).

75. *Id.* ¶ 32–33 (explaining that the development of the SIS II is charged to the EU budget, with the Member States contributing, and the UK Home Office being responsible for the costs of implementing the SIS II). *See also* Gregor Noll, *Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236, 242 (2003) (commenting that the costs of developing the SIS II system were covered by the EC budget).

76. *Id.* ¶ 78 (directing the Home Office to prepare for an increase in resources that will inevitably be needed by the Crown Prosecution Service if the SIS II is effective in apprehending criminals).

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