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Articles

Note

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ARTICLES

NOTE

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

The *Journal* is among the oldest and best-established student-published international law journals in the United States. In the wake of the Bay of Pigs disaster and the Cuban Missile Crisis, our publication began as an offshoot of the University of Texas International Law Society.[1] In January 1965, under the guidance of Professor E. Ernest Goldstein, we planted the Texas flag in the international arena with our first issue, entitled *The Journal of the University of Texas International Law Society*. Publications thereafter were biannual, taking the name *Texas International Law Forum* until summer 1971, when the *Journal* adopted its present title and began publishing three to four issues per year. Of the more than eighty student-published international law journals across the country, only three schools have an older international heritage.

Over the years, the *Journal* staff has made the most of its established heritage. We have developed international repute by forging close ties with numerous scholars and authors worldwide. As a result, we receive more than six hundred unsolicited manuscripts each year and are extremely selective in our publication choices. This position has helped us develop one of the largest student-published subscription circulations of any international law journal in the United States. The *Journal*'s subscription base includes law schools, government entities, law firms, corporations, embassies, international organizations, and individuals from virtually every state in the United States and dozens of countries.

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

the American Law Institute; **Louis Henkin**, former president of the American Society of International Law, chief reporter of the Restatement of Foreign Relations Law of the United States, and former coeditor in chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, former member of the Constitutional Court of South Africa and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda; **the Honorable Dalia Dorner**, former Associate Justice of the Supreme Court of Israel; **Robert Reich**, professor of public policy at the University of California, Berkeley, former U.S. Secretary of Labor, and former director of public policy for the Federal Trade Commission; **Joseph Jova**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under Presidents Kennedy and Johnson; **Ewell "Pat" Murphy**, former chairman of the American Bar Association's Section of International Law and respected attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and honorary editor of the *American Journal of International Law*.

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Leaving the FDA Behind: Pharmaceutical Outsourcing and Drug Safety

CHENGLIN LIU*

Abstract

During the 2008 heparin crisis, a tainted blood-thinning drug imported from China caused the deaths of at least eighty people in the United States. However, despite the Food and Drug Administration's (FDA) reactive measures, the American regulatory framework for drug safety remains largely unchanged. Currently, about 80% of active pharmaceutical ingredients, 40% of finished drugs, and 50% of all medical devices used in the United States are imported from over 100 countries. With the growth of product outsourcing, pharmaceutical companies in the United States have stopped manufacturing many essential medicines. Nevertheless, the FDA's foreign inspections have lagged. It would take the FDA more than eighteen years to inspect all the establishments in China that produce drugs for the United States, eight times longer than it would take to inspect all domestic firms. To offset inadequate foreign inspections, the FDA emphasizes cooperation with exporting countries in the hope that foreign governments will share the burden of ensuring the safety of imported drugs in the U.S. market. Essentially, the FDA is outsourcing its regulatory power to other countries, some of which are highly susceptible to corrupt regulatory practices and counterfeit production. Since China is responsible for the largest percentage of drugs imported into the United States, this Article uses China as an example and argues that the FDA's regulatory outsourcing approach is seriously flawed. The FDA has largely overlooked the unique challenges that Chinese regulators face in ensuring drug safety.

SUMMARY

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I. THE FDA'S CHALLENGES IN REGULATING IMPORTED DRUGS

The Food and Drug Administration (FDA) is responsible for "protecting public health by ensuring the safety of a wide range of food and medical products."[1] The FDA is "the oldest comprehensive consumer protection agency in the U.S. federal government."[2] Its modern function was first defined in the Pure Food and Drug Act (PFDA) of 1906.[3] In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act (FDCA) in response to a well-publicized accident involving an untested elixir drug that "killed 107 people, including many children."[4] To regain public trust, the

1. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-46, FOOD & DRUG ADMINISTRATION: BETTER COORDINATION COULD ENHANCE EFFORTS TO ADDRESS ECONOMIC ADULTERATION AND PROTECT THE PUBLIC HEALTH 2 (2011), *available at* http://www.gao.gov/assets/590/585861.pdf [hereinafter GAO-12-46].

2. *About FDA: History*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm (last updated July 29, 2010).

3. Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 79 (2000) ("The PFDA made it a misdemeanor to introduce adulterated food into interstate commerce. It granted the Secretary of Agriculture the authority to examine food specimens for possible adulteration and directed the Secretary to report potential violations to the Department of Justice.").

4. *Regulatory Information: Legislation*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/RegulatoryInformation/Legislation/default.htm (last updated July 9, 2012); MICHAEL SCHUMANN ET AL., FOOD

FDCA completely overhauled the public health system. The FDCA required drug makers to seek FDA approval before marketing any new drugs.[5] The law also authorized the FDA to conduct factory inspections to ensure drug safety.[6] The FDCA set forth the current food and drug regulatory framework in the United States. The FDA has developed into a powerful agency, which regulates approximately one quarter of total U.S. consumer expenditures.[7]

However, globalization and pharmaceutical outsourcing have dramatically increased the volume of imported products that fall within the FDA's jurisdiction. Approximately 80% of Active Pharmaceutical Ingredients (API), 40% of finished drugs, and 50% of all medical devices used in the United States are imported.[8] With the growth of product outsourcing, pharmaceutical companies in the United States have stopped manufacturing many essential medicines. A telling example is that Americans today rely entirely on imported antibiotics because no domestic firm produces a single dose.[9] Despite efforts to lure manufacturing jobs back to the United States, it is expected that China and India will continue to increase the exportation of FDA-regulated drugs and medical equipment to the United States by at least 12% in the next decade.[10] Cost minimization is the primary driving force for outsourcing. One survey indicates that the cost of producing an API can be as much as 40% lower in India than in the United States.[11] In addition, pharmaceuticals have seen increasing costs in the past decade.[12] However, due to limited breakthroughs, research and development (R&D) investments have led to largely disappointing results. "The number of New Molecular Entity approvals," an indicator of productivity, has decreased sharply since 2000.[13] Therefore, outsourcing remains the primary means for pharmaceutical companies to remain afloat in the overly competitive market. As a result of pharmaceutical outsourcing, importation of "high risk" medical products to the U.S. market quadrupled between 2000 and 2007.[14] Many medical devices, which were at one time produced domestically, are

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SAFETY LAW 7 (1997); Merrill & Francer, *supra* note 3 at 81.

5. SCHUMANN, *supra* note 4, at 7.

6. *Milestones in U.S. Food and Drug Law History*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/AboutFDA/WhatWeDo/History/Milestones/ucm128305.htm (last visited July 23, 2012) [hereinafter *FDA Milestones*].

7. RONALD HAMOWY, THE INDEP. INST., INDEPENDENT POLICY REPORT: MEDICAL DISASTERS AND THE GROWTH OF THE FDA 2 (2010), *available at* http://www.independent.org/pdf/policy_reports/2010-02-10-fda.pdf; Gardiner Harris, *The Safety Gap*, N.Y. TIMES (Oct. 31, 2008), http://www.nytimes.com/2008/11/02/magazine/02fda-t.html?pagewanted=all&_r=0.

8. GAO-12-46, *supra* note 1, at 2.

9. *The Diane Rehm Show: Addressing Prescription Drug Shortages*, NAT'L PUB. RADIO (Nov. 2, 2011), *available at* http://thedianerehmshow.org/shows/2011-11-02/addressing-prescription-drug-shortages/transcript; *see also* Gardiner Harris, *Drug Making's Move Abroad Stirs Concern*, N.Y. TIMES (Jan. 19, 2009), http://www.nytimes.com/2009/01/20/health/policy/20drug.html ("The critical ingredients for most antibiotics are now made almost exclusively in China and India.").

10. U.S. FOOD & DRUG ADMIN., PATHWAY TO GLOBAL PRODUCT SAFETY AND QUALITY 20 (2011), *available at* http://www.fda.gov/downloads/AboutFDA/CentersOffices/OC/GlobalProductPathway/UCM259845.pdf [hereinafter GLOBAL PRODUCT SAFETY].

11. *Id.* at 13.

12. *Id.* at 9–10.

13. *Id.*

14. *Id.* at 18.

"increasingly being manufactured overseas and imported."[15] For example, it would take the FDA about eighteen years to inspect all of the establishments in China that produce drugs for the United States, almost eight times longer than if the FDA inspected domestic firms.[16] Nevertheless the FDA's foreign inspections have lagged.

The FDA's ineffective supervision of drug safety prompted the U.S. Government Accountability Office (GAO) to add "[t]he oversight of medical products" to its High-Risk List in 2009.[17] The GAO explained that the "FDA was facing multiple challenges that threatened to compromise its ability to protect the public health."[18] The GAO identified several areas of weakness in the FDA's oversight of drug safety, "including inspections of foreign manufacturing establishments, postmarket safety monitoring, and oversight of clinical trials."[19] Because of its inadequate efforts to address serious problems identified by the GAO, the FDA has consistently remained on the High-Risk List since 2009.[20]

To offset inadequate foreign inspections, the FDA has expanded efforts to cooperate with exporting countries in the hope that foreign governments will share the burden of ensuring imported drug safety in the U.S. market.[21] Essentially, the FDA is outsourcing its regulatory power to other countries, some of which are highly susceptible to corrupt regulatory practices and counterfeit production. Since China has "more establishments manufacturing drugs that were offered for import into the United States than any other foreign country,"[22] this Article uses China as an example and argues that the FDA's regulatory outsourcing approach is seriously flawed, because it has largely overlooked the unique challenges that Chinese regulators face in safeguarding drug safety. Part I of the Article examines the drug safety regulatory framework and the challenges that the FDA faces in conducting foreign inspections and preventing counterfeit drugs from entering the U.S. market. In Part II, the Article analyzes the FDA's regulatory outsourcing approach and its agreement with China regarding drug safety. Part III offers a detailed analysis of the Chinese regulatory framework on drug safety and the unique challenges that China faces in enforcing its laws.

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15. *Id.*

16. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-961, DRUG SAFETY: FDA HAS CONDUCTED MORE FOREIGN INSPECTIONS AND BEGUN TO IMPROVE ITS INFORMATION ON FOREIGN ESTABLISHMENTS, BUT MORE PROGRESS IS NEEDED 15–16 (2010), *available at* http://www.gao.gov/new.items/d10961.pdf [hereinafter GAO-10-961].

17. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-278, HIGH-RISK SERIES: AN UPDATE 115 (2011), *available at* http://www.gao.gov/new.items/d11278.pdf.

18. *Id.*

19. *Id.*

20. *Id.* GAO will remove the listed government agency from its High-Risk List if the agency has made adequate efforts to address areas of weaknesses. *Id.* at 3.

21. *See* GLOBAL PRODUCT SAFETY, *supra* note 10, at 24–25 (calling for increased emphasis on cooperation with foreign governments to effectively regulate drugs being imported into the United States).

22. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-970, DRUG SAFETY: BETTER DATA MANAGEMENT AND MORE INSPECTIONS ARE NEEDED TO STRENGTHEN FDA'S FOREIGN DRUG INSPECTION PROGRAM 15 (2008), *available at* http://www.gao.gov/assets/290/281366.pdf [hereinafter GAO-08-970].

A. The Heparin Crisis

Heparin is a blood thinner that is commonly used in cardiac surgery and dialysis.[23] In 2008, at least eighty-one deaths in the United States were linked to contaminated heparin imported from China by Baxter International.[24] Hundreds of patients suffered allergic reactions after using the drug.[25] German health officials reported at least eighty cases of adverse reactions to heparin during the same period.[26] In response, Baxter International recalled "virtually all of its heparin products" from the U.S. market.[27]

China was the world's biggest supplier of the active ingredient used in heparin.[28] The raw materials for making heparin came from mucous membranes in pig intestines, which were being processed in unregulated family workshops.[29] Pig farmers sold the cooked mucous membranes to consolidators, who in turn sold them to drug makers.[30] Neither the extraction process nor the working environment was subject to any regulation. Before the crisis, the FDA had never inspected Changzhou SPL, the Chinese manufacturer that exported contaminated heparin to the United States.[31]

After an intensive investigation, scientists finally determined that the contaminant was chemically altered chondroitin sulfate, which was twenty times cheaper than the real active ingredient in heparin.[32] Although the contaminant did not have blood-thinning properties, it had "such a close resemblance to heparin that it had fooled standard quality tests and made it into the United States."[33] While it remains unclear at which stage the contamination occurred, the harmful chemical

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23. Heparin decreases the clotting ability of blood, thereby preventing formation of clots and stopping the growth of already existing clots. It has been marketed in the United States for nearly seventy years and is used in a variety of clinical settings, including during kidney dialysis and cardiac procedures, and for treatment or prevention of serious medical conditions, including pulmonary embolis and deep vein thrombosis. Over one million multi-dose vials of heparin are sold per month in the United States. Baxter supplies about half of the heparin sold in this country.

In re Heparin Prods. Liab. Litiga., MDL No. 1953, 2011 WL 1097637, at *1 (N.D. Ohio Mar. 22, 2011).

24. Gardiner Harris, *Heparin Contamination May Have Been Deliberate, F.D.A. Says*, N.Y. TIMES (Apr. 30, 2008), http://www.nytimes.com/2008/04/30/health/policy/30heparin.html. According to The New York Times, "149 deaths from allergic reactions were reported among people who took heparin from Jan. 1, 2007, to May 31, 2008." Bettina Wassener, *In China, Strong Debut for Supplier of Heparin*, N.Y. TIMES (May 6, 2010), http://www.nytimes.com/2010/05/07/business/global/07drug.html.

25. Walt Bogdanich, *Heparin Find May Point to Chinese Counterfeiting*, N.Y. TIMES (Mar. 20, 2008), http://www.nytimes.com/2008/03/20/health/20heparin.html.

26. *Id.*

27. *Id.*

28. David Barboza, *China Orders New Oversight of Heparin, with Tainted Batches Tied to U.S. Deaths*, N.Y. TIMES (Mar. 22, 2008), http://www.nytimes.com/2008/03/22/world/asia/22heparin.html.

29. Walt Bogdanich, *The Drug Scare That Exposed a World of Hurt*, N.Y. TIMES (Mar. 30, 2008), http://www.nytimes.com/2008/03/30/weekinreview/30bogdanich.html.

30. *Id.*

31. *Id.*

32. Bogdanich, *supra* note 25.

33. Jake Hooker and Walt Bogdanich, *Scientists Near Source of Altered Heparin*, N.Y. TIMES (Mar. 19, 2008), http://www.nytimes.com/2008/03/19/world/asia/19heparin.html.

was apparently added to increase the yield of heparin by combining it with a counterfeit substance.[34] The heparin crisis has exposed two challenges facing the FDA: (1) inadequate foreign inspections, and (2) the lack of a mechanism to prevent counterfeit drugs from entering into the U.S. market.

B. FDA Inspections and Challenges in Foreign Countries

The FDA's authority to conduct regular inspections stems mainly from Section 704 of the FDCA. In addition, Sections 505 and 515 authorize the FDA to conduct inspections for the purpose of pre-market approval of new drugs and medical devices. Inspection of pharmaceutical facilities is one of the most important enforcement tools used to secure drug safety. In most cases, inspection is the only effective means through which the FDA is able to identify potential health threats. Without inspection, the FDA has no legitimate grounds for utilizing other post-market enforcement tools, such as seizure, injunction, or recall.

The FDCA grants the FDA wide discretion in deciding when and how it conducts an inspection.[35] The FDA is required to give advance notice with an owner's valid consent, or if the consent is withheld, to produce a warrant.[36] If the FDA reasonably believes that a serious violation of the FDCA has occurred, it may conduct a raid.[37] Refusing an FDA inspection may lead to one year of imprisonment and a fine of up to $1,000.[38] The owner may also face government seizure or an injunction.[39] Forcible actions against inspectors can also lead to criminal punishment.[40] Because of serious punishments upon refusal, most U.S. firms cooperate with FDA inspections.[41]

The coverage of an FDA inspection of prescription drugs and restricted devices is broad. The inspection can reach "all things."[42] This includes not only the "factory, warehouse or establishment in which foods, drugs, devices, or cosmetics are manufactured, processed, packed or held,"[43] but also "records, files, papers, processes, controls, and [other] facilities."[44] Despite the FDA's broad discretion, it faces serious challenges in conducting inspections on foreign drugs and medical device manufacturers.

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34. *Id.*

35. *See* 21 U.S.C. § 374 (2012) (listing the broad powers granted to the FDA to conduct inspections).

36. *See* United States v. Jamieson-McKames Pharm., Inc., 651 F.2d 532, 540 (1981) ("[A]n inspection pursuant to a § 374 notice to inspect is authorized only when there is a valid consent. If consent is withheld, a separate violation of the Act occurs, and the FDA inspectors are required to obtain a warrant before the inspection can proceed.").

37. *Id.*

38. I JAMES T. O'REILLY, FOOD & DRUG ADMINISTRATION § 20:14 (3d ed. 2007).

39. *Id.* § 20:1.

40. *Id.* § 20:12.

41. *Id.* § 20:11.

42. *Id.* § 20:3.

43. *Id.* (internal quotation marks omitted).

44. *Id.*

1. Challenges to Foreign Inspections

The FDCA requires the FDA to inspect establishments in the United States every two years,[45] but it does not have the same requirement for inspecting foreign establishments exporting to the United States.[46] Instead, the FDCA relies on cooperative agreements with foreign governments to ensure that imported drugs or devices are manufactured properly.[47] The FDA has the power to refuse the entry of imported drugs or medical devices at the border, but it can only do so when it has sufficient evidence that the manufacturing process of a foreign establishment violated the FDCA.[48] Because the FDA cannot conduct an adequate inspection, this burden is very hard to meet. Thus, foreign inspection is crucial in keeping foreign-produced drugs and medical products in compliance with U.S. law and regulations.

The FDA began conducting foreign inspections of certain European antibiotic firms in 1955.[49] The 1976 medical device amendment to the FDCA extended the scope of the FDA's foreign inspections to include foreign medical device and diagnostic manufacturers.[50] However, the FDA did not have a written inspection procedure until 1983.[51] The current guide to foreign inspections is an updated version of the procedure created in 1999.[52]

Despite the FDA's continuous efforts to increase foreign inspections,[53] foreign establishments are subject to fewer inspections than their domestic counterparts.[54] In 2009, the FDA conducted 424 inspections of foreign establishments, which accounted for 11% of all foreign establishments.[55] At this rate, it would take the FDA about nine years to inspect all foreign establishments once.[56] In contrast, the FDA conducted 1,015 inspections in the United States, comprising approximately 40% of all domestic establishments.[57] At this rate, it would take the FDA about two and a half years to inspect all domestic firms.[58]

Since China has the largest number of establishments exporting to the United States, it would take the FDA even longer to cycle through inspections. It would take the FDA "about 18 years to inspect all of the 920 establishments in China."[59]

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45. 21 U.S.C. § 360(h) (2012).

46. *See id.* § 360(i)(3) (requiring only that FDA cooperate "with officials of foreign countries to ensure that adequate and effective means are available for purposes of determining . . . whether drugs or devices . . . if imported or offered for import into the United States, shall be refused admission").

47. *Id.*

48. *Id.* § 381(a).

49. DIV. OF FIELD INVESTIGATION, U.S. FOOD & DRUG ADMIN., GUIDE TO INTERNATIONAL INSPECTIONS AND TRAVEL ch. 1 § 100 (2002), *available at* http://www.fda.gov/ICECI/Inspections/ForeignInspections/ucm110616.htm#SUB100.

50. *Id.*

51. *Inspections, Compliance, Enforcement, and Criminal Investigations*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ICECI/Inspections/ForeignInspections/ucm110593.htm (last visited Oct. 9, 2012).

52. *Id.*

53. GAO-10-961, *supra* note 16, at 11.

54. *Id.*

55. *Id.* at 15.

56. *Id.*

57. *Id.*

58. *Id.*

59. GAO-10-961, *supra* note 16, at 16.

Even worse, due to lack of resources and limited legal authority, nearly 64% of foreign establishments—or 2,394 out of 3,765 in the FDA's inventory for the fiscal year of 2009—may never have been inspected by the FDA.[60] Almost half of the uninspected establishments are in China and India.[61]

The disparity between inspections of foreign and domestic establishments exists not only in frequency but also in coverage. There are two types of FDA inspections: preapproval inspections and Good Manufacturing Practices (GMP) inspections.[62] A preapproval inspection takes place when an establishment seeks approval of a new drug to be marketed in the United States. Upon receiving the application, the FDA may conduct inspections of the establishment to verify whether it in fact follows what it has promised in the application.[63] A GMP inspection is conducted at an establishment that has already marketed products in the United States.[64] The purpose of a GMP inspection is to determine whether the drugs produced in the establishment are of high quality.[65] Without GMP inspections, preapproval inspections cannot ensure the establishments' continued compliance.[66]

In practice, however, relatively fewer foreign establishments have been subjected to GMP inspections compared with domestic establishments.[67] In 2009, only 17% of foreign inspections were GMP-only inspections.[68] In other words, 83% of foreign inspections had preapproval components, which means that the inspections were either preapproval-only or inspections that combined preapproval and GMP inspections.[69] In contrast, 82% of domestic inspections were GMP-only inspections, while only 18% were preapproval inspections or combined inspections.[70]

In addition, the FDA faces resistance from foreign firms, a challenge that it rarely encounters while inspecting domestic firms. Even with a cooperative agreement with a foreign government, the FDA is not likely to enjoy the foreign government's assistance in its inspections, especially in times of crisis. For example, during the heparin crisis, a consolidator of the tainted raw heparin ingredient refused to cooperate with FDA inspectors.[71] FDA inspectors were denied access to the consolidator's laboratory and records.[72] If the same crisis affected Chinese consumers, the Chinese government likely would have quickly raided the suspected plant and taken the managers into custody.[73] Furthermore, if the tainted products

60. *Id.* at 16–17.

61. *Id.* at 17.

62. *Id.* at 7.

63. *Id.*

64. *Id.*

65. GAO-10-961, *supra* note 16, at 7.

66. *See* Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT'L L.J. 249, 268 (2010) ("Without regular periodic audits, foreign factories are not likely to take the GMP or the HACCP processes seriously because compliance with these procedures requires additional costs.").

67. GAO-10-961, *supra* note 16, at 19.

68. *Id.*

69. *Id.* at 18.

70. *Id.* at 18–19.

71. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-936T, DRUG SAFETY: FDA FACES CHALLENGES OVERSEEING THE FOREIGN DRUG MANUFACTURING SUPPLY CHAIN 7 (2011), *available at* http://www.gao.gov/assets/130/126943.pdf [hereinafter GAO-11-936T].

72. *Id.*

73. *See* Chenglin Liu, *Profits Above the Law: China's Melamine Tainted Milk Incident*, 79 MISS. L.J.

had caused the deaths of Chinese citizens, the CEO and other managers would likely be subject to criminal investigation.[74] If convicted, the CEO and other managers would face life sentences or even the death penalty.[75] However, since the victims of the heparin crisis were not Chinese citizens, the Chinese government was not subject to the mounting public pressure that it had seen in previous food and drug scandals that claimed lives in China.[76] The Chinese government did not even initiate its own probe, let alone prosecute anyone.[77] The only public response from the Chinese government after the heparin crisis was its vigorous denial that the tainted raw heparin had caused deaths in the United States.[78] Thus, the Chinese government's involvement in dealing with the heparin crisis was noticeably absent.[79]

Furthermore, the FDA cannot conduct foreign inspections without prior notice.[80] Surprise inspections are crucial for quality control, which explains why the FDCA grants the FDA wide discretion to conduct inspections of domestic firms.[81] According to FDA officials, it is very difficult for inspectors to get an accurate glimpse of the manufacturing process when the manufacturer has been notified months in advance.[82] However, unannounced inspections of foreign facilities are almost impossible to conduct because, in some cases, the FDA can only gain access to the facilities by first receiving permission from the foreign government.[83] For example,

> During the pet food scandal of 2007, the FDA intended to inspect the suspected factories in China. The Chinese government deliberately delayed the FDA inspectors' visas. One report stated that when inspectors finally reached the two suspected plants in southern China, one plant had already been bulldozed and the other one was deserted. According to another report, the owner of the factory not only bulldozed the building, but also deeply plowed the ground to ensure that U.S. inspectors would not find any trace of melamine.[84]

Costs are another impediment to FDA inspections of foreign firms. Because of logistical hurdles and long-distance travel, the average cost for the FDA to conduct a foreign inspection is around $52,000, which is more than twice the cost of a domestic inspection.[85]

371, 386–88 (2009) (detailing the process of governmental confrontation of the sale of tainted baby formula in China).

74. *See id.* at 387 (explaining that a criminal investigation would be proper for the sale of poisonous food or drugs under the criminal law of China).

75. *Id.*

76. *Id.* at 373.

77. Alicia Mundy, *China Never Investigated Tainted Heparin, Says Probe*, WALL ST. J. (July 22, 2010), http://online.wsj.com/article/SB10001424052748703954804575381540372921432.html.

78. Gardiner Harris, *U.S. Identifies Tainted Heparin in 11 Countries*, N.Y. TIMES (Apr. 22, 2008), http://www.nytimes.com/2008/04/22/health/policy/22fda.html?pagewanted=1&_r=1.

79. *Id.*

80. GAO-11-936T, *supra* note 71, at 7.

81. *Id.*

82. *Id.*

83. *Id.*

84. Liu, *supra* note 66, at 269.

85. GLOBAL PRODUCT SAFETY, *supra* note 10, at 24.

Additionally, the FDA's lack of information regarding foreign firms that export to the United States only contributes to inadequate inspections.[86] According to a 2008 GAO report, there was a large gap between the FDA's registration database, which had information on 3,000 foreign establishments, and its import database, which recorded around 6,800 foreign establishments.[87] One reason for the gap is that some foreign firms use FDA registration status as a marketing gimmick, attempting to trick local consumers to believe that their products have been either approved or endorsed by the FDA in the United States. Even though they remain FDA-registered establishments, such firms may not have actually offered products in the U.S. market.[88] Because the registration and import data are not electronically integrated, FDA officials have to manually compare some of the foreign establishments across the two databases.[89] Despite the FDA's recent effort to improve information management, it still relies on multiple, sometimes inaccurate, sources in determining which foreign establishments are subject to surveillance inspection.[90]

86. GAO-08-970, *supra* note 22, at 18–19.
87. *Id.* at 5.
88. *Id.* at 18.
89. *Id.* at 17.
90. GAO-10-961, *supra* note 16, at 9.

Number of Establishments in the FDA's Inventory That May Never Have Been Inspected by the FDA and Total Estimated Number of Establishments in the FDA's Inventory, by Country, Fiscal Year 2009[91]

Countries with the largest number of establishments in FDA's inventory that may never have been inspected	Number of establishments in FDA's inventory that may never have been inspected	Estimated number of establishments in FDA's inventory	Percent of establishments in FDA's inventory that may never have been inspected
China	811	920	88
India	323	502	64
Canada	206	310	66
France	107	188	57
Japan	99	207	48
Germany	97	228	43
United Kingdom	82	191	43
South Korea	69	75	92
Mexico	57	76	75
Italy	55	168	33
All other countries	488	900	54
Foreign total	2,394	3,765	64
Domestic total	253	2,498	10

C. Counterfeit Drugs

Most Americans have confidence in the integrity of drugs in the U.S. market and believe that counterfeits are only a problem in developing countries.[92] In reality, however, the U.S. market has not been immune to counterfeit drugs. The World Health Organization (WHO) estimates that counterfeit drugs account for less than

91. *Id.* at 18.

92. *See* U.S. FOOD & DRUG ADMIN., COMBATING COUNTERFEIT DRUGS *i* (2004), *available at* http://counterfeiting.unicri.it/docs/FDA%20combating%20ctf%20drugs.pdf ("In many more countries, counterfeit drugs are common. In the United States, a relatively comprehensive system . . . has kept drug counterfeiting rare, so that Americans can have a high degree of confidence in the drugs they obtain through legal channels.").

1% of drug sales in the United States.[93] In 2010, American's spent over $300 billion on medicine, nearly $4 billion of which was spent on prescription drugs.[94] Even one-tenth of 1% of drug sales in the United States still equates to more than $300 million worth of drugs that may have been affected by counterfeits each year.[95]

Counterfeit drugs pose a serious challenge to governments throughout the world. Global sales of counterfeit drugs were estimated to reach $75 billion in 2010.[96] According to WHO, counterfeited drugs could account for 30% of the markets in Africa, Asia, and Latin America.[97] Because the majority of drug ingredients consumed in the United States come from countries that experience serious problems related to counterfeiting, American patients have become increasingly exposed to drug safety issues.[98]

The 2008 heparin crisis is only one of several incidents during which the FDA has discovered counterfeits in imported drugs. In June 2003, the FDA discovered 30,000 bottles of fake Lipitor, a top-selling anti-cholesterol pill.[99] It took the FDA over two years to complete its investigation of how the counterfeit drugs entered legitimate distribution channels and subsequently reached patients.[100] Investigators discovered that Mr. Julio Cruz conspired with other individuals to smuggle $42 million worth of counterfeit Lipitor into the U.S. market.[101] Cruz and his co-conspirators pled guilty to their roles in distributing counterfeit, misbranded, and illegally imported drugs.[102] H.D. Smith Wholesale Drug Co., the fourth largest drug wholesaler in the United States, was also implicated in the counterfeit Lipitor scandal.[103] The investigation revealed that one conspirator paid more than $400,000 in kickbacks to an employee of H.D. Smith who bought counterfeit Lipitor and other fake drugs for further distribution.[104] In the settlement with the federal government,

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93. *Counterfeit Medicines*, WORLD HEALTH ORG., http://www.who.int/medicines/services/counterfeit/impact/ImpactF_S/en/ (last revised Nov. 14, 2006) [hereinafter *Counterfeit Medicines*].

94. IMS INSTITUTE FOR HEALTHCARE INFORMATICS, THE USE OF MEDICINES IN THE UNITED STATES: REVIEW OF 2010, at 4, 8 (2011), *available at* http://www.imshealth.com/deployedfiles/imshealth/Global/Content/IMS%20Institute/Static%20File/IHII_UseOfMed_report.pdf.

95. This calculation was inspired by two sources. *See* Bryan A. Liang, *Fade to Black: Importation and Counterfeit Drugs*, 32 AM. J.L. & MED. 279, 283 (2006) (performing a similar calculation based on WHO estimates); PEW HEALTH GRP., AFTER HEPARIN: PROTECTING CONSUMERS FROM THE RISKS OF SUBSTANDARD AND COUNTERFEIT DRUGS 13 (2011), *available at* http://www.pewtrusts.org/uploaded Files/wwwpewtrustsorg/Reports/Health/Pew_Heparin_Final_HR.pdf (performing a similar calculation based on FDA estimates).

96. *Counterfeit Medicines*, *supra* note 93.

97. *Id.*

98. *See* GAO-12-46, *supra* note 1, at 2 ("The FDA Commissioner has said that globalization presents huge and growing challenges and that economic adulteration remains a public health threat.").

99. *FDA Uncovers More Fake Lipitor*, USA TODAY (June 3, 2003), http://www.usatoday.com/news/health/2003-06-03-fake-lipitor_x.htm.

100. Stephanie Saul, *F.D.A. Hoping For Indictment Over Fake Pills*, N.Y. TIMES (July 26, 2005), http://query.nytimes.com/gst/fullpage.html?res=9807E2DA123FF935A15754C0A9639C8B63.

101. *Florida Man Gets 13 Years in Lipitor Case*, KANSAS CITY BUS. J. (Oct. 23, 2006), http://www.bizjournals.com/kansascity/stories/2006/10/23/daily7.html?page=all; *Florida Man Pleads Guilty in Lipitor Conspiracy*, KANSAS CITY BUS. J. (Nov. 6, 2006), http://www.bizjournals.com/kansascity/stories/2006/11/06/daily2.html?page=all.

102. *Id.*; *Illinois Company Settles Fake Lipitor Case for $2.2M*, KANSAS CITY BUS. J. (May 11, 2006), http://www.bizjournals.com/kansascity/stories/2006/05/08/daily27.html?page=all [hereinafter *Illinois Company*].

103. *Illinois Company*, *supra* note 102.

104. *Id.*

H.D. Smith agreed to pay $2.2 million in civil forfeiture to the federal government.[105] It remains unclear, however, whether H.D. Smith's civil forfeiture was derived from proceeds gained from distributing the counterfeit Lipitor.[106]

Despite the FDA's efforts after the heparin crisis, counterfeits remain a threat to public health in the United States. In 2010, the FDA warned consumers that a counterfeit version of Alli, an over-the-counter weight-loss drug, did not contain active ingredients.[107] Instead, the counterfeit Alli contained a controlled substance that could cause harm to consumers.[108] In the same year, the FDA discovered fake versions of Tamiflu, Viagra, and Lipitor sold over the Internet.[109] A Belgian citizen was sentenced to forty-eight months in prison for marketing counterfeit drugs through online sales.[110] In February 2012, Roche Co. warned physicians, hospitals, and patients that a counterfeit version of Avastin was found in the U.S. market.[111] Avastin is a widely used cancer drug with sales in the United States exceeding $2.5 billion in 2011.[112] Roche's preliminary testing indicated that the counterfeit version of Avastin did not contain the active ingredient.[113] The FDA sent warning letters to nineteen physicians who were suspected of purchasing the counterfeit Avastin.[114] It remains unclear how much of the counterfeit Avastin was distributed in the U.S. market or whether the counterfeit caused any harm.[115]

1. Distribution Loopholes

Counterfeit drugs cannot harm patients without first entering legitimate distribution channels in the U.S. market. The heparin crisis and other counterfeit drug incidents demonstrate that the regulation of drug distribution is inadequate. While the FDA has exclusive power to regulate drug approval and manufacturing, it does not regulate the drug distributions that take place within state boundaries.[116] Each state has its own laws regulating drug distribution, repackaging, dispensing, and diversion.[117] For example, as of March 2012, twenty-six states required drug

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105. *Id.*

106. *Id.*

107. Press Release, U.S. Food & Drug Admin., FDA Warns Consumers About Counterfeit Alli (Jan. 18, 2010), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm197857.htm.

108. *Id.*

109. Jonathan D. Rockoff & Christopher Weaver, *Fake Cancer Drug Found in U.S.*, WALL ST. J. (Feb. 15, 2012), http://online.wsj.com/article/SB10001424052970204795304577223472661091252.html.

110. Press Release, U.S. Dep't of Justice, Belgian Citizen Sentenced for Selling Counterfeit, Misbranded Drugs (June 3, 2011), *available at* http://www.fda.gov/ICECI/CriminalInvestigations/ucm257945.htm.

111. Rockoff & Weaver, *supra* note 109.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* PEW HEALTH GRP., *supra* note 95, at 70 ("The FDA and the U.S. Drug Enforcement Administration investigate suspected illegal activity by wholesalers and pharmacies when it crosses state lines, but states are responsible for most compliance oversight.").

117. Liang, *supra* note 95, at 288. An excellent source for drug pedigree requirements by state is available on the National Alliance for Model State Drug Laws' website at http://www.namsdl.org/documents/StateStatutoryCompilationJuly2011.pdf.

distributors to maintain pedigrees, or transaction histories, of the drugs they market.[118] Another two states are considering such legislation.[119] The purpose of the drug pedigree requirement is to prevent counterfeit drugs from slipping into the stream of commerce.[120] Nevertheless, twenty states still do not have such requirements.[121] The discrepancies among various states' requirements have created loopholes that allow counterfeit drugs to enter legitimate distribution chains in states that have no pedigree requirements. This lack of a pedigree-tracing system encumbers communication among distributors, healthcare providers, and patients, thus rendering recalls ineffective. A telling example is that nearly 8,000 patients in California were still exposed to the counterfeit heparin even after recalls were issued.[122]

2. Inadequate Penalties

Penalties for violation of the FDCA are too lenient to deter drug counterfeiting. The FDCA mandates two penalties for counterfeiting:[123] (1) a misdemeanor violation carrying only a maximum of one year in prison, a $1,000 fine, or both;[124] (2) a felony violation, requiring proof of intent to defraud or mislead,[125] and punishable by three years in prison, a fine not to exceed $10,000, or both.[126] Although there is an option to prosecute counterfeiting under trademark law, which could lead to a maximum of ten years in prison, counterfeit drug cases are often prosecuted under the FDCA.[127] The criminal penalties for drug counterfeiting are less rigorous than those for narcotic trafficking, even though drug counterfeiting can be more profitable.[128] Due to resource limitations, it is very difficult to uncover drug counterfeiting.[129] As a result, organized criminals have become increasingly involved in counterfeit drug trafficking.[130] Drug counterfeiting has even become an important source of financing for terrorist operations.[131]

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118. *Distributor Licensing and Pedigree Requirements by State,* HEALTHCARE DISTRIB. MGMT. ASS'N, http://www.healthcaredistribution.org/gov_affairs/.state/state_legis-static.asp.

119. *Id.*

120. *States, FDA Pressing Forward with Pedigree, Track and Trace Rules and Regulations*, NAT'L ASS'N OF BDS. OF PHARMACY (May 3, 2011), http://www.nabp.net/news/states-fda-pressing-forward-with-pedigree-track-and-trace-rules-and-regulations/.

121. *Distributor Licensing*, *supra* note 118.

122. PEW HEALTH GRP., *supra* note 95, at 70.

123. 21 U.S.C. § 333(a) (2012).

124. *Id.*

125. *Id.*

126. *Id.*

127. PEW HEALTH GRP., *supra* note 95, at 53.

128. PFIZER, A SERIOUS THREAT TO PATIENT SAFETY, COUNTERFEIT PHARMACEUTICALS 5 (2007), *available at* http://www.pfizer.com/files/products/CounterfeitBrochure.pdf.

129. *Id.*

130. *Id.*

131. *See id.* ("In March 2006, the U.S. Attorney's Office indicted 18 people for a multimillion-dollar international conspiracy to smuggle untaxed cigarettes, counterfeit Viagra and other goods to raise money for the Middle East terrorist group Hezbollah.").

II. THE FDA'S REGULATORY OUTSOURCING

Several well-publicized scandals in 2007 prompted the FDA to engage with foreign governments and set up overseas offices to improve import safety. First, the FDA found melamine, a harmful chemical usually used to make plastics, in pet food.[132] The FDA's investigation further revealed that Chinese producers had deliberately adulterated the pet food.[133] Melamine was much cheaper than real protein and was still able to pass inspection.[134] Approximately 17,000 consumers complained that their pets were injured after eating Chinese-made pet food.[135] As a result of the contamination, more than 2,000 dogs died.[136] Shortly after the pet food scandal, the FDA discovered that Chinese-made toothpaste sold in Miami and other cities contained a toxic chemical agent.[137] The FDA estimated that over $3 million worth of toothpaste in the U.S. market was imported from China.[138] In the same year, Chinese-made toys were found to contain high levels of lead, which could have resulted in injuries to children throughout the United States.[139]

Consequently, food and product safety became the top issue in U.S.-China bilateral trade relations in 2007.[140] President George W. Bush issued an executive order to create the Interagency Working Group on Import Safety (IWG).[141] The IWG's mission was to "identify actions and appropriate steps that can be pursued, within existing resources, to promote the safety of imported products."[142] Against this background, the Department of Health and Human Services (HHS) and the FDA issued action plans to improve import safety.[143] The plans called for the federal

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132. Brenda Goodman, *Pet Food Contained Chemical Found in Plastic, F.D.A, Says*, N.Y. TIMES (Mar. 31, 2007), http://www.nytimes.com/2007/03/31/us/31petfood.html.

133. David Barboza, *China Finds Two Companies Guilty in Tainted Pet Food Export*, N.Y. TIMES (May 8, 2007), http://www.nytimes.com/2007/05/08/business/worldbusiness/08iht-petfood.5.5627364.html.

134. David Barboza & Alexei Barrionuevo, *Filler in Animal Feed Is Open Secret in China*, N.Y. TIMES (Apr. 30, 2007), http://www.nytimes.com/2007/04/30/business/worldbusiness/30food.html?page wanted=all.

135. U.S. FOOD & DRUG ADMIN., IMPORT ALERT 99-29 (Aug. 14, 2012), http://www.accessdata.fda.gov/cms_ia/importalert_267.html [hereinafter IMPORT ALERT 99-29].

136. *Id.*

137. Walt Bogdanich, *Toxic Toothpaste Made in China Is Found in U.S.*, N.Y. TIMES (June 2, 2007), http://www.nytimes.com/2007/06/02/us/02toothpaste.html.

138. *Id.*

139. Eric S. Lipton & David Barboza, *As More Toys Are Recalled, Trail Ends in China*, N.Y. TIMES (June 19, 2007), http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html?pagewanted=all.

140. Glenn Somerville, *Paulson—Food Safety a Top Issue for US-China Talks*, REUTERS (Dec. 7, 2007), http://uk.reuters.com/article/2007/12/07/usa-china-idUKWAT00856120071207.

141. Exec. Order No. 13,439, 72 Fed. Reg. 40,053 (July 20, 2007), *available at* http://www.gpo.gov/fdsys/pkg/FR-2007-07-20/pdf/07-3593.pdf.

142. *Id.*

143. Major reports on import safety to the President include: (1) INTERAGENCY WORKING GRP. ON IMP. SAFETY, IMPORT SAFETY—ACTION PLAN UPDATE: A PROGRESS SUMMARY (July 2008), *available at* http://archive.hhs.gov/importsafety/report/actionupdate/actionplanupdate.pdf [hereinafter ACTION PLAN UPDATE]; (2) INTERAGENCY WORKING GRP. ON IMP. SAFETY, ACTION PLAN FOR IMPORT SAFETY: A ROADMAP FOR CONTINUAL IMPROVEMENT (Nov. 6, 2007), *available at* http://archive.hhs.gov/importsafety/report/actionplan.pdf [hereinafter ACTION PLAN FOR IMPORT SAFETY]; (3) INTERAGENCY WORKING GRP. ON IMP. SAFETY, PROTECTING AMERICAN CONSUMERS EVERY STEP OF THE WAY: A STRATEGIC FRAMEWORK FOR CONTINUAL IMPROVEMENT IN IMPORT SAFETY (Sept. 10, 2007), *available at* http://archive.hhs.gov/importsafety/report/report.pdf [hereinafter PROTECTING AMERICAN CONSUMERS].

government to negotiate cooperative arrangements with foreign governments on product safety to include measures for (1) conducting inspections in foreign countries; (2) collaborating with foreign governments to conduct joint investigations; and (3) expanding information-sharing channels on product safety.[144] Since 2008, the FDA has set up more than ten overseas offices in China, India, Europe, the Middle East, and Latin America, three of which are in China.[145] Cooperation with foreign governments has become the primary means for the FDA to regulate import safety. Currently, the FDA has sixty-seven agreements with foreign governments regarding the safety of food, drugs, and medical devices manufactured for the U.S. market.[146]

A. Agreement with China

The FDA and China's State Food and Drug Administration (SFDA) signed a Memorandum of Understanding Agreement regarding drug and medical device safety (the Agreement) in December 2007.[147] Renewed in 2009, the Agreement will remain effective until 2013.[148]

The purpose of the Agreement is to exchange information between the two parties and encourage regulatory cooperation on the safety of drugs and medical devices manufactured for their respective markets.[149] Thus, the parties will "improve their mutual understanding of, and gain greater confidence in," each other's drug safety systems.[150] The Agreement covers a number of products designated by each party based on actual or potential risk of fraudulent practices in previous trade.[151] The FDA designated ten drugs and devices including gentamicin sulfate, atorvastatin, sildenafil, dietary supplements intended for erectile dysfunction or sexual enhancement, human growth hormone, oseltamivir, cephalosporin manufactured in facilities that also manufacture non-cephalosporin drugs, glycerin, glucose test strips, and condoms.[152] Heparin is noticeably missing from the

144. ACTION PLAN FOR IMPORT SAFETY, *supra* note 143, at 24–25.

145. The three Chinese offices are in Beijing, Shanghai, and Guangzhou. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-960, FOOD & DRUG ADMINISTRATION: OVERSEAS OFFICES HAVE TAKEN STEPS TO HELP ENSURE IMPORT SAFETY, BUT MORE LONG-TERM PLANNING IS NEEDED 8 (2010), *available at* http://www.gao.gov/assets/320/310614.pdf.

146. *See Memoranda of Understanding and Other Cooperative Arrangements*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/default.htm (last updated Nov. 30, 2012) [hereinafter MOU] (listing the memoranda of understanding currently in existence between the FDA and foreign governments).

147. Agreement Between the Department of Health and Human Services of the United States of America and the State Food and Drug Administration of the People's Republic of China on the Safety of Drugs and Medical Devices, U.S.-China, Dec. 11, 2007, T.I.A.S. No. 07-1211, *available at* http://www.fda.gov/InternationalPrograms/Agreements/MemorandaofUnderstanding/ucm107512.htm [hereinafter Agreement].

148. MOU, *supra* note 146.

149. Agreement, *supra* note 147, art. I.

150. *Id.* art. II(B).

151. *Id.* art. IV(A)(1).

152. *Id.* art. IV(A)(2). SFDA designated drugs and devices are: recombinant human insulin, lysine fat and lysine salt, cefoperazone and its salts, paclitaxel injection, penicillin and its finished dosage form, diagnostic kit for blood screening (specifically, for HIV/AIDS and hepatitis B & C), intraocular lenses, and cardiac pacemakers. *Id.*

designated list because the agreement was signed before the heparin crisis broke out.[153]

The most problematic provision in the agreement is that the FDA will eventually rely on the SFDA to verify whether Chinese firms that export drugs and medical devices to the U.S. market are in compliance with U.S. law.[154] According to this provision, when the FDA deems that regulatory conditions in China are met, the FDA will recognize that SFDA-certified products satisfy U.S. requirements and may enter the U.S. market.[155] The provision essentially sets a goal for the FDA to outsource its regulatory power to the Chinese government. While the provision may greatly facilitate bilateral trade of drugs and medical devices, the potential risk to U.S. patients has been largely overlooked. Soon after the signing ceremony for the Agreement, the Chinese government faced yet another domestic food scandal in which at least nine infants died and over 300,000 children were sickened by adulterated milk powder laced with melamine, the same chemical responsible for the pet food crisis in the United States.[156] Will the Chinese government live up to the job of safeguarding drug and medical devices destined for the U.S. market? In order to answer this question, it is necessary to examine the Chinese drug safety regulatory framework.

III. DRUG REGULATION IN CHINA

During the Korean War,[157] a number of wounded soldiers died of infection after using expired drugs or unsanitary medical devices provided by Dakang, a privately owned pharmaceutical company in Shanghai.[158] Investigation revealed that Wang Kangnian, the owner of Dakang, bribed sixty-five officials in twenty-five government departments in order to win the defense contract.[159] Chairman Mao was furious and ordered Wang's immediate execution, despite the fact that there were no drug safety laws in place.[160] The harsh punishment showed that Mao was determined to root out

153. The Agreement was signed on December 11, 2007. Agreement, *supra* note 147. The heparin crisis took place in 2008. Wassener, *supra* note 24.

154. Agreement, *supra* note 147, art. IV(C).

155. *Id.*

156. Mark McDonald, *Death Sentences in China Milk Case*, N.Y. TIMES (Jan. 22, 2009), http://www.nytimes.com/2009/01/22/news/22iht-23MILK.19584434.html; Elizabeth Weise & Julie Schmit, *FDA Limits Chinese Food Additive Imports*, USA TODAY, http://usatoday30.usatoday.com/money/industries/2007-04-30-chinese-imports-usat_N.htm (last updated May 1, 2007).

157. Otherwise known in China as the War Resisting America and Aiding Korea. *Jianshang Wang Kangnian Pianqv Zhiyuanjun Gouyao Jvkuan Shanghai Shi Gong'an Ju Genjv Dianyuan Jianjv Ba Gaifan Daibu* (奸商王康年骗取志愿军购药巨款上海市公安局根据店员检举把该犯逮捕) [*Wang Kangnian Defrauded Huge Sum of Money from Troops, Shanghai Public Security Bureau Arrested Wang Based on Information Provided by a Sales Clerk*], XINHUANET, Feb. 16, 1952, http://www.cass.net.cn/zhuanti/y_kmyc/review/1952/mouth2/19520216-04.htm (on file with author).

158. In the early 1950s, like other major industries, pharmaceuticals were privately owned. *Wuer Nian Quanguo Dajia Qiangbi Liang Jianshang Zhenshe Ji Shi Nian* (五二年全国打假枪毙俩奸商震慑几十年) [*The Execution of Two Swindlers in 1952 Had Deterrence for Decades*], FENGHUANG LUNTAN (Jan. 13, 2009), http://blog.ifeng.com/article/2047317.html (on file with author) [hereinafter *Two Swindlers*]. After the socialization movement at the end of the 1950s, the Chinese government nationalized all major industries. Liu, *supra* note 66, at 282.

159. *Two Swindlers*, *supra* note 158.

160. *Id.*

counterfeiting by any means necessary. Mao later waged an all-out crusade against private businesses, which led to the nationalization of major industries in the late 1950s.[161]

In 1963, the State Council promulgated its first drug regulation, titled the Rules of Drug Administration.[162] In 1984, the People's Congress enacted the Drug Administration Law (DAL), which was amended in 2001.[163] The 2001 DAL sets forth the current regulatory framework for drug administration in China.[164] To implement the DAL, the government subsequently issued a number of regulations on drug approval and registration.[165]

Influenced by the U.S. model, the State Council decided to merge several then-existing government agencies that were in charge of drug administration and create a single entity in 1998—the Drug Administration.[166] In 2003, the State Council renamed the Drug Administration the State Food and Drug Administration (SFDA).[167] The head of the SFDA enjoys administrative privileges at a level only slightly lower than that of ministries. According to the DAL, the SFDA is responsible for drug registration, approval, and quality control.[168] Provincial and local governments are responsible for supervision of drug production and distribution within their jurisdictions.[169]

A. The Drug Administration Law

Like U.S. law, the DAL requires that drug makers seek premarket approval from the SFDA for the production of new drugs.[170] The DAL also requires that drug makers have certified drug specialists, maintain sanitary condition in facilities, designate personnel and equipment for quality control, and establish internal rules and procedures for safe production.[171] Additionally, the DAL states that drug makers must comply with "Drug Production Quality Administration Protocols,"[172] which serve as a legal basis for the SFDA to require all drug makers to meet GMP

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161. *Shehui Zhuyi Sanda Gaizao* (*社会主义三大改造*) [*Three Big Socialist Reforms*], XINHUANET, http://news.xinhuanet.com/ziliao/2003-09/03/content_1060054.htm (last visited July 6, 2012).

162. *Woguo Yaopin Guanli Fa he Yaopin Zhuce Guanli Banfa de Lishi Yange* (*我国《药品管理法》和《药品注册管理办法》的历史沿革*) [*Historical Development of Drug Administration Law and Drug Registration Law in China*], BEIJING YIYAO WEISHENG FAXUE LVSHI (Jan. 6, 2011), http://www.yixuefalv.com/onews.asp?id=3409 (on file with author) [hereinafter *Yange*].

163. *Id.*

164. *Id.*

165. *Id.*

166. *Zhuce Fengbao Zhong Yiyao Hangye Xianzhuang* (*注册风暴中医药行业现状*) [*Current Situation of the Pharmaceutical Industry in the Midst of Registration Storm*], ZHONGYAO, http://www.zhong-yao.net/shi/32170.htm (last visited July 6, 2012).

167. SFDA OF CHINA, http://www.sfda.com (last visited July 23, 2012).

168. *Yange*, *supra* note 162.

169. Yaopin Guanli Fa (药品管理法) [Drug Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2001, effective Dec. 1, 2001) art. 5 (China), *available at* http://www.sfda.com/drug-administration-law-of-the-peoples-republic-of-china.html [hereinafter DAL].

170. *See generally* 1 FOOD & DRUG ADMIN. § 13:79 (2011) (explaining the four stages of U.S. FDA proceedings for drug approval); DAL, *supra* note 169, arts. 29–31.

171. DAL, *supra* note 169, art. 8.

172. *Id.* art. 9.

standards.[173] In addition to the production process, the DAL further requires that drug makers ensure the safety and quality of active drug ingredients and excipients.[174]

1. Inspections

The SFDA may inspect drug production and distribution.[175] Drug makers and distributors must permit SFDA inspectors to access drug facilities and must cooperate with inspections.[176] The SFDA may also conduct random inspections without notice.[177] During the inspections, if the SFDA finds evidence indicating that a drug may cause harm to human health, it can seize that drug and halt production.[178] If the SFDA does so, it must issue an administrative decision within seven days.[179] If the SFDA needs to conduct further analysis of the suspected drugs, it must issue a decision within fifteen days.[180] The SFDA must also periodically publish inspection results.[181] If the drug maker being inspected disagrees with the SFDA's inspection results, it can request an administrative retest.[182] In addition, the DAL established an adverse drug reactions system, which requires that drug makers, distributors, and health providers make timely reports to the SFDA once they discover severe adverse drug reactions.[183]

2. Fake Drugs

Since fake drug scandals prompted changes to the DAL, the new law has several sections devoted to combating fake and substandard drugs. According to Article 48, a fake drug is defined as a drug produced under any of the following circumstances:

> (1) The ingredients in the drug are different from those specified by the national drug standards;
>
> (2) A non-drug substance is substituted for a drug, or a substitute drug is mislabeled as a genuine drug;
>
> (3) Use of the drug is prohibited by law;
>
> (4) The drug is produced or imported without required approval, or marketed without required testing;
>
> (5) The finished drug has been spoiled or deteriorated;

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173. *See* discussion of GMP regulations *infra* Part III.B.1.
174. DAL, *supra* note 169, art. 11.
175. *Id.* art. 64.
176. *Id.*
177. *Id.* art. 65.
178. *Id.*
179. *Id.*
180. DAL, *supra* note 169, art. 65.
181. *Id.* art. 66.
182. *Id.* art. 67.
183. *Id.* art. 71.

(6) The finished drug has been contaminated;

(7) The drug has been produced using ingredients prohibited by law or substances without approval numbers as required by law; or

(8) The effects of the drug are misrepresented or beyond the drug's specified scope.[184]

Drug makers that engage in drug production without SFDA permits will face closure and forfeiture of all illegal gains.[185] In addition, they will be fined two to five times the sale amount.[186] Those who manufacture fake drugs may face termination of production licenses, closure, forfeiture of all illegal gains, and fines of two to five times the sale amount.[187] Owners of drug manufacturers that produce fake or substandard drugs causing severe consequences are barred from re-entering the drug industry for ten years.[188] In any case, if circumstances are serious enough, criminal prosecutions will be initiated.[189]

3. Criminal Penalties and Civil Liabilities

The criminal law of China imposes severe sanctions on those who produce counterfeit or substandard products that cause serious bodily injury or death.[190]

Product safety in China is regulated by China's Product Quality Law,[191] which requires sellers to inspect and verify the quality of products[192] and prohibits the production or sale of products that fail to meet that standard.[193] The consequences for producing adulterated products range from halt of production to confiscation to fines equaling up to 300% of the total sale.[194] Under the most serious circumstances, the penalty may include revocation of the producer's business license and even criminal investigation.[195] If the fake drugs cause serious harm or death, the responsible parties will face penalties ranging from three years to life

184. *Id.* art. 48.

185. *Id.* art. 73.

186. DAL, *supra* note 169, art. 73.

187. *Id.* art. 74.

188. *Id.* art. 76.

189. *Id.* arts. 73–75, 77.

190. *See* Zhonghua Renmin Gongheguo Xingfa (中华人民国和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 1980, amended Mar. 14, 1997) arts. 140–42 (China), *available at* http://www.cecc.gov/pages/newLaws/criminalLawENG.php [hereinafter PRC Criminal Law] (imposing sentences of up to fifteen years imprisonment and fines up to ¥2 million).

191. Zhonghua Renmin Gonghe Guo Chanpin Zhiliang Fa (中华人民共和国产品质量法) [The Product Quality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., effective Sept. 1, 1992, amended July 8, 2000) art. 32 (China), *available at* http://www.chinalawandpractice.com/Article/1694405/Channel/9942/PRC-Product-Quality-Law-Revised.html [hereinafter PRC Product Quality Law] (synonymous with products liability law).

192. *Id.* art. 33 ("Sellers shall implement the system of examination and acceptance of goods procured, verifying the product quality certificates and other marks.").

193. *Id.* art. 32 ("Producers shall not adulterate their products or pose fake products as genuine or shoddy products as good or substandard products as standard.").

194. *Id.* arts. 49–50

195. *Id.* art. 50; PRC Criminal Law, *supra* note 190, arts. 141–42.

imprisonment.[196] If the circumstances are particularly serious, the death penalty may be imposed.[197] In either case, responsible parties will face a fine of 50% to 200% of the sale amount or a confiscation of the total amount of the illegal proceeds.[198]

A series of recent counterfeit drug scandals prompted lower courts to seek guidance from the Supreme People's Court on how to interpret Article 141. In 2009, the Supreme People's Court and the Supreme People's Procuratorate Communique jointly issued a judicial interpretation of Article 141 (the Interpretation).[199] The Interpretation clarifies the meanings of terms such as "seriously endanger human health" and "particularly serious harm."[200] Furthermore, the Interpretation expressly extends criminal penalties to medical institutions, such as hospitals and clinics, which knowingly administer fake drugs to patients.[201]

In terms of compensation, the producer of a defective product may be liable for medical expenses as well as any lost earnings as a result of the injury.[202] Compensation may also cover the living expenses of a party's dependants if the defective product left the victim disabled.[203] In cases that result in the victim's death, the law entitles the decedent's surviving dependants to funeral and living expenses.[204]

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196. PRC Criminal Law, *supra* note 190, arts. 141–42.

197. *Id.*

198. *Id.*

199. Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Shengchan Xiaoshou Jiayao Lieyao Xingshi Anjian Jüti Yingyong Falü Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理生产、销售假药、劣药刑事案件具体应用法律若干问题的解释) [Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Regarding the Specific Application of Law in Handling Criminal Cases about Production and Sale of Counterfeit or Substandard Drugs] (promulgated by Sup. People's Ct. & Sup. People's Proc. Communique, Feb. 24, 2009, effective May 27, 2009), 2009 SUP. PEOPLE'S CT. GAZ. 7 (China), *available at* http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1060.htm [hereinafter Interpretation].

> Article 1 Where any fake medicine produced or sold falls under any of the following circumstances, it shall be deemed as "seriously endangering the human health" as prescribed in Article 141 of the Criminal Law:
>
> (1) The fake medicine contains toxic or hazardous substances that are prohibited by the national drug standards, or the toxic or hazardous substances that it contains exceed the national drug standards;
>
> (2) The fake medicine belongs in the category of narcotic drugs, psychotropic drugs, toxic drugs for medical use, radioactive drugs, contraceptive drugs, blood products or vaccines;
>
> (3) The fake medicine is mainly administered to pregnant and lying-in women, infants, children, or critically ill patients;
>
> (4) The fake medicine belongs in the category of injection drugs or first aid drugs;
>
> (5) There is no drug production license or production approval code or the said license or code is counterfeit, and the fake medicine belongs in the category of prescription drugs; or
>
> (6) Any other circumstance of seriously endangering the human health.

Id.

200. *Id.* art. 2.

201. *Id.* art. 4.

202. PRC Product Quality Law, *supra* note 191, art. 44.

203. *Id.*

204. *Id.*

B. *Law in Practice*

In 1998, Mr. Zheng Xiaoyu became the first director of the Drug Administration, which would later become the SFDA.[205] During Zheng's eight-year tenure, he was credited with transforming the Drug Administration's framework and initiating numerous reforms that helped China become one of the world's leading pharmaceutical exporting countries.[206] However, Zheng's career ended tragically. In 2007, Beijing's No. 1 Intermediate People's Court sentenced Zheng to death for corruption and dereliction of duty.[207] Although corruption cases were common in China, Zheng was one of a few high-ranking officials to receive the death penalty in a decade. Zheng's trial offered a rare glimpse of the inner workings of the SFDA and the challenges that the Chinese government faces in enforcing the laws and regulations on drug safety.

As the head of the SFDA, Zheng carried out two reforms: (1) establishing GMP standards, and (2) consolidating all new drug approval processes.[208] These initiatives were aimed at increasing drug quality control. Zheng strongly believed that the Chinese pharmaceutical industry would not be able to face challenges in the international market without these two reforms. Ironically, it was Zheng's tenacious efforts in pushing the whole industry forward that sent him on the path towards the death penalty.[209]

1. Good Manufacturing Practices (GMP)

During the first year of his tenure, Zheng oversaw the promulgation of many major regulations, several of which addressed quality control processes, such as good manufacturing practice (GMP), good clinical practice (GCP), and good laboratory practice (GLP).[210] His contribution towards institutionalizing China's drug safety framework was profound.[211] In 2001, China became a member of the World Trade Organization (WTO), which provided the Chinese drug industry with unprecedented opportunities in the international market. With its abundance of cheap labor and its lax environmental regulations, China had great potential to become a powerhouse for drug manufacturing. Zheng's push for GMP certification among China's drug makers greatly facilitated their cooperation with western pharmaceutical firms, all of which had already incorporated GMP into their production processes in the 1960s. Therefore, GMP certification was a valuable ticket for Chinese pharmaceuticals to

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205. David Barboza, *A Chinese Reformer Betrays His Cause, and Pays,* N.Y. TIMES (July 13, 2007), http://www.nytimes.com/2007/07/13/business/worldbusiness/13corrupt.html?pagewanted=all.

206. *Id.*

207. David Barboza, *China Sentences Former Drug Regulator to Death*, N.Y. TIMES (May 29, 2007), http://www.nytimes.com/2007/05/29/world/asia/29cnd-drug.html.

208. Barboza, *supra* note 205.

209. *See id.* (arguing that companies' profit losses due to the reforms led to the corruption of the SFDA and Zheng, which consequently resulted in Zheng's execution).

210. Heping Jia, *China Syndrome—a Regulatory Framework in Meltdown?*, 25 NATURE BIOTECHNOLOGY 835, 835 (2007); *see also Zheng Xiaoyu Zai Di Sanci GAP Qicao Gongzuo Huiyi Shang de Shumian Jianghua (郑筱萸在第三次 GAP 起草工作会议上的书面讲话) [Zheng's Speech On the Third GAP Drafting Meeting]*, CHINAPHARM (Sep. 22, 2004), http://www.chinapharm.com.cn/html/gap/09300720040922.html (last visited Oct. 11, 2012).

211. *See* Jia, *supra* note 210, at 836 ("You cannot deny those achievements by SFDA simply because Zheng did a poor job in the end.").

enter the world stage.[212] Even after Zheng's execution, scholars agreed that he guided the Chinese drug industry in the right direction.[213] Professor Yang Yue commented that the GMP requirement was a necessary step to improve drug quality and safety: "You don't know what horrible conditions some drug makers had been in. For example, in some traditional Chinese medicine companies, workers stirred the drugs with their feet."[214]

In practice, however, Zheng's idealistic regulations were met with strong resistance from the pharmaceutical industry for several reasons: First, the industry viewed these regulations as a straitjacket that increased production costs and limited the profit margin.[215] To upgrade facilities and hire qualified staff would add unbearable financial burden to the drug industry.[216] Many firms had to divert funds originally budgeted for research and development to meet GMP compliance, which seriously reduced these firms' competitiveness.[217] Second, since Zheng ardently pushed the regulations through, the drafters did not conduct adequate research or broad discussion with the drug industry.[218] After promulgation of the regulations, the SFDA did not take the time to educate the industry on how to comply with the regulations.[219] As a result, the industry found the new regulations confusing.[220] Third, the industry, which was accustomed to deregulation and state stimulus, was never before subject to any strict regulations.[221] Therefore, most drug makers reacted poorly to Zheng's rigorous demands. Fourth, the government capped the price of drugs to combat growing health care costs.[222] In addition, the cutthroat competition among drug makers added pressure to cut production costs.[223] Drug makers were squeezed between government price control and the cost of GMP compliance.

Despite growing discontent from the drug industry, Zheng required all pharmaceuticals to meet GMP standards by 2004.[224] Failure to comply with GMP standards would result in closure.[225] Of 6,700 drug makers, nearly 2,000 lost their production licenses for not meeting GMP by the end of 2004.[226] The GMP

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212. *See* He Xin et al., *Zhe Yaojian Gaoguan Luoma Gongchu Zheng Xiaoyu* (*浙药监高官落马供出郑筱萸*) [*A Disgraced High Official at the Zhejiang Drug Administration Tipped off Zheng Xiaoyu's Corruption Case*], SOHU (Feb. 9, 2007), http://news.sohu.com/20070209/n248140809.shtml.

213. *Id.*

214. Barboza, *supra* note 205.

215. *See id.* ("Companies complained that because of their shrinking profit margins, they did not have the money to develop new drugs.").

216. Gai et al., *GMP Implementation in China: A Double-Edged Sword for the Pharmaceutical Industry*, 1 DRUG DISCOVERIES & THERAPEUTICS 12, 12–13 (2007).

217. Jia, *supra* note 210, at 836.

218. Zheng Xiaoyu Shouhui, Wanhu Zhishou An Xingshi Panjue Shu (郑筱萸受贿,玩忽职守案刑事判决书) [In re Zheng Xiaoyu's Bribery and Abuse of Power], 2007 Beijing No. 1 Interm. People's Ct. Criminal Judgment No. 1799, § 2 (May 19, 2007) (China) (hereinafter Zheng's Judgment).

219. Jia, *supra* note 210, at 836.

220. *Id.*

221. REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION 145 (John Gillespie and Randall Peerenboom eds., 2009).

222. *See* Barboza, *supra* note 205 ("Some producers switched to the drugs not covered by the government's price caps.").

223. Jia, *supra* note 210, at 837.

224. *Id.* at 836.

225. *Id.*

226. *Id.*

regulations created enormous opportunities for rent-seeking. Many drug makers bribed Zheng with gifts in exchange for speedy approval and other special favors. Further investigation revealed that at least one in six pharmaceutical companies in Zhejiang Province that were GMP-certified had once bribed Zheng and other high-ranking officials.[227] Unable to resist the temptation of cash, cars, and a free villa, Zheng directed his wife and son to form a consulting company in Shanghai to take bribes from desperate drug makers.[228] According to court documents, Zheng and his family accepted more than $850,000 worth of gifts.[229] In his confession, Zheng wrote, "Why are the friends who gave me money all the bosses of pharmaceutical companies? Obviously because I was in charge of [the] drug administration."[230] Even though Zheng secretly paid back many of the gifts he received after he stepped down from the SFDA, he was not able to avoid the death penalty in the end.[231]

2. National Standards

Another of Zheng's signature initiatives was to centralize drug registration based on a national standard.[232] Before this reform, each province had the power to approve new drugs and define its own drug standards for packaging and labeling.[233] In addition, each provincial health department held independent power over drug registration.[234] The inconsistency among provincial drug standards and registration systems not only confused consumers, but also stiffened market competition across provincial borderlines. Furthermore, the close ties between drug makers and local drug administration officials were often tainted by corruption.[235] In 2001, the government passed the new DAL, which established a national standard for drug registration and marketing.[236] According to the new law, the SFDA would review all drugs that were already approved by provincial governments and re-register them on the condition that they complied with the national standard.[237] Neither drug makers nor local governments liked the new changes. Because of the new law, drug makers incurred substantial costs in meeting the national standard. Local governments resisted the law because it deprived them of influence over local drug makers.

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227. Chen Xiaoying, *Shouhui Qianwan Zheng Xiaoyu Wo'an Dujia Jiemi* (*受贿千万 郑筱萸窝案独家解密*) [*Exclusive Report on Mr. Zheng's Corruption Case*], XINJING DAILY (Apr. 9, 2007), http://finance.sina.com.cn/roll/20070409/15061321771.shtml.

228. Barboza, *supra* note 205.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Quanli Da Jizhong Jie "Dibiao" Sheng "Guobiao" Zhiji Zheng Xiaoyu Kuangmai 2600 Duojian Piwen* (*权力大集中 借"地标"升"国标"之际 郑筱萸狂卖2600 多件批文*) [*Centralization of Power: Zheng Xiaoyu Took Advantage of Drug Standardization and Sold More Than 2,600 Drug Registration*], SHIDAI SHANGBAO (Feb. 8, 2007), http://news.sohu.com/20070208/n248109796.shtml.

233. *Id.*

234. *Id.*

235. Liu Wei, *Woguo Yaopin Jianguan de Fengyu Jiunian* (*我国药品监管的风雨九年*) [*Nine Tumultuous Years of China's Drug Regulation*], XINHUANET (Mar. 9, 2007), http://news.xinhuanet.com/health/2007-03/08/content_5816477.htm.

236. DAL, *supra* note 169.

237. Yaopin Zhuce Guanli Banfa (药品注册管理办法) [Provisions for Drug Registration] (promulgated by the St. Food & Drug Admin., July 10, 2007, effective Oct. 1, 2007) (China), *available at* http://www.sfdachina.com/info/64-1.htm.

In practice, the SFDA failed to implement the law because the agency did not have a proper procedure in place or enough staff to handle the re-registration process. At trial, Zheng was accused of dereliction of duty for not anticipating the massive amount of work that resulted from the overhaul.[238] To reduce the workload and speed up the process, Zheng delegated to provincial governments the work of verifying the authenticity of documents that drug makers submitted for re-registration.[239] The SFDA only reviewed a photocopy of the documents.[240] This simplified the procedure but seriously compromised the integrity of the registration process because it provided loopholes for fraudulent applications.[241] Court documents indicate that the SFDA granted registration to a large number of drug makers that submitted fake application documents. For example, Mr. Qingxiang Yu, a high-ranking official in Jilin Province, abused his entrusted power and assisted local drug makers in falsifying documents in exchange for over ¥1 million ($158,510).[242] Yu was sentenced to fifteen years in prison.[243]

Furthermore, Zheng disregarded the central government's requirement that the power of drug registration and approval must be shared among several subdivisions within the SFDA in order to prevent power concentration and corruption.[244] Instead, Zheng designated only one division with fewer than twenty employees to handle re-registration applications from all across China.[245] He appointed his longtime friend, Mr. Cao Wenzhuang, to head the division. Cao instantly cashed in his unchecked power by taking about ¥2 million ($317,020) from pharmaceutical companies in exchange for granting registrations.[246] In a three-month period, Cao's division re-registered 147,900 drugs previously registered by provincial governments.[247] Given the flawed system and corrupt officials, it came as no surprise that at least six SFDA-registered drugs were counterfeits.[248]

3. New Drug Approval

Unsurprisingly, the SFDA's new drug approval process was as chaotic as that seen in the drug registration process. The new DAL granted the SFDA the sole power to approve new drugs by stripping provincial governments of such power.[249] The new change coincided with the central government's price control on generic

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238. Zheng's Judgment, *supra* note 218, § 2.

239. *Id.*

240. *Id.*

241. *Id.*

242. Luo Changping & Zhang Yingguang, *Zheng Xiaoyu Zui yu Fa* (*郑筱萸罪与罚*) [*Zheng's Guilt and Punishment*], XINJING DAILY (Apr. 18, 2007), http://finance.sina.com.cn/g/20070418/11223513657.shtml.

243. *Id.*

244. Zheng's Judgment, *supra* note 218, § 2.

245. Luo & Zhang, *supra* note 242.

246. Li Xinyue, *Yaojian Ju Yuan Yaopin Zhuce Sizhang Cao Wenzhuang Beikong Shouhui 200 Wan* (*药监局原药品注册司长曹文庄被控受贿200万*) [*Mr. Cao Wenzhuang, Former SFDA Drug Registration Head Accused of Taking ¥2 Million in Bribes*], XINJING DAILY (May 21, 2007), http://news.sina.com.cn/c/l/2007-05-21/044213034442.shtml.

247. *Id.*

248. Zheng's Judgment, *supra* note 218, § 2.

249. Luo & Zhang, *supra* note 242.

drugs, which severely squeezed drug makers' profit margins. To avoid government price control, drug makers used new drugs to compensate for the loss in generic drug sales.[250] In addition, the SFDA's regulation defined the term "new drug" loosely. For example, even mere dosage changes or technological improvements could cause a drug to be approved as a new drug.[251] The SFDA's inadequate definition created a loophole for drug manufacturers that allowed them to manipulate the system. Rather than relying on research and development, drug makers reshuffled ingredients of generic drugs, claimed them as "new drugs," and sought the SFDA's approval.[252] In 2005, the SFDA approved 1,113 applications for "new drugs" that were in fact generics with only dosage changes.[253] During the same period in the United States, the FDA only approved eighty-one new drugs.[254] As in the registration process, some drug makers used falsified documentation for new drug applications.[255] The cozy relationships between Zheng and drug makers that sought approval often gave rise to corruption. "Court records show that when a company named the Double Doves Group sought to register disposable syringes, it offered shares to Mr. Zheng's wife; his son received a used Audi, consulting fees and property in Shanghai."[256]

4. Fake Drug Scandals

The impact of counterfeit drugs is difficult to quantify. For obvious reasons, the drug industry does not want to reveal any irregularities. The government tends to censor any damaging information that could cause public unrest. As a result, there are no reliable statistics revealing to what extent fake drugs have caused death and illness in China.[257] A series of food and drug scandals, however, have had a profound impact on public consciousness. In a widely cited survey, over 70% of the Chinese public has lost confidence in the Chinese food and drug regulatory system.[258] In addition, scholars believe that a series of fake-drug scandals contributed to the doom of Zheng's reign.[259]

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250. Dali Yang, Regulatory Learning and Its Discontents in China: Promise and Tragedy at the State Food and Drug Administration, Address at Conference on Pushing Back on Globalization: Local Asian Perspectives on Regulation (Nov. 28–30, 2007), *available at* http://www.daliyang.com/files/Yang_SFDA_paper.pdf.

251. Jia, *supra* note 210, at 836.

252. Yang, *supra* note 250, at 7.

253. Jia, *supra* note 210, at 836.

254. *Id.*

255. Luo & Zhang, *supra* note 242.

256. Zheng's Judgment, *supra* note 218, § 2.

257. *See* Barboza, *supra* note 205 (explaining that the government does not know how many deaths or illnesses have resulted from faulty drugs).

258. Xie Xiaoliang, *Diaocha Xianshi: Wenti Yao Rang 72.7% de Gongzhong Danxin Yaopin Anquan* (*问题药让72.7%的公众担心药品安全*) [*72.7% of the Public Worried About Drug Safety*], CHINA YOUTH DAILY (July 10, 2006), http://news3.xinhuanet.com/politics/2006-07/10/content_4811420.htm.

259. *See* Zhao Bingzhi et al., *Zheng Xiaoyu Weihe Bei Panchu Sixing? Zhongguo Xingfa Xuejie Zhuanjia Jiedu* (*郑筱萸为何被判死刑？中国刑法学界专家解读*) [*Why Was Xiaoyu Zheng Sentenced to Death? Analysis by China's Criminal Law Experts*], CHINALAWINFO.COM, http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=38924 (last visited Oct. 11, 2012).

a. Xinfu (clindamycin phosphate glucose)

In July 2006, approximately 100 patients across sixteen provinces became violently ill after receiving antibiotic injections of Xinfu.[260] At least ten people died as a result of using the drug.[261] Since the SFDA was extremely slow to react to the incident, physicians scrambled to find out what exactly caused the severe reactions to Xinfu, a very commonly used drug.[262] On August 3, 2006, a week after the death of a six-year-old girl, the SFDA issued a public notice warning about adverse reactions to Xinfu.[263] Had the SFDA acted more quickly, doctors would not have given Xinfu to the girl.[264] Further investigation uncovered that Huayuan, the maker of Xinfu, violated GMP standards in the production process to curb costs.[265] Ironically, Huayuan was one of the first drug makers to receive GMP certification from the SFDA in 1999.[266] However, neither the SFDA nor the local drug administrative bureau has ever conducted thorough inspections to verify whether Huayuan actually enforced GMP standards in the production process. Local officials and inspectors stated that they rarely went to pharmaceutical plants to conduct GMP inspections, except for occasional symbolic tours.[267] According to these officials, it was Huayuan's responsibility to conduct self-inspections to ensure GMP standards were observed.[268]

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260. Beiyuan Chen, *Quanguo Ge Shengshi Diqu Yin Zhushe Xinfu Buliang Fanying Tongbao* (*全国各省市地区因注射欣弗不良反应通报*) [*National Report on Instances of Pathological Reactions to the Injection of Xinfu*], QIYE FALV FENGXIAN PEIXUN LVSHI TUANDUI BLOG (企业法律风险培训律师团队博客) [LEGAL RISK MANAGEMENT BLOG] (Aug. 11, 2006, 6:35 PM), http://blog.sina.com.cn/s/blog_4a1afcff0100059j.html.

261. *"Xinfu" Shijian Yuzhen: Anhui Huayuan Yaoye Yuan Zong Jingli Zisha* (*"欣弗"事件余震:安徽华源药业原总经理自杀*) [*Latest Development on the Xinfu Scandal: The Former CEO of Huayuan Pharmaceutical Company Committed Suicide*], CHINA SECURITIES NEWS (Nov. 3, 2006), http://news.qq.com/a/20061103/000995.htm.

262. Xie Ding, *Anhui Huayuan Wenti Yaopin Shijian Tuxian Ke Lin Mei Su Jianguan Queshi* (*安徽华源问题药品事件凸现克林霉素监管缺失*) [*The Huayuan Scandal Reveals Lack of Supervision*], XINJING DAILY (Aug. 8, 2006), http://news.sina.com.cn/c/2006-08-08/005010655080.shtml.

263. *Id.*

264. *Id.*

265. *Xinfu Shijiang Shimo: Qian gui ze Yia de Dianxing Daibiao* (*欣弗事件始末：潜规则下的典型代表*) [*The Xinfu Scandal Reveals Hidden Rules in the Drug Industry*], XINJING DAILY (Aug. 16, 2006), http://news.sina.com.cn/c/2006-08-16/02109758112s.shtml; *Shipin Anquan Ju Jiu "Anhui Huayuan" Yaopin Buliang Shijiang Dawen* (*食品药品监管局就"安徽华源"药品不良事件答问*) [*SFDA's Comment on the Anhui Huayuan Fake Drug Scandal*], XINHUANET (Aug. 16, 2006), http://www.gov.cn/zwhd/2006-08/16/content_363425.htm.

266. Wang Yue, *Cong Xinfu Zhiliang Shijian Kan GMP Renzheng Hou de Guanli Quewei* (*从欣弗质量事件看 GMP 认证后的管理缺位*) [*The Xinfu Scandal Revealed Lack of Supervision of GMP Standards*], CHINA QUALITY DAILY (Aug. 18, 2006), http://www.5ijk.net/show.aspx?id=50979&cid=865.

267. Gu Ping, Jiang Longfei & Wang Liping, *Xinfu Chuchang Qian You Huayuan Zijian Shengshi Yaojian Ju Tuiwei Choujian Zeren* (*欣弗出厂前由华源自检 省市药监局推诿抽检责任*) [*Huayuan Conducted Self-Inspection of Xinfu; Both Provincial and City Drug Administrations Refused Responsibilities*], XINJING DAILY (Aug. 8, 2006, 12:43 AM), http://news.sina.com.cn/c/2006-08-08/004310655075.shtml.

268. *Id.*

b. Qiqihar No. 2 Pharmaceutical

At about the same time that the Xinfu scandal broke out, thirteen patients died in Guangzhou after receiving Armillarisni A, made by Qiqihar No. 2 Pharmaceutical (Qiqihar No. 2).[269] Like Huayuan, Qiqihar No. 2 received GMP certification from the SFDA in 2005.[270] Mr. Guo Xingping, deputy general manager, testified that the company obtained GMP certification by paying ¥10,000 ($1,566) even though the company was clearly incapable of meeting the GMP standards for production.[271] The company's drug-ingredient acquisition manager, Mr. Niu Zhongren, only had a middle-school education.[272] In 2005, Niu ordered one metric ton of counterfeit propylene glycol, which in fact was diethylene glycol, a toxic material used in making plastic and industrial dyes.[273] If the company had enforced the GMP protocol, its laboratory would have discovered the counterfeit materials. However, most of the company's laboratory staff had never studied chemistry nor received any formal training.[274] No one conducted any analytical screening of the fake materials before they were put into the manufacturing process.[275]

c. Toxic Toothpaste and Pet Food

Even though the counterfeit scandals involving Hauyuan and Qiqihar No. 2 caused far more damage in China than the tainted pet food caused in the United States, American media outlets did not pay much attention to the safety issues in the Chinese pharmaceutical industry.[276] The FDA did not take serious precautions until after it received reports from owners that their dogs had fallen ill, or had died, after consuming Chinese-made pet food.[277] Further laboratory testing indicated that the counterfeit pet food contained melamine, a cheap chemical that was often used to make plastics and fertilizers.[278] Some Chinese pet food makers had found that melamine mimicked protein so closely that it easily passed regular inspections.[279] It

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269. *China Bans 2 Factories from Exporting Toys*, N.Y. TIMES, Aug. 9, 2007, http://www.nytimes.com/2007/08/09/business/worldbusiness/09iht-yuan.1.7054901.html.

270. *Qi Er Yao Jiayao An Beigao Cheng Changfang Hua 10 Wan Gou Mai GMP Renzheng* (*齐二药假药案被告称厂方花10万购买GMP认证*) [*Qiqihar No. 2 Pharmaceutical Company Official Admitted that the Company Bought the GMP Certification for 10,000 Yuan*], SOHU (Aug. 9, 2007), http://news.sohu.com/20070809/n251491059_1.shtml [hereinafter *Renzheng*].

271. *Id.*

272. Cao Jingjing, *"Qi Er Yao An" Dusi 13 Ren 5 Ming Zeren Ren Guangzhou Bei Kong Zhongzui* ("*齐二药案"毒死13人5名责任人广州被控重罪*) [*Qiqihar No. 2 Pharmaceutical's Fake Drugs Killed Thirteen People, Five Managers Received Severe Criminal Prosecution in Guangzhou*], XINQUAI DAILY (Apr. 13, 2007), http://news.sohu.com/20070413/n249397187.shtml.

273. Wu Xiaodong et al., *Qi Er Yao SanNian ZaoJia DiaoCha* (*齐二药三年造假调查*) [*Investigation Report on Qiqihar No. 2's Three-Year Counterfeiting*], XINJING DAILY (May 22, 2006), http://news.sina.com.cn/c/2006-05-22/02128985883s.shtml.

274. *Renzheng*, *supra* note 270.

275. Wu et al., *supra* note 273.

276. Barboza, *supra* note 133.

277. *Id.*

278. *Id.*

279. *See id.* ("[T]wo companies had cheated pet food companies by adding a fake protein into the feed to make pet food suppliers believe they were purchasing high protein feed when in fact they were getting lower protein feed.").

was the U.S. media's pervasive reporting on the pet food scandal that severely tarnished the reputation of Chinese-made products in the U.S. market.[280] Since exportation was a driving force for China's economic growth, the pet food scandal put the Chinese government under enormous pressure.[281]

Even though corruption crimes in China are subject to capital punishment, the sentence of immediate execution took both Zheng and his lawyer by surprise.[282] Some scholars observed that Zheng's punishment was indeed much heavier than those imposed on other high-ranking officials who accepted more bribes than Zheng.[283] In addition, Zheng's passionate confession and efforts to pay back bribes were mitigating factors that could have persuaded the court to sentence him to the death penalty with a two-year suspension, which would have eventually been commuted to life imprisonment.[284] According to scholars, the reason the court disregarded Zheng's mitigating actions was that his dereliction and corruption had threatened the public health and damaged the reputation of China's food and drug industry in China.[285] In essence, the Chinese government used Zheng's execution to prove that it was serious about food and drug safety.[286]

5. Problems Continue

Zheng's execution did not put an end to corruption in China's drug industry. Recent scandals demonstrate that corrupt officials continue to cash in on their power over drug registration and approval. As a result, fake drugs continue to claim lives and inflict grave injuries to patients.

In 2010, the rabies vaccine manufactured by Yanshen Pharmaceutical Co. (Yanshen) caused injuries to more than one million people.[287] Yanshen was a leading

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280. *See generally* May Hongmei Gao, *The 2007 Chinese Pet Food Crisis: On U.S. Media's Coverage and U.S. Pet-Owners Reactions*, 3 J. EMERGING KNOWLEDGE ON EMERGING MKTS. 411 (2011) (discussing the American and Chinese reactions to the contamination of Chinese-produced pet foods).

281. *Id.*

282. Li Kejie, *Zheng Xiaoyu Mei Xiangdao Ziji Hui Pan Sixing* (*郑筱萸没想到自己会被判死刑*) [*Zheng Xiaoyu Did Not Expect the Death Penalty*], MODERN DAILY (June 11, 2007), http://news.xinhuanet.com/newmedia/2007-06/11/content_6225167.htm.

283. *Id.*

284. *Id.*

285. *Id.*

286. *See* Joseph Kahn, *China Quick to Execute Drug Official*, N.Y. TIMES (July 11, 2007), http://www.nytimes.com/2007/07/11/business/worldbusiness/11execute.html?ref=business (stating that Zheng's case "allow[ed] senior leaders to show that they have begun confronting the country's poor product-safety record"); Zhu Zhe, *Ex-Official Gets Death for Graft*, CHINA DAILY (May 30, 2007), http://www.chinadaily.com.cn/china/2007-05/30/content_882994.htm ("[Zheng's] sentence reflects the concern of Chinese top leaders about issues such as corruption and food safety.").

287. Sha Ke, *Jia Yimiao Zaici Tiaozhan Baixing Chengshou Dixian* (*假疫苗再次挑战百姓承受底线*) [*Fake Vaccines Challenge the Tolerance of Ordinary People*], DONGFANGNET (Mar. 31, 2010), http://finance.ifeng.com/opinion/special/yimiaoshijian/mssd/20100331/1991801.shtml; Li Songtao, *Jiangsu Kuangquan Yimiao Qunian Sanyue Chushi Niandi Cai Gongbu Yin Zhengyi* (*江苏狂犬疫苗去年三月出事 年底才公布引争议*) [*Investigation of Jiangsu Fake Vaccine Scandal in March Finally Made Public by the End of the Year, the Delay Has Caused Controversy*], CHINA YOUTH DAILY, April 5, 2010, http://finance.ifeng.com/news/special/yimiaoshijian/bgt/20100405/2008646.shtml; Xiao Sisi & Wu Tao, *Jiangsu 20,000 Duofen Wenti Yimiao Liuru Guangdong Yinfa 1 Li Buliang Fanying* (*江苏2 万多份问题疫 苗流入广东 引发1 例不良反应*) [*Over 20,000 Problematic Vaccines Slipped from Jiangsu into Guangdong,*

manufacturer of the rabies vaccine in China, with annual sales of ¥180 million ($28 million).[288] In 2008, the local health department imposed fines on Yanshen for multiple violations, which included cutting corners, falsifying data, and evading inspections.[289] To recoup the loss, Mr. Zhongyi Zhang, the vice-manager of Yanshen, was secretly ordered to release substandard vaccines to the market.[290] According to regulations regarding vaccine production, a firm must seek approval from the health department before marketing vaccines.[291] Zhang directed the company's chief scientist to fabricate lab reports and send false samples to the state quality control office, which quickly approved the products.[292] As a result, Yanshen sold 53,293 doses of substandard rabies vaccines in seventeen provinces for ¥1,601,282 ($252,658).[293] At trial, Zhang admitted that it was a common practice to falsify lab reports and provide false samples to ensure approval for marketing.[294] Zhang further testified that among the dozens of vaccine makers in China, only some were up to international standards, while others lagged far behind.[295] To stay in the market, many manufacturers without the required technology and facilities took illegal measures to get their products approved, such as falsifying documents, bribing officials, or both.[296]

Shortly after the fake vaccine scandal, a criminal investigation led to the arrest of five SFDA officials, including Mr. Wei Liang, a subdivision director in charge of biological drug supervision and GMP certification.[297] Wei allegedly received bribes totaling ¥1,470,000 ($232,594) from at least twenty-five different pharmaceutical companies that were seeking drug registration and approval.[298] Despite the public's wide suspicion that the fake vaccine scandal prompted the arrest, the government openly denied a direct link.[299] Having learned a lesson from previous scandals, the

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Causing One Adverse Reaction] XINHUANET (Apr. 3, 2010), http://finance.ifeng.com/roll/20100403/2007369.shtml; Ye Wentian & Chen Jiying, *Yimiao An Yinfa Yaojian Xitong Fanfu Fengbao* (*疫苗案引发药监系统反腐风暴*) [*The Fake Vaccine Scandal Likely to Prompt an Anti-Corruption Storm*], CHINA MARKETING DAILY, Apr. 3, 2010, http://finance.sina.com.cn/roll/20100403/10307688350.shtml.

288. *Jiangsu Changzhou Kuangquan Bing Yimiao Shejia An Kaiting, Beigao Dangting Jie Heimu* (*江苏常州狂犬病疫苗涉假案开庭 被告当庭揭黑幕*) [*Suspects Revealed Hidden Secrets at the Fake Rabies Vaccine Trial*], CHINA YOUTH DAILY (Aug. 17, 2010), http://finance.ifeng.com/news/special/yimiaoshijian/20100817/2520606.shtml.

289. Han Wei, *Yimiao Hangye Zai Bao Chouwen Pingzhuang Shengli Yanshui Yijia Luanzhen* (*疫苗行业再爆丑闻瓶装生理盐水以假乱真*) [*Fake Vaccine Scandal Resurfaced: Selling Pharmacy Physiological Saline as Vaccine*], TIMES WEEKLY (June 10, 2010), http://finance.ifeng.com/news/special/yimiaoshijian/20100610/2297762.shtml.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. Han, *supra* note 289.

296. *Id.*

297. Wen Shuping, *Yaojian Ju Zaibao Fubai Woan Wu Ren Beibu* (*药监局再曝腐败窝案 5 人被批捕*) [*Corruption Scandal Resurfaced in the SFDA, Five Officials Arrested*], ECONOMIC OBSERVER (Apr. 16, 2010), http://finance.ifeng.com/news/20100416/2063592.shtml.

298. *Shoushou 25 Jia Qiye Huilu: Yaojian Ju Wei Liang An Kaiting* (*收受 25 家企业贿赂：药监局卫良案开庭*) [*Wei Liang, an SFDA Official, at Trial, Accused of Receiving Bribes from 25 Drug Companies*], 21 CENTURY ECONOMY (Nov. 20, 2010), http://finance.sina.com.cn/g/20101120/11218984470.shtml [hereinafter *Wei Liang An*].

299. Wu Xiaolei, *Yaojian Ju Shuyue Nei Fasheng 16 Qi Renshi Renmian Fouren Yin Yimiao Shijian* (*药监局数月内发生 16 起人事任免 否认因疫苗事件*) [*The SFDA Dismissed 16 Officers within Several*

government restricted information regarding the case.[300] At a ninety-minute-long trial (unusually short even by Chinese standards), the Beijing court invoked a summary procedure and limited the audience to two of Wei's family members.[301] There was no information about which drug makers bribed Wei in exchange for what special favor, nor was any information released regarding what happened to the drugs produced by the companies that bribed Wei.[302] By all appearances, the government tried to put a quick end to Wei's case in order to prevent further public suspicion of other officials and drug makers.

There is no punishment more extreme than the death penalty. By executing the country's top drug regulator, the Chinese government has shown its dedication to drug safety. However, Zheng's execution has failed to deter corrupt dealings between regulators and the food and drug industry. Scandals continue to claim lives and inflict injuries. Despite the Chinese government's genuine efforts to clean up corruption, drug safety will remain one of the top issues in the foreseeable future.

CONCLUSION

Judging by appearances alone, there is no great disparity between the United States' Food, Drug and Cosmetic Act (FDCA) and China's Drug Administration Law (DAL). Even the English translation of the Chinese agency's name underscores the similarities between China's SFDA and the United States' FDA. The reason for the similarities between the two laws is that the U.S. law serves as a model for China's DAL. Despite their differing political structures and legal systems, each country's law designates a special agency in charge of drug safety supervision. Both laws emphasize pre-market approval, inspection, and post-market sanctions to ensure drug safety. In terms of legal provisions, regulatory agencies, and desire to ensure drug safety, the two systems are very much aligned. Perhaps due to this perception, the FDA had engaged with its Chinese counterpart in hopes that the SFDA would share the burden of regulating drugs made for the U.S. market. In practice, however, the Chinese law as it is written on paper is entirely different from what is put into action. Unfortunately, the FDA either completely overlooked or unwisely disregarded this critical factor when it reached agreement with China.

The ideal outcome of the FDA's agreement is that its foreign counterpart will regulate manufacturers exporting drugs to the U.S. market as rigorously as the FDA regulates U.S. manufacturers producing similar products for domestic consumption. However, even if the foreign government makes genuine efforts and does what it promised in the agreement, the risk of adulteration and counterfeiting remains. This is because the regulatory framework and environment of the foreign country is drastically different from that of the United States. While scholars often criticize lenient penalties for counterfeiting and cite a lack of resources for prosecuting such crimes in the United States, the criminal penalties, albeit inadequate, are wholly

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Months, but Denied Any Link to the Fake Vaccine Scandal], TIMES WEEKLY (Apr. 8, 2010), http://china.huanqiu.com/roll/2010-04/771391.html.

300. *Wei Liang An*, *supra* note 298.

301. *Yimiao She Jia An Tingshen Jingbao Hangye Heimu* (*疫苗涉假案庭审惊曝行业黑*) [*Fake Vaccine Trial Shockingly Exposes Shady Industry*], CHINA YOUTH DAILY (Aug. 17, 2010), http://article.cyol.com/law/content/2010-08/17/content_3378568.htm.

302. *Id.*

inapplicable in foreign jurisdictions. It is therefore quite naïve to expect a foreign government to cooperate with the FDA in times of crisis. Even under the existing agreement, the FDA's attempt to investigate a Chinese firm in the heparin crisis was met with enormous resistance from the Chinese government. When its reputation and profit are at stake, a foreign government will make every effort to protect its own business interests, even at the expense of U.S. consumers. Therefore, the FDA's reliance-on-foreign-governments approach to drug safety is seriously flawed.

Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance

ROBERT C. BLITT*

Abstract

To what extent should or must a corporation contemplate international human rights law? Following a brief discussion of the increasing influence of transnational corporations and global business transactions, as well as the growth of the international human rights system, this Article uses the 2011 United Nations' *Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm* as a jumping-off point for addressing the most recent developments related to identifying and regulating business-related human rights practices. After identifying an emerging divide between endorsement and criticism of the Guiding Principles, the Article concludes with a forward-looking view, arguing that although the Guiding Principles may represent a good starting point, corporations genuinely concerned with ensuring the effective minimization or elimination of exposure to potentially embarrassing and costly human rights liabilities should be prepared to apply a more rigorous approach.

SUMMARY

* Associate Professor of Law, University of Tennessee College of Law. The author would like to thank John Ruggie for providing feedback on an early draft of this Article as well as John Bradley and the staff of the *Texas International Law Journal* for their rapid and able editorial guidance in bringing this final version to press. The author also acknowledges the generous support of the University of Tennessee College of Law for funding the research associated with this Article.

INTRODUCTION

Your corporation, Minerals R Us, is confronted with public protests and lawsuits in various countries around the world five years into an otherwise profitable merger with Lior Minerals Inc., a company headquartered in Gisserville, the capital of Lioria.[1] While Minerals R Us is now the primary supplier of iMineral, a key component necessary for powering all forms of modern gadgetry, it appears that Lior Minerals Inc. managed to extract the coveted iMineral—a complex and dangerous process—only after displacing an indigenous tribe and employing children based on racial preference, all the while preventing unionization through threats and the imposition of onerous contractual terms that essentially relegated employees to forced laborers.

At the time of the merger, no one thought to scrutinize whether Lior Minerals' business practices violated human rights. Likewise, the cigar-chomping CEO of Minerals R Us, Richard McKnight, never bothered to travel to Lioria to view employee conditions firsthand because the country consistently ranked near the top of the Failed States Index and was notorious for its widespread violence, which particularly targeted foreigners. During discussions leading up to the merger, McKnight was heard to remark—to affirmative nods from the board of directors—"Mine baby, mine!" and "Who gives a rat's ass how it gets done. Just do it."

1. The names, places, and minerals referenced here are purely hypothetical and intended only for the sake of example.

While this scenario may be illustrative of past standard operating procedures for many corporations, and arguably may persist in some boardrooms today, the takeaway message intended from this Article cautions counsel against ignoring human rights liabilities at their own, their principals', and indeed even their corporation's peril. This advice is premised on the dynamic and increasingly socially conscious global arena within which businesses operate, and more specifically, on the emerging international framework intended to address business-related human rights harms. Following a brief discussion of the increasing influence of transnational corporations (TNCs)[2] and global business transactions, as well as the growth of the international human rights system, this Article will discuss the most recent developments related to identifying and regulating business-related human rights practices. The departure point for this analysis will be the March 2011 Guiding Principles on Business and Human Rights,[3] the culmination of John Ruggie's six-year effort as the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.[4]

This report, while heralded as a milestone, is only a departure point for the simple reason that it underestimates the rapidity in which the human rights environment for businesses is unfolding. Human rights advocates have already expressed concern that the SRSG's Guiding Principles do not go far enough.[5] In fact, the principles set a minimal-expectation bar for businesses, promulgating a series of non-binding "lowest common denominator" recommendations that arguably neglect a more complex reality.[6] Based on a consideration of the emerging divide between endorsement and criticism of the Guiding Principles, I conclude with a forward-looking view, arguing that although the principles may represent a good starting point, corporations genuinely concerned with ensuring the effective minimization or elimination of exposure to potentially embarrassing and costly human rights liabilities should be prepared to apply a more rigorous approach.

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2. For the purposes of this Article, I use the terms TNC and multinational corporation (MNC) interchangeably. *See* Peter F. Drucker, *The Global Economy and the Nation-State*, 76 FOREIGN AFF. 159, 167–68 (1997) (noting that more multinational corporations are becoming transnational in nature).

3. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

4. Shortly after his mandate as Special Representative ended, Mr. Ruggie accepted a Senior Advisor position with Foley Hoag LLP's Corporate Social Responsibility (CSR) practice. *See John G. Ruggie*, FOLEY HOAG LLP, http://www.foleyhoag.com/People/Specialists/Ruggie-John.aspx (last visited Dec. 10, 2012) (describing Ruggie's position at Foley Hoag LLP).

5. *See, e.g.*, *UN Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011), http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards (stating that various organizations have expressed concern that Ruggie's Guiding Principles are weaker than established human rights norms).

6. *See* David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 12 SUR INT'L J. HUM. RTS. 199, 216 (2010), *available at* http://www.surjournal.org/eng/conteudos/getArtigo12.php?artigo=12,artigo_10.htm (explaining that, in an effort to find consensus, Ruggie undermined basic human rights standards by failing to state that corporations are bound to these standards under international law).

I. A BRIEF HISTORY OF THE RISE OF TRANSNATIONAL CORPORATIONS, THE GLOBAL ECONOMY, AND INTERNATIONAL HUMAN RIGHTS

A. The Rise of the Transnational Corporation

While the origins of the modern-day TNC can be traced back to the East India Company[7] or even to ancient Rome,[8] it was not until the turn of the 20th Century that an increasingly large number of enterprises began developing a transnational structure. This pattern continued through the era leading up to the Second World War, and in the period that followed expanded at an unprecedented pace, fueled by communication and transportation advances and associated cost savings brought about by "containerized freight, airborne deliveries and the telex."[9]

In the 1960s, MNCs came to be regarded "as more progressive, dynamic, [and] geared to the future than provincial companies which avoid foreign frontiers and their attendant risks and opportunities."[10] Indeed, this period represented a historical "high-water mark in the spread of the transnational networks of United States-based industrial enterprises," with foreign affiliates reaching an all-time high.[11] By the early 1990s, virtually all industrialized countries provided a base for numerous MNCs, which were fast becoming "the dominant form of organization responsible for the international exchange of goods and services."[12] Likewise, the pace and scale of mergers also began growing exponentially during this period.[13]

In the wake of this extraordinary pattern of growth and globalization, TNCs found themselves in the startling position of outperforming the national economies of states[14]—a dramatic turn of events considering that hitherto nation-states had been considered the primary, if not exclusive, actors within the international order.[15] To be certain, the nation-state's iron-fisted grip on sovereignty has been challenged from other directions,[16] but the global rise of TNCs is unique insofar as the value-added

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7. NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL x–xii (2006).

8. STANLEY BING, ROME, INC.: THE RISE AND FALL OF THE FIRST MULTINATIONAL CORPORATION xv (2006).

9. Raymond Vernon, *Transnational Corporations: Where are They Coming From, Where are They Headed?*, 1 TRANSNAT'L CORPS. 7, 10 (1992).

10. Howard V. Perlmutter, *The Tortuous Evolution of the Multinational Corporation*, COLUM. J. WORLD BUS., Jan-Feb 1969, at 9, 10.

11. Vernon, *supra* note 9, at 12.

12. *Id.* at 7.

13. *Id.* at 20.

14. Consider Apple Inc.'s $76 billion pile of cash, which in mid-2011 outstripped U.S. cash reserves. Matt Hartley, *U.S. Balance Now Less Than Apple Cash*, FIN. POST (July 28, 2011, 4:56 PM), http://business.financialpost.com/2011/07/28/u-s-balance-now-less-than-apple-cash/.

15. The Charter of the United Nations reaffirms this traditional view by restricting its membership exclusively to "other peace-loving states." U.N. Charter art. 4, para. 1. The modern state system typically dates to the Treaty of Westphalia in 1648. Daud Hassan, *The Rise of the Territorial State and The Treaty of Westphalia*, 9 Y.B. N.Z. JURIS. 62, 69 (2006).

16. *See* Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 304 n.192 (2004) (offering examples of non-governmental organizations making critical statements that have posed a challenge to the sovereignty of some nation-states, such as Sudan, in the past).

activities of the 100 largest corporations have grown faster than those of nation states, indicating their critical importance in the global economy.[17] As if to underscore the point, studies estimate that TNCs today make up one-third to one-half of the world's 100 largest economic entities.[18] In the face of this economic might, it seems reasonable that Howard V. Perlmutter, writing in the 1960s, called "the senior executives engaged in building the geocentric enterprise ... the most important social architects of the last third of the twentieth century. For the institution they are trying to erect promises a greater universal sharing of wealth and a consequent control of the explosive centrifugal tendencies of our evolving world community."[19]

Despite its 1960s sanguinity—and putting aside that the phrase "geocentric enterprise" conjures up a discarded script from *Mad Men* (CEO of Minerals R Us: "We need some creative ideas for cleaning up our shabby corporate image." Sterling Cooper Copywriter: "How does 'geocentric enterprise' grab you?")—Perlmutter's vision evidences that even early in their modern development, TNCs, for better or worse, exhibited a powerful potential capable of displacing the ability of government to exert influence over their actions.[20] If anything, the last fifty years have made it clear that states no longer hold a monopoly on manipulating the international system, and moreover, that corporate and state interests are not necessarily always simpatico.[21] Indeed, much like states, many TNCs today "have the resources and power both to perpetrate and to escape responsibility" for human rights abuses.[22]

Partly because of this unfolding new reality, a parallel rising emphasis on greater accountability now confronts these corporate actors. As writer Charles Handy has observed:

> If we haven't bothered much about these things in the past, it is probably because we never thought of businesses as political institutions, but rather as engines and instruments of commerce, as machines not communities. We did not, therefore, apply the same rules to them as we would to a

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17. Press Release, U.N. Conference on Trade and Development, Are Transnationals Bigger than Countries?, U.N. Press Release TAD/INF/PR/47 (Aug. 12, 2002) [hereinafter UNCTAD Press Release]; *see also* SARAH ANDERSON & JOHN CAVANAGH, INSTITUTE FOR POLICY STUDIES, TOP 200: THE RISE OF CORPORATE GLOBAL POWER i (2000) ("The Top 200 corporations' sales are growing at a faster rate than overall global economic activity. Between 1983 and 1999, their combined sales grew from the equivalent of 25.0 percent to 27.5 percent of World GDP.").

18. UNCTAD Press Release, *supra* note 17.

19. Perlmutter, *supra* note 10, at 18. According to Perlmutter, the geocentric enterprise offered "an institutional and supra-national framework which could conceivably make war less likely, on the assumption that bombing customers, suppliers and employees is in nobody's interest." *Id.*

20. Vernon, *supra* note 9, at 27.

21. Whereas the bottom line for many TNCs is maximizing share price, nation-states ideally seek to improve material welfare as a whole while keeping the peace. *See* Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 141, 145–50 (Philip Alston ed., 2005) (comparing the traditional role of international law in a "state-centric" system, where the motivation is the protection of citizens, to the altered role of international law where the state sovereignty is challenged by MNCs interested in low production costs effectuated by minimal human rights standards).

22. *Id.* at 142; *see also* Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993) ("The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes.").

nation-state, where matters of human rights, free speech and the responsibility of governors to the governed would be argued about and even fought over.[23]

B. International Human Rights Law: From Humble, Non-binding Beginnings

The 1948 Universal Declaration of Human Rights (UDHR) is often credited as the first modern acknowledgment on the part of states that international law can in fact serve as a source of rights and responsibilities for individual as well as state actors.[24] While the United Nations (U.N.) General Assembly voted unanimously to endorse the UDHR, it did so with the express understanding that its content constituted an aspirational statement of human rights principles, rather than a binding treaty capable of establishing legally enforceable obligations on the part of states.[25] In the words of Eleanor Roosevelt, chairperson of the international commission responsible for drafting the UDHR, it "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights setting up a common standard of achievement for all peoples and all nations."[26]

Despite the seemingly constrained ambition of the UDHR, binding international law has a funny way of being created out of the customary (distinct from contractual or treaty) practices of states, provided that such practices are readily identifiable as being widespread, consistent, and motivated by a sense of legal obligation.[27] And this is precisely what has transpired in the case of the rights expressed in the UDHR. Soon after the UDHR's passage, the International Court of Justice reasoned that its provisions reflected guiding principles of law and basic tenets of humanity.[28] By the 1970s, evolving state practice allowed the renowned international law scholar Ian Brownlie to acknowledge that "the indirect legal effect of the Declaration is not to be underestimated and it is frequently regarded as a part of the 'law of the United Nations.'"[29] Closer to home, the United States Court of Appeals for the Second Circuit in 1980 observed that the prohibition against torture

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23. Charles Handy, *The World in 1997: Will Your Company Become a Democracy?*, ECONOMIST, Jan. 10, 2011, *available at* http://www.economist.com/node/17878558.

24. Margaret R. Somers & Christopher N.J. Roberts, *Toward a New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights,* 4 ANN. REV. L. SOC. SCI. 385, 391 (2008) (quoting JUDITH BLAU & ALBERTO MONCADA, HUMAN RIGHTS: BEYOND THE LIBERAL VISION 33 (M.D. Lanham ed., 2005)) (The UDHR is "today recognized as perhaps the 'fundamental source of inspiration for international efforts to promote and protect human rights and fundamental freedoms, and . . . the canonical reference for all other human rights instruments.'").

25. *See The Foundation of International Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/udhr/hr_law.shtml (last visited June 24, 2012) (noting that the UDHR was originally a commitment to upholding dignity and justice that was slowly translated into law over the years).

26. 1948 U.N.Y.B. 527, U.N. Sales No. 1950.I.II [hereinafter U.N.Y.B.]; *History of the Document*, UNITED NATIONS, http://www.un.org/en/documents/udhr/history.shtml (last visited June 24, 2012).

27. *See* Corfu Channel Case (U.K. and N. Ir. v. Alb.), 1949 I.C.J. 4, at 22 (Apr. 9) ("Such obligations are based, not on the Hague Convention of 1907 . . . but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.").

28. *Id.*

29. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 559 (7th ed. 2008).

had "become part of customary international law, as evidenced and defined by the [UDHR]."[30]

In an even broader recognition of this unfolding process, others have concluded that many of the UDHR's provisions "have become incorporated into customary international law, which is binding on all states."[31] The U.N. itself confirmed this evolutionary process on the occasion of the UDHR's 60th anniversary, when it recognized that the document's aspirational commitment

> [o]ver the years . . . has been translated into law, whether in the forms of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights.[32]

Ultimately, the UDHR was only the opening salvo in the rapid development of a binding system of international human rights law that continues to expand and entrench itself today in international, regional, and domestic contexts. Beginning with the lynchpin covenants governing both civil and political rights and economic, social, and cultural rights[33] (together with the UDHR, sometimes referred to as the International Bill of Human Rights), the international community has drafted and ratified a total of nine core international human rights treaties, with the most recent—addressing enforced disappearance—entering into force at the end of 2010.[34] Among other things, these regimes require state reporting on implementation and establish committees of independent experts responsible for engaging with state parties and providing authoritative interpretations of treaty provisions.[35]

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30. Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

31. Hurst Hannum, *The UDHR In National and International Law*, 3 HEALTH & HUM. RTS. 144, 145 (1998).

32. *The Foundation of International Human Rights Law*, UNITED NATIONS, http://www.un.org/events/humanrights/2008/ihrl.shtml (last visited June 21, 2012).

33. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights [ICESCR], G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Jan. 3, 1976).

34. *Human Rights Treaty Bodies*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., http://www2.ohchr.org/english/bodies/treaty/index.htm (last visited June 22, 2012). In addition to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the covenants noted above (ICCPR and ICESR), the core treaties consist of the following: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) (1984); the Convention on the Rights of the Child (CRC) (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990); and the Convention on the Rights of Persons with Disabilities (CRPD) (2006). *See International Law*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., http://www2.ohchr.org/english/law/index.htm (last visited June 24, 2012) (providing a list and links to the full text of the core international human rights instruments).

35. *Human Rights Treaty Bodies*, *supra* note 34.

Even more profoundly, the European regional human rights system has established a judicial mechanism empowered to hear individual complaints filed against state parties and issue binding judgments. Within this framework, the European Court of Human Rights serves as the final "supranational" court of appeal on matters relating to the European Convention for the Protection of Human Rights and Fundamental Freedoms—a treaty premised on "tak[ing] the first steps for the collective enforcement of certain of the rights stated in the [UDHR]."[36] Similar efforts and systems have evolved in other geographic regions including the Americas and Africa with varying degrees of success.[37]

Finally, in the domestic context, the promise of the UDHR has informed the drafting of national constitutions and served as a touchstone for defining human rights protections for over half a century.[38] In this regard, its influence has been broad and far-reaching, coloring the constitutional outcomes in a diverse array of countries, including New Zealand, Iraq, Afghanistan, South Africa, and all the states of the former Soviet Union and Warsaw Pact, to name a few.[39]

From this brief survey, it becomes evident that the powerful logic, appeal, and moral currency of human rights continues to gain ground, permeating virtually every aspect of our lives, from the global to the local. Human rights have served as the rallying cry for "Arab Spring" protestors braving confrontation with their governments in the streets,[40] and violations of these rights have provided the basis for the International Criminal Court's indictment against the now-deceased Libyan strongman Muammar Gaddafi.[41] In a parallel development, the human rights discourse—long considered applicable only to the relationship between governments and the governed—is increasingly being invoked as a reference point for relationships between individuals and corporate actors. For example, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) foreshadowed this spillover effect by requiring state parties *inter alia* "[t]o take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*" (emphasis added).[42] To gauge how far-reaching and all-permeating this phenomenon has become, consider that all of the following have potential human rights implications: the coffee you drink,[43] the clothing you

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36. European Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953).

37. *See* Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards*, 25 LAW & INEQ. 467, 476–79 (2007) (discussing the UDHR and subsequent human rights treaties in the Americas); Nsongurua J. Udombana, *Mission Accomplished? An Impact Assessment of the UDHR in Africa*, 30 HAMLINE J. PUB. L. & POL'Y 335, 336–38 (2008) (noting the impact of the UDHR on organizational efforts in Africa to improve human rights and their effectiveness).

38. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 18 (2009).

39. Robert C. Blitt, *Should New Bills of Rights Address Emerging International Human Rights Norms? The Challenge of 'Defamation of Religion,'* 9 NW. U. J. INT'L HUM. RTS. 1, 2 (2010).

40. Shadi Mokhtari, *The Middle East and Human Rights: Inroads Towards Charting Its Own Path*, 10 NW. U. J. INT'L HUM. RTS. 194, 195 (2012).

41. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Case No. ICC-01/11, Warrant of Arrest, para. 3 (June 27, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1099321.pdf.

42. Convention on the Elimination of All Forms of Discrimination against Women art. 2(e), G.A. Res. 34/180, U.N. Doc. A/RES/34/46 (Sept. 3, 1981) [hereinafter CEDAW].

43. *See As the Global Coffee Crisis Worsens, a Human Rights Organization Launches a Grassroots Campaign Demanding that Folgers Start Offering Fair Trade Coffee*, DEMOCRACY NOW (Dec. 24, 2001), http://www.democracynow.org/2001/12/24/as_the_global_coffee_crisis_worsens (discussing the global crisis

wear,[44] your Internet search results,[45] the computer you buy,[46] and the diamonds encrusting the whip Lady Gaga reportedly presented Beyoncé for her 29th birthday.[47]

Thus, the story of the UDHR is the story of how aspirational non-binding principles, or "soft law," can evolve continually over time into more durable and enforceable "hard law"—either in the form of a written treaty or in the consolidation of customary international practice. As I argue below, this is the most important lesson for corporate counsel to internalize when contemplating the evolving relationship between business and human rights. Put simply, although SRSG Ruggie's freshly minted Guiding Principles might strike one as plainly non-binding and aspirational today, these same principles can and will find surreptitious ways of growing up and becoming enforceable international norms that may carry serious repercussions for corporations, officers, and ill-prepared shareholders.

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created by the collapse in coffee prices and human rights campaigns demanding free trade coffee); *see also* Sarah Lyon, *Fair Trade Coffee and Human Rights in Guatemala*, 30 J. CONSUMER POL'Y 241, 242–43 (2007) (arguing that "fair trade consumption plays an important role in the realization of human rights"); *Global Human Rights Statement*, STARBUCKS COFFEE CO., 1, http://assets.starbucks.com/assets/1d7de46ff5f845d89c01a81bebdbdb59.pdf (last visited July 25, 2012) (manifesting Starbuck's desire to "uphold the provision of basic human rights and to eliminate discriminatory practices").

44. *See* Kathy Marks, *Exposed: The Reality Behind London's 'Ethical' Olympics*, THE INDEPENDENT (Apr. 14, 2012), http://www.independent.co.uk/news/world/asia/exposed-the-reality-behind-londons-ethical-olympics-7644013.html (discussing allegations of widespread violations of workers' rights in Indonesian factories contracted to manufacture Olympics apparel for Adidas).

45. *See* Amy Schatz, *Web Firms Under Fire to Protect Human Rights*, WALL ST. J. (Mar. 2, 2010), http://online.wsj.com/article/SB10001424052748704548604575097603307733826.html (discussing Google's decision to "stop censoring search results in China after the company's servers came under a cyber-attack there"); David Drummond, *A New Approach to China: An Update*, Mar. 22, 2010, OFFICIAL GOOGLE BLOG (Mar. 22, 2010, 2:03 PM), http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html (explaining Google's attempt to balance the demands of the Chinese government and resultant cyber-attacks on human rights activists with the company's desire to offer uncensored search results). Shortly after Google transferred its service to Hong Kong as a result of these cyber attacks, Microsoft willingly stepped in to strike a deal with Baidu, China's leading search provider, wherein it would supply the Chinese company with censored web search services in English. Matt Warman, *Microsoft Bing in Search Deal with China's Baidu*, TELEGRAPH (July 4, 2011, 5:09 PM), http://www.telegraph.co.uk/technology/microsoft/8616260/Microsoft-Bing-in-search-deal-with-Chinas-Baidu.html.

46. *See Fair Labor Association Begins Inspections of Foxconn*, APPLE (Feb. 13, 2012, 3:32 PM), http://www.apple.com/pr/library/2012/02/13Fair-Labor-Association-Begins-Inspections-of-Foxconn.html (discussing Apple's decision to allow voluntary audits of its factories by the Fair Labor Association).

47. *Whip, Whip Hooray*, THE SUN (Sept. 7, 2010) http://www.thesun.co.uk/sol/homepage/showbiz/bizarre/3127396/Cracking-birthday-present-for-Beyonce-from-GaGa-pal.html. The author hazards a guess that Gaga did not insist that the diamonds be certified conflict-free. Information about conflict diamonds is available at *Conflict Diamonds: Sanctions and War*, U.N. DEP'T PUB. INFO. (Mar. 21, 2001), http://www.un.org/peace/africa/Diamond.html. For information on the Kimberley Process diamond certification system, *see* KIMBERLEY PROCESS, http://www.kimberleyprocess.com/home/index_en.html (last visited June 30, 2012) ("The Kimberley Process (KP) is a joint government, industry and civil society initiative to stem the flow of conflict diamonds—rough diamonds used by rebel movements to finance wars against legitimate governments."). Critics debate whether or not the definition of a conflict diamond should be expanded. *See, e.g.*, Sandra Nyaira, *Kimberley Process Meeting Ends Without Consensus on Zimbabwe Diamonds*, VOICE AM. (June 23, 2011), http://www.voanews.com/zimbabwe/news/Kimberley-Process-Meeting-Ends-Without-Consensus-on-Zimbabwe-124439624.html (reporting on disagreements during a recent meeting regarding Zimbabwe conflict diamonds).

II. CORPORATIONS AND HUMAN RIGHTS LIABILITY—A WORK IN PROGRESS

A. Overview

A rich and expansive literature debating the theoretical and practical implications of ascribing liability for human rights violations to corporate entities has emerged during the past twenty years.[48] However, the following section is concerned primarily with SRSG Ruggie's 2011 report to the U.N. Human Rights Council (H.R.C.), which sets out guiding principles for addressing the relationship between business and human rights. The justification for this narrow focus flows from the fact that Ruggie's effort, encompassing a lengthy and inclusive consultation process, has garnered U.N. endorsement and therefore stands as the most internationally authoritative statement in this area. Despite this pedigree—or perhaps because of it—the Ruggie report has also gained its share of detractors, as will be discussed below.

The SRSG's appointment dates back to 2005,[49] following a contentious and ultimately unsuccessful first attempt by a separate U.N. initiative to establish TNC human rights obligations along the same baseline as is applicable to states.[50] After concluding that little in the way of consistent standards or practices governed TNCs in this area, the SRSG in 2008 recommended a three-pillar framework for improving the existing fragmentary and inconsistent approach: "Protect, Respect and Remedy."[51] In summary, this framework calls for:

> Preserving "the [S]tate duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication."

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48. *See, e.g.*, Anthony D'Amato, *Are Human Rights Good For International Business?*, 1 NW. J. INT'L L. & BUS. 22, 24 (1979) (discussing possible inconsistencies between multinational investments and human rights); Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 68 (1993) (positing that businesses investing in China are responsible for ensuring that their actions do not "contribute to the systematic denial of human rights"); HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 32–34 (Michael K. Addo ed., 1999) (attempting to define a framework for transnational corporate responsibility for human rights through a collection of essays, which were presented at the University of Exeter); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 48 (2002) (addressing the uncontrolled human rights danger multinationals pose as analyzed in light of the Holocaust and other modern events); TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 28 (Jedrzej George Frynas & Scott Pegg eds., 2003) ("In both practical and academic terms, the issues surrounding TNCs and human rights are fast proving themselves to be a growth market for the twenty-first century."); Peter Muchlinski, *Social and Human Rights Implications of TNC Activities in the Extractive Industries*, 18 TRANSNAT'L CORPS. 125, 125 (2009) (discussing human rights violations linked to TNCs as they occur in the extractive industries). For additional reading, *see generally Getting Started Portal*, BUS. & HUM. RTS. RESOURCE CENTRE, http://www.business-humanrights.org/GettingStartedPortal/15reports (last visited July 7, 2012) (providing links to various resources on business and human rights).

49. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 222, 242 (2008).

50. *Id.*; U.N. ESCOR, Comm'n on Hum. Rts., *Economic, Social, and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, pmbl., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

51. *Guiding Principles*, *supra* note 3, at 3–4.

> Requiring corporate respect for human rights under a due diligence standard intended to avoid "infringing on the rights of others and to address adverse impacts" involving the TNC; and
>
> Enhancing "access by victims [of human rights violations] to effective remedy, both judicial and non-judicial."[52]

With a renewed mandate from the H.R.C., Ruggie moved to "operationalize" this framework by developing concrete and practical recommendations which he ultimately set forth in his March 2011 report, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*.[53] Shortly thereafter, the H.R.C. unanimously endorsed Ruggie's report and moved to establish a working group dedicated, *inter alia*, to "effective and comprehensive dissemination and implementation of the Guiding Principles."[54]

B. The 2011 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

1. Key Parameters

There are two things the SRSG's Guiding Principles do not accomplish. First, as is evident from the title, the principles do not aspire to create binding international law or impose obligations on TNCs. Rather, its "normative contribution lies . . . in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved."[55] Similarly, the Guiding Principles do not offer a plug-and-play "tool kit" for identifying corporate human rights responsibilities. Instead, they proffer a sliding-scale approach for corporations based on their size and, ostensibly, their location.[56] In the words of the report, "When it comes to means for implementation . . . one size does not fit all."[57]

Inherent in the SRSG's approach is a rejection—to the relief of many corporate boardrooms—of what he labels the "advocacy community's" attempt "to lay on business itself all manner of responsibility for social outcomes."[58] The purpose, therefore, of the Guiding Principles is to "clearly differentiate the respective roles of

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52. *Id.* at 4.

53. *Id.*

54. *Id.* at 3; Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess., June 16, 2011, U.N. Doc. A/HRC/17/L.17/Rev.1, para. 6(a) (July 6, 2011).

55. *Guiding Principles*, *supra* note 3, at 5. Here it is worth recalling Mrs. Roosevelt's statement to delegates concerning the UDHR. U.N.Y.B., *supra* note 26, at 527.

56. *See Guiding Principles*, *supra* note 3, at 5 ("While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises.").

57. *Id.*

58. OECD, *Prof. John Ruggie on Businesses and Human Rights*, YOUTUBE (Dec. 10, 2010), http://www.youtube.com/watch?v=dVDupBFJiqE.

businesses and governments and make sure that they both play those roles."[59] In other words, while government retains the exclusive responsibility for protecting and fulfilling human rights obligations, the litmus test for corporations under the Guiding Principles only inquires whether business enterprises *respect* human rights.[60]

According to international law, the duty to respect requires that actors "refrain from interfering directly or indirectly with the enjoyment" of human rights.[61] This "entails the prohibition of certain acts . . . that may undermine the enjoyment of rights."[62] Put more succinctly, it obligates actors "not to commit violations themselves."[63] However, under the Guiding Principles, a further key distinction is drawn between obligation and responsibility. The responsibility to respect human rights "means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved."[64] Yet the term responsibility, as opposed to duty or obligation, is intended to indicate "that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws."[65]

With these clarifications, we are still left with an outstanding question: Are the Guiding Principles informed by a broad or narrow interpretation of human rights? The text of Guiding Principle 12 suggests the latter approach by framing "internationally recognized human rights . . . at a minimum, as those expressed in the International Bill of Human Rights [IBHR] and the principles concerning

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59. *Id.*

60. *Guiding Principles*, *supra* note 3, at 13. To a lesser extent, the Guiding Principles also address certain responsibilities relating to remedying human rights violations. *See id.* at 22–27 (discussing various judicial, administrative, legislative, and other appropriate mechanisms for providing effective remedies when business-related human rights abuses occur).

61. Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), Nov. 11–29, 2002, para. 21, U.N. Doc. E/C.12/2002/11, ESCOR, 29th Sess. (Jan. 20, 2003). This is also referred to as a negative obligation since it informs states of what they must *not* do. JEAN-FRANÇOIS AKANDJI-KOMBE, COUNCIL OF EUROPE, HUMAN RIGHTS HANDBOOK NO. 7, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11 (2007), *available at* http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf. Positive obligations require actors to take action. *Id.* The duty to respect typically comes alongside the obligation to protect against human rights abuses and the obligation to fulfill basic human rights. *International Human Rights Law*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx (last visited July 7, 2012).

62. MANFRED NOWAK, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, NO. 8, HUMAN RIGHTS HANDBOOK FOR PARLIAMENTARIANS 11 (2005). For example, with regard to education, governments are prohibited from impinging upon the liberty of parents "to establish private schools and to ensure the religious and moral education of their children in accordance with their own convictions." *Id.*

63. AKANDJI-KOMBE, *supra* note 61, at 5.

64. *Guiding Principles*, *supra* note 3, at 4.

65. John Ruggie, U.N. Special Representative for the Sec'y Gen. for Bus. & Human Rights, *The U.N. "Protect, Respect and Remedy" Framework for Business and Human Rights*, 2 (Sept. 2010) [hereinafter *Framework for Business and Human Rights*]. The plain meaning of "responsibility" suggests a moral obligation to behave correctly or a thing that one is required to do, rather than a duty to which an actor is legally bound. OXFORD UNIVERSITY PRESS, OXFORD AMERICAN DICTIONARY 577 (1980). Although the final Guiding Principles do not provide explicit recognition that "responsibility" is distinct from "duty" or "obligation," the difference is implied insofar as the term duty is invoked in regard to states only.

fundamental rights set out in the International Labour Organization's [ILO] Declaration on Fundamental Principles and Rights at Work."[66] From this wording, the Guiding Principles create the appearance of a baseline that leaves open to debate the larger spectrum of recognized rights, including, for example, norms established under CEDAW and CPMW[67]—to name but two international treaties that may have immediate particular relevance to corporate practices.

Consideration of the Commentary accompanying Guiding Principle 12 goes some way towards alleviating the issue of which rights are to be respected. For example, it rightly acknowledges "business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights."[68] It also provides that, "[d]epending on circumstances, business enterprises may need to consider additional standards."[69] However, several concerns still persist with this formulation. First, it devalues the international community's ongoing commitment to elaborating a normative rights framework beyond the IBHR, as manifested in the entry into force of no fewer than seven additional "core international human rights treaties."[70] Part of the motivation for this ongoing endeavor may be attributed to the inadequate explication of norms as well as inattention to specific issues under the IBHR. For example, as the preamble to CEDAW acknowledges, "despite [the IBHR] extensive discrimination against women continues to exist."[71] Core treaties such as CEDAW represent "the product of more than half a century of continuous elaboration" of human rights norms and "set international standards for the protection and promotion" of these norms.[72] Relegating reference to these core treaties to the Commentary of Guiding Principle 12 does this hard fought international effort a disservice by implying the divisibility of rights and downplaying the trend towards greater international scrutiny of private actors, including potential liability where recognized rights are harmed.[73]

Second, Guiding Principle 12, at least in part, sources its human rights norms in the ILO's Declaration on Fundamental Principles and Rights at Work, a document that emphasizes principles and rights relating to "(a) freedom of association and

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66. *Guiding Principles*, *supra* note 3, at 13. The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in 1988, "is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values . . . vital to our social and economic lives." *ILO Declaration on Fundamental Principles and Rights at Work*, INT'L LABOUR ORG., http://www.ilo.org/declaration/lang--en/index.htm (last visited June 22, 2012).

67. *See* Blitt, *supra* note 39, at 2–3 (discussing the debate between whether established international standards represent "the normative ceiling or only the floor"); *International Law*, *supra* note 34 (introducing CEDAW and CMPW).

68. *Guiding Principles*, *supra* note 3, at 13.

69. *Id.* at 14.

70. This term is an intentional one used by the United Nations and others to encapsulate the primary international human rights treaties. *See, e.g.*, *International Law*, *supra* note 34 (listing the "nine core international human rights treaties").

71. CEDAW, *supra* note 42, pmbl.

72. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 30, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES 7, http://www2.ohchr.org/english/bodies/docs/OHCHR-Fact Sheet30.pdf (last visited July 15, 2012).

73. *See* JERNEJ CERNIC, HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 97 (2010) ("The core international human rights treaties explicitly and implicitly refer to state human rights obligations of states in relation to corporate conduct.").

effective recognition of the right to collective bargaining; (b) the elimination of . . . forced or compulsory labour; (c) the abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."[74] Although the declaration's relevance in the context of corporate responsibility is understandable, its non-binding status necessarily renders it a less authoritative source of law than the core treaties. Indeed, the decision to invoke the declaration within the text of the Guiding Principle ultimately comes at the expense of forgoing explicit reference to the core international treaties that establish a broader range of compulsory norms beyond the declaration's narrow focus. Citing the declaration as a source of minimum-recognized human rights norms is also curious insofar as the declaration has fewer parties than some of the core international human rights treaties, including the CRC and CEDAW,[75] and offers fewer formalized tools for meaningful review, engagement, and enforcement.[76]

Finally, referencing "additional standards" in the Commentary to the Guiding Principles presumes that decision makers within the corporate community—and potentially judicial and arbitral forums down the road—will be prepared to give weight to this supplemental source as a tool for elucidating the full scope and intent of the Guiding Principles. Examining international norms and practices that govern treaty interpretation indicates that such an approach is by no means guaranteed. The *pacta sunt servanda*, or good faith rule of treaty interpretation, "does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."[77] Similarly, where the text of a given treaty is deemed sufficiently clear, interpretation rules shun resorting to related *travaux préparatoires* including commentary for additional guidance.[78] Accessing the commentary—and the additional standards they may reference—is thus contingent on a subjective finding that the language used "leaves the meaning ambiguous or obscure."[79] Accordingly, in the immediate context of

74. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, INT'L LABOUR ORG., http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (last visited July 7, 2012).

75. The ILO declaration represents the views of the organization's 183 member states. *Tripartite Constituents*, INT'L LABOUR ORG., http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm (last visited June 20, 2012). By way of comparison, the CRC and CEDAW have 193 and 187 state parties respectively. Convention on the Rights of the Child, G.A. Res. 44/252, U.N. GOAR, 44th Sess., U.N. Doc. A/44/252 (Nov. 20, 1989); CEDAW, *supra* note 42.

76. According to the ILO, the declaration's follow up mechanisms are essentially promotional. Rev. of Ann. Rep. Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 310th Sess., Mar. 2011, at 1, I.L.O. Doc. GB.310/3 (2011). An annual review is required for those states that have not ratified the ILO's fundamental human rights conventions, and a Global Report on the effect given to the promotion of the fundamental principles and rights at work is published to inform ongoing ILO discussions. *Id.* In 2011, fifty-one states were subject to the annual review process. *Id.* at 2, 19. The ILO's 2010 *Resolution on the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* reiterates that its objective "is of a strictly promotional nature." *Id.* at 31. In contrast, the core international human rights treaties establish various opportunities for general comments and recommendations that may impact obligations of private actors, including corporations and also allow for decisions that address individual complaints where specific treaty obligations may have been violated. CERNIC, *supra* note 73, at 98–99.

77. *Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 187, 219, U.N. Doc. A/CN.4/191.

78. *Id.* at 222–23.

79. Vienna Convention on the Law of Treaties art. 32(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980).

Guiding Principle 12, the term "at a minimum" may or may not trigger consideration of preparatory work based on the discretionary finding of a given decision maker.[80] Adopting a clearer, more authoritative and inclusive reference to the core international human rights treaties noted above could easily avert this potentially uncertain outcome. Unlike the halting standard promulgated under Guiding Principle 12, a more robust reference to existing international human rights standards would more effectively put corporations on notice regarding the full range of scenarios under which a responsibility to respect might arise, better conform with the international community's approach to identifying and codifying human rights, and generally reflect a more embracive and straightforward approach to corporate human rights compliance.[81]

2. Guiding Principles for Respecting Human Rights

With this curious framing of applicable international human rights in place, the Guiding Principles urge business enterprises to respect human rights by recommending that they:

> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and]
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[82]

To accomplish these objectives, an enterprise must have three basic mechanisms in place: (1) a formal policy commitment to respect human rights approved at the most senior level and reflected in operational policies and procedures; (2) "a human rights due-diligence process to identify, prevent, mitigate and account for" business-related impacts on human rights; and (3) remediation processes to address any "adverse [business-related] human rights impacts [the enterprises] cause or to which they contribute."[83]

With regard to the due-diligence mechanism, the Guiding Principles propose that a business enterprise assess actual and potential human rights impacts it "may cause or contribute to through its own activities, *or which may be directly linked to its operations, products or services by its business relationships*" (emphasis added).[84] This responsibility, according to the SRSG, should be "ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."[85] Moreover, to further validate the due-diligence process,

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80. VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 584 (Oliver Dörr and Kirsten Schmalenbach eds., 2012).

81. For example, invoking the core international human rights treaties in the Guiding Principles proper would obviate the commentary's need for providing an unwieldy definition for "core internationally recognized human rights" that arguably underestimates the full panoply of rights contained across the nine core treaties. *Guiding Principles*, *supra* note 3, at 13.

82. *Id.* at 14.

83. *Id.* at 15.

84. *Id.* at 16.

85. *Id.*

the enterprise should rely on both internal and independent external expertise and also take steps to meaningfully consult with relevant stakeholders and other potentially affected groups.[86]

This seemingly far-reaching process is intended to identify and prevent certain deleterious human rights impacts that may arise in a given business venture, including those from associated business relationships or engagement with vulnerable minority groups or populations.[87] Accordingly, the due process mechanism—like the other recommended mechanisms set forth under the Guiding Principles—is envisioned to apply to all enterprises across the board. That said, a determination of whether a given enterprise has satisfactorily complied with its responsibilities is subject to a sliding scale that varies based on "size, sector, operational context, ownership and structure," as well as the magnitude of the human rights impact in question.[88] In other words, any human rights policy commitment, due diligence process, or relevant remediation process is expected to be more rigorous where the corporation is larger, a greater risk of a more severe human rights impact appears, or additional national human rights obligations may be in play. Conversely, smaller businesses that may be operating in less controversial areas are subject to a less rigorous compliance standard under the Guiding Principles.

3. Guiding Principles for Responding to Negative Human Rights Impacts

Once a business has an operational due diligence mechanism in place, the Guiding Principles outline three specific responses corporations should take for addressing adverse human rights impacts. First, where an enterprise "causes or may cause an adverse impact, it should take the necessary steps to cease or prevent the impact."[89] Second, where an enterprise contributes or may contribute to the harm, it should act "to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible."[90] In both instances, as part of preventing, ceasing, or mitigating the harm, the Guiding Principles recommend actively engaging in remediation, including the use of non-judicial "[o]perational-level grievance mechanisms."[91]

Finally, if a business enterprise does not cause or contribute to an adverse human rights impact, but has its operations, products, or services directly linked to another entity responsible for adverse human rights impacts, the situation, according to the Guiding Principles, "is more complex."[92] To clarify the business enterprise's responsibilities under this third scenario, the SRSG identifies several variable factors that will be relevant to the determining analysis, including "the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself

86. *Guiding Principles*, *supra* note 3, at 17.

87. *Id.*

88. *Id.* at 14.

89. *Id.* at 18.

90. *Id.*

91. *Id.* at 20. Over-reliance on non-judicial and corporate-controlled remediation tools has been the target of some criticism by human rights groups. *See infra* notes 117–18 and accompanying text (examining criticism by Amnesty International and Human Rights Watch regarding the Guiding Principles' failure to create an enforcement mechanism of its own).

92. *Guiding Principles*, *supra* note 3, at 18.

would have adverse human rights consequences."[93] Regardless of which questions are deemed relevant here, unlike the first two scenarios set out above, the Guiding Principles do not impose a remediation responsibility in cases where the adverse impact is merely directly linked to the business enterprise's operations, products, or services.[94]

The manner in which the Guiding Principles address the complexity of a corporation being directly linked to harmful human rights impacts appears to weigh heavily in favor of preserving the business enterprise's economic interests. Indeed, the scenario itself is premised on tacitly consenting to another actor causing or contributing to an adverse human rights impact.[95] Still, the Guiding Principles caution that, at the end of the day, a decision by the business entity to preserve a potentially deleterious relationship may come at a cost: "[A]s long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection."[96] Additionally, the Guiding Principles urge that any corporate human rights impacts—whether caused, contributed, or directly linked—be communicated publicly and at an ongoing and sufficiently detailed level.[97]

4. "Issues of Context"

The SRSG's final comments regarding corporate respect for human rights are provided under the vague heading "Issues of context."[98] Here, business enterprises are urged "[i]n all contexts" to follow three rudimentary, if feebly drafted, golden rules:

> (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
>
> (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
>
> (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.[99]

The formulation of these basic tenets raises a number of questions. In the first instance, should the Guiding Principles function to entrench a principled distinction between "comply" and "respect?"[100] By the same token, precisely what are "ways to

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93. *Id.*

94. *Id.* at 20–21.

95. *See id.* at 19 (pointing out the possibility of situations in which the business has no leverage to persuade a related entity to prevent or mitigate adverse impact, but is also not in a position to end the relationship with that entity).

96. *Id.* at 19.

97. *Id.* at 20.

98. *Guiding Principles*, *supra* note 3, at 21.

99. *Id.*

100. As noted above, the Guiding Principles assert that even "respecting rights is not currently an obligation that international human rights law generally imposes directly on companies." *Framework for*

honor" human rights principles and who will be responsible for defining them? Do you honor human rights by acknowledging their existence in the business entity's annual report or by refusing to do business with a regime or business partner that causes or condones human rights violations? Should a business be absolved of human rights responsibility altogether where it operates within a state that is not in compliance with international human rights norms? Faced with this latter scenario, the Commentary on the Guiding Principles recommends that a corporation only respect human rights "to the greatest extent possible in the circumstances."[101] This ambiguous standard appears to invite a business-as-usual approach even in the face of potentially appalling human rights outcomes, on the permissive basis that the corporation can "demonstrate their efforts" to respect international human rights.[102]

Despite this relatively weak formulation, the Guiding Principles rightly caution businesses operating in conflict-affected areas that any venture should be weighed against the "the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility."[103] Here, it is worth recalling that any prospective form of corporate liability reinforces the existing rules concerning individual accountability for human rights violations that still may befall corporate directors, officers, and employees based on their actions.

C. Life After Ruggie's Guiding Principles: Endorsement and Critique

1. Endorsement

Reaction to the Guiding Principles has varied from enthusiastic endorsement to vehement criticism. The U.N. H.R.C. has welcomed the SRSG's findings and is quickly moving to expand their relevancy as a touchstone for interactions between businesses and human rights.[104] Likewise, at its 2011 meeting, the Organization for Economic Cooperation and Development (OECD) rapidly took up and endorsed the Guiding Principles.[105] More concretely beyond statements of support, the OECD overhauled its 2008 *Guidelines for Multinational Enterprises* by specifically incorporating the SRSG's Guiding Principles into a new chapter that for the first

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Business and Human Rights, *supra* note 65, at 2. To what extent does this distinction entrench prior or current practice rather than account for prospective changes that appear to be evolving through customary international law or other sources of law?

101. *Guiding Principles*, *supra* note 3, at 21.

102. Imagine a situation in which a corporation refuses to hire or provide services to any individual from a government-persecuted racial minority in the name of complying with domestic law and then defends the practice by asserting that it acted to respect human rights "to the greatest extent possible in the circumstances." *See id.* ("[B]usiness enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances.").

103. *Id.* at 21.

104. H.R.C. Res. 17/4, *supra* note 54, at 2.

105. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), *available at* http://www.oecd.org/dataoecd/43/29/48004323.pdf [hereinafter OECD GUIDELINES]. Established in 1961, the OECD is an intergovernmental organization dedicated to promoting policies to "improve the economic and social well-being of people around the world." *About OECD,* OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited June 20, 2012).

time addresses in a comprehensive manner business-related human rights concerns.[106] U.S. Secretary of State Hillary Clinton praised the revised OECD guidelines for their potential to help governments "determine how supply chains can be changed so that it [sic] can begin to prevent and eliminate abuses and violence. We're going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, are [sic] absolutely essential."[107] As of June 2011, forty-two states have committed to the OECD's more robust standards,[108] which are part of the overarching 1976 OECD Declaration and Decisions on International Investment and Multinational Enterprises.[109]

In a similar show of support, the European Commission "strongly welcome[d]" the U.N. H.R.C.'s approval of the SRSG's Guiding Principles on business and human rights and noted that they would serve as "an important reference for the [European Union's] renewed policy on corporate social responsibility."[110] Finally, the U.N. Global Compact, "the world's largest corporate citizenship and sustainability initiative,"[111] has acknowledged the SRSG's Guiding Principles as relevant inasmuch as it provides "further operational clarity" for the Global Compact's own foundational human rights principles.[112]

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106. OECD GUIDELINES, *supra* note 105, at 4.

107. Hillary Rodham Clinton, *Secretary Clinton's Remarks on the Commemoration of the 50th Anniversary of the OECD on Guidelines for Multinational Enterprises*, HUMANRIGHTS.GOV (May 26, 2011), http://www.humanrights.gov/2011/05/26/secretary-clintons-remarks-on-the-commemoration-of-the-50th-anniversary-of-the-oecd-on-guidelines-for-multinational-enterprises/.

108. This number represents all thirty-four OECD members as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. *New OECD Guidelines to Protect Human Rights and Social Development*, OECD (May 25, 2011), http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html.

109. The 1976 Declaration enshrines a policy commitment by government signatories to "improve the investment climate; encourage the positive contribution multinational enterprises can make to economic and social progress; [and] minimise and resolve difficulties which may arise from their operations." *OECD Declaration and Decisions on International Investment and Multinational Enterprise*, OECD, http://www.oecd.org/document/24/0,3746,en_21571361_44315115_1875736_1_1_1_1,00.html (last visited June 21, 2012).

110. *Business and Human Rights: New United Nations Guidelines*, EUROPEAN COMMISSION (June 17, 2011), http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220.

111. *U.N. Global Compact Participants*, U.N. GLOBAL COMPACT (July 28, 2011), http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html. The Global Compact's board, appointed and chaired by the U.N. Secretary-General, is the U.N.'s highest-level advisory body involving the private sector. *Global Compact Governance*, U.N. GLOBAL COMPACT (Apr. 30, 2011), http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html. Its thirty-one members comprise representatives of business, civil society, and international organizations. *Id.* For a critical perspective on the Global Compact, *see* Graham Knight & Jackie Smith, *The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility*, *in* DISCIPLINE AND PUNISHMENT IN GLOBAL POLITICS: ILLUSIONS OF CONTROL (Janie Leatherman ed., 2008) (describing "how the attempts to expand global CSR regimes through the UN Global Compact and the UN Norms for Business have been limited in their ability to impact actual practices").

112. *The U.N. Protect, Respect and Remedy Framework for Business and Human Rights: Relationship to U.N. Global Compact Commitments*, U.N. GLOBAL COMPACT (May 2010), http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/UNGC_SRSGBHR_Note.pdf (emphasis omitted). "Principle 1 calls upon companies to respect and support the protection of internationally proclaimed human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights abuses." *Id.*

In addition to governmental and intergovernmental support, numerous corporations have applauded the Guiding Principles for, among other things, "clarify[ing] the distinct, interrelated roles and responsibilities of States and business entities" and for helping to "operationalize . . . respective approaches to human rights in a business context."[113] Reinforcing this favorable impression, investment advisors and corporate lawyers alike have begun urging parties to adopt the Guiding Principles. In a note to investors, one Swedish institutional investment advisor group reasoned that U.N. approval of the principles lent them "authoritative status as the global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity."[114] Similarly, an Australian law firm has concluded that the U.N. endorsement establishes the Guiding Principles as an

> authoritative document for both States and business . . . . [I]t is likely that they will have a significant influence on the domestic legal and policy standards that will apply to business in the future . . . . [T]he Principles will become the new standard for 'best practice' for business on human rights internationally and the touchstone against which businesses will evaluate their culture and response to human rights issues.[115]

2. Critique

As laudatory as governments and businesses would appear to be, not everyone has consumed the Kool-Aid of the Guiding Principles. Many leading human rights nongovernmental organizations (NGOs) have publicly criticized the principles for not going far enough to regulate the human rights impact of corporate actors. For example, the International Federation for Human Rights (FIDH), an umbrella group representing over 150 human rights groups around the world, has concluded that the "road towards accountability is still a long way ahead" because the Guiding

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113. Letter from Bob Corcoran, Vice President, Corporate Citizenship, General Electric, to Professor John G. Ruggie, Special Representative of the Sec'y-General on the Issue of Human Rights and Transnational Corps. (May 20, 2011), *available at* http://www.global-business-initiative.org/SRSGpage/files/GE%20letter%20to%20John%20Ruggie.pdf; *see also* Letter from Richard Wong, Vice President, Global Corporate Soc. Responsibility and Emp. Relations, Flextronics, to Professor John G. Ruggie, Special Representative of the Sec'y-General on the Issue of Human Rights and Transnational Corps. (May 25, 2011), *available at* http://www.global-business-initiative.org/SRSGpage/files/Letter%20to%20Ruggie%20110525%20flextronics.pdf ("writing to thank and commend" Ruggie for his framework); Letter from Edward E. Potter, Dir., Global Workplace Rights, Coca-Cola, to Professor John G. Ruggie, Special Representative of the Sec'y-General on the Issue of Human Rights and Transnational Corps. (May 26, 2011), *available at* http://www.global-business-initiative.org/SRSGpage/files/Guiding%20Principles%20Endorsement%20from%20Coke.pdf (offering congratulations to Ruggie for his framework on behalf of the Coca-Cola Company).

114. Gisela Riddarström, *U.N. and OECD Guidelines Reinforce Expectations on Companies to Respect Human Rights*, ETHIX PRESS (June 28, 2011), http://www.ethix.se/content/ethix-press-un-and-oecd-guidelines-reinforce-expectations-companies-respect-human-rights.

115. *Focus: U.N. Endorses Guiding Principles for Business and Human Rights*, ALLENS (June 29, 2011), http://www.allens.com.au/pubs/ldr/focsrjun11_01.htm. Allens is "a major legal force in Asia." http://www.allens.com.au/about/index.htm (last visited June 21, 2012). *See also U.N. Guiding Principles for Business & Human Rights: Issuance of Ruggie Principles Portends Increasing Need for Multinational Businesses to Focus on Human Rights Compliance,* STEPTOE & JOHNSON LLP (Apr. 20, 2011), http://www.steptoe.com/publications-newsletter-pdf.html/pdf/?item_id=172 (noting that "[w]hile the Principles do not constitute 'law,' they will likely lead to increased human rights regulations").

Principles fail to ensure "the right to an effective remedy and the need for States' measures to prevent abuses committed by their companies overseas."[116]

Alongside FIDH, Human Rights Watch (HRW) and Amnesty International, two of the largest and most influential international human rights NGOs, have likewise taken a critical stance vis-à-vis the Guiding Principles. HRW blasted the document for refusing to establish a "global standard" for corporate responsibility and opting instead in favor of a sliding scale based on business size and geographic location.[117] The NGO further accused the U.N. H.R.C. of disregarding recommendations by dozens of civil society groups, blaming the body for "squander[ing] an opportunity" to establish a mechanism that would ensure the Guiding Principles are actually "put into practice."[118] According to HRW, the U.N. H.R.C.'s endorsement of the Guiding Principles amounted to nothing more than an "endorse[ment] [of] the status quo: a world where companies are encouraged, but not obliged, to respect human rights."[119]

In a similar manner, Amnesty International criticized the Guiding Principles' failure to adequately address key corporate accountability issues and suggested mandating rather than only recommending a due diligence approach, effectively preventing and punishing extraterritorial human rights abuses, and explicitly recognizing the right to a judicial remedy as a human right.[120] Amnesty also took aim at the U.N. H.R.C. for failing to empower its newly established Working Group on the issue of human rights and transnational corporations and other business enterprises with the ability to weigh and assess the implementation and effectiveness of the "protect, respect and remedy" framework and the Guiding Principles. According to Amnesty International, without a stronger mandate, the Working Group would be unable to "to take proactive steps to tackle the need for greater clarity and increased legal protections. If not corrected, this will be a missed opportunity."[121] Indeed, the U.N. H.R.C. resolution endorsing the Guiding Principles omits any mention of the term "legal" or any reference to the potential for a future

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116. *U.N. Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies*, FIDH (June 17, 2011), http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles. A more detailed analysis of the shortcomings in the draft *Guiding Principles* signed by over 120 NGOs is available at *Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights*, FIDH (Mar. 3, 2011), http://www.fidh.org/Joint-Civil-Society-Statement-on-the-draft,9066. Another statement released by a coalition of over fifty NGOs in advance of the June 2011 U.N. H.R.C. meeting is available at *Joint Civil Society Statement: Advancing the Global Business and Human Rights Agenda: Follow-up to the Work of the Special Representative of the Secretary-General (SRSG) on Human Rights and Transnational Corporations and Other Business Enterprises,* CTR. FOR ECON. AND SOC. RTS. (May 2011), http://www.cesr.org/downloads/Joint-civil-society-statement-on-business-and-human-rights-May-2011_1.pdf.

117. *U.N. Human Rights Council: Weak Stance on Business Standards*, HUM. RTS. WATCH (June 16, 2011), http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

118. *Id.*

119. *Id.*

120. Public Statement, *United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses*, AMNESTY INT'L 2 n. 4 (June 14, 2011), http://www.amnesty.org/ar/library/asset/IOR40/009/2011/en/0ba488bd-8ba2-4b59-8d1f-eb75ad9f3b84/ior400092011en.pdf.

121. *Id.* at 3.

international instrument that would hold corporations accountable for human rights violations.[122]

The Child Rights Information Network (CRIN), a UK-based NGO dedicated to the promotion of children's rights, has also sternly rebuked the SRSG's final report:

> It is with great disappointment that we see no . . . substantive discussion of the rights particular to children that have long been a matter of international law. . . . '[I]t is difficult to imagine th[e Guiding Principles] could provide any meaningful guidance for States and business enterprises seeking to 'protect, respect and remedy' the human rights of children.'[123]

This omission is especially troubling because the SRSG's mandate, *inter alia*, required giving "special attention to persons belonging to vulnerable groups, in particular children."[124] However, this shortcoming may potentially be remedied through the new U.N. Working Group's mandate, which does preserve an emphasis on continuing to "integrate a gender perspective throughout [its] work . . . and to give special attention to persons living in vulnerable situations, in particular children."[125]

Although the process that led to the adoption of the Guiding Principles is unlikely to be impugned for a lack of transparency or collaboration, the SRSG has not responded to the substantive allegations set out above,[126] many of which relate back to the desire to seek greater accountability for corporate action that may cause or facilitate human rights violations. Accordingly, from a human rights standpoint, the key stumbling block moving forward remains convincing state and corporate actors of the need for legally binding and enforceable international norms capable of effectively regulating business conduct wherever human rights concerns may arise.[127]

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122. H.R.C. Res. 17/4, *supra* note 54.

123. *Business and Human Rights: CRIN Response to Adoption of the Guiding Principles*, CRIN (June 21, 2011), http://www.crin.org/resources/infodetail.asp?id=25245. Ruggie's final report does allude to the 2007 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups. *Guiding Principles*, *supra* note 3, at 8–9. However, it explicitly excludes the provisions of the Convention on the Rights of the Child from the "authoritative list of the core internationally recognized human rights." *Id.* at 13; *see supra* notes 34 and 67 and accompanying text (listing the internationally recognized core human rights treaties).

124. Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 8th Sess., U.N. Doc. A/HRC/RES/8/7, para. 4(d) (June 18, 2008).

125. H.R.C. Res. 17/4, *supra* note 54, para. 6(f).

126. In contrast, SRSG Ruggie quickly responded to criticism raised by MiningWatch Canada concerning the Guiding Principles' overreliance on non-judicial grievance mechanisms. *Having the Ruggie Pulled Out From Under Us: From "Sanction and Remedy" to Non-Judicial Grievance Mechanisms*, MININGWATCH CANADA (June 6, 2011), http://www.miningwatch.ca/article/having-ruggie-pulled-out-under-us-sanction-and-remedy-non-judicial-grievance-mechanisms; *see also* John Ruggie, *Response by UN Special Representative on Business & Human Rights John Ruggie to MiningWatch Canada*, BUS. & HUM. RIGHTS RESOURCE CENTRE (June 15, 2011), http://www.business-humanrights.org/Links/Repository/1006780/jump (showing that he responded to MiningWatch's criticism within two weeks). This example, however, may be a case of picking the proverbial low-hanging fruit. According to Ruggie's response, much of MiningWatch's criticism "actually addresses a draft . . . released for public comment last November, not the March final." *Id.*

127. For John Ruggie's plainspoken take on this, *see Business and Human Rights: Together at Last? A Conversation with John Ruggie*, 35 FLETCHER F. WORLD AFF. 117, 117 (2011) (describing the refusal of the U.N. Commission on Human Rights to adopt the "Norms on Transnational Corporations and Other Business Enterprises" because governments and businesses opposed the idea of making them legally

The difficulty inherent in this challenge is reinforced by a survey of the corporate community currently willing to engage even with seemingly non-threatening, non-binding human rights principles. In practice, only a minute fraction of the world's businesses appear to be genuinely concerned with the human rights implications of their activities. For example, the U.N. Global Compact, hailed as "the world's largest corporate citizenship and sustainability initiative," has an existing membership of only 8,000 participants, with approximately 6,000 being businesses situated across 135 countries.[128] While these numbers may appear impressive at first glance, even the U.N. Secretary-General has labeled the initiative's current participation rate inadequate, insofar as it reflects only a small percentage of the estimated "70,000 multinationals and millions of small businesses."[129] Moreover, already more than 2,400 companies have faced expulsion from the Global Compact's esteemed membership "for failing to report to their stakeholders on [human rights-related] progress they have made."[130] SRSG Ruggie has confirmed this cynical manipulation by businesses of the Global Compact's human rights agenda: "Apparently [the corporations] simply wanted to sign up and associate themselves with this U.N. initiative and get co-branded, but didn't intend to do anything."[131] This bleak picture is compounded when one considers that a survey conducted by the SRSG identified fewer than 300 corporate entities with established human rights policies.[132]

Along these lines, it is also worth recalling that the OECD and the European Union, strong supporters of the Guiding Principles, represent only a small fraction of the world's nations. While these bodies play a vital role in shaping international trade and commerce practices, they by no means represent global public opinion concerning the SRSG's Guiding Principles. In addition, the OECD's revised 2011 *Guidelines for Multinational Enterprises* are vulnerable to many of the same criticisms leveled against the SRSG's Guiding Principles. For example, the OECD guidelines are drafted in a manner that may enable corporations to downgrade their human rights responsibilities based on the country in which they operate.[133] Acting on such a variable yardstick, a corporation might pursue business opportunities in a "rogue" state that has neglected to ratify relevant international human rights treaties, and thus empower itself to act in a manner that would breach human rights norms if undertaken elsewhere. In an attempt to foreclose this possibility, the OECD guidelines suggest that "enterprises should seek ways to honour [human rights] to the fullest extent which does not place them in violation of domestic law."[134] Relying on

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binding).

128. *U.N. Global Compact Participants*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (last updated July 28, 2011).

129. *Secretary-General Urges Companies to Join Global Compact*, U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/news/134-06-21-2011 (last updated June 21, 2011).

130. *Id.*

131. *Business and Human Rights: Together at Last?*, *supra* note 127, at 120.

132. Only companies that have adopted a formal policy statement explicitly referring to human rights are included in the list, whether or not they participate in the Global Compact. *Company Policy Statements on Human Rights*, BUS. & HUM. RTS. RESOURCE CENTRE, http://www.business-humanrights.org/Documents/Policies (last updated July 6, 2012). Over half of the corporations listed are European. *Business and Human Rights: New United Nations Guidelines*, *supra* note 110.

133. OECD GUIDELINES, *supra* note 105, at 31.

134. *Id.* at 32.

this type of tenuous language opens the door to any number of scenarios that are antithetical to respect for universal human rights norms. For example, a corporation acting under the pretense of complying with domestic law could intentionally exclude from its workforce members of a persecuted minority group yet still claim to be satisfying the guidelines. Here, the plain choice that would ensure compliance with the spirit, if not letter, of international human rights law would be to terminate operations in that country until the discriminatory legislative framework is rectified. This route, however, is neither required nor recommended by the OECD guidelines or the Guiding Principles.

Even if one follows additional OECD guidance suggesting that enterprises, irrespective of country of operation, should refer to "at a minimum ... the internationally recognised human rights expressed in the International Bill of Human Rights"[135] (i.e. the UDHR, ICCPR, and ICESCR), businesses are still left with permission to violate rights provided under other core international human rights instruments, including the CERD, CEDAW, and CRC. In this regard, the OECD's standards mirror the same flawed departure point introduced under the SRSG's Guiding Principles:[136] both cheapen a hard-fought elaboration of international human rights law by casting aside key treaties intended to particularize safeguards for historically vulnerable groups—such as racial minorities, women, and children—and thereby shield them from further discrimination and maltreatment.[137]

Finally, the OECD's endorsement of the SRSG's approach to adverse human rights impacts directly linked to a corporation's operations, products, or services by virtue of its relationship with another entity signals adoption of another flaw inherent in the Guiding Principles. As noted above, applying the proposed subjective framework in these types of scenarios affords the enterprise wide discretion in defining its level of responsibility based on a variety of factors such as "the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts."[138] From this perspective, in addition to being premised on legitimating the perpetuation of business transactions with actors responsible for human rights abuses, the OECD formulation fails to establish any meaningful objective standard for corporate decision making under these circumstances, thus opening the process to potential abuse.

CONCLUSION: NAVIGATING A POST-GUIDING PRINCIPLES WORLD

As the U.N. H.R.C. Working Group on the issue of human rights and transnational corporations begins its mandate to further operationalize the SRSG's Guiding Principles, it is clear that the precise nexus between business and human rights remains very much a work in progress. Businesses taking their first steps in a "post-Guiding Principles" world must still confront the open question: What, if any, human rights responsibilities are we expected to observe? While recent U.N. activity

135. *Id.*

136. *Guiding Principles*, *supra* note 3, at 13.

137. *See id.* at 13–14 (stating corporations should refer to other instruments when dealing with the rights of women, children, and minorities, but failing to provide specific U.N. instruments as guidance beyond the ICCPR and ICESCR); OECD GUIDELINES, *supra* note 105, at 31 (noting the chapter on human rights is in line with Guiding Principles).

138. OECD GUIDELINES, *supra* note 105, at 33.

may have bestowed a patina of authoritativeness on the SRSG's Guiding Principles, these principles remain—at least for the present time—non-binding. Nevertheless, ongoing debate, civil society action, shifting domestic law, and the efforts of the U.N. H.R.C. Working Group may all conspire in the future to generate a more binding legal requirement on corporations to respect human rights norms, regardless of enterprise size or location.

For their part, human rights NGOs are unlikely to back down from the objective of a binding accountability regime for businesses enshrined under international law. Indeed, the NGO campaign of attrition—being waged piecemeal on the international level within intergovernmental fora as well as through domestic courts around the world—shows no signs of letting up.[139] In the latter context, municipal developments indicate some traction for holding corporations accountable. For example, in the United States, recent case law signals a divide in approach concerning corporate liability under the Alien Tort Statute (ATS).[140] A Second Circuit majority in *Kiobel v. Royal Dutch Petroleum* concluded that "corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS."[141] However, other jurisdictions paint a different understanding. A U.S. District Court (N.D. Ill.) explicitly rejected *Kiobel* as contrary to "persuasive precedent indicating that corporations can be held liable under the ATS,"[142] based in part on the Eleventh Circuit's *Romero v. Drummond Co., Inc.* decision.[143] Likewise, a Florida district court, also following the Eleventh Circuit, recently denied Chiquita Brands International's motion to dismiss ATS claims filed against it "for torture, extrajudicial killing, war crimes, and crimes against humanity."[144]

In a related vein, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a lower court decision rejecting personal jurisdiction over DaimlerChrysler Aktiengesellschaft (DCAG) for allegedly allowing one of its Argentinian subsidiaries to collaborate with "state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina's 'Dirty

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139. *See* William Bradford, *Beyond Good and Evil: The Commensurability of Corporate Profits and Human Rights*, 26 NOTRE DAME J.L ETHICS & PUB. POL'Y 141, at 159–69 (2012) (describing strategies NGOs have implemented to mandate compliance with corporate human rights obligations).

140. *See* Alien Tort Statute, 28 U.S.C. § 1350 (2003) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

141. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010); *see also* John Gibeaut, *Shell Gets a Pass on Nigerian Claims, But Tort Law's Future Still Unclear*, A.B.A. J., Jan. 2011 at 14, 15 (Regarding the majority decision, lead plaintiffs' lawyer Paul L. Hoffman stated: "They issued [the judicial opinion] without a single brief or a single word from either party . . . . I've never seen that in 30 years.").

142. Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, 807 F. Supp.2d 689, 694 (N.D. Ill. 2011).

143. *Id.*; *see also* Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit is that [the ATS] grants jurisdiction from complaints of torture against corporate defendants"). *But see* Flomo v. Firestone Natural Rubber Co., 744 F.Supp.2d 810, 818 (S.D. Ind. 2010) (holding "no corporate liability exists under the ATS"). Both the Holocaust Victims and Flomo courts are within the jurisdiction of the U.S. Court of Appeals for the Seventh Circuit.

144. In re Chiquita Brands Int'l, Inc., 792 F.Supp.2d 1301, 1359 (S.D. Fla. 2011).

War.'"[145] Alluding to the ATS and state interest in adjudicating the suit, the Court reasoned:

> [A]lthough the events at issue did not take place in California and although the plaintiffs are not California residents, the forum state does have a significant interest in adjudicating the suit. California partakes in the "shared interest of the several States in furthering fundamental substantive social policies." Here, as the claims are predicated upon the ATS and [Torture Victims Protection Act], that policy is providing a forum to redress violations of international law by defendants who have enough connections with the United States to be brought to trial on our shores, even though the injury is to aliens and occurs outside our borders—"a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[146]

DCAG is also drawing fire in a separate legal battle unfolding in New York following a Second Circuit Appeals Court decision to remand a set of ATS claims filed by dozens of individuals allegedly injured by DCAG's apartheid era activities in South Africa.[147] Subsequently, the district court ruled against a number of ATS claims but allowed certain others to move forward, including against DCAG, GM, and Ford for aiding and abetting torture, cruel and inhuman treatment, extrajudicial killing, and apartheid based on their provision of military equipment and trucks used by government forces for attacks on protesting citizens and activists.[148] In September 2009, the South African Government announced its support for the lawsuit, withdrawing its previous opposition to the case.[149]

Returning to *Kiobel*, the U.S. Supreme Court accepted a petition for certiorari and, following initial oral arguments in February 2012, directed the parties to file supplemental briefs addressing the question of "[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[150] The case itself, as decided by the Second Circuit Court of Appeals, already comes with its own strongly worded rejection of the majority's interpretation of prevailing law concerning corporate liability—paradoxically in the form of a concurring opinion:

> The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule

145. Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 911 (9th Cir. 2011).

146. *Id.* at 927 (citation omitted). In November 2011, the Ninth Circuit Court of Appeals unanimously denied a petition for rehearing and a petition for rehearing en banc. Bauman v. DaimlerChrysler Corp. 676 F.3d 774, 774 (9th Cir. 2011).

147. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 264 (2d Cir. 2007). The Supreme Court, unable to muster the requisite quorum of six after four Justices recused themselves, affirmed the Second Circuit ruling without opinion. American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

148. In re S. African Apartheid Litig., 617 F.Supp.2d 228, 264 (S.D.N.Y. 2009). *But see* In re Motors Liquidation Co., 447 B.R. 150, 153 (S.D.N.Y. 2011) (disallowing the "move for certification of [Apartheid Claimants'] claims as class proofs of claim" and invoking Kiobel as controlling authority "binding on [it] and every other lower court in the Second Circuit").

149. Wendell Roelf, *S. Africa Changes Tack, Supports U.S. Apartheid Suits,* REUTERS, Sept. 4, 2009, http://af.reuters.com/article/topNews/idAFJOE5830DH20090904.

150. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (mem.).

> my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. Without any support in either the precedents or the scholarship of international law, the majority take the position that corporations . . . are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.[151]

In Canada, the courts of Quebec continue to grapple with a case alleging that an Australian mining company facilitated a massacre of civilians in Kilwa, Democratic Republic of Congo (DRC) by providing logistical support to the Armed Forces of the Democratic Republic of Congo (FARDC).[152] The court of first instance rejected Anvil Mining Ltd.'s preliminary motion to dismiss in part because of a finding that the plaintiffs—family members of the victims—stood little reasonable chance of judicial consideration in Australia or the DRC and ultimately risked being left without any recourse to justice.[153] The Quebec Court of Appeals overturned this decision less than a year later, holding that the Superior Court judge erred in law by failing to positively link the dispute in DRC to any of the activities directed out of Anvil's Montreal office.[154] In a press release following the ruling, the Association Canadienne contre l'impunite (ACCI) expressed its "deep[] disappoint[ment] that the Court would deprive the victims of what could be their only remaining hope to seek justice" and announced its intention to appeal the decision to the Supreme Court of Canada.[155]

Against this backdrop of human-rights-NGO pressure and uncertainty within the judicial arena, many corporations have opted to settle claims for human rights violations out of court, often at great financial expense.[156] Examples include three settlements stemming from Holocaust-era litigation, a settlement for an estimated $20 million by U.S. clothing retailers for alleged sweatshop violations, and over $15 million in compensation to the families of Ken Saro-Wiwa and John Kpuinen, two men whose deaths were linked to Royal Dutch Petroleum's oil-exploration efforts in the Ogoni region of Nigeria.[157]

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151. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149–50 (2d Cir. 2010).

152. Association Canadienne contre l'Impunité v. Anvil Mining Ltd., 2011 QCCS 1966 paras. 2–4 (Can. Que.).

153. *Id.* paras. 38–39.

154. Anvil Mining Ltd. v. Association Canadienne contre l'Impunité, 2012 QCCA 117 paras. 91–94 (Can. Que.). The Appeals Court also questioned the plaintiff's position—and the lower court's acquiescence—that Australia could not realistically serve as a more appropriate trial venue. *Id.* paras. 101–03.

155. Press Release, Canadian Ass'n Against Impunity, *Congolese Massacre Survivors to Pursue Justice at the Supreme Court of Canada* (Jan. 31, 2012), http://www.globalwitness.org/library/congolese-massacre-survivors-pursue-justice-supreme-court-canada.

156. *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002) *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (highlighting the uncertainty of corporate human rights claims in the first human rights case in which jurisdiction was granted over a corporation). Settlement was subsequently recognized in John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

157. Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/article.jsp?id=1202473215797.

Faced with this reality, let's return to the outstanding question: What, if any, human rights responsibilities are corporations expected to observe? If thirty years ago the usual modus operandi for business was profit without regard for "indigenous rights" or "child labor," moving forward that standard is necessarily—if slowly—changing. Despite this gradual shift, business enterprises retain the autonomy to determine their individual courses of action. In other words, the answer, for the moment, is that corporations have the freedom to choose. On one hand, they can opt to maintain the "pre-Guiding Principles" status quo and run the risk of being perceived as a pariah falling outside the new "authoritative" corporate responsibility consensus, including accepting any liability that may ensue. Alternatively, they can fulfill the minimum recommendations established under the SRSG's Guiding Principles. Although this would arguably appear to satisfy current best practices, this latter option still exposes the corporation to potentially costly liability down the road—either in a court of law or the court of public opinion—if and when corporate implementation of the Guiding Principles is deemed inadequate or defective.

By way of conclusion, therefore, this Article ends with a proposal for a third option: that corporations get in front of what, by all indications, is a moving target and take an embracive approach to human rights compliance. In practical terms, this means instead of observing select "lowest common denominator" human rights principles as envisioned by the SRSG, corporations should seek out higher ground by complying with all applicable human rights treaty norms. This approach is premised on an understanding that the notion of minimum standards in human rights law "dialectically entails as well the notion of something more demanding than the minimum—that is, the possible expansion of rights to which people are entitled."[158] Importantly, it also promises a variety of value-added benefits for willing business enterprises. In the first instance, positioning a corporation to comply with due diligence standards and other practices based on a more inclusive range of human rights norms will significantly reduce or even potentially eliminate exposure to human rights liability now and in the future. Simply put, aligning business activities with the full spectrum of recognized international human rights norms can more effectively help identify and prevent harmful impacts as well as insulate the corporation from the evolutionary changes inherent in customary international law.[159]

Second, this approach promises to eliminate the uncertainty and inconsistency associated with making corporate human rights responsibilities contingent upon a given host country's existing treaty obligations and the nature or scope of the company's activities therein. As U.S. Deputy Assistant Secretary Daniel Baer has observed, "In States that violate human rights, it will be more difficult for businesses to respect those rights—because domestic law may require actions inconsistent with internationally recognized human rights, because State practices encourage businesses to take actions that undermine the enjoyment of human rights, or because States involve businesses in their own human rights violations."[160] Establishing a

158. Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies,* LAW & CONTEMP. PROBS. Spring 2002, at 259.

159. This would require an expanded due diligence process, including sensitivity to relevant emerging international human rights norms expressed outside of treaty regimes. *See* Giovanni Mantilla, *Emerging International Human Rights Norms for Transnational Corporations*, 15 GLOBAL GOVERNANCE 279, 292 (2009), *available at* https://apps.cla.umn.edu/directory/items/publication/300487.pdf (describing a method of increased corporate responsibility through increased due diligence on the part of corporations).

160. Deputy Assistant Secretary Daniel Baer, *Businesses and Transnational Corporations Have a Responsibility to Respect Human Rights*, HUMANRIGHTS.GOV (June 16, 2011),

single transnational policy expressly aligned with the standards promulgated by the U.N. human rights treaty bodies in place of the SRSG's mercurial guidelines promises corporations independence from variances derived from host state practices, avoids potential conflicts arising from patchwork policies, and ultimately lends itself to a more reliable process and outcome.[161] Naturally, in the context of TNC activity that gives rise to cultural, social, political, legal, and economic differences, such a policy becomes even more essential. Moreover, implementing a streamlined due-diligence process around a universally applicable human rights policy also promises the added benefit of being more cost-effective.[162]

A third benefit of adopting an embracive human rights approach is the likely spike in public goodwill directed at the corporation. This advantage should not be understated. As the U.N. Global Compact demonstrates, businesses already recognize the value of associating their brands with social responsibility and human rights, even if they do not sincerely implement related undertakings.[163] Boycotts remain a powerful consumer tool, and such actions promise an even greater impact as social awareness, activism, and Internet connectedness become further embedded in global culture. Taking concrete measures to distinguish a corporation's genuine commitment to human rights from other free riders or generic endorsers of the Guiding Principles therefore promises to go a long way in building a corporate brand as well as consumer—and shareholder—confidence.

Finally, two derivative benefits associated with this "third way" proposal are worth noting here. First, by more actively managing its human rights footprint, a corporation can contribute to halting the larger cycle of human rights violations that the Guiding Principles perpetuate. As noted, the SRSG's standards enable business enterprises to preserve relationships with human rights violators that may be directly linked to their operations, products, or services.[164] Rather than allow such relationships to continue, an embracive human rights approach would operate to shut them down. As a consequence, actors identified as human rights abusers would be denied a source of economic oxygen and, more dramatically, as the allegations against Anvil Mining illustrate, would potentially be denied the wherewithal to carry out or continue human rights violations.[165] This shift to requiring that business

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http://www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/.

161. In the event that a corporate head office is situated in a country enjoying stronger human rights protections than afforded under international law, the domestic norms should govern the corporation's activities regardless of where they occur. *See, e.g.*, Charter of Fundamental Rights of the European Union, art. 53, Dec. 18, 2000, 2000 O.J. (C 364) 5.

162. *See, e.g.*, ICMM, HUMAN RIGHTS IN THE MINING AND METALS INDUSTRY: INTEGRATING HUMAN RIGHTS DUE DILIGENCE INTO CORPORATE RISK MANAGEMENT PROCESSES 6 (Mar. 2012), http://wp.cedha.net/wp-content/uploads/2012/06/Integrating-human-rights-due-diligence.pdf (discussing human rights due diligence and explaining that the "[f]ailure to effectively address human rights risks can lead to significant costs in terms of the management time required to respond to crises, and may impact a company's ability to access resources elsewhere or receive funding/insurance from some financial institutions or export credit agencies").

163. *See* U.N. GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited July 11, 2012) (noting that corporate participants based in the United States include Starbucks, PepsiCo, Coca-Cola, Nike, Ford Motor Company, General Electric, Hewlett-Packard, United Airlines, J.C. Penney, Pfizer, and others).

164. *See supra* notes 92–93 and accompanying text.

165. *See Congolese Raise Mining Lawsuit in Supreme Court*, CBC NEWS (Mar. 26, 2012),

relations conform to all international human rights norms can have a transformative effect by prodding other enterprises into an embracive human rights business model through a combination of peer pressure and the promise of potential economic advantage. At the very least, the embracive approach is distinct from the SRSG's Guiding Principles insofar as it proposes a clear-sighted and principled stance against interactions with recognized human rights violators. Lastly, this "third way" may also operate to reduce or eliminate liability risks for individuals associated with the business entity. Championing a corporate culture that respects and safeguards the full range of international human rights law requires an environment where related decisions are more closely scrutinized for compliance, concerns are identified and resolved earlier, and managers and staff are empowered to act accordingly.

Perlmutter's musings from half a century ago provide a relevant context for closing.[166] It remains accurate to say that corporations retain a significant potential for positively shaping the world we live in, though this potential remains—at least for the moment—mostly untapped and non-obligatory. If the Guiding Principles demonstrate anything, it is that the international community is increasingly serious about exploring how this potential can be harnessed as a means of minimizing corporate actions that may cause harm to individuals, groups, and our planet's resources. From this vantage point, the more corporate counsel integrates a robust understanding of existing international human rights into corporate decision-making, the greater the likelihood will be of consistently and predictably minimizing or eliminating conduct likely to trigger deleterious human rights consequences now and into the future. This, coupled with the spillover benefits outlined above, should weigh heavily in favor of adopting an approach that uses the Guiding Principles as a starting point, but moves quickly to enlarge and enhance its reach.

http://www.cbc.ca/news/canada/montreal/story/2012/03/26/congolese-families-look-to-supreme-court-in-bid-to-sue-anvil-cp.html (explaining that if the Supreme Court of Canada decides to hear the case, there could be "major implications on whether Canadian companies can be held accountable for their involvement in human rights violations committed abroad").

166. *See* Perlmutter, *supra* note 10, at 18 (remarking that "the senior executives engaged in building the geocentric enterprise could well be the most important social architects of the last third of the twentieth century").

Tracking Genocide: Persecution of the Karen in Burma

JAY MILBRANDT*

Abstract

For over sixty years a civil war has raged in the jungles of Burma.[1] One of the lingering questions asked by human rights advocates and the international community is to what extent war crimes have been committed and whether the actions by the Burma Army amount to genocide. Based on significant data collected in the field over the past decade, this Article argues that the forced displacement of the Karen ethnic group does rise to the international standard of genocide. This Article explores the theory and application of genocidal intent through the inference of a systematic plan to destroy an ethnic group or nationality.

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1. Patrick Winn, *Myanmar: Ending the World's Longest-Running Civil War*, POST-GAZETTE.COM (May 13, 2012), http://www.post-gazette.com/stories/news/world/myanmar-ending-the-worlds-longest-running-civil-war-635657/;

> At the time of gaining independence from Britain in 1948, the official name [of] Burma was the "Union of Burma." In 1989, as part of a broader exercise to rename geographical place names, the ruling military regime changed the name of the country to the "Union of Myanmar." Similarly, "Rangoon" became "Yangon," "Pegu" became "Bago," etc. The name changes are not accepted by most opposition groups, who reject the legitimacy of the military regime to unilaterally change the name of the country and view the name changes as part of an effort to "Burmanize" the national culture. While the United Nations recognizes the name change and refers to the country as Myanmar, countries such as the United States, the United Kingdom, Australia, and Canada use the name Burma.

PARTNERS RELIEF & DEV. & FREE BURMA RANGERS, DISPLACED CHILDHOODS: HUMAN RIGHTS AND INTERNATIONAL CRIMES AGAINST BURMA'S INTERNALLY DISPLACED CHILDREN v (2010) [hereinafter DISPLACED CHILDHOODS]; "The term 'Burmese' refers to the language or the people of Burma as a whole, including all the ethnic nationalities, whereas the term 'Burman' refers to the dominant ethnic group in the country." *Id.* at v. The term "Burmanize" means the desire to homogenize the ethnic groups. *Id.*

SUMMARY

INTRODUCTION

Late one evening, Pa La Sae sat in his family's bamboo hut.[2] Suddenly, this peaceful evening in the jungle was shredded by the explosion of mortar shells. Pa La Sae's village was under attack by the Burma Army.[3]

His family jumped up from their seats on the floor. Mortar shells exploded throughout their village as they ran out from their hut. Pa La Sae's parents told him to run ahead with another group of children.

Machine gun fire started as the Burma Army approached the village. Those who were caught were shot or forced to work for the Burma Army, porting loads for

2. Interview with Pa La Sae, in Mae La Refugee Camp, in Mae Sot, Thailand (Mar. 8, 2009) (on file with author).

3. *Id.*

the soldiers.[4] In parts of the country, women caught alone were raped.[5] As they left the village behind, Burma Army soldiers set landmines to dissuade the villagers from returning.[6]

The village was flattened. Those who could escape hid in the jungle, running away from the Burma Army as quickly as possible. They stopped days later in one of the internally displaced persons (IDP) camps inside Burma, or they crossed the border into Thailand to seek refuge in one of Thailand's temporary refugee camps.[7]

Pa La Sae walked through the jungle for five days to Mae La Refugee Camp on the Thai side of the border. He has not seen his family since he fled the jungle. He does not know for sure whether they are dead or alive, but he is confident that he will see them again one day.

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4. *See* THE KAREN WOMEN'S ORG. (KWO), STATE OF TERROR: THE ONGOING RAPE, MURDER, TORTURE AND FORCED LABOUR SUFFERED BY WOMEN LIVING UNDER THE BURMESE MILITARY REGIME IN KAREN STATE 12–13 (Feb. 2007), *available at* http://karenwomen.files.wordpress.com/2011/11/state20of20terror20report.pdf (noting that villagers in the Karen State were forced to be laborers and porters for the State Peace and Development Council (SPDC) soldiers, carrying their supplies and sweeping for mines).

5. *See* INT'L CTR. FOR TRANSITIONAL JUSTICE, IMPUNITY PROLONGED: BURMA AND ITS 2008 CONSTITUTION 11–12 (2009), *available at* http://ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf (discussing how sexual violence as a strategy of war continues to be a serious problem in Burma). *See generally* The Shan Human Rights Foundation (SHRF) & The Shan Women's Action Network (SWAN), *License to Rape: The Burmese Military Regime's Use of Sexual Violence in the Ongoing War in Shan State*, BURMA CAMPAIGN UK (May 2002), http://burmacampaign.org.uk/images/uploads/License_to_rape.pdf ("The report reveals that the Burmese military regime is allowing its troops systematically and on a widespread scale to commit rape with impunity in order to terrorize and subjugate the ethnic peoples of Shan State. The report illustrates there is a strong case that war crimes and crimes against humanity, in the form of sexual violence, have occurred and continue to occur in Shan State.").

6. *See* HUMAN RIGHTS DOCUMENTATION UNIT (HRDU), HUMAN RIGHTS YEARBOOK 2001–02: BURMA: VIOLATIONS AGAINST THE DIGNITY, LIVELIHOOD AND FUNDAMENTAL RIGHTS OF PEOPLE IN BURMA PERPETRATED BY THE MILITARY DICTATORSHIP OF RANGOON 626 (1st ed. 2002) ("Evidence suggests that in the Karen State there is one landmine victim everyday.").

7. As of December 2011, there were ten displaced persons camps along the Thailand-Burma border housing 137,742 total persons, and seven IDP camps located within Burma housing 16,787 total persons. *Burmese Border Displaced Persons: December 2011*, THAILAND BURMA BORDER CONSORTIUM, http://www.tbbc.org/camps/2011-12-dec-map-tbbc-unhcr.pdf (last visited Dec. 11, 2012). On April 11, 2011, Tawin Pleansri, National Security Council Chief of Thailand, affirmed an intent to close refugee camps in Thailand, citing the burden imposed on Thailand from maintaining these camps for over twenty years. *Thailand-Myanmar: Concern Over Refugee Camp Closure Plans*, IRIN NEWS (Apr. 12, 2011), http://www.irinnews.org/Report/92445/THAILAND-MYANMAR-Concern-over-refugee-camp-closure-plans. Pleansri indicated that talks have been initiated with the Burma government regarding Thailand's intent to close the camps. *Id.* This would force the almost 140,000 individuals residing there to return to Burma without any protection against the Burma Army and civil conflict they had initially been forced to flee in order to save their own lives. *See id.* ("According to the Thailand Burma Border Consortium (TBBC), a group of INGOs operating along the 1,800 km-long border, about 142,000 Burmese refugees live in nine government-run camps."). Since the launch of a third-country resettlement program in 2005, approximately 58,000 refugees have been resettled from the camps, primarily to Canada, the United States, and Australia. *Id.* These efforts, however, have been over a nearly six-year period, illustrating that these governments would be unable to immediately resettle such a massive, instant influx of endangered and homeless individuals. *Id.*

I. ISSUE: IS THIS GENOCIDE?

Traveling to the Thailand-Burma border for the first time in 2007, I was shocked and appalled by what was happening in Burma. The longest-running civil war in the world still raged in the jungles of Burma.[8] A brutal military junta governed the country and was forcibly displacing, torturing, and killing its people in a struggle for control and resources. The ethnic people, particularly a tribe named the Karen, took the blunt force of the war. The Karen people, however, were not giving up against the military rulers who opposed them.[9]

I had never heard of this war. I had never heard of the Karen people who were being slowly and systematically eliminated.[10] I could not, prior to this trip, even place Burma on a map, much less the junta's name for the country, "Myanmar."

When I first arrived, NGOs and organizations responding to the crisis in Burma used the terms "genocide" and "ethnic cleansing" to describe the situation. I started returning to the border annually, and on subsequent visits these organizations backed away from the "genocide" terminology and instead used general descriptives such as "armed conflict" and "struggle." Why the change? Confusion. There was confusion over the definition of genocide and whether the crisis in Burma met the international legal standard for genocide.[11] There were no lawyers to make the case either way, nor were there law review articles to reference.

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8. ASHLEY SOUTH, BURMA'S LONGEST WAR: ANATOMY OF THE KAREN CONFLICT 6 (2011) *available at* http://www.tni.org/sites/www.tni.org/files/download/Burma's%20Longest%20War.pdf. Burma "has been in a state of internal armed conflict since it gained independence from the United Kingdom in 1948." AMNESTY INT'L, THE KAYIN STATE (KAREN) STATE—MILITARIZATION AND HUMAN RIGHTS (1999), *available at* http://www.unhcr.org/refworld/docid/3ae6a9c714.html; *see also Why Burma*, PARTNERS RELIEF & DEV., http://partnersworld.org/the-story/why (follow "Expand+" hyperlink) (last visited Dec. 13, 2012) (describing the history of conflict in Burma after the country attained independence from the United Kingdom). Although Burma has no external enemies, the country's leadership spends almost a quarter of its national budget on military expenditures and maintains an army of around 400,000 soldiers. Min Lwin, *War Office Sets Out Ambitious Army Plan*, DEMOCRATIC VOICE OF BURMA (July 21, 2011), http://www.dvb.no/news/war-office-sets-out-ambitious-army-plan/16661; *see also* THAILAND BURMA BORDER CONSORTIUM, PROGRAMME REPORT: JANUARY TO JUNE 2011 154 (2011) [hereinafter PROGRAMME REPORT] ("The main threats to human security in eastern Burma are related to militarisation. Under the guise of state building, the Burmese army's strength grew from 180,000 soldiers in 1988 to an estimated 400,000 soldiers currently. The number of battalions deployed across eastern Burma has approximately doubled since 1995.").

9. *See* Kate McGeown, *The Fighting Spirit of Burma's Karen*, BBC NEWS (Mar. 1, 2007), http://news.bbc.co.uk/2/hi/asia-pacific/6407305.stm (describing the intense military struggle of the Karen people in the face of overwhelming odds).

10. Ethnic minorities make up roughly thirty-two percent of the total population, and the Karen people make up seven percent of this total. U.S. DEP'T OF STATE, BACKGROUND NOTE: BURMA (2011) [hereinafter BACKGROUND NOTE: BURMA]. The Karen people make up the second largest ethnic minority group behind the Shan at nine percent of the total population. *Id.*

11. THE FREE BURMA RANGERS, A CAMPAIGN OF BRUTALITY 17 (2008) [hereinafter CAMPAIGN OF BRUTALITY].

> Much of what is happening is difficult to capture with photos, video and reports. It is generally a slow and insidious strangulation of the population rather than an all-out effort to crush them. While the campaign of control against the ethnic villagers and IDPs meets the UN definition of genocide, it is not the kind of genocide that occurred in Cambodia or Nazi Germany. There are rarely massacres nor are there attempts to annihilate the people. Many areas of Burma have large ethnic populations who are not subject to direct military action or the attempts to kill them. These areas are generally where there is no organized resistance to the government or areas where ethnic armies have entered into some form of ceasefire with the Burma Army.

In recent years, the world has reconsidered whether past international conflicts met the criteria for "genocide."[12] In these situations, legal recognition is sometimes granted years later, such as with the Armenian Genocide.[13]

This Article was written to achieve proper recognition for the people of Burma and the ongoing genocide that they face. It aims to show that the crisis in Burma does indeed rise to meet and surpass the international standard for genocide. This determination provides greater international law protection, increased options for advocacy, and clarification in terminology for organizations responding to the crisis.[14]

Based on actual data from the field, this Article will show that the military junta in Burma has clearly committed past acts of genocide, and continues to advance its genocidal strategy today despite a January 12, 2012 ceasefire with Karen ethnic leaders.[15] While there are many ethnic groups engaged in the conflict, this Article will focus on the Karen people since significant data is available on their condition. In addition to showing whether genocide has happened in Burma, this Article will consider whether a perpetrator engaged in a widespread counterinsurgency can, in part, commit genocide against a certain group while being engaged in non-genocidal conflict with other groups.

This work would not be made possible without in-field data, facts, and information generously provided by the Karen National Union and Free Burma Rangers. This Article is dedicated to these heroes who risk their lives to report and relay human rights data so that the rest of the world can understand the crisis.

Id.

12. Recent examples of analyses that reconsider the criteria for genocide include examinations of the violence committed against Iraqi Kurds, the East Timorese, and ethnic groups in Cambodia. *E.g.*, Mark Levene, *Why Is the Twentieth Century the Century of Genocide?*, 11 J. WORLD HISTORY 305 (2000); Ben Saul, *Was the Conflict in East Timor 'Genocide' and Why Does It Matter?*, 2 MELB. J. INT'L L. 477 (2001); William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287 (2000–01).

13. Even today, many countries and world leaders still refuse to label the systematic destruction of the Armenian population of the Ottoman Empire as a "genocide." *See, e.g.*, Peter Baker, *Obama Marks Genocide Without Saying the Word*, N.Y. TIMES, (Apr. 25, 2010), http://www.nytimes.com/2010/04/25/world/europe/25prexy.html?_r=0 (contrasting President Obama's use of the term in 2008 as a candidate with his 95th anniversary of the Armenian Genocide speech, after becoming president). In France, the Senate approved on January 23, 2012 a bill imposing a mandatory fine and jail sentence for denying or minimizing the Armenian genocide. Kim Willsher & Sam Jones, *Turkey Warns France Over Armenian Genocide Law*, THE GUARDIAN (Jan. 24, 2012), http://www.guardian.co.uk/world/2012/jan/24/turkey-warns-france-armenian-genocide. Turkey has since threatened former French President Nicholas Sarkozy with retaliatory action that would compound "France's political, legal, and moral mistakes" if he signs the bill into action. *Id.* The political intricacies, alliances, and international relations at stake in naming events that occurred around ninety years ago as "genocide," demonstrate the significance and necessity of using this terminology for the genocide currently occurring in Burma.

14. *See* William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide*, U.N. AUDIOVISUAL LIBRARY OF INT'L LAW 4–5 (2008), *available at* http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf (stating that the definition of genocide as promulgated by the Genocide Convention protects human rights and assists the human rights movement).

15. Hanna Hindstrom, *Attacks Continue Despite Karen Ceasefire*, DEMOCRATIC VOICE OF BURMA (Feb. 3, 2012), http://www.dvb.no/news/attacks-continue-despite-karen-ceasefire/20059.

II. OVERVIEW OF THE CRISIS

British colonization is responsible for the design of modern-day Burma.[16] "After assuming control over Burman-dominated central Burma in 1852, the British slowly incorporated previously independent and self-governed ethnic territories into its empire, including areas occupied by ethnic Arakan, Chin, Kachin, Karen, Karenni, Mon, and Shan."[17]

A campaign for independence from Britain grew in the 1940s.[18] Eventually, the British agreed to grant Burma its independence only if the ethnic nationalities agreed to participate in a federal union.[19] The ethnic nationalities agreed, and they formalized their commitment to a federal union in the Panglong Agreement of 1947.[20] The agreement included a "principle of equality" between Burmans and the ethnic nationalities and guarantees of political autonomy in the ethnic territories.[21]

The Panglong Agreement's promises of ethnic equality and a unified federal union were never realized. On July 19, 1947, several leaders of Burma's independence movement were assassinated, weakening ethnic support for the union.[22] This disappointment was followed by the new constitution, which failed to address particular demands of the ethnic nationalities.[23] Against the desires of the ethnic groups, the constitution went into effect on September 24, 1947.[24] On January 4, 1948, Britain granted Burma its independence.[25]

Ethnic opposition forces began fighting the newly empowered central government.[26] Within months, the country broke into civil conflict. The Karen were one of the first ethnic nationalities to oppose the central government, establishing an armed opposition group less than a year after Burma's independence.[27] Other ethnic groups joined in the struggle throughout the late 1940s and 1950s.[28]

On March 2, 1962, Burma Army General Ne Win seized power through a military-led coup.[29] He overthrew the democratically-elected government and "the prospects for peace in Burma crumbled."[30]

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16. DISPLACED CHILDHOODS, *supra* note 1, at 11.

17. *Id.* at 11.

18. *Id.*

19. *Id.*

20. Lian H. Sakhong, *Federalism, Constitution Making and State Building in Burma, in* DESIGNING FEDERALISM IN BURMA 11, 11–12 (David C. Williams & Lian H. Sakhong eds. 2005).

21. *Id.* at 37–38.

22. *See* CHRISTINA FINK, LIVING SILENCE: BURMA UNDER MILITARY RULE 23–24 (2001) (commenting on the July 19, 1947 assassination of General Aung San, along with most of his cabinet, and its effect on Burma's political future); *see also* Sakhong, *supra* note 20, at 12 (noting Aung San's importance in unifying the ethnic nationalities and the impact of his assassination).

23. *See* Sakhong, *supra* note 20, at 17–20 (noting that the 1947 Constitution allowed only the Burman ethnic nationality sovereign control of the nation, making the other ethnic nationalities "vassal states").

24. Lian H. Sakhong, *The Basic Principles for Future Federal Union of Burma, in* DESIGNING FEDERALISM IN BURMA, *supra* note 20, at 35, 35.

25. FINK, *supra* note 22, at 23.

26. *See id.* at 23–24, 29 (noting how certain insurgent groups sought to gain power through force instead of the electoral process).

27. *Id.* at 24.

28. MARTIN SMITH, ETHNIC GROUPS IN BURMA: DEVELOPMENT, DEMOCRACY AND HUMAN RIGHTS 25 (Anne-Marie Sharman ed., 1994).

29. FINK, *supra* note 22, at 29.

After the coup, protests broke out across the country. On July 7, 1962, Rangoon University students staged a peaceful government protest that was suppressed by the military through the killing of over 100 students.[31] The following day, the army demolished the student union building on the university campus with dynamite.[32] General Ne Win announced that he had "no alternative but too [sic] meet dah (knife) with dah (knife), and spear with spear."[33] After the subsequent failure of peace negotiations, the government arrested student leaders and closed the university.[34] More ethnic groups joined the conflict, including, in 1964, the Shan State Army, which launched a rebellion in response to the 1962 military coup d'état.[35] On March 28, 1964, all opposition parties were banned from the political process.[36]

General Ne Win worked to isolate Burma from the outside world, and established a one-party system with the Burma Socialist Programme Party (BSPP) assuming complete control.[37] During this period, Ne Win increased attacks on ethnic insurgent groups.[38] According to the magazine *The Irrawaddy*:

> Aware of the growing influence of [the] Karen . . . [General] Ne Win and his commanders routinely launched military campaigns in the region, but were unable to wipe out the insurgency. In 1971, Ne Win assigned Col Than Tin to lead the mission to turn the delta "white"—that is, to cleanse the area of insurgents once and for all.[39]

The government faced economic uncertainty after pursuing socialist economic policies.[40] In January 1974, a new constitution vested supreme legislative, executive, and judicial authority in Ne Win's post-coup government, installing Ne Win as the

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30. DISPLACED CHILDHOODS, *supra* note 1, at 12.

31. FINK, *supra* note 22, at 31.

32. *Id.*; *see also Burmese Student Movement*, ALL BURMA FEDERATION OF STUDENT UNIONS, http://abfsu.net/?page_id=3 (last visited Dec. 13, 2012).

33. *Burmese Student Movement*, *supra* note 32.

34. *Id.*; Josef Silverstein, *Burmese Student Politics in a Changing Society*, 97 DAEDALUS 274, 291 (1968).

35. *The Uwsa: Guns, Drugs, And Power Politics*, BURMA ISSUES, Apr. 2001, at 3.

36. *Burma/Myanmar (1948-Present)*, UNIV. CENT. ARK., http://uca.edu/politicalscience/dadm-project/asiapacific-region/burmamyanmar-1948-present (last visited Sept. 24, 2012).

37. *Some Background Information About Burma*, BURMAWATCH.ORG (Mar. 20, 2010), http://www.burmawatch.org/aboutburma.html [hereinafter *Background Information About Burma*].

38. *See id.* ("Over the years, the army had become more involved in the counterinsurgency campaigns against ethnic rebels who would eventually join to form the National Democratic Front in 1975.")

39. Aung Zaw, *Operation Delta*, THE IRRAWADDY (June 10, 2008), http://www2.irrawaddy.org/opinion_story.php?art_id=12595. *The Irrawaddy*, a magazine based across the border from Burma in Thailand, provides coverage of events in Burma and Southeast Asia. *About Us*, THE IRRAWADDY, http://www.irrawaddy.org/about-us (last visited Dec. 14, 2012).

40. BACKGROUND NOTE: BURMA, *supra* note 10.

president.[41] The public, in response to increasing government oppression and restrictions, marked the next few years with large demonstrations.[42]

Ne Win stepped down from the presidency in 1981, yet he remained in power as Chairman of the BSPP until stepping down on July 23, 1988.[43] Economic turmoil—due in part to the cancellation of certain bank notes for superstitious reasons—and bloody police repressions of student protests, resulting in the death of over one thousand students and civilians in March and June 1988, caused large protests and demonstrations to break out throughout the country on August 8, 1988.[44] These clashes with the government resulted in "the largest ever national Burmese uprising demanding democracy," now termed the "8888 Uprising."[45]

University students initially began the uprising, followed by hundreds of thousands of people nationwide, demanding that the BSPP regime step aside to be replaced by an elected civilian government.[46] The Burma military employed methods of torture, political imprisonment, and other human rights abuses in an attempt to quash the rebellion, and soldiers fired on unarmed protestors, killing thousands.[47] Following this massacre, Aung San Suu Kyi, daughter of General Aung San who was a leader in Burma's independence from Britain, made her first political speech at a rally and became the official leader of the opposition.[48]

During the 8888 Uprising, the military slaughtered thousands of citizens, including students and Buddhist monks.[49] In September 1988, a group of military generals suspended the 1974 Constitution "and established a new ruling military junta called the State Law and Order Restoration Council (SLORC)."[50] Under the banner of restoring order, the SLORC mobilized the army to suppress ongoing public demonstrations, killing an estimated 3,000 additional civilians and causing more than 10,000 students to flee into the hills and border areas.[51]

In response to the continued ethnic insurgency, the SLORC increased attacks in the early 1990s, leading many ethnic opposition groups to sign ceasefire agreements with the regime.[52] Since 1989, as many as seventeen ethnic opposition groups laid

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41. *See Background Information About Burma*, *supra* note 37 ("In 1974, a new constitution, which people were forced to approve, established a one-party (the Burma Socialist Programme Party or BSPP) government with a 451 member People's National Congress; and the name of the country was changed to the Socialist Republic of the Union of Burma. A one-party election was held and Revolutionary Council Chairman General Ne Win became Chairman of the State Council and President of Burma U Ne Win. The military junta was still firmly in control.").

42. *Burmese Student Movement*, *supra* note 32.

43. *The Rise and Fall of General Ne Win*, 5 THE IRRAWADDY no. 6 (1997), *available at* http://www2.irrawaddy.org/article.php?art_id=884.

44. Philippa Fogarty, *Was Burma's 1988 Uprising Worth It?*, BBC NEWS (Aug. 6, 2008), http://news.bbc.co.uk/2/hi/asia-pacific/7543347.stm; *8888 Uprising History*, ALL BURMA I.T. STUDENTS' UNION (ABITSU) (Aug. 9, 2007), http://www.abitsu.org/?p=32 [hereinafter *8888 Uprising History*].

45. *8888 Uprising History*, *supra* note 44.

46. Thomas R. Lansner, *Brief History of Burma*, BACKPACKING BURMA, http://journalism.berkeley.edu/projects/burma/history.html (last visited Dec. 20, 2012).

47. *Id.*

48. BACKGROUND NOTE: BURMA, *supra* note 10.

49. *8888 Uprising History*, *supra* note 44.

50. BACKGROUND NOTE: BURMA, *supra* note 10.

51. *Id.*

52. *See* TIN MUANG MUANG THAN, *Myanmar, in* MUTHIAH ALAGAPPA, ASIAN SECURITY PRACTICE: MATERIAL AND IDEATIONAL INFLUENCES 415 (Muthiah Alagappa ed., 1998) (noting that due

down their arms following ceasefire negotiations with the regime.[53] For some ethnic groups, the agreements failed to hold and fighting resumed.[54]

Under the ceasefire pacts, the Burma Army promised ethnic opposition groups full control over an agreed territory, economic concessions, and the right to retain weaponry.[55] Despite these concessions, the ceasefire agreements were intended to exercise control. The conditions attached to the ceasefire arrangement require ethnic opposition forces to lay down their arms, to remain within a defined territory and refrain from traveling into government-controlled areas without prior permission, to withdraw from multilateral resistance organizations, and to abstain from having contact with active opposition groups.[56] In most cases, the ceasefire agreements failed to provide any protections or guarantees to the ethnic civilian population. The Burma Army continued attacks against civilian populations within ceasefire areas, which, at times, led to the breakdown of the ceasefire and a recommencement of fighting.[57]

The SLORC ruled by martial law until its announcement that national parliamentary elections were slated to be held in May 1990.[58] These elections were primarily judged to be free and fair by the international community, and the military—assuming their selected candidates would win—refrained from voter intimidation.[59] The election resulted in an overwhelming victory for the National League for Democracy party, led by Aung San Suu Kyi (under house arrest at the time), who won almost sixty percent of the vote and 392 of a possible 485 parliamentary seats.[60] Instead of honoring the results of this election, the SLORC suspended parliament and imprisoned political activists in an effort to maintain power.[61] According to one report by Partners Relief and Development and the Free Burma Rangers:

> It would be two more years before the SLORC announced the convening of a National Convention, the mechanism governing the constitutional-drafting process, in April 1992. The National Convention took place sporadically between 9 January 1993 and 31 March 1996, resuming again

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in part to "strong attack and criticism from the West, SLORC in the 1990s appears to be moving toward regional cooperation via ASEAN," the Association of Southeast Asian Nations, and away from more coercive strategies).

53. Wai Moe, *Naypyidaw Orders New "Four Cuts" Campaign*, THE IRRAWADDY (Mar. 4, 2011), http://www2.irrawaddy.org/article.php?art_id=20880.

54. C.S. Kuppuswamy, *Myanmar: The Second Round Of Ceasefire With Ethnic Groups—Analysis*, EURASIA REVIEW (Feb. 10, 2012), http://www.eurasiareview.com/10022012-myanmar-the-second-round-of-ceasefire-with-ethnic-groups-analysis; *see also* Saw Thu War, *Behind the Ceasefires*, 6 BURMA ISSUES NEWSLETTER, no. 9, 1996, http://www.karen.org/news2/messages/149.html (explaining that while fifteen ethnic groups participated in ceasefires, the SLORC continued to launch military campaigns against the Karen National Union).

55. ALTSEAN-BURMA, BURMA BRIEFING: ISSUES AND CONCERNS VOL. 1, 25 (2004).

56. *Id.*

57. *See id.* (explaining how, in 1995, the Karenni National Progressive Party (KNPP) ceasefire agreement with the regime broke down after the regime initiated forcible relocations of the Karenni people and burned their villages).

58. BACKGROUND NOTE: BURMA, *supra* note 10.

59. *Id.*

60. *Id.*

61. *Id.*

> from May 2004 until September 2007. These sessions were fully controlled by the military regime, with hand-picked delegates, open discussions restricted, alternative proposals overridden, [and] opponents intimidated . . . .[62]

According to the U.S. State Department, "[t]he ruling junta adopted the name State Peace and Development Council (SPDC) in 1997, but did not change its policy of autocratic control and repression of the democratic opposition."[63]

> The same Partners Relief and Free Burma Ranger report stated further that:
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> In September 2007, amid spreading nationwide protests, the military regime . . . announced the closing of the final session of the National Convention. Soon after, the SPDC formed a 54-member Commission for Drafting the State Constitution. The Commission once again excluded political and ethnic opposition leaders. On 19 February 2008, the Generals of the SPDC announced that they would hold a referendum on its draft constitution on 10 May 2008 followed by elections in 2010.[64]

"While the referendum law provided for a secret ballot, free debate was not permitted and activities considered 'interfering with the referendum' carried a [three]-year prison sentence."[65] Despite the humanitarian disaster and widespread devastation caused by Cyclone Nargis only days earlier, the government still held the referendum and declared 92.48 percent approval of the new constitution.[66]

"The military government faced harsh criticism from the international community for the procedural flaws in Suu Kyi's trial and the obvious attempt to silence the leadership of Burma's main political opposition group, the NLD [National League for Democracy]."[67] "The SPDC Government released Aung San Suu Kyi on November 13, 2010, after more than 7 years' continuous detention. However, the government continued to hold an estimated 2,100 other political prisoners."[68]

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62. DISPLACED CHILDHOODS, *supra* note 1, at 12.

63. BACKGROUND NOTE: BURMA, *supra* note 10.

64. DISPLACED CHILDHOODS, *supra* note 1, at 14.

65. BACKGROUND NOTE: BURMA, *supra* note 10.

66. *Id.* *See also* DISPLACED CHILDHOODS, *supra* note 1, at 14 ("Eight days before the scheduled referendum vote, Cyclone Nargis struck southwestern Burma, leaving in its wake a path of death and destruction. Despite the massive loss of life and devastation in the Irrawaddy Delta region, the Generals pushed forward with the scheduled vote on May 10, allowing a two-week delay in only 47 affected townships, where millions remained without food, shelter, or medicine. On May 27, the regime announced a 92.8 percent popular approval of the constitution with a 99 percent voter turnout. In response, the international community, including UN officials, denounced the drafting process, referendum, and resulting constitution as a 'sham' that lacked legitimacy and genuine participation.").

67. DISPLACED CHILDHOODS, *supra* note 1, at 15. *See also id.* at 14. ("In 2009, the military government continued to push forward its agenda of entrenching military rule through an eminently flawed election process. On 14 May 2009, 13 days before Aung San Suu Kyi house arrest was scheduled to end, the SPDC re-arrested her and charged her under the country's 'Law to Safeguard the State from the Dangers of Subversive Elements'—a law widely employed by the regime to suppress political dissidents and opposition groups. The arrest came after an American man, John Yettaw, entered Suu Kyi's home and spent two days as her uninvited guest. On 11 August 2009, after a six-week trial, a criminal court in Rangoon found Suu Kyi in violation of the terms of her house arrest and sentenced her to three years in prison—a sentence that was later commuted to an additional 18 months under her existing house arrest.").

68. BACKGROUND NOTE: BURMA, *supra* note 10.

On November 7, 2010, Burma held its first elections in twenty years.[69] The regime proxy Solidarity and Development Party won more than seventy-five percent of seats in parliament in an election that was widely discredited as neither fair nor free by the international community.[70] "The new, nominally civilian government took office on April 1, 2011," and although this marked the end of SPDC rule, insiders from the SPDC regime assumed almost all key positions at the state and national levels.[71]

The situation in the ethnic territories continues to deteriorate as armed conflict, human rights abuses, and extreme poverty take their toll on the civilian population. Reports of extrajudicial killings, torture, sexual violence, arbitrary arrests and detentions, forced labor, recruitment of child soldiers, deprivation and confiscation of property, arbitrary and excessive taxation, and restrictions of fundamental freedoms are widespread and well documented.[72] Extreme poverty and limited access to basic social services are also common in the ethnic areas. Conditions are particularly appalling in Eastern Burma where the military regime has waged offensives against the ethnic opposition forces for more than four decades.[73] From 1996–2002 the military in Eastern Burma destroyed some 2,500 villages, displaced over 630,000 villagers, and committed countless egregious abuses against the civilian population.[74]

After years of pressure and sanctions by foreign governments, including the United States, the central government in Burma signed a ceasefire agreement with the Karen National Union on January 12, 2012.[75] According to *Democratic Voice of Burma*, "[t]he deal has been received with caution by many who see Burma's democratic reforms as a largely cosmetic effort to woo Western governments."[76] Although fighting has decreased with the ceasefire, reports have surfaced that the

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69. *Id.* Throughout 2011, the Myanmar government released a series of political prisoners, though as of September 27, 2012, the Assistance Association for Political Prisoners estimated that more than 300 remain in custody. *Myanmar: Final Push on Political Prisoners Needed*, IRIN NEWS (Sept. 27, 2012), http://www.irinnews.org/report/96402/MYANMAR-Final-push-on-political-prisoners-needed.

70. *Id.*

71. *Id.*

72. *See, e.g.*, NETWORK FOR HUMAN RIGHTS DOCUMENTATION—BURMA, HUMAN RIGHTS DOCUMENTATION MANUAL SERIES: DOCUMENTING KILLINGS AND DISAPPEARANCES IN BURMA iii (2008), *available at* http://www.aappb.org/nd_burma_Killings%20and%20Disappearances.pdf (outlining a series of manuals and reports documenting the various human rights abuses in Burma).

73. *See* KAREN HUMAN RIGHTS GROUP & HUMAN RIGHTS WATCH, DEAD MEN WALKING: CONVICT PORTERS ON THE FRONT LINES IN EASTERN BURMA 7 (2011) ("The Tatmadaw has been battling a wide range of primarily ethnic minority insurgencies throughout the country since independence in 1948.").

74. BURMESE BORDER CONSORTIUM, RELIEF PROGRAMME JANUARY TO JUNE 2003: INCLUDING AUDIT FOR JULY 2002 TO JUNE 2003 AND FUNDING APPEAL FOR 2004 47 (2003), *available at* http://www.tbbc.org/resources/2003-6-mth-rpt-jan-jun.pdf.

75. *See* Hindstrom, *supra* note 15 (stating that Burma signed the historic ceasefire agreement with the Karen National Union on January 12, 2012, but that many thought this was a cosmetic effort to please western governments); Thomas Fuller, *In Myanmar, Karen Rebels Deny Signing a Cease-Fire*, N.Y. TIMES (Feb. 3, 2012), http://www.nytimes.com/2012/02/04/world/asia/in-myanmar-karen-rebels-deny-signing-a-cease-fire.html?pagewanted=all&_r=0 (stating that the United States and other countries require Myanmar to reconcile with its armed ethnic groups before they will lift economic sanctions and other punitive measures).

76. Hindstrom, *supra* note 15.

Burma Army has continued to carry out unprovoked attacks on civilians in the Karen State.[77]

III. DEFINITION OF GENOCIDE

Genocide is a modern term coined in 1944 by the Polish scholar Raphaël Lemkin.[78] The word genocide is a combination of the Greek word *genos*, meaning race or tribe, and the Latin *cide*, meaning killing.[79] In his work documenting Nazi atrocities, entitled *Axis Rule in Occupied Europe*, Lemkin defines genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."[80] Lemkin notes that "[g]enocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[81]

Lemkin later worked alongside "a team of Americans to prepare the Nuremberg trials where he was able to get the word 'genocide' included in the indictments against Nazi leadership."[82] After returning to the United States following the Nuremberg trials, Lemkin began lobbying for the United Nations to recognize the term and the commission of "genocide" in international law.[83] His efforts resulted in the establishment of a United Nations convention dedicated to the subject of genocide—The United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Convention).[84] "The Genocide Convention was the first human rights treaty adopted by the General Assembly of the United Nations."[85]

The Convention, as adopted by the General Assembly on December 9, 1948,[86] defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;

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77. *Id.*

78. *Coining a Word and Championing a Cause: The Story of Raphael Lemkin*, U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007050 (last updated May 11, 2012) [hereinafter U.S. HOLOCAUST MEM'L MUSEUM].

79. RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

80. *Id.*

81. *Id.*

82. U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 78.

83. *Id.*

84. *Id.* "[The Genocide Convention] stresses the role of criminal justice and accountability in the protection and promotion of human rights." Schabas, *supra* note 14, at 4. Unlike the majority of human rights treaties currently in effect, however, the Genocide Convention did not set up a monitoring mechanism. *Id.* at 5. In 2004, the Secretary-General of the United Nations created the position of Special Advisor on the Prevention of Genocide. *Id.*

85. Schabas, *supra* note 14, at 4.

86. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. There are currently 137 states parties to the Convention. *Information on the Genocide Convention*, PREVENT GENOCIDE INT'L, http://www.preventgenocide.org/law/convention/ (last visited Dec. 21, 2011).

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.[87]

This phrasing has been widely accepted as the primary international legal definition of the crime of genocide, and as such, has been incorporated into numerous other international conventions, foundational documents, and commentaries.[88] The Convention protects four groups—national, ethnical, racial, and religious.[89] A national group denotes a group of individuals "whose identity is defined by a common country of nationality or national origin."[90] An ethnical group is a group of individuals "whose identity is defined by common cultural tradition,

87. Genocide Convention, *supra* note 86, art. 2. The establishment of this convention was the first step toward founding a permanent international criminal tribunal with jurisdiction over crimes which had not yet been defined by international treaty law. *See* Anna N. Astvatsaturova et al. *The Case for Prosecuting Iraqi Nationals in the International Criminal Court*, 10 INT'L LEGAL THEORY 27, 33 (2004) (asserting that the Genocide Convention mandates prosecution by a competent tribunal for the crime of genocide); Christine H. Chung, *The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress*, 40 CASE W. RES. J. INT'L L. 227, 228 (2007–08) (observing that the International Criminal Court has begun to fulfill the aims of the Genocide Convention); Sonali B. Shah, Comment, *The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court's Definition of Genocide*, 16 EMORY INT'L L. REV. 351, 352 (2002) (recognizing that the International Criminal Court adopted the Genocide Convention's definition of genocide).

88. *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 2, U.N. Doc. S/RES/995 annex (Nov. 8, 1994) (employing the Convention's definition of genocide in exercising its competence to persecute persons committing genocide); Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted by* U.N.S.C. Res. 827, art. 4(2) U.N. Doc. S/Res/827, (May 25, 1993) (employing the Convention's definition of genocide); Rome Statute of the International Criminal Court art. 5–6, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (adopting the Convention's definition of genocide and granting the International Criminal Court jurisdiction over the crime of genocide). The first case prosecuted under the Convention was that of Jean-Paul Akayesu, the Hutu mayor of the Rwandan town of Taba at the time of the genocide, who was convicted of genocide and crimes against humanity on September 2, 1998. Karin Davies, *Hutu Mayor Found Guilty of Genocide*, THE INDEPENDENT (Sept. 3, 1998), http://www.independent.co.uk/news/hutu-mayor-found-guilty-of-genocide-1195665.html. In 2004, General Radislav Krstić, the first man to be convicted of genocide in Bosnia by the International Criminal Tribunal for the former Yugoslavia (ICTY), appealed his conviction for his role in the killing of over 7,000 Muslim men and boys in Srebrenica. *Analysis: Defining Genocide*, BBC NEWS (Aug. 27, 2010), http://www.bbc.co.uk/news/world-11108059. The court ultimately rejected General Krstić's argument that the number of individuals killed was "too insignificant" to constitute genocide—a move likely to set international legal precedent and further delineate the crime of genocide. *Id.*

89. Genocide Convention, *supra* note 86, art. 2.

90. *The Legal Definition of Genocide*, PREVENT GENOCIDE INT'L, http://www.preventgenocide.org/genocide/officialtext-printerfriendly.htm (last visited Dec. 21, 2012). In the *Akayesu* decision, the International Criminal Tribunal for Rwanda (ICTR) trial chamber further defined a "national group" as a "collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, para. 512 (Sept. 2, 1998).

language, or heritage."[91] A racial group is defined through "hereditary physical traits often identified with a geographical region," and a religious group is one whose members "share the same religion, denomination or mode of worship."[92] In its trial judgment, the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* specifically noted that through the delineation of four protected groups, the delegates to the Convention perceived genocide as a crime, which can only be committed against "'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups."[93]

The crime of genocide, under the Convention's definition, is comprised of two elements: *mens rea* and a physical component. The *mens rea* component is embodied by the language "*intent* to destroy."[94] The inclusion of the language "in whole or in part" indicates that perpetrators do not need to intend to destroy an entire group in order to have committed genocide.[95]

In the *Krstić* case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) appeals chamber concluded that "genocidal intent may be inferred . . . from evidence of 'other culpable acts systematically directed against the same group.'"[96] In effect, "[w]here direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime" and the "inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent attributable are not precisely identified."[97] Mere knowledge of executions directed against a certain

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91. *The Legal Definition of Genocide*, *supra* note 90.

92. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, paras. 514–15.

93. *Id.* para. 511. The ICTR trial chamber further considered whether protected groups should be limited to only the four groups expressly mentioned in the Genocide Convention and concluded that, "it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group." *Id.* para. 516.

94. Genocide Convention, *supra* note 86, art. 2 (emphasis added).

95. *The Legal Definition of Genocide*, *supra* note 90. The phrasing "in whole or in part" has inspired great scrutiny and debate regarding the requisite number or percentage of a population that a perpetrator must have intended to destroy in order to constitute genocide. *See, e.g.*, *Global Conference on the Prevention of Genocide: Background*, MCGILL FACULTY OF LAW, http://efchr.mcgill.ca/WhatIs Genocide_en.php (discussing the different ways of defining the meaning of "in whole or in part"). In 2001, the ICTY trial chamber in the case of Radislav Krstić reasoned that "in whole or in part" meant that "the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality may be characterised as genocide." Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, para. 589 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001). The ICTY cited numerous cases in support of this proposition: "The United Nations General Assembly characterised as an act of genocide the murder of approximately 800 Palestinians detained at Sabra and Shatila," indicating that genocide could target a limited geographic zone; "[t]he Federal Constitutional Court of Germany, in the Nikola Jorgi} [sic] case, upheld the Judgement of the Düsseldorf Supreme Court, interpreting the intent to destroy the group 'in part' as including the intention to destroy a group within a limited geographical area"; and a May 1997 Bavarian Appeals Chamber judgment finding that acts of genocide were committed "within the administrative district of Fo~a [sic]" in June 1992. *Id.* The ICTY noted that "it is important to bear in mind the total context in which the physical destruction is carried out." *Id.* para. 590.

96. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeal Judgement, para. 33 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (quoting Prosecutor v. Goran Jelisic, Case No. IT-95-10-A, Appeal Judgement, para. 47 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001)).

97. *Id.* para. 34.

population and the use of derogatory language directed at a group are both insufficient to support an inference of genocidal intent.[98]

In the *Jelisic* case, the ICTY appeals chamber indicated that the *mens rea* for genocide may be:

> [I]nferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.[99]

The ICTY appeals chamber further noted that although "the existence of a plan or policy" was not required for a finding of genocidal intent, such evidence would often facilitate proof of the crime.[100] In refusing to convict Jelisic of genocide, the ICTY trial chamber stated that arbitrary killing was insufficient to constitute a "clear intention to destroy a group," as required by the definition of genocide.[101]

The ICTR trial chamber, in the case of *Akayesu*, specified that the intent requirement should be judged pursuant to a standard of whether the accused "knew or should have known that the act committed would destroy, in whole or in part, a group."[102] The ICTR trial chamber further directed that for an accused to be held guilty of complicity in genocide, it must initially "be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed."[103] "[A]n accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[104] Further, "'an indifference to the result of the crime does not itself negate [the possibility of] abetting'" that crime.[105] It follows that mere "*knowledge* of a genocidal plan, coupled with the *actus reus* of participation in the execution of such plan . . . is required for complicity or accomplice liability" even where the accomplice's special intent, or *mens rea*, for genocide is absent.[106]

The International Commission of Inquiry on Darfur concluded that even where there may be a general subjective perception of the existence of separate ethnic groups there must be a specific self-perception of those involved in a conflict distinguishing a group on racial, ethnic, national, or religious grounds in order to warrant protection under the Genocide Convention.[107]

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98. *Id.* paras. 111, 130.

99. *Goran Jelisic*, Case No. IT-95-10-A, para. 47 (2001).

100. *Id.* para. 48.

101. Prosecutor v. Goran Jelisic, Case No. IT-95-10-T, Judgement, para. 108 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999).

102. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, para. 520.

103. *Id.* para. 530.

104. *Id.* para. 540.

105. *Id.* para. 539 (quoting National Coal Board v. Gamble, [1959] 1 Q.B. 11).

106. *Id.* para. 544.

107. INT'L COMM'N OF INQUIRY ON DARFUR, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL: PURSUANT TO SECURITY COUNCIL RESOLUTION 1564 OF 18 SEPTEMBER 2004, para. 518 (Jan. 25, 2005) [hereinafter Darfur Report], *available at* http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

The second element of genocide is the physical component, requiring the execution of at least one of the acts listed in sections (a) through (e) noted above.[108] The ICTR trial judgment in *Akayesu* outlined the boundaries of each of the physical acts constituting genocide under the Convention's definition.

Physical act (a) killing members of the group, was thus defined, pursuant to implications of the usage of the more precise term "meurtre" in the French translation of the Convention, as "[h]omicide committed with intent to cause death."[109] The ICTR, in drawing this distinction between intentional and unintentional killing, cited the "*travaux preparatoires* of the Genocide Convention," which included the opinion of several delegates that premeditation need not be listed as a requirement because "the very crime of genocide, necessarily entails premeditation."[110]

The second physical act (b) "causing serious bodily or mental harm to members of the group," was interpreted as not requiring "that the harm [be] permanent and irremediable."[111] The ICTR took this term to mean acts of, or those of a similar caliber to, torture, whether "bodily or mental, inhumane or degrading treatment, [or] persecution."[112]

The third physical act constitutive of genocide (c) "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[113] Examples of such conditions include "subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement."[114]

The fourth act (d) imposing "measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages."[115] The ICTR further stated that, "[i]n patriarchal societies, where membership of a group is defined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child identified who will consequently not belong to its mother's group."[116] Notably, the ICTR asserted "that measures intended to prevent births within the group may be physical, but can also be mental . . . . [where] members of a group can be led, through threats or trauma," such as rape, to refrain from subsequent procreation.[117]

The fifth physical element (e) "forcibly transferring children of the group to another group," includes both the physical movement of children as well as "acts of

108. Genocide Convention, *supra* note 86, art. 2.
109. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 500.
110. *Id.* para. 501.
111. *Id.* para. 502.
112. *Id.* para. 504.
113. *Id.* para. 505.
114. *Id.* para. 506.
115. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 507.
116. *Id.*
117. *Id.* para. 508.

threats or trauma which would lead to the forcible transfer of children from one group to another."[118]

It is important to note that Article I of the Convention clarifies that genocide is capable of being committed "in time of peace or in time of war."[119] Under the Convention, genocide may occur absent any context of armed conflict.

Under the Convention, "[i]t is a crime to plan or incite genocide, even before killing starts, and to aid or abet genocide: Criminal acts include conspiracy, direct and public incitement, attempts to commit genocide, and complicity in genocide."[120]

> The following are genocidal acts when committed as part of a policy to destroy a group's existence: Killing members of the group includes direct killing and actions causing death. Causing serious bodily or mental harm includes inflicting trauma on members of the group through widespread torture, rape, sexual violence, forced or coerced use of drugs, and mutilation. Deliberately inflicting conditions of life calculated to destroy a group includes the deliberate deprivation of resources needed for the group's physical survival, such as water, food, clothing, shelter, or medical services. Deprivation of the means to sustain life can be imposed through confiscation of harvests, blockade of foodstuffs, detention in camps, forcible relocation or expulsion into deserts. Prevention of births includes involuntary sterilization, forced abortion, prohibition of marriage, and long-term separation of men and women intended to preven procreation. Forcible transfer of children may be imposed by direct force or by fear of violence, duress, detention, psychological oppression or other methods of coercion. The Convention on the Rights of the Child defines children as persons under the age of 18 years.[121]

Although the Convention did not establish a monitoring mechanism, international legal jurisprudence has increasingly begun to recognize an affirmative duty to prevent genocide.[122] In a 2007 ruling, the International Court of Justice (ICJ) interpreted Article I of the Convention as imposing a duty of "due diligence" upon the states parties to prevent genocide, including in countries beyond the scope of a nation's own borders, and those in which their influence extends.[123] This duty to prevent the occurrence of genocide operates alongside the responsibility to protect, which was recognized by the United Nations General Assembly in 2005[124] and endorsed by the Security Council in 2006.[125]

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118. *Id.* para. 509.

119. Schabas, *supra* note 14, at 2. When the Convention was adopted in 1948, there was still great doubt regarding whether, absent an armed conflict, "crimes against humanity" could be committed and thus prosecuted. *Id.* In this context, it is important to note that the drafters of the Convention specifically indicated that genocide was a crime capable of being committed without an armed conflict.

120. *The Legal Definition of Genocide*, *supra* note 90.

121. *Id.*

122. Schabas, *supra* note 14, at 2–3.

123. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, para. 430 (Feb. 2007).

124. 2005 World Summit Outcome, G.A. Res. 60/1, paras. 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

125. S.C. Res. 1674, para. 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

IV. EXAMPLES OF GENOCIDE

A. *Prosecutor v. Radislav Krstić (ICTY)*

The ICTY appeals chamber concluded "that Bosnian Serb forces carried out genocide against the Bosnian Muslims."[126] It found, *inter alia*, that the Bosnian Serbs:

> [t]argeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber ... calls the massacre at Srebrenica by its proper name: genocide.[127]

In determining Krstić's personal liability, the ICTY appeals chamber was careful to note that Krstić's knowledge that executions were being carried out in specific areas under control of the Zvornik Brigade—which participated in the executions of unarmed Bosnian Muslim men and boys captured from the United Nations designated safe area in Srebrenica in July 1995[128]—could not "support an inference of genocidal intent on his part."[129] It reasoned that a finding of genocidal intent on behalf of Krstić would necessitate a conclusion that he had directed the executions carried out by the Zvornik Brigade or supervised their commission, and that mere knowledge alone is insufficient to support a finding of genocidal intent.[130]

The ICTY appeals chamber found that Krstić had aided and abetted in genocide, rather than having functioned as a principal perpetrator,[131] yet from July 15, 1995, he did possess "knowledge of the genocidal intent of some of the Members of the VRS [the Bosnian Serb Army] Main Staff."[132] The ICTY appeals chamber reasoned that since Krstić was aware that the Main Staff lacked resources to carry out the executions, and because he subsequently allowed the Main Staff to use the Drina Corps (another branch of the Bosnian Serb Army) resources at his disposal, Krstić was guilty of aiding and abetting in genocide against the Bosnian Muslims in Srebrenica.[133] After making this finding, the ICTY appeals chamber indicated that "an individual who aids and abets a specific intent offense [such as genocide] may be held responsible if he assists the commission of the crime knowing the intent behind the crime."[134] The ICTY appeals chamber delineated a subtle distinction between knowledge of intent and a sharing of intent, and noted that Krstić lacked genocidal intent himself.

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126. *Radislav Krstić*, Case No. IT-98-33-A, Judgement, para. 35.
127. *Id.* para. 37.
128. *Radislav Krstić*, Case No. IT-98-33-T, Judgement, paras. 66–68.
129. *Radislav Krstić*, Case No. IT-98-33-A, para. 111.
130. *Id.* para. 129.
131. *Id.* para. 134.
132. *Id.* para. 137.
133. *Id.* paras. 137, 144.
134. *Id.* para. 140.

B. *Prosecutor v. Goran Jelisic (ICTY)*

In the *Jelisic* case, the ICTY appeals chamber specifically affirmed that the *actus reus* requirement for genocide is not comprised of a specific or articulable number of victims, and may be satisfied, as it was in this case, without any such numerical finding.[135]

In analyzing the *mens rea* relevant in genocide indictments, the trial chamber held that Jelisic lacked the requisite genocidal "intent to destroy in whole or in part the Muslim group from Brčko. . . . [H]e was acting [neither] pursuant to a plan created by superior authorities to accomplish that end . . . [nor] as a single perpetrator."[136] The ICTY trial chamber admitted that Jelisic told detainees at Luka Camp that "he held their lives in his hand and that only between 5 to 10% of them would leave there . . . [and] that 70% of them were to be killed, 30% beaten and that barely 4% of the 30% might not be badly beaten," and that he reportedly wanted to "cleanse" the Muslim population.[137] The ICTY trial chamber then reasoned that although Jelisic "'obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group,'" and thus failed to possess the *mens rea* required for a conviction of genocide.[138]

C. *Prosecutor v. Jean-Paul Akayesu (ICTR)*

After having determined that genocide was committed against the Tutsi group in Rwanda in 1994—the first interpretation and application by an international court of the Convention—the ICTR trial chamber found Akayesu, elected *bourgmestre* of the Taba commune in Rwanda during the genocide, guilty of nine counts of genocide and crimes against humanity.[139] The ICTR trial chamber held that from April 18, 1994, Akayesu "not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to cause certain Tutsi, and endorsed and even ordered the killing of several Tutsi."[140] Akayesu was also found, through "his presence, his attitude and his utterances," to have tacitly encouraged rape and sexual violence against Tutsi women, and to have made statements at public gatherings which immediately led to widespread killings of Tutsi in Taba.[141] The ICTR trial chamber further found that Akayesu ordered police, militiamen, and local people to capture and kill certain Tutsi individuals and groups such as Tutsi intellectuals.[142]

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135. *Goran Jelisic*, Case No. IT-95-10-A, Judgement, para. 59.

136. *Id.* para. 61.

137. *Id.* para. 62.

138. *Id.* para. 64. (quoting *Goran Jelisic*, Case No. IT-95-10-T, Judgement, para. 108).

139. U.N. Secretary-General, *Rep. of the Int'l Crim. Trib. for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l Hum. Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 Jan. and 31 Dec. 1994*, paras. 14–15, U.N. Doc. A/54/315-S/1999/943 (Sept. 7, 1999); *see also Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, section 8 verdict (listing Akayesu's convictions).

140. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para. 704.

141. *Id.* paras. 706, 709.

142. *Id.* para. 718.

D. *International Commission of Inquiry on Darfur (Pursuant to U.N. Security Council Resolution 1564)*

The Commission concluded that two objective elements of genocide materialized in Darfur from the gross human rights violations committed by the Government of Sudan and the militias under its control.[143] The first element is the "*actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction."[144] The second is, "on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct."[145] The Commission subsequently concluded, however, that the government authorities lacked specific genocidal intent and that its policy of "attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds."[146] Rather than genocidal intent, the Commission found evidence of an "intent to drive victims from their homes, primarily for purposes of counter-insurgency warfare."[147]

The Commission based this finding primarily on the fact that the tribes in the Darfur states which have been the object of attacks and killings "do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong" because "[t]hey speak the same language (Arabic) and embrace the same religion (Muslim)."[148] The Commission also found significant the fact that inter-marriage "over the years has tended to blur the distinction between the groups."[149] For these reasons, the Commission found it impossible to conclude that acts carrying genocidal intent could have been carried out against a racial, ethnic, national, or religious group, as required to institute the protections and competence of the Genocide Convention.[150]

143. Darfur Report, *supra* note 107, at 4.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*, at 129.
149. Darfur Report, *supra* note 107, at 129.
150. Genocide Convention, *supra* note 86, art. 2.

V. ANALYSIS OF THE SITUATION IN BURMA[151]

The standard that must be met for genocide is described *supra* Section III. As noted in Article I of the Convention, genocide is capable of being committed "in time of peace or in time of war."[152] While the Burma Army and government might claim that it is conducting a civil war and that any actions that may have taken place were conducted as counterinsurgent operations, this does not excuse or provide a guise for genocidal acts.

A. National, Ethnical, Racial, or Religious Group?

The standard for genocide set by the Commission requires a clearly distinguished national, ethnical, racial, or religious group.[153] Under the *Akayesu* case, this group must be "stable," meaning that one cannot arbitrarily join or leave the group. The Karen meet both requirements in two categories: national and ethnical.

The Karen meet the national group requirement as they can trace their historical lineage back to Karen State, also known as the "Kawthoolei" in their language.[154] Until 1956, they fought for an independent Karen State but now support

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151. Raw data from the *Displaced Childhoods* report is used in this Article.

> [The *Displaced Childhoods*] report is based on a culmination of data collected by [Partners Relief and Development] and [Free Burma Rangers] from more than 14 years of service with the people of Burma. In preparing for this report, Partners collected information from at least 200 people affected by displacement in Burma through community-based surveys and border interviews.
>
> Partners conducted 82 in-depth interviews with IDPs and former IDPs living along the Thailand-Burma border between June and December 2009. Sixty-five of those interviewed for this report spent time displaced during the last seven years and were able to provide detailed information on recent incidents and conditions of displacement in Burma. Interviewees included parents and grandparents as well as children from Arakan State, Chin State, Kachin State, Karen State, Karenni State, Mon State, and Shan State with experience living in SPDC-designated relocation sites, in ceasefire areas, and in hiding.
>
> Partners conducted interviews with over 30 representatives of community-based organizations with years of knowledge and experience working with the IDP communities in Burma. Partners also interviewed members of the armed opposition groups who often provide protection and logistical support to IDP populations and relief workers assisting IDP populations in Burma. For security reasons, it was not possible to interview active officers of the Burma Army.
>
> In preparation of this report, 52 FBR relief teams that are on-the-ground year-round surveyed internally displaced communities inside Burma. Between July 2009 and January 2010, the teams surveyed more than 93 people from the ethnic Karen and Shan communities, including 38 women and 46 children.

DISPLACED CHILDHOODS, *supra* note 1, at 7.

152. Genocide Convention, *supra* note 86, art. 1.

153. Darfur Report, *supra* note 107, para. 181.

154. THE KAREN NAT'L UNION, THE KARENS AND THEIR STRUGGLE FOR FREEDOM 7 (2006) (1991).

> The Karens named this land Kaw-Lah, meaning the Green Land. We began to peacefully clear and till our land free from all hindrance. Our labours were fruitful and we were very happy with our lot. So we changed the name of the land to Kawthoolei, a land free of all evils, famine, misery and strife: Kawthoolei, a pleasant plentiful, and peaceful country. Here were lived characteristically simple, uneventful and peaceful lives, until the advent of the Burman.

federalism with Karen sovereignty.[155] Karen State is still a distinct ethnic state today and, prior to British occupation, that distinction was even stronger.

The Karen meet the ethnical group requirement as they are a group of individuals whose identity is defined by common cultural traditions, language, and heritage.[156] There is a robust Karen heritage marked by traditions, group history, and the Karen language.[157]

B. Mens Rea?

Genocidal intent may be demonstrated through direct evidence, including the widely known admission of Burma Army General Maung Hla that, one day, "Karen people would be seen only in the museum."[158] According to the standard set in *Krstić*, genocidal intent may be inferred from evidence of "other culpable acts systematically directed against the same group."[159] Genocidal intent is also inferred through widely documented systematic acts directed against the Karen. In the *Jelisic* case, evidence of culpable acts could be demonstrated by "the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[160]

As to scale, there is not a minimum triggering point at which "genocide" is triggered.[161] Under the Convention, no action is required as long as there is evidence of the intent to plan or incite genocide.[162] Also in the *Jelisic* case, the trial chamber found that genocide does not require a specific, articulable, or numeric finding.[163]

C. Acts Committed

The physical component of genocide is met when the perpetrator "[d]eliberately inflict[s] on the group conditions of life calculated to bring about its physical destruction in whole or in part" with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[164]

Id.

155. Nant Bwa Bwa Phan, *Crimes Against the Karen Must End*, DEMOCRATIC VOICE OF BURMA (Sept. 2, 2011), http://www.dvb.no/analysis/crimes-against-the-karen-must-end/17411.

156. *See generally* HARRY IGNATIUS MARSHALL, THE KAREN PEOPLE OF BURMA: A STUDY IN ANTHROPOLOGY AND ETHNOLOGY (1922), *available at* http://gutenberg.net.au/ebooks08/0800061h.html (discussing the history and culture of the Karen people).

157. *See generally id.* (discussing in depth the history of the Karen people).

158. *KNU President Saw Tamla Baw Says Peace Needs a 1,000 More Steps*, KAREN NEWS (Feb. 2, 2012), http://karennews.org/2012/02/knu-president-saw-tamla-baw-says-peace-needs-a-1000-more-steps.html/.

159. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, para. 33 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

160. Prosecutor v. Goran Jelisic, Case No. IT-95-10-A, Judgement, para. 47 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

161. *Id.* para. 59.

162. *The Legal Definition of Genocide*, *supra* note 90.

163. *See* Prosecutor v. Goran Jelisic, Case No. IT-95-10-T, Judgement, para. 65 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999) ("Although the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisi] [sic] for the period of indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied.").

164. Genocide Convention, *supra* note 86, art. II(c).

D. Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About Its Physical Destruction in Whole or in Part

The Burma Army has committed genocide by deliberately inflicting conditions of life calculated to bring about physical destruction of the Karen people in whole or in part. Specifically, it has systematically and continuously displaced the Karen people in order to destroy the group and its way of life. As described in the *Akayesu* case, deliberately inflicted conditions include "systematic expulsion from homes."[165]

The scale of this systematic expulsion was described by the Thailand Burma Border Consortium (TBBC):

> TBBC's partner agencies have documented the destruction, forced relocation or abandonment of more than 3,600 civilian settlements in eastern Burma since 1996. These field reports have been corroborated by high-resolution commercial satellite imagery of villages before and after the displacement occurred. This scale of villages forcibly displaced is comparable to the situation in Darfur and has been recognised as the strongest single indicator of crimes against humanity in eastern Burma. Approximately 70,000 people have been forced to leave their homes each year since 2002, and at least 446,000 people were internally displaced in rural areas of eastern Burma at the end of 2010. As this conservative estimate only covers 37 townships and discounts urban areas, it is likely that well over half a million internally displaced persons remain in eastern Burma.[166]

According to a March 4, 2011 report in *The Irrawaddy* magazine:

> The War Office in Naypyidaw has ordered Burmese government forces based in ethnic areas to relaunch their infamous "Four Cuts" strategy against the ethnic cease-fire groups that continue to resist the junta's Border Guard Force (BGF) plan.
>
> The Burmese army's "Four Cuts" policy was developed in the 1970s during the former regime of the Burmese Socialist Programme Party with the intention of undermining ethnic militias by cutting off access to food, funds, information and recruitment, often with devastating consequences.
>
> According to military sources, the War Office recently ordered regional commanders to reimpose the strategy in areas including Kachin State, Shan State, Karenni State, Karen State, Mon State and Tenasserim Division.
>
> . . . .
>
> "The Four Cuts strategy has been modified by the current military junta," said Htet Min, a former army officer who is now living in exile. "When I was in the military, it was also called 'sweeping' an area, meaning removing any suspected villagers and burning their villages."[167]

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165. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, para. 506 (Sep. 2, 1998).
166. PROGRAMME REPORT, *supra* note 8, at 154.
167. Wai Moe, *supra* note 53.

These sweeps were based on a strategy formulated by General Ne Win to rid the Karen State of insurgent groups.[168] The Burma Army built detention facilities called "new villages," which might be better understood as "concentration camps."[169] Villagers suspected of being loyal to Karen forces were relocated to these new villages.[170] These new villages were located near Burma Army posts and Burma Army units would make "sporadic searches" of the villages.[171] According to *The Irrawaddy*, "[w]hoever was found to be missing at the time of the raid would be assumed to be an insurgent."[172]

The Burma Army's policy toward suspected insurgents essentially gave them license to target the Karen people as a whole and forcibly relocate anyone and entire villages.

The overall intent of the Burma Army is to systematically destroy the Karen people group through a "slow and insidious strangulation of the population rather than an all-out effort to crush them."[173] As described by a Karen relief team leader from Free Burma Rangers in January 2006:

> The dictatorship of Burma attempts to control all the peoples of Burma and is in an ongoing and brutal program of domination, assimilation and exploitation.
>
> While they try to wipe out the resistance and fight them whenever they see them, there seems to be more of an effort to dominate the population. This is done in order to cut off support for the resistance as well as to expand the dictators' control over the people.
>
> Under attack is a people's way of life and their ability to stay in their homes and farms. The Burma Army regularly, about once a month in the Karen and Karenni States, launches 1–4 battalion-sized sweeping operations in villages and areas where IDPs are suspected to be hiding. These troops harass civilians, loot homes, beat, rape and torture indiscriminately and sometimes burn homes or entire villages. They also place landmines in areas that they want to deny to the people and the resistance.[174]

The attacks by the Burma Army take on a systematic pattern. According to documented patterns by Free Burma Rangers:

> During this offensive the Burma Army has deployed over 50 battalions into the northern districts. These battalions have been attacking in 2–4 week cycles throughout the rainy season. 2–4 battalion-sized task forces with limited objectives conduct most operations. Once these objectives are met, the units return to a base to re-supply and then re-deploy on another series of attacks. The time between attacks is usually 2–4 weeks. Attacks

168. Aung Zaw, *supra* note 39.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. CAMPAIGN OF BRUTALITY, *supra* note 11, at 17.
174. *Id.*

> are usually two-pronged sweeps with the task force split into two columns, moving in parallel on separate terrain features and linking up at an intermediate objective. One column of 1–2 battalions will attack along an axis of advance, destroying villages and chasing the displaced. The other column of 1–2 battalions conducts a parallel movement to contact and then both units meet at the limit of their advance then return to their base of origin or move together to a different support base.
>
> When the Burma Army arrives near a village, they often mortar and machine-gun the village first and then enter the deserted village to loot and sometimes destroy the homes. Landmines are then laid in the village and on the routes that villagers use in and out of the village. If a villager is seen, he or she is shot on sight.[175]

From October 2002 to January 2010, there were 181 documented incidents of displacement against the Karen.[176] Reported displacement activity reached its height between late 2005 and the end of 2007.[177] Between November 2005 and January 2008, there were only two months without an accounting of incidents of displacement.[178] During this twenty-six month period alone, 100 displacement events were reported—approximately one act of displacement per week.[179] In total, the number of Karen people displaced during this period may have exceeded 45,000.[180]

The following chart, adopted from the Appendix to the *Displaced Childhoods* report and updated with information provided by the Free Burma Rangers, provides the raw data and demonstrates the scale, repetition, and pattern of instances of internal displacement by the Burma Army against the Karen.[181]

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175. *Id.* at 28.

176. DISPLACED CHILDHOODS, *supra* note 1, at 85–94.

177. *Id.*

178. *Id.*

179. *Id.* at 87–92 (noting that by November 2005, there had been fifty-six displacement events reported, while at the end of 2007, there had been 156 displacement events).

180. From November 2005–January 2008, the Free Burma Rangers documented 34,034 displaced Karen individuals, 614 displaced families, and 84 displaced villages. DISPLACED CHILDHOODS, *supra* note 1, at 87–93. The average household in the Burmese refugee camps along the western Thailand border with Myanmar consists of five people. Thus, the author estimates that the average household size in the displaced Karen villages was also five people because displaced families typically move together and remain together in the camps. UN Refugee Agency, *UNHCR Quick Fact Sheet: Burmese Resettlement from Tham Hin Camp in Thailand*, LCS REFUGEES BLOG 3, (Feb. 2007) *available at* http://www.lcfsrefugees.blogs.com/cultural_descriptions/UNHCR%20Quick%20Fact%20Sheet%20--%20%20Burmese.pdf; *see also* BURMA ETHNIC RESEARCH GROUP AND FRIEDRICH NAUMANN FOUNDATION, FORGOTTEN VICTIMS OF A HIDDEN WAR: INTERNALLY DISPLACED KAREN IN BURMA 12 (1998) (Showing that according to the most recent census data from 1967, there was a population of 728,515 in the Karen State comprised of 141,311 households, amounting to 5.15 heads per household). On average, a Karen village has twenty households. *See Id.* at 15. The 614 displaced families represent 3,070 peoples (614 families x 5 heads per household), and the 84 displaced villages represent 8,400 people (84 villages x 20 households per village x 5 heads per household). Thus, it can be determined that over 45,000 Karen peoples were displaced from November 2005–January 2008 by adding 34,034 individuals plus 3,070 individuals plus 8,400 individuals.

181. Most of the data comes from DISPLACED CHILDHOODS, *supra* note 1, at 86–106. For occurrences from August 2009–November 2010, data comes from the following Free Burma Rangers' reports: FREE BURMA RANGERS, FORCED CHILD LABOR AND INDISCRIMINATE SHOOTING—BURMA ARMY OPPRESSION IN CENTRAL KAREN STATE (2009); Tha U Wa A Pa, *Raw Report from Team Leader*

Date of Incident	Region	Location (Village, Township or District)	Displacement
18 Oct. 02	Karen	Si Pa Lay Kee Village, Pa'an District	Unknown
2003	Karenni	Southern Karenni State	3,000
June 03	Karen	Dooplaya District	Unknown
June–Aug 03	Karen	Si Pa Day Kee, Hsi Pa Day Kee, & Htee Th'Blu Hta Villages, Pa'an District	3 villages
Sept. 03	Karen	Thi Wah Pu Village Tract, Ta Nay Chah Township, Pa'an District	152
26 Sept.–2 Oct. 03	Karen	Pa'an District	503
10 Dec. 03	Karenni	Townships 2 & 3, District 2	Unknown
17 Dec. 03	Karen	Klee Soe Kee & Kaw They Der Villages, Toungoo District	2 villages
19 Dec. 03	Karen	Maw Thoo Der Village, Toungoo District	1 village
29 Dec. 03	Karenni	Mawchi	1,673
29 Dec. 03	Karenni	Pa Hoe & Kae Lay Moo Villages	455
30 Dec. 03	Karen	Ka Lae Lo, Lay Wah, Thay Ba Htee & Mar Mee Villages, Muthraw District	557
2004	Karen	Maw Tu Der Village, Toungoo District	1 village
Jan. 04	Karen	Kae Ko Mu Der, Htoo Ko Lae, Bler Lu, Ka Lae Lo, Thay Pa Htee/Marmee, Lay Wa, Thoo Kler, Baw Kee, & Saw Mee Plaw Villages, Muthraw District	1,750
15 Jan. 04	Karen	Nu Thoo Kee & Nu Thoo Hta Villages	2 villages

with IDPs in Hiding, Karen State, BURMA DIGEST, Dec. 4, 2010 http://burmadigest.info/2010/12/07/raw-report-from-team-leader-with-idps-in-hiding-karen-state/; FREE BURMA RANGERS, 2,100 DISPLACED, VILLAGES BURNED, SCHOOLS ABANDONED AS SEVEN BURMA ARMY BATTALIONS ATTACK (2010).

17 Jan. 04	Karen	Ko Lay Village	500
20–22 Jan. 04	Karen	Dwee Der, Kya La Der & Taw Thoo Der Villages	3 villages
26–29 Jan. 04	Karenni	Karenni State	2,000
29 Jan. 04	Karen	Toungoo & Muthraw Districts	3,000
May 04	Karen	Mu Ki, Keh Der, Oo Keh Kee, Ta Kaw Der & Thaw Der Villages, Nyaunglebin District	4 villages
25 June 04	Karenni	Pahoe Village	500
30 June 04	Karenni	Gay Lo Village	100
27 Sept. 04	Karen	Hsaw K'Daw Hta Village	242
28 Sept. 04	Karen	Nah Ka Praw Village, Mergui-Tavoy District	600–700
28 Sept. 04	Karenni	Nu Thu Hta Village	1 village
1 Oct. 04	Karenni	Mawchi	Unknown
14 Nov.–15 Dec. 04	Karen	Hsaw Htee Township, Nyaunglebin District	4,781
6 Dec. 04	Karen	Yeh Tho Gyi Village	1 village
12 Dec. 04	Karen	Su Mu Klo Village	1 village
22 Dec. 04–27 Jan. 05	Karen	Thaw Nge Der Village, Kyauk Kyi Township, Naunglybin District	65
22 Dec. 04–27 Jan. 05	Karen	Tha Kaw Du Village, Kyauk Kyi Township, Naunglybin District	122
22 Dec. 04–27 Jan. 05	Karen	Do Kae Kee Village, Kyauk Kyi Township, Naunglybin District	95
22 Dec. 04–27 Jan. 05	Karen	Kwe Du Village, Kyauk Kyi Township, Naunglybin District	65
22 Dec. 04–27 Jan. 05	Karen	Ko Lu Village, Kyauk Kyi Township, Naunglybin District	52
22 Dec. 04–27 Jan. 05	Karen	Kaw Hta Village, Kyauk Kyi Township, Naunglybin District	38
22 Dec. 04–27 Jan. 05	Karen	Ler Taw Lu Village, Kyauk Kyi Township, Naunglybin District	44

22 Dec. 04–27 Jan. 05	Karen	Day Baw Kee Village, Kyauk Kyi Township, Naunglybin District	64
22 Dec. 04–27 Jan. 05	Karen	Mu Ki Village, Kyauk Kyi Township, Naunglybin District	173
22 Dec. 04–27 Jan. 05	Karen	Htee Thaw Lo Village, Kyauk Kyi Township, Naunglybin District	40
22 Dec. 04–27 Jan. 05	Karen	Kaw Taw Hay Ko Village, Kyauk Kyi Township, Naunglybin District	29
22 Dec. 04–27 Jan. 05	Karen	Day Baw Lu Village, Kyauk Kyi Township, Naunglybin District	61
22 Dec. 04–27 Jan. 05	Karen	Mae Lae Kee Village, Kyauk Kyi Township, Naunglybin District	94
26 Dec. 04	Karen	Tantabin Township, Toungoo District	440
6 Jan. 05	Karen	Mon Township, Nyaunglebin District	Unknown
4 Apr. 05	Karen	Ler Kla Village Tract	100
20 Apr. 05	Karen	Kwee Lah Village Tract	100
28 Apr. 05	Shan	Loi Tai Leng Village	1,000
12 June 05	Karen	Nyaunglebin District	3 villages
20 June 05	Karen	Teh Htu Village, Nyaunglebin District	94 families
17 July 05	Karen	Nyaunglebin District	Unknown
21 Sept. 05	Karen	Kyauk Kyi Township, Nyaunglebin District	400
26–30 Nov. 05	Karen	Toungoo District	1,900–2,000
26–30 Nov. 05	Karen	Hee Daw Kaw Village	300
29 Nov. 05	Karen	Mon Township, Nyaunglebin District	60–80
17 Dec. 05	Karenni	Pah Poe (Papo) Village	255
23 Dec. 05	Karenni	Gee Gaw Per Village	610
23 Dec. 05	Karenni	Toe Ka Htoo Village	341
Feb. 06	Karen	Ler Ker Der Thah Village, Toungoo District	29 families
Feb. 06	Karen	Koh Mee Koh Village, Toungoo District	22 families

Feb. 06	Karen	Sah Ba Law Ke Village, Toungoo District	40 families
Feb. 06	Karen	Haw Lu Der Village, Toungoo District	27 families
Feb. 06	Karen	Sho Ko Village, Toungoo District	1 village
Feb. 06	Karen	Toungoo District	640
Mar. 06	Karen	Muthraw District	500
Mar. 06	Karen	Ker Der Gah Village, Toungoo District	50–60 families
Mar. 06	Karen	Hpa Wae Der Kho Village, Toungoo District	40 families
Mar. 06	Karen	Pa Wae Der Gah Village, Toungoo District	28 families
Mar. 06	Karen	Kwey Der Village, Kyauk Kyi Township, Nyaunglebin District	1,153
Mar. 06	Karen	Toungoo District	700
4 Mar. 06	Karen	Mon Township, Nyaunglebin District	4,000
9 Mar. 06	Karen	Klaw Kee & Haw Kee Villages, Mon Township, Nyaunglebin District	19 families
13–18 Mar. 06	Karen	Hsaw Hti Township, Nyaunglebin District	Unknown
20 Mar. 06	Karen	Ler Wah Village, Nyaunglebin District	400
22 Mar. 06	Karen	The Ler Baw Hta & Kwe Doh Kaw Villages	2 villages
23 Mar. 06	Karen	Tha Yae Yu Village, Toungoo District	1 village
23 Mar. 06	Karen	Nya Moo Kee Village, Mon Township, Nyaunglebin District	15 families
24 Mar. 06	Karen	Maw Lee Loo Village, Mon Township, Nyaunglebin District	4 families
27 Mar. 06	Karen	Ka Ba Hta Village, Mon Township, Nyaunglebin District	1 village
Apr. 06	Karen	Ta Pa Kee Village	1 village

Apr. 06	Karen	Da Ka La Village, Nyaunglebin District	1 village
6 Apr. 06	Karen	Maw Tu Der, Saw Wah Der, Bu Ki, Saw Mu Der, Day Lo Klo & Yer Lo Klo Villages, Toungoo District	6 villages
15 Apr. 06	Karen	Daw Pa Ko & Yae Yu Villages, Toungoo District	2 villages
20 Apr. 06	Karen	Lay Gwo Loh, Baw Pa, Yer Loh, Blaw Baw Der, Ta Ba Kee & Mwee Loh Villages, Toungoo District	6 villages
22 Apr. 06	Karen	Tha Yae U Village, Toungoo District	30 families
25 Apr. 06	Karen	Yetagon Village, Toungoo District	110 families
27–28 Apr. 06	Karen	Ta Kaw Ta Baw, Tha Da Der, & Tee Mu Der Villages, Muthraw District	3 villages
28 Apr. 06	Karen	Kway Kee Village, Toungoo District	1 village
27 Apr.–2 May 06	Karen	Hta Ko To Baw Village, Muthraw District	100
1 May 06	Karen	Htee Ko & Nwa Chee Villages, Nyaunglebin District	2 villages
9 May 06	Karen	The Boe Plaw Village, Luthaw Township, Muthraw District	1,000
10 May 06	Karen	Saw Wah Der Village, Toungoo District	1 village
June 06	Karen	Bilin River Valley, Muthraw District	1,000
2 June 06	Karen	Ger Baw Kee Village, Muthraw District	1 village
3 June 06	Karen	Saw Thu Kee Village, Kyaikto Township, Thaton District	101
15 June 06	Karen	Pa Na Ku Plaw, Pa Na Eh Per Ko, Ker Gwaw Ko, Htee Mu Kee & Nae Yo Hta Villages, Muthraw District	3,000
28 June 06	Karen	Dee Htu Der Village, Muthraw District	1 village
4 July 06	Karen	Saw Wah Daw Ko Village, Toungoo District	70–80

6 July 06	Karen	Saw Wah Der Village, Toungoo District	1 village
11 July 06	Karen	Toe Ta Dah Village, Kyauk Kyi Township, Nyaunglebin District	1 village
15 July 06	Karen	Htee Ko Village, Mon Township, Nyaunglebin District	1 village
3 Aug. 06	Karen	Pai Taw Dai Village, Toungoo District	1 village
Sept. 06	Karen	Ga Ba Ta Village, Mon Township, Nyaunglebin District	331
Sept. 06	Karen	Thet Baw Der Village, Mon Township, Nyaunglebin District	781
Sept. 06	Karen	Kaw Po Lo & Per Daw Kho Villages, Toungoo District	2 villages
5 Sept. 06	Karen	Ler Kla Der Village, Toungoo District	1 village
12–20 Sept. 06	Karen	Muthraw District	2,000
28 Sept. 06	Karen	Saw Ka Der, Kwi Dee Kaw & Keh To Der Villages, Mon Township, Nyaunglebin District	3 villages
Oct. 06	Karen	Ka Baw Hta Village, Mon Township, Nyaunglebin District	37
20–26 Oct. 06	Karen	Kyauk Pya, They Baw Der & Ka Baw Hta Villages, Nyaunglebin District	1,450
20 Oct. 06	Karen	Mon Township, Nyaunglebin District	Unknown
24 Oct. 06	Karen	Kwee Deh Kaw, Kyauk Pya & Thet Baw Der Villages, Mon Township, Nyaunglebin District	3 villages
1 Nov. 06	Karen	Thay Kay Lu Village, Mon Township, Nyaunglebin District	1 village
1 Nov. 06	Karen	Klay Hta Village, Toungoo District	1 village

6 Nov. 06	Karen	Mon Township, Nyaunglebin District	260
6 Dec. 06	Karen	Par Weh Village, Toungoo District	10 families
7 Jan. 07	Karen	Kgo Pu Hsaw Mi Lu Village, Mon Township, Nyaunglebin District	1 village
8 Jan. 07	Karen	Baw Kwa Village, Muthraw District	800
16 Feb. 07	Karen	Saw Tay Der, Ker Po Der & Play Kee Villages, Mon Township, Nyaunglebin District	201
5 Mar. 07	Karen	Kyauk Kyi Township, Nyaunglebin District	1,000
8 Mar. 07	Karen	Wa Kwe Klo Village, Dooplaya District	200
15 Mar. 07	Karen	Saw Ka Der Village, Mon Township, Nyaunglebin District	600
20 Mar. 07	Karen	Tha Da Der & Hta Kaw To Baw Villages, Muthraw District	400
Apr. 07	Karen	Ma La Daw, Yu Lo & Ka Mu Lo Villages, Mon Township, Nyaunglebin District	3 villages
4 Apr. 07	Karen	Ker Der Village, Kyauk Kyi Township, Nyaunglebin District	900
7–9 Apr. 07	Karen	Loh Di Tah, Thay Kai Yah & Tha Ka Klah Villages, Pa'an District	180 families
28 Apr. 07	Karen	Yaw Kee Village, Mon Township, Nyaunglebin District	150
28 Apr. 07	Karen	Kay Pu Village, Muthraw District	4,000
11 May 07	Karen	Htee Nya Mu Kee Village, Nyaunglebin District	107
13 May 07	Karen	Yaw Yi Village, Mon Township, Nyaunglebin District	119
17 May 07	Karen	Htee Mu Kee Village, Muthraw District	1 village

9 June 07	Karen	Saw Ka Der Village, Mon Township, Nyaunglebin District	223
23 June 07	Karen	Nyaunglebin District	5 villages
29 June 07	Karen	Kay Pu Village, Muthraw District	1 village
20 July 07	Karen	Saw Wah Der Area, Toungoo District	Unknown
Aug. 07	Karen	Mwee Lo & Maw Nay Pwer Villages, Toungoo District	Unknown
13 Aug. 07	Karenni	Ga Yu Der Village	880
15–16 Aug. 07	Karen	Lay Kee Village	1 village
25 Aug. 07	Karen	Kler La Village, Toungoo District	1 village
13 Oct. 07	Karen	Yaw Kee Village, Mon Township, Nyaunglebin District	120
24 Oct.–11 Nov. 07	Karen	Ye Mu Plaw Village, Muthraw District	1,000
1–19 Nov. 07	Karen	Kyauk Kyi Township, Nyaunglebin District	100
1–15 Nov. 07	Karen	Kwi Lah & Keh Der Village Tracts, Nyaunglebin District	12 villages
Nov. 07	Karen	Ler Mu hiding site, Mergui-Tavoy District	Unknown
Nov. 07	Karen	Maw Dta Thoo hiding site, Mergui-Tavoy District	Unknown
15 Nov. 07	Karen	Nyaunglebin District	300
Dec. 07	Karenni	Gee Ga Per Village	1,200
1 Dec. 07	Karen	Kwee Di Kaw Village Tract, Mon Township, Nyaunglebin District	4 villages
1 Dec. 07	Karen	Lo Daw Village Tract, Mon Township, Nyaunglebin District	3 villages
2 Dec. 07	Karen	Tha Aye Kee Village Tract, Toungoo District	2 villages
5 Dec. 07	Karen	Tantabin Township, Toungoo District	1 villages

20 Dec. 07	Karen	Daw Kle Tey Village, Sha Daw Township, Dooplaya District	185
2008	Karen	Thu Ka Bee Township	4 villages
Jan. 08	Karen	Htee Law Kee & Htee Po Lay hiding sites, Mergui-Tavoy District	430
4 Mar. 08	Karen	Htee Mu Kee Village, Muthraw District Karen State	1,700
4 Mar. 08	Karen	Ga Yu Der Village, Muthraw District	80
4 Mar. 08	Karen	Lay Kee Village	400
8 Mar. 08	Karen	Pa Ka, Bpwe Myaw, and 2 Villages, Nyaunglebin District	4 villages
Apr. 08	Karen	Kyauk Kyi Township, Nyaunglebin District	220
13 Apr. 08	Karen	Toungoo District	6 villages
10 May 08	Karen	Mae Li Ki Village	>80
27 May 08	Karen	Mon Township	>500
4 June 08	Karen	Muthraw District	>1,000
Oct. 08	Karen	Dooplaya District	250
30 Oct.–1 Nov. 08	Karen	Mon Township, Nyaunglebin District	1,971
21 Dec. 08	Karen	Kyauk Kyi Township, Nyaunglebin District	215
2 Jan. 09	Karen	Dooplaya District	300
15 Feb. 09	Karen	Kyauk Kyi Township, Nyaunglebin District	442
25 Mar. 09	Karen	Maw Thay Der area, Tantabin Township, Toungoo District	4
May 09	Karen	Nyaunglebin District	6 villages
18 May 09	Karen	Lui Kee, Kler U Nga & Nga Per Lay Koh Villages	Unknown
May 09	Karen	Htee Per, Pa'an District	40 families
5–9 June 09	Karen	Ler Per Her, Pa'an District	3,521
5 June 09	Karen	Ho Kee & Ha To Per Villages, Tantabin Township, Toungoo District	>100

7 June 09	Karen	Muthraw District	7,000
7–9 Oct. 09	Karen	Mon Township, Nyaunglebin District	1,500
21 Aug. 09	Central Karen	Ta Ray Poe Kwee	Unknown
7–9 Oct. 09	N. Karen	Mone Township, Nyaunglebin District	1,500
2 Jan. 10	N. Karen	Ler Doh Township	>2,100
18 Jan. 10	N. Karen	Hti Blah Hsaw Hti Township	>200
19 Jan. 10	N. Karen	Htu Gaw Soe	Unknown
21 Jan. 10	N. Karen	Khwe Der, Kaw Taw Kee, ThHur Kaw Der, Thuang Nya der, Kaw Hta, Ler Taw Loo, Day Baw Kee, Muki, Hti Law Kee, Ko Lu Ler Doh Township	1,000
24 Jan. 10	N. Karen	Ta U Plaw Northern Mon Township	Unknown
22 Mar. 10	N. Karen	Kaw Hta Ler Doh Township	Unkown
9 July 10	Central Karen	Kwee Ta, Kee Ler Shu, Mae Ta La Hta, Thay Baw Boe	500
9 July 10	Central Karen	Oo Kray Hta, Maw Ker, Wor Lay	300
23 July 10	N. Karen	The Dah Der, Tha Kaw To Baw, Ti Mu Der Papun DistrictTi Baw Lah, Papun District	916
25 Sept. 10	Kachin	Lo Kha LoMyitkyina, Laiza, Bhamo	15,668
7 Nov. 10	Central Karen	Myawaddy	20,000
9 Nov. 10	Central Karen	Choo Ka Lee, Kanel Thay Poe Lay, Paw Baw Hta, Maw Ka Noh Kee, Kwee Ta Hoe, Ka Naw Hta, Kwee Ta U, Kwee Naw Ta, Ukrayta, Maw Ker, Lay Gaw, Thayh Baw Boe. Mae Ka Tha	>400

9 Nov. 10	Central Karen	Ta Ka Klo, Ta Ka Kee, Ta Ku Kee, Kya Inn, Kawtari Township	>400
30 Nov. 10	South Central Karen	Choo Ka Lee	Unknown
30 Nov. 10	South Central Karen	Kwee Ta U	130
5 Dec. 10	South Central Karen	Chen Pyaw	85
5 Dec. 10	Karen	Jay Baw Klo, Noh Day, Wah Brway Tu, Meh Pru, Lu Pler Township, Pa'an District	773
15 Dec. 10	Karen	Kaw La Wah	13 families
1 Jan. 11	Karen	Kler The Lu	600
23 Jan. 11	S. Karen	Ta Naw Tha Ri Township	236
29 Jan. 11	South Central Karen	U Grate Hta	Unknown
28 Apr. 11	Karen	Paletwa Township: Paletwa, Stamwa, Mariwa, Nygelawa, Kamwa, TaraweyeMuthey	20 families
9 June 11	Kachin	Bhamo District	10,000
25 Nov. 11	Kachin	Momauk Township	2,000
27 Nov. 11	Kachin	Yang Lu Camp, Law Hpai Camp, Hka Dawng Pa Camp, Nga Nawng Pa Camp, Na Kawng Kawng Camp, Lung Kawk Camp	3,998
30 Nov. 11	Kachin	MoMauk Township	3,000
8 Dec. 11	Kachin	Hkin Buk Hka Para	37
22 Dec. 11	N. Karen	Toh Boh Dam Toungoo District	1 village
27 Dec. 11	Kachin	Ba Maw District	2,442

E. Killing Members of the Group

Targeted attacks against the Karen may fall into the category of "[k]illing members of the group."[182] This standard, however, is more challenging to meet as the Burma Army rarely engages in mass murder.[183] Based on a standard set in *Krstić*, mere knowledge of executions directed against a certain population "is insufficient to support the further inference of genocidal intent. . . ."[184]

Nonetheless, killing members of the Karen people group is a part of the Burma Army's explicit "shoot on sight" policy, which may suggest genocidal intent. *The Irrawaddy* explained the "No Man's Land" policy set in place for Karen State that allows for the execution of anyone found in areas of military operation, including the Karen State:

> Aung Lynn Htut, a former counter intelligence officer now living in the US, said the massive internal displacement in eastern Burma is directly related to the "Four Cuts" strategy, which was known in the far south of Burma as "No Man's Land" policy during operations in the 1990s, directly commanded by the office of the commander-in-chief.
>
> The "No Man's Land" policy was ordered by the War Office to execute anyone, including children, who were found in areas of military operations, he said.[185]

Regular targeted killings of members of the Karen are reported by Free Burma Rangers.[186] One of the largest patterns of targeted killings took place during the 2006–2007 offensives in Karen State when more than 370 were killed during the displacement actions of the Burma Army.[187]

Additionally, during these offensives, the Burma Army forced over 2,200 Karen villagers to carry military loads.[188] "[O]ver 265 [of these porters] have been reported dead, many of whom were executed."[189]

Escaped porters, Burma Army deserters, and villagers report seeing the murders of the forced-labor porters.[190] During the porting process, the villagers are "beaten and poorly fed."[191] According to the report, "[i]f they cannot carry loads

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182. Genocide Convention, *supra* note 86, art. 2.

183. CAMPAIGN OF BRUTALITY, *supra* note 11, at 17.

184. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, para. 129 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19 2004).

185. Wai Moe, *supra* note 53.

186. *See* CAMPAIGN OF BRUTALITY, *supra* note 11, at 55–56 (describing and listing attacks that target civilians).

187. *Id.* at 28–30.

188. *Id.* at 32 ("The Burma Army is now using the term 'transporter'—'Woon Htan'—instead of 'prisoner porter' to describe the people they force to carry their loads.").

189. *Id.*

190. *Id.*

191. *Id.*

they are often beaten to death or shot. Some who become sick are given an injection of an unknown drug and these porters reportedly die within a few hours."[192]

VI. OPTIONS FOR ADVOCACY

How this report should be used in international law is beyond the scope of this Article. Nonetheless, it must be mentioned briefly that this falls within the purview of the United Nations. For a more detailed report of United Nations' statements about Burma and specific recommendations for proceeding to the International Criminal Court, please see *Crimes in Burma*, a report by the International Human Rights Clinic at Harvard Law School.[193]

In 1998, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court met to create provisions for establishing an international tribunal that would prosecute perpetrators of war crimes, crimes against humanity, and genocide.[194] The conference resulted in a treaty, adopted by a vote of 120 to 7, now known as the Rome Statute.[195] This treaty set out the structure, jurisdiction, and function of the International Criminal Court (ICC) and the terms of its ratification.[196]

> The Court does not have universal jurisdiction. The Court may only exercise jurisdiction if:
>
> The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
>
> The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
>
> The United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.[197]

Its "jurisdiction is further limited to events taking place since 1 July 2002."[198] Burma is not a signatory to the Rome Statue and, thus, not a state party, nor a state otherwise accepting the jurisdiction of the Court.[199]

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192. CAMPAIGN OF BRUTALITY, *supra* note 11, at 32.

193. THE INT'L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., CRIMES IN BURMA (2009), *available at* http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf.

194. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 18–19 (4th ed. 2011).

195. *Id.* at 21.

196. Int'l Crim. Court, *Establishment of the Court*, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20the%20court.aspx (last visited Dec. 22, 2012). "In accordance with its terms, the Statute entered into force on 1 July 2002, once 60 States had become Parties." *Id.*

197. Int'l Crim. Court, *Jurisdiction and Admissibility*, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx (last visited Dec. 22, 2012).

198. *Id.* "In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force." *Id.*

CONCLUSION

Under the rigorous international standard set forth for genocide and the body of case law supporting it, actions by the Burma Army amount to genocide against the Karen ethnic group. Reported data from inside Burma demonstrates a pattern of internal displacement of Karen civilians with extreme repetition and significant scale. Clearly, the Burma Army has executed a plan for the destruction of the Karen people.

199. *See* SCHABAS, *supra* note 194, at 490–94 (listing state parties and signatories to the Rome Statute, of which Burma is not one).

The Limits of Economic Sanctions Under International Humanitarian Law: The Case of the Congo

MALLORY OWEN*

SUMMARY

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A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.[1]

- Woodrow Wilson, 1919

INTRODUCTION

In the 1990s, economic sanctions[2] were widely heralded as humane and cost-effective alternatives to war.[3] In practice, however, sanctions amount to rather "blunt instrument[s]," unfettered by any domestic or international laws.[4] In countries like Haiti and Iraq, sanctions proved far more "terrible" than "peaceful."[5] Consequently, there is widespread consensus that sanctions should be designed in a way that minimizes their potentially devastating long-term impact.[6] For example, the United Nations Security Council has applied more focused sanctions with

1. W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 89 (1998) (quoting WILSON'S IDEALS 108 (S.K. Padover ed., 1942)).

2. "Economic sanctions may take many forms and may be applied unilaterally or multilaterally . . . they involve the purposive threat or actual granting or withholding of economic indulgences, opportunities, and benefits by one actor or group of actors in order to induce another actor or group of actors to change or adjust an internal or external policy." W. Michael Reisman, *When are Economic Sanctions Effective? Selected Theorems and Corollaries*, 2 ILSA J. INT'L & COMP. L. 587, 587 (1995–1996).

3. From 1990 to 2001, the Security Council imposed sanctions against Iraq (1990), Yugoslavia (1991, 1992, 1998), Libya (1992), Cambodia (1992), Somalia (1992), Liberia (1992, 2001), Rwanda (1992), Haiti (1993), part of Angola (1993, 1997, 1998), Sudan (1996), Afghanistan (1999, 2000), Ethiopia-Eritrea (2000), and Liberia (2001). DAVID CORTRIGHT & GEORGE A. LOPEZ, THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S 205–07 (David Cortright & George A. Lopez eds., 2000).

4. U.N. Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, para. 70, U.N. Doc. A/50/60-S/1995/1 (Jan. 25, 1995).

5. In Haiti, "[t]he wealthy elite and the military command were waxing rich off the contraband industry the economic sanctions had spawned. The rest of the population, which had been deprived of its popularly elected government and whom we were supposed to be helping, was—without exaggeration—starving to death." W. Michael Reisman, *Assessing the Lawfulness of Non-military Enforcement: The Case of Economic Sanctions*, 89 AM. SOC'Y INT'L L. PROC. 350, 350–51 (1995). Similarly in Iraq, "[n]o one knows with any precision how many Iraqi civilians have died as a result [of the sanctions], but various agencies of the United Nations . . . have estimated that they have contributed to hundreds of thousands of deaths." John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFF. 43, 49 (1999).

6. Larry Minear, David Cortright, Julia Wagler, George A. Lopez & Thomas G. Weiss, *Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System*, at xiii (Thomas J. Watson Jr. Inst. for Int'l Studies, Occasional Papers Ser. No. 31, 1998), *available at* http://www.watsoninstitute.org/pub/OP31.pdf. The former U.N. Secretary-General, the International Federation of the Red Cross and Red Crescent Societies (IFRC), and the United Nations International Children's Emergency Fund (UNICEF) have all voiced concerns for review and revision of the current use of sanctions. *Id.*; *see also* Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects*, 18 HARV. HUM. RTS. J. 167, 168 (2005) ("[T]here is widespread consensus that the comprehensive sanctions regimes of the past amounted to a rather blunt instrument and that future sanctions must be designed more humanely.").

humanitarian exemption clauses.[7] Despite these thin safeguards, however, sanctions continue to have severe consequences for civilian populations.

Today, economic sanctions are frequently used as a "unilateral technique in international politics, though not necessarily explicitly."[8] The most recent example of this technique is Section 1502 of the *Dodd-Frank Wall Street Reform Act* ("Section 1502"). Section 1502 was created to address the humanitarian crisis in the Democratic Republic of the Congo ("DR Congo").[9] It requires public companies to disclose whether certain minerals in their supply chain originate from the DR Congo or its neighboring countries.[10] Section 1502 has been widely criticized for failing to address the root causes of conflict in the DR Congo and, instead, creating a *de facto* embargo on a minerals trade that hundreds of thousands of civilians rely on for their livelihoods.[11] In light of these unintended consequences, this Note poses the question: How should we think about influence strategies like economic sanctions that are likely to directly or indirectly produce significant collateral damage?

The first part of this Note examines some of the current theories behind the causes of civil war and considers how these theories ought to shape and inform an understanding of prescriptive measures. The second part of this Note begins with a brief history of civil war conflicts in the DR Congo followed by an analysis of Section 1502 as a well-intentioned but flawed response to the conflict in the DR Congo. The third part of this Note provides a general discussion of international humanitarian law ("IHL") and how it can and should be applied to economic sanctions specifically. Ultimately, the Note concludes that because economic instruments like Section 1502 are coercive in nature, they should be assessed under an IHL framework. Left unregulated, sanctions programs will continue to map new patterns of inequality and violence in target countries.

I. THE CAUSES OF CIVIL WAR

While the number of new civil wars worldwide has fallen in the last decade, the average duration (sixteen years) has remained constant.[12] Ending civil war conflicts—or at least reducing their intensity—should be an international priority. In

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7. Geiss, *supra* note 6, at 183–84. Humanitarian exemption clauses "make provision for products essential to meeting humanitarian needs." *Id.* at 183.

8. Reisman & Stevick, *supra* note 1, at 87.

9. Congress believed that "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo [was] helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting [Section 1502]." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010) (codified at 12 U.S.C. § 5581) [hereinafter Dodd-Frank Act].

10. *Id.* § 1502(p)(1)(A).

11. *E.g.*, Laura E. Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* 1 (Ctr. for Global Dev., Working Paper No. 284, 2012), *available at* http://www.cgdev.org/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf.

12. Syed Mansoob Murshed & Mohammad Zulfan Tadjoeddin, *Revisiting the Greed and Grievance Explanations for Violent Internal Conflict*, 21 J. INT'L DEV. 87, 87 (2009) (citing James D. Fearon, *Why Do Some Civil Wars Last So Much Longer Than Others?*, 41 J. PEACE RES. 275, 275–302 (2004)).

order to minimize civil war conflicts in the future, we must develop a robust understanding of their causes. This section addresses some of the causes of civil war conflict so as to inform future prescriptions.

Whereas traditional analyses of the causes of civil war singled out "relative deprivation" as the primary motivation for conflict,[13] modern analyses focus on economic theories and the relationship between resources and violent conflict.[14] Today, economists and a growing number of social scientists "analyze civil wars as a competition between warlords for the appropriation of valuable resources."[15] For example, two prominent economists, Paul Collier and Anke Hoeffler, pioneered the rational choice model of greed-rebellion where "[a]n economic calculus of the costs and opportunities for the control of primary commodity exports appears to be the main systematic initial impetus to rebellion."[16] Influential among World Bank circles, activist organizations, government leaders, and the donor community, the greed theory suggests that to end armed conflict one must curb the perpetrators' access to financial resources by eliminating their control of the minerals trade.[17]

Critics of the greed theory argue that a purely economic rationale for understanding conflict is reductionist and downplays the important role that inequality in terms of political and economic rights, inequality of income, ethnic and religious divisions, the political economy, institutional degradation, and poor governance can have in promoting and perpetuating violent conflicts.[18] Impoverished populations offer the best recruitment grounds for rebel operations; therefore, effective policy interventions should promote better functioning institutions, infrastructure, and state capacity.[19]

In line with the critics, a report funded in part by the United Kingdom's Department for International Development and the London School of Economics looked specifically at conflict in the DR Congo and suggested that greed (i.e., the financial gain from the minerals trade in the DR Congo) is not the primary cause of

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13. *See* TED ROBERT GURR, WHY MEN REBEL 24 (1971) ("The potential for collective violence varies strongly with the intensity and scope of relative deprivation among members of a collectivity.").

14. *See, e.g.*, Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War* 2 (The World Bank Dev. Research Group, Working Paper No. 2355, 2000), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/06/17/000094946_00060205420011/Rendered/PDF/multi_page.pdf (arguing that most civil wars begin with "resource capture" setting up a rational choice model of "greed-rebellion" as opposed to rebellions motivated by grievance).

15. Ola Olsson & Heather Congdon, *Congo: The Prize of Predation* 4 (Dept. of Economics Göteborg Univ., Working Papers in Economics No. 97, 2003), *available at* https://gupea.ub.gu.se/bitstream/2077/2818/1/gunwpe0097rev.pdf.

16. *Id.* at 2.

17. *Id.* at 27 ("The policy intervention points here are reducing the absolute and relative attraction of primary commodity predation, and reducing the ability of diasporas to fund rebel movements."); *see also* Cristina Bodea & Ibrahim A. Elbadawi, *Riots, Coups, and Civil War: Revisiting the Greed and Grievance Debate* 2 (The World Bank Dev. Research Grp., Policy Research Working Paper No. 4397, 2007), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/11/13/000158349_20071113144706/Rendered/PDF/wps4397.pdf (discussing the direction of contemporary scholarship on the causes of civil war onset). Murshed & Tadjoeddin, *supra* note 12, at 88.

18. Murshed & Tadjoeddin, *supra* note 12, at 88–89; *see also* NICHOLAS GARRETT & HARRISON MITCHELL, TRADING CONFLICT FOR DEVELOPMENT: UTILISING THE TRADE IN MINERALS FROM EASTERN DR CONGO FOR DEVELOPMENT 5 (2009) (arguing that poor governance is partially to blame for the violent conflict).

19. Murshed & Tadjoeddin, *supra* note 12, at 108.

insecurity and violence in the area.[20] While activist organizations tend to blame the DR Congo's rich mineral resources for its history of violence,[21] this does little to address the underlying political and ethnic roots of the DR Congo's instability. The militarization of the minerals trade is, in fact, "a symptom of conflict rather than its cause."[22] While "conflict-minerals" offer an appealing narrative (i.e., pitting greedy corporate forces against humanitarian concerns), framing the debate in terms of greed vs. good oversimplifies the multi-faceted dimensions of conflict in the eastern DR Congo.[23] Halting the minerals trade will have a severe negative effect on regional development.[24] This, in turn, will exacerbate poverty levels and increase the number of people who feel that they have no choice but to join the militant groups.[25]

In sum, policy measures that ultimately halt the minerals trade do little to help protect civilians in the DR Congo and will have devastating consequences for those trying to make an honest living in that trade.[26] Instead, policymakers and the private sector should consider formalizing a large percentage of the minerals trade, turning the eastern DR Congo into a sustainable mining sector that contributes to development.[27]

Unfortunately, U.S. leaders have largely ignored the arguments made against greed-related explanations for violence in the DR Congo. The U.S. government seems convinced that there is a direct link between conflict in the DR Congo and the minerals trade.[28] Discussed in further detail below, this link has become the subject

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20. GARRETT & MITCHELL, *supra* note 18, at 5 ("[E]ven if a rational economic profit motive goes far in explaining the behaviour of political and military elites, placing it at the centre of the analysis neglects the complexity of Eastern DR Congo's war economy and ignores a number of critical issues.").

21. *See, e.g.*, *Conflict Minerals*, RAISE HOPE FOR CONGO, http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals (last visited Nov. 8, 2012) ("[G]reed for Congo's natural resources has been a principal driver of atrocities and conflict throughout Congo's tortured history. In eastern Congo today, these mineral resources are financing multiple armed groups, many of whom use mass rape as a deliberate strategy to intimidate and control local populations . . . ."); *Conflict-Free Minerals Campaign*, STAND, http://www.standnow.org/campaigns/cfci (last visited Nov. 8, 2012) ("Minerals mined in the DRC's eastern Kivu provinces provide much of the funds for the conflict's key actors."); GARRETT & MITCHELL, *supra* note 18, at 11 ("[A] plethora of stakeholders work[ed] to portray the conflict in ways that best fitted their own agendas; in particular, the region's mineral wealth was implicated as complicit in the violence.").

22. *Id.* at 5.

23. *See* Joe Bavier, *Ban on 'Conflict Minerals' Would Hurt Congo's Poor*, REUTERS (Apr. 8, 2009), http://www.reuters.com/article/idUSL867206720090408 (reporting on a study that found banning minerals from Congo would worsen the conflict); *see also* GARRETT & MITCHELL, *supra* note 18, at 11 (arguing that portraying the conflict as mineral wealth causing violence does not properly explain the complexity of the situation).

24. *See e.g.*, GARRETT & MITCHELL, *supra* note 18, at 13 ("It threatens regional wealth creation as it reduces the value of minerals of the remaining formal trade in other Congolese minerals and commodities.").

25. *See generally* Bavier, *supra* note 23 (examining how the ban on conflict minerals negatively affects the poor in the DR Congo).

26. GARRETT & MITCHELL, *supra* note 18, at 13–14.

27. *Id.* at 5.

28. *See, e.g.*, NICOLAS COOK, CONG. RESEARCH SERV., R42618, CONFLICT MINERALS IN CENTRAL AFRICA: U.S. AND INTERNATIONAL RESPONSES 1 (2012) (defining "conflict minerals" as metal ores that contribute to the armed conflict and human rights abuses in the DR Congo); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1030, THE DEMOCRATIC REPUBLIC OF CONGO: U.S. AGENCIES

of a number of governance efforts, including U.S. legislation that aims to "cut off funding to the people who kill people."[29]

II. THE PROBLEM

A. *Background: Conflict in the Democratic Republic of the Congo*

The DR Congo has long been the subject of tyranny, war, and "the vilest scramble for loot that ever disfigured the history of human conscience . . . ."[30] In 1960, the DR Congo won its independence from colonial exploitation and enslavement only to lose control to President Mobutu Sese Seko.[31] President Seko was a kleptocratic and repressive ruler who stole billions from state-owned companies and pitted ethnic communities against each other.[32] The eastern Congo, populated by immigrants from neighboring Rwanda, faced the brunt of these political power games.[33]

The First Congo War (1996–1997) began in the aftermath of the Rwandan genocide.[34] After losing power, the Hutu militias responsible for the 1994 Rwandan genocide (known as the *interahamwe*) fled into neighboring East Congo to regroup and reorganize.[35] In 1996, Rwanda led a rebellion in the DR Congo to eliminate the Hutu militias.[36] A year later, the rebel armies successfully overthrew President Seko and installed a rebel leader named Laurent Kabila.[37] By 1998, President Kabila's growing ties with the *interahamwe* caused Rwandan-backed and Ugandan-backed rebel groups to launch a new round of attacks in the East with the primary purpose

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SHOULD TAKE FURTHER ACTIONS TO CONTRIBUTE TO THE EFFECTIVE REGULATION AND CONTROL OF THE MINERALS TRADE IN EASTERN DEMOCRATIC REPUBLIC OF THE CONGO 19 (2010) ("The minerals trade is one of several factors that contribute to continuing human rights abuses and conflicts in eastern DRC.").

29. David Aronson, *How Congress Devastated Congo*, N.Y. TIMES (Aug. 7, 2011), http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html.

30. Simon Robinson, *Inside Congo*, TIME MAGAZINE (Jan. 18, 2007), http://www.time.com/time/magazine/article/0,9171,1580371,00.html (quoting Joseph Conrad, *Geography and Some Explorers*, NATIONAL GEOGRAPHIC, Mar. 1924, *available at* http://www.conradfirst.net/view/image?id=17399).

31. Simon Robinson, *The Deadliest War in the World*, TIME MAGAZINE (May 28, 2006), http://www.time.com/time/magazine/article/0,9171,1198921,00.html [hereinafter *The Deadliest War in the World*].

32. Daron Acemoglu, Thierry Verdier & James A. Robinson, *Kleptocracy and Divide-And-Rule: A Model of Personal Rule*, 2 J. EUR. ECON. ASS'N 162, 169–70 (2004).

33. Séverine Autesserre, *The Trouble with Congo: How Local Disputes Fuel Regional Conflict*, 87 FOREIGN AFF., 94, 97–99 (2008).

34. Ryan S. Lincoln, *Recent Developments Rule of Law for Whom? Strengthening the Rule of Law as a Solution to Sexual Violence in the Democratic Republic of the Congo*, 26 BERKELEY J. GENDER L. & JUST. 139, 142–43 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698830.

35. *Id.* at 142.

36. *Id.*; *The Deadliest War in the World*, *supra* note 31, at 3–4.

37. Lincoln, *supra* note 34, at 143.

of ousting Kabila.[38] The conflict quickly denigrated into a huge regional conflict that became one of the most lethal armed conflicts since World War II.[39]

The DR Congo's Second War (the Second War) (1998–2002) encompassed twenty-five separate groups and eight nations.[40] In a 2007 survey report, the International Rescue Committee ("IRC") estimated that between August 1998 and April 2007, 5.4 million deaths occurred in the DR Congo,[41] which is approximately 50,000 people each month. Notably, however, around 2.1 million of these deaths occurred after the conflict ended and can be attributed to war-related causes like food shortages, the collapse of the health system, poor access to potable water, disease, and population displacement.[42]

While the Second War may have ended in 2002, the situation in the eastern DR Congo remains "one of the worst humanitarian crises in the world."[43] In February 2008, "an estimated 6,000 to 7,000 foreign, non-state armed groups were active in eastern DR Congo" (North Katanga, North Kivu, South Kivu, and the Ituri District).[44] Congolese regular armed forces ("FARDC"), "mai mai" militias, and ethnic Hutu rebels have consistently targeted civilians: pillaging homes, abducting children for their armies, practicing torture, and committing egregious acts of sexual violence.[45]

B. The Link Between Minerals and Conflict: Militarization of the Minerals Trade

The link between the eastern DR Congo's mineral wealth and violent conflict in the area has been the subject of a number of reports by international organizations, non-governmental organizations ("NGOs"), complaints before the Organisation for

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38. *How Kabila Lost His Way: The Performance of Laurent Désiré Kabila's Government,* INT'L CRISIS GRP. (May 21, 1999), http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/003-how-kabila-lost-his-way-the-performance-of-laurent-desire-kabilas-government.aspx.

39. *The Deadliest War in the World*, *supra* note 31, at 1.

40. *See* Lincoln, *supra* note 34, at 143 ("[T]he conflict eventually encompassed over twenty-five separate armed groups."); *The Deadliest War in the World*, *supra* note 31, at 4 ("The scramble for power and resources dragged in forces from at least eight African neighbors . . . .").

41. BENJAMIN COGHLAN ET AL., INT'L RESEARCH COMM., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS ii (2007), *available at* http://www.rescue.org/sites/default/files/migrated/resources/2007/2006-7_congomortalitysurvey.pdf.

42. *Id.* at ii–iii.

43. *UN: DRC One of World's 'Worst Humanitarian Crises,'* MAIL & GUARDIAN (June 11, 2010), http://mg.co.za/article/2010-06-11-un-drc-one-of-worlds-worst-humanitarian-crises.

44. Lincoln, *supra* note 34, at 144; *see also* Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Mission to the Democratic Republic of the Congo: Addendum to Rep. on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Including the Right to Development* para. 8, Human Rights Council, U.N. Doc. A/HRC/7/6/Add.4 (Feb. 28, 2008) (by Yakin Ertürk), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/7session/A.HRC.7.6.Add.4.doc (describing the conflict listing the areas in eastern DR Congo where conflict occurred).

45. Lincoln, *supra* note 34, at 143–45; *see also Fresh Attacks by Hutu Rebels Lead to More Displacement in DR Congo,* UNITED NATIONS NEWS CENTRE (Mar. 20, 2009), http://www.un.org/apps/news/story.asp?NewsID=30244&Cr=FDLR&Cr1=#.UFmtA6D0-rs ("[A]ttacks by a Hutu rebel group are continuing to uproot thousands in eastern Democratic Republic of Congo . . . .").

Economic Co-operation and Development ("OECD"), and litigation in the United Kingdom.[46] Civil society organizations, such as the Enough Project and Global Witness, argue that the violence in the DR Congo is a direct consequence of various actors trying to accumulate money and power through the exploitation and control of the country's minerals.[47]

The DR Congo's failure to establish a functioning national military force coupled with governance issues have allowed a few military groups to establish their own governance structures in mineral areas.[48] Notably, however, "the 'blood diamond' scenario of a gun held to the head of an artisanal miner and forcing him/her to mine is largely absent" from the mineral areas.[49] Rather, these groups obtain a major portion of their income from extortion—forcing "mine workers and intermediary traders [to be] obligated to pay [illegal] 'taxes' on their production/trade volumes."[50] The "taxes are placed at levels high enough to generate revenue, but low enough so as not to jeopardise the overall productivity and efficiency of extraction and trade."[51] Thus, criminal warlords are exploiting an otherwise legitimate business that is trying its best to function aboveboard.

C. *Section 1502 of the* Dodd-Frank Wall Street Reform and Consumer Protection Act

Most recently, the conflict minerals trade in the eastern DR Congo became the subject of U.S. legislation. On July 21, 2010, President Barack Obama signed Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the Dodd-Frank Act) into law.[52] Section 1502 directs the American Securities and Exchange Commission ("SEC") to promulgate regulations requiring every reporting company (including any foreign private issuer) to annually disclose whether "conflict . . . minerals necessary to the functionality or production of [their] product" originated in the DR Congo or an adjoining country (Angola, the Republic of Congo [Brazzaville], the Central African Republic, the Sudan, Uganda, Rwanda, Burundi, Tanzania, or Zambia).[53] Consumers can then make purchasing decisions based on that public information.

Under Section 1502, "conflict minerals" include the following minerals: columbite-tantalite (used in the manufacture of condensers, micro-electronic technology such as chips and processors, cell phones, nuclear reactors, and highly heat-tolerant varieties of steel), cassiterite (the major ore used in making tin),

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46. Christiana Ochoa & Patrick J. Keenan, *Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation*, 3 GOETTINGEN J. INT'L L. 129, 133 (2011).

47. *Congo Mining Ban: A First Step Towards Ending 'Conflict Mineral' Trade?*, GLOBAL WITNESS (Sept. 13, 2010), http://www.globalwitness.org/library/congo-mining-ban-first-step-towards-ending-'conflict-mineral'-trade; THE ENOUGH PROJECT TEAM WITH THE GRASSROOTS RECONCILIATION GROUP, A COMPREHENSIVE APPROACH TO CONGO'S CONFLICT MINERALS 1 (2009), *available at* http://www.enoughproject.org/publications/comprehensive-approach-conflict-minerals-strategy-paper [hereinafter THE ENOUGH PROJECT].

48. GARRETT & MITCHELL, *supra* note 18, at 17.

49. *Id.*

50. *Id.*

51. *Id.*

52. Dodd-Frank Act, *supra* note 9, at 2213.

53. *Id.*

wolframite (the principle ore in tungsten, used in numerous electrical items), gold, and any other mineral or its derivatives that the Secretary of State determines is financing conflict in the DR Congo or an adjoining country.[54] If companies publish the steps taken to conclude that their minerals were not extracted from the DR Congo or neighboring countries (the "conflict zone"), their products can be labeled "DRC conflict free."[55]

However, in cases where companies are unable to indicate the origin of their minerals or whether their minerals originate from the conflict zone, these companies are required to submit a report to the SEC describing the measures taken "to exercise due diligence on the source and chain of custody of such minerals."[56] The report must include a description of the products that are not "DRC conflict free," the country of origin of the conflict minerals, the facilities used to process the conflict minerals, efforts used to determine the mine or location of origin, as well as an independent, private sector audit of the report.[57] Finally, the report must be made publicly available on the company's website.[58] In effect, the law stigmatizes commercial activity with the DR Congo without making it expressly illegal.[59]

Section 1502 will have a significant effect on the U.S. and Congolese economy. According to a Tulane University study, "[t]housands of manufacturers—ranging from Fortune 500 companies to companies with $10 million in annual sales—in the industrial, aerospace, healthcare, automotive, chemicals, electronics/high tech, retail and jewelry industries are consumers of these metals, and thus affected by the new law."[60] The study estimates that implementation costs will amount to $7.93 billion, with the bulk of those total costs incurred by the mineral suppliers.[61]

D. Section 1502 as a Second-Order Sanction with Second-Order Humanitarian Effects

Using a securities-based regulatory regime to address humanitarian issues abroad is unprecedented and controversial.[62] This type of disclosure mechanism has

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54. *Id.* at 2218. It is estimated that in 2008 alone, these minerals provided Congolese armed groups with approximately $185 million in profits. THE ENOUGH PROJECT, *supra* note 47, at 3.

55. Dodd-Frank Act, *supra* note 9, at 2214. "DRC conflict free" is defined to mean products that do "not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country." *Id.*

56. *Id.* at 2213.

57. *Id.* at 2214.

58. *Id.*

59. Section 1502 does not expressly ban the use or purchase of conflict minerals, impose any legal penalties for using these minerals, or mandate companies to find or evaluate alternative materials, suppliers or sources. *See generally id.* § 1502.

60. CHRIS BAYER, A CRITICAL ANALYSIS OF THE SEC AND NAM ECONOMIC IMPACT MODELS AND THE PROPOSAL OF A 3RD MODEL IN VIEW OF THE IMPLEMENTATION OF SECTION 1502 OF THE 2010 DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 4 (2011).

61. *Id.* at 3.

62. Shannon Raj, *Blood Electronics: Congo's Conflict Minerals and the Legislation that Could Cleanse the Trade,* 84 S. CAL. REV. 981, 1002–04 (2011); David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 327 (2011).

generated a significant amount of debate concerning its implementation and practical effects.[63] For example, those against the legislation argue that it fails to account for the complete absence of local security and institutional frameworks necessary for its successful implementation and enforcement.[64] Further, it fails to address the political and economic causes of the violence in the DR Congo.[65]

Instead, Section 1502 has essentially created a *de facto* embargo on the entire mining industry in the DR Congo. To avoid any association with conflict minerals, companies are choosing to withdraw from the DR Congo altogether.[66] No company wants to be associated with "financing African warlords—especially the glamorous high-tech firms like Apple and Intel that are often the ultimate buyers of these minerals. It's easier to sidestep Congo than to sort out the complexities of Congolese politics—especially when the minerals are readily available from other, safer countries."[67] The withdrawal of international corporations from the DR Congo has reduced the legitimate minerals trade by ninety percent, penalizing hundreds of thousands of civilians across the Great Lakes region who depend on this trade for their livelihood.[68] In a *New York Times* Op-Ed, David Aronson noted that the sudden lack of income in this area has meant mothers giving birth at home, children having to drop out of school, and people left unable to buy food.[69]

This kind of collateral damage might be justified had the law effectively cut-off funding to violent warlords in the area. In reality, however, the law will likely accomplish little to diminish the power of these militia groups. By the time the law was signed, "the conflict had moved into a different phase" as the majority of violent militias from 2003–2008 have since been incorporated into the Congolese Army.[70] Those few groups that remain "get their money from kidnapping and extortion, not from controlling mining sites or transport routes."[71] While rebel groups in the past have made money exploiting mineral resources, absent that option, they will

63. *E.g.*, Raj, *supra* note 62, at 983 ("Congress's recent decision to regulate the trade through the SEC should be reconsidered."); E-mail from the Jewelers Vigilance Committee et al. to the SEC para. 3 (Sep. 13, 2010), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized disclosures-8.pdf ("Using the regulatory authority of the SEC to impact the use of raw materials that are not otherwise restricted by any lawful sanctions or embargos is troubling, and perhaps the wrong approach.").

64. Carol Jean Gallo, *Digging Deeper into the Dodd-Frank Congo 'Blood Minerals' Controversy,* UN DISPATCH (Aug. 9, 2011), http://www.undispatch.com/digging-deeper-into-the-dodd-frank-congo-blood-minerals-controversy.

65. *Id.*

66. Aronson, *supra* note 29.

67. *Id.*

68. Mark Drajem, Jesse Hamilton & Michael J. Kavangh, *A Rule Aimed at Warlords Upends African Mines*, BLOOMBERG BUSINESSWEEK (Aug. 4, 2011), http://www.businessweek.com/magazine/a-rule-aimed-at-warlords-upends-african-mines-08042011.html; GARRETT & MITCHELL, *supra* note 18, at 23 ("The trading chain is highly complicated and involves local, national, regional, and international actors including miners, mine support workers, porters, intermediate buyers, civil servants, security forces, transporters, assayers, urban day labourers, exporters, state officials, and mineral processors. Including the dependents of artisanal miners and traders, an estimated one million persons regionally live off the trade in minerals from Eastern DR Congo.").

69. Aronson, *supra* note 29.

70. *Id.*

71. *Id.*

certainly find other sources of financing. Notably, the Chinese continue trading with the DR Congo at a steep discount.[72]

Section 1502 offers a compelling reason for continuing to examine the humanitarian impact of economic sanctions and the adequacy of safeguards used to limit their collateral damage. The next section argues that principles of IHL provide the best legal framework under which policy-makers can effectively and lawfully shape and enforce economic sanctions.

III. THE LIMITS OF ECONOMIC SANCTIONS UNDER INTERNATIONAL HUMANITARIAN LAW

Economic sanctions play a significant role in armed conflicts as an alternative to military action or a supplement to the use of force.[73] Their popularity can be explained on a number of levels. In most instances, advanced democracies would prefer to avoid the political backlash that comes with sending troops abroad, and sanctions "generate a sense of civic virtue, without incurring unacceptable domestic political costs."[74] Further, there is a sense of moral superiority that comes with using sanctions as a means of expressing opposition to foreign misconduct.[75] The United States, in particular, has been an aggressive proponent of unilateral economic sanctions, using them as a foreign policy weapon to promote its economic and humanitarian policy goals abroad.[76] Despite their popularity, economic sanctions remain largely unfettered by domestic and international humanitarian laws.[77] This raises two important questions: Should IHL principles apply to economic sanctions? If so, how should they be applied?

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72. *Id.*

73. *See* Reisman & Stevick, *supra* note 1, at 96–126 (looking at U.N. economic sanction programs and embargoes enacted in Southern Rhodesia (1965–1979), Iraq (1991–Present), Libya (1992–Present), Yugoslavia (1992–1995), and Haiti (1993–1994)). Reisman and Stevick emphasize a nearly complete failure on the part of U.N. economic sanction programs to consider "international law standards, particularly the criteria of proportionality and discrimination, in defining and enforcing sanctions regimes." *Id.* at 126.

74. *Id.* at 94.

75. *Id.*

76. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 4–5 (2001).

77. *See* August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 860 (Oct. 2001) (asserting rules of international humanitarian law do not directly apply to economic sanctions). However, there are a few IHL norms that may regulate the use of certain economic sanctions under severe situations. For example, Additional Protocol I, art. 54(1) prohibits the starvation of a civilian population. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 54(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Geneva Convention IV, art. 24 requires that Parties allow the passage of medical and hospital supplies, religious accouterments and essential foodstuffs and clothing intended for children under the age of 15. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 24, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Finally, Additional Protocol I, Article 75(2)(d) suggests that all manners of collective punishment are prohibited. Additional Protocol I, *supra*, art. 75(2)(d).

On the one hand, it seems anomalous to regulate a state's right to provide or withdraw economic benefits to another state. Traditionally, the *raison d'être* of classic IHL has been to regulate military actions and the use of arms, not foreign trade policies.[78] On the other hand, this narrow legal perspective ignores the indiscriminate nature of economic sanctions and their detrimental effects on target populations.[79] It also ignores IHL's general purpose as a humane response to coercive state action.

Broadly conceived, IHL is designed to "conciliate the necessities of war with the laws of humanity."[80] It attempts to shield individuals from all harm that cannot be justified as necessary and proportionate to the successful pursuit of military objectives.[81] Most importantly, IHL is designed to anticipate and account for

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78. *See* Jean-François Queguiner, *Precautions Under the Law Governing the Conduct of Hostilities*, 88 Int'l Rev. of the Red Cross 793, 793 (2006), *available at* http://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf ("Respect for civilian persons and objects and protecting them against the effects of hostilities is an important *raison d'Ítre* of international humanitarian law (IHL)."); *see also* Int'l Comm. of the Red Cross [ICRC], *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30IC/07/8.4, 3–4 (Oct. 2007) (discussing the traditional purpose of IHL relating to armed conflicts).

79. *See, e.g.*, Reisman & Stevick, *supra* note 1, at 98–105, 110–11, 113–16, 119–21 (discussing the indiscriminate effects of UN sanctions on target populations in Southern Rhodesia, Iraq, Libya, the former Yugoslavia, and Haiti, including: general economic hardship, lack of medical care, increased food prices, lack of drinkable water, increased crime, increased unemployment, and malnutrition); *see also* Roy Gutman and Daoud Kuttab, *Indiscriminate Attack*, CRIMES OF WAR, http://www.crimesofwar.org/a-z-guide/indiscriminate-attacks/ (last visited Nov. 8, 2012) ("An indiscriminate attack is one in which the attacker does not take measures to avoid hitting non-military objectives, that is, civilians and civilian objects."); Madeleine Albright, *Economic Sanctions and Public Health: A View from the Department of State*, 132 ANNALS OF INTERNAL MEDICINE, no. 2, Jan. 2000, at 155 ("When the United Nations or the United States imposes sanctions against a regime, whether in response to military aggression or egregious violations of human rights, it does not intend to create unnecessary hardships for innocent people, especially children and infants. Good intentions, however, do not automatically translate into good results."). Examples of indiscriminate attacks include German V-1 and V-2 missiles in World War II, which were aimed at the general direction of large metropolitan areas because they were technologically incapable of being aimed at specific military objectives. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 127–28 (2nd ed. 2010). Also, the imprecise Iraqi Scud missiles directed against the metropolitan area of Tel Aviv in 1991 were indiscriminate attacks. *Id.* An example of an unlikely discriminate attack occurred in 1991 during the Gulf War when US air forces struck a bunker used in part as an air-raid shelter killing hundreds of civilians. *Id.* The US had relied on intelligence indicating that the bunker was a command and control center, and because they had no knowledge of the civilians at the time, it was considered in good faith a military objective and hence a lawful target. *Id.*

80. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, International Military Commission, Nov. 29, 1868, 18 Martens (1st) 474, 1 A.J.I.L. Supp 95, *available at* http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument [hereinafter 1868 St. Petersburg Declaration]. Also known as the 1868 St. Petersburg Declaration, this treaty is one of the earliest formal agreements on the principles applicable in armed conflict. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 62 (2008); *Introduction to Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, International Humanitarian Law: Treaties & Documents*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument (last visited Nov. 8, 2012).

81. *See* Additional Protocol I, *supra* note 77, art. 35 ("In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited . . . . It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."); DINSTEIN, *supra* note 79, at 129 ("Current customary [Laws of International Armed Conflict] definitely confirms the precept that an attack against military objectives expected to cause disproportionate collateral damage to civilians or civilian objects, in relation to the military

developments in warfare that might lead to new humanitarian imperatives.[82] To this end, all coercive instruments should be judged by their foreseeable effects and not merely by the mechanisms used for their implementation.[83]

Because of their costly foreseeable effects, economic sanctions should be treated like weapons of warfare and regulated as such. It is undisputed that sanctions are frequently adopted in lieu of military measures, that they can prove highly coercive, and that they can cause severe collateral damage.[84] Such "attacks" should not evade legal considerations because they *seem* to offer "wholly non-violent and non-destructive ways of implementing international policy."[85] Rather, economic sanctions should be equated with an armed attack because they produce the type of damage that typically results from conventional military attacks.

In an article titled *The Applicability of International Law Standards to United Nations Economic Programmes,* Michael Reisman and Douglas L. Stevick make important arguments about the applicability of international legal standards to economic sanctions.[86] The authors map out an IHL legal framework under which policy-makers can effectively and lawfully shape and enforce an economic sanctions program.[87] Their proposal for economic sanctions programs includes the following:

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advantage anticipated, is unlawful.").

82. KOLB & HYDE, *supra* note 80, at 61. Recognizing the inevitable gaps that might emerge in IHL, the delegates at the Hague unanimously agreed to include in the preamble to the Hague Convention II the so-called "Martens clause" requiring that "civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience." *Id.* (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 2(1), June 8, 1977, 1125 U.N.T.S. 3). The Martens clause's primary purpose is to ensure that humanitarian considerations prevail despite any changes to the means and methods of warfare. *Id.* at 62–63.

83. *See id.* at 61–63 (interpreting the Martens clause as binding Parties to always uphold humanitarian ends regardless of the change in method of war). Additionally, this is similar to the "consequentiality approach" used to fit cyber warfare into the IHL regime. *See* Wolfgang McGavran, *Intended Consequences: Regulating Cyber Attacks*, 12 TUL. J. TECH. & INTELL. PROP. 259, 270 (2009) (analogizing cyber attacks with traditional forms of attack).

84. *See* Reisman & and Stevick, *supra* note 1, at 93, 127 (discussing the need for restricting highly coercive sanctions and the capability for economic sanctions to cause collateral damage that is much greater than conventional weapons). "Collateral damage" can be defined as: "(a) incidental losses or injury to civilians; (b) destruction of or damage to civilian objects; or (c) a combination of both." DINSTEIN, *supra* note 79, at 128–29.

85. Reisman & Stevick, *supra* note 1, at 94. *See also id.* ("'At least', one hears again and again, 'we're not killing anyone.' 'At least we're giving non-lethal sanctions a chance.' In this line of thinking, economic sanctions are always to be preferred to the application of military strategy and, in any case, are always to be exhausted before military action is initiated. As we have seen, however, such assumptions are unfounded.").

86. *See generally* Reisman & Stevick, *supra* note 1 (arguing that UN economic sanctions should be subject to more strict international laws).

87. One view might be that recourse to economic sanctions is illegal in any circumstance because they are indiscriminate and have a propensity for causing immense collateral damage, thus rendering them inherently and totally incompatible with the law of IHL. *See* Reisman & Stevick, *supra* note 1, at 93 ("In sum, then, considered in terms of threat theory, the collateral damage caused by non-military instruments—the economic and propagandic—may be greater than that of the military instrument . . . ."). In most circumstances, sanctions are unable to draw any distinction between the civilian population and its immediate targets. David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions:*

that sanctions be necessary and proportionate, that they reasonably maximize discrimination between combatants and non-combatants, that they be periodically assessed, and that relief be provided to injured third parties.[88]

Reisman and Stevick define four strategic instruments used to implement state policies: the military instrument, the diplomatic instrument, the economic instrument, and the ideologic or propagandic instrument.[89] Each instrument is designed to reduce "the ambit of choice of the target by constraining it to adopt policies or positions it would otherwise eschew."[90] For purposes of this Note, I will focus on the economic instrument, which involves "the granting or withholding of indulgences or deprivations from a target," and the ideologic or propagandic instrument, which involves the "modulation of carefully selected signs and symbols to politically relevant parts of the rank and file as a means of influencing the elite that governs it."[91] These two strategic instruments best describe economic sanctions and consequently Section 1502.

Both the economic and propagandic instruments have the potential for creating more collateral damage than the military instrument.[92] This is due to their relatively indiscriminate nature and their limited success at the communication stage.[93] Specifically, for every instrument, there are two stages of implementation: the communication (or threat) stage and the application stage.[94] During the communication stage, the strategy is to influence the cost-benefit analysis of decision-makers in a way that will convince them to change their problematic policies.[95] Compliance depends in part on the "expectation of the effectiveness of enforcement mechanisms."[96] Decision-makers are more likely to comply if they perceive that the threat is credible and the threatening state has the capacity to initiate and sustain the threat.[97] The target will not comply if the threat is "essentially symbolic, staged for certain internal or external audiences."[98]

Lessons from the 90's, *in* SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 1–2 (David Cortright & George A. Lopez eds. 2002) (explaining the traditional problem of unintended negative consequences for civilian populations under economic and trade sanctions). They are by their very nature indiscriminate. *Id.* This argument is untenable, however, because humanitarian law expressly allows for self-defense and countermeasures. *See* U.N. Charter art. 51 (authorizing Member States to engage in countermeasures and to use force in instances of self-defense without U.N. Security Council authorization). Further, sanctions are sometimes preferable to using military force or to not using any force at all.

88. Reisman & Stevick, *supra* note 1, at 86.

89. *Id.* at 89.

90. *Id.*

91. *Id.* The propagandic instrument was used during Desert Storm to encourage insurrection against the Ba'ath regime. *Id.* at 92.

92. *Id.* at 93. Reisman and Stevick define collateral damage as "[t]he destruction of people and objects on the periphery of a target." *Id.* at 92.

93. Reisman & Stevick, *supra* note 1, at 93–95.

94. *Id.* at 90.

95. *See id.* at 91 (discussing the target's possible strategies at the communications stage).

96. W. Michael Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1, 7 (1969).

97. *See* Reisman & Stevick, *supra* note 1, at 90 ("[T]he communication stage should ensure the desired change in behaviour if two cumulative conditions are met; (i) the content of the programme is clearly sufficient to accomplish its manifest objectives; and (ii) the communication of capacity and intention ('political will') is credible.").

98. *Id.*

A credible military threat is more likely to be an effective instrument at the communication stage than an economic sanction or a propagandic instrument because its rapid, irreversible effects preclude the possibility of any sort of passive response.[99] By contrast, the credible threat of the economic instrument often elicits a "wait-and-see" posture as opposed to an immediate response.[100] Because threatening military force is often more effective than other strategic instruments, the military instrument can actually result in less collateral damage than an economic or propagandic instrument.[101]

Unfortunately, the false assumption that the military instrument is the only destructive strategic instrument of enforcement has resulted in a "persistent blind spot in international legal analysis."[102] Whereas all major military campaigns are subject to IHL principles of necessity, proportionality, and distinction, the naïve assumption that sanctions are inherently non-destructive has insulated them from similar legal regulations. This lack of regulation has resulted in grave humanitarian consequences for civilians.[103]

To the extent that IHL permits instruments of self-defense and countermeasures, a state should be allowed to execute economic sanctions. However, when sanctions involve a high degree of coercion and collateral damage, they should be justified and based in IHL principles.

IHL principles of necessity, proportionality, and distinction are the legal yardsticks for determining the extent of permissible collateral damage.[104] Generally, IHL principles should help decision-makers appraise the legality of a military, economic, or propagandic instrument based on a calculus of social goals, costs, and alternative consequences.[105] While the instrument's lawfulness turns on its precision and effectiveness compared to that of alternative measures,[106] the amount of

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99. *Id.* at 91. ("[T]he military instrument, as we have seen, in its communicative or threat stage, can be and usually is used in non-destructive and essentially communicative ways . . . . Threats and coordinate demonstrations of power are perceived by the intended target; they concentrate its mind in a way that words alone do not; and they stimulate careful assessments of relative power positions correlated with the degree of importance of the issues at stake. Where the assessments indicate probabilities of net losses, they lead to appropriate non-belligerent adjustments. The military instrument is more likely than the other instruments to be effective in this stage, precisely because 'wait-and-see' is an inappropriate response.") *Id.* at 93.

100. *Id.* at 91.

101. *Id.* at 93. Notably, there are additional risks of collateral damage attached to "psychwar"—a common method of propaganda that attempts to undermine elite control by inciting latent conflicts between different ethnic groups. *Id.* This type of propaganda can exacerbate violent tensions, inducing widespread pogroms and a festering hatred that "cannot be set to self-destruct." *Id.*

102. Reisman & Stevick, *supra* note 1, at 95.

103. Geiss, *supra* note 6, at 167.

104. Reisman & Stevick, *supra* note 1, at 128–29. *See also* INT'L COMM. OF THE RED CROSS, DISTINCTION: PROTECTING CIVILIANS IN ARMED CONFLICT (2007), *available at* http://www.cicr.org/eng/assets/files/other/icrc_002_0904.pdf (describing the principle of distinction as a "cornerstone" of the 1977 Additional Protocols).

105. Reisman & Stevick, *supra* note 1, at 129.

106. *Id.* at 130.

permissible collateral damage depends on the degree and durability of the injury posed to the public.[107]

The following sections seek to clarify the legal principles applicable to economic sanctions in times of peace or armed conflict. The analysis then looks at whether Section 1502 and its *de facto* embargo against the DR Congo violates these principles.

A. The Principles of Necessity and Proportionality and Economic Sanctions

First, the principle of necessity requires that the targeting state limit itself to those measures that can reasonably be expected to achieve its objective.[108] This rule is expressed in Article 57(3) of Additional Protocol I:

> When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.[109]

In effect, the principle of necessity requires that a state adopt the least destructive measure capable of accomplishing its desired outcome.[110] In order to achieve this balance, there should be an initial comparative test, assessing the proposed measure against all alternatives.[111] It is important to note that the principle of necessity is not an entirely restrictive criterion; rather, it must be flexible enough to allow for substantial collateral damage in the face of extreme risks to the public order.[112]

Next, the principle of proportionality prescribes an outer limit on the damage permitted under the necessity inquiry.[113] This traditional IHL principle requires that the losses resulting from military action should not exceed the expected military advantage.[114] Proportionality is closely related to the concept of indiscriminate attacks codified in Article 51(5)(b) of Additional Protocol I:

> [An attack is indiscriminate and hence prohibited if it] may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian

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107. For instance, the Reisman and Stevick article offers an illustrative example of this point comparing (1) looters during a period of public breakdown with (2) a terrorist group moving to seize an undefended elementary school. *Id.* at 129. In the first scenario, the tolerance for collateral damage is lower because ordinary police work can repair the damage attributed to the looting. *Id.* In the second scenario, the tolerance for collateral damage is higher because the damage resulting from the terrorist group is less reparable after public order is restored. *Id.*

108. Geiss, *supra* note 6, at 175.

109. Additional Protocol I, *supra* note 77, art. 57(3).

110. KOLB & HYDE, *supra* note 80, at 47.

111. Reisman & Stevick, *supra* note 1, at 130.

112. *Id.* at 128.

113. *Id.* at 131.

114. *See* KOLB & HYDE, *supra* note 80, at 132 (discussing the principle of proportionality and commenting on when military attacks are appropriate under the principle).

> objects, or a combination thereof, which would be excessive in relation to the concrete and directly military advantage anticipated.[115]

Thus, any means of attack must be selected with a view toward preventing incidental civilian casualties and damage that is disproportionate to a concrete and direct military objective. It is likely that a remote, indirect, or indefinite advantage would never be a proper consideration in relation to the collateral damage.[116]

Notably, the proportionality principle also includes "dual use objects," which serve both civilian and combatant purposes.[117] Assuming that targeting a dual use object would result in a military advantage, the targeting state must further assess whether the collateral damage that may occur outweighs the expected military advantage.[118] If the harm to civilians is proportionate to the military advantage expected, the attack may be deemed justified under the principle of proportionality.[119]

In the context of economic sanctions, it is nearly impossible to compare with any real precision the military advantage gained versus the collateral damage caused. Reisman and Stevick address this problem by shifting the comparison to consider "the immediate or prospective consequences of the act that triggered the contingency," e.g., threats to peace, breaches of the peace, or acts of aggression.[120] In effect, the collateral damage imposed on the civilian population, even if necessary, must not be disproportionate to the damage caused by the acts that initially triggered the intervention.[121]

B. The Principle of Discrimination and Economic Sanctions

The principle of discrimination requires that an economic sanction concentrate on (1) actors who can materially influence policy-making and (2) "resources that are not essential for civilian survival . . . but whose neutralization is likely to lead to desirable adjustments in the target's policies."[122]

The principle of discrimination is analogous to—though less restrictive than—the principle of distinction, a classic IHL tenet that prohibits direct attacks on civilian

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115. Additional Protocol I, *supra* note 77, art. 51(4)-(5)(b).

116. *See* Boris Kondoch, *The Limits of Economic Sanctions Under International Law: The Case of Iraq*, 7 INT'L PEACEKEEPING 267, 287 (2001), *available at* http://www.casi.org.uk/info/kondoch01.pdf (examining the limitations of economic sanctions under the proportionality principle).

117. KOLB & HYDE, *supra* note 80, at 132.

118. *See id.* (asserting that incidental civilian losses must also be weighed when considering an attack).

119. *See id.* (giving examples of when dual use objects may be justifiably destroyed under the principle of proportionality). *See also* Additional Protocol I, *supra* note 77, art. 51(5)(b) (prohibiting attacks which may be expected to cause injury to civilians, which would be excessive in relation to the military advantage expected).

120. Reisman & Stevick, *supra* note 1, at 131.

121. *See id.* (commenting that the collateral damage must be proportional to the immediate or expected consequences of the act of that prompted the sanction).

122. *Id.* at 133.

persons and objects.[123] In its most expansive form, the principle of distinction would prohibit economic sanctions outright because sanctions tend to be directed against civilians or against the population as a whole.[124] An outright prohibition is undesirable, however, because sanctions may offer a potentially powerful enforcement instrument in the right context.[125]

Instead, the principle of discrimination offers a more elastic version of the distinction principle. It establishes that "[m]ore limited and precise economic sanctions are to be preferred over more general and undiscriminating programmes."[126] For example, "[s]anctions that deprive an adversary of [its] war *matérial* are presumptively lawful, for they are directed against combatants."[127] However, a general embargo that deprives the target of its war *matérial* should be illegal because a wholesale embargo, by definition, is an indiscriminate attack.[128] In other words, sanctions aimed at the entire population as a whole violate the principle of discrimination.

To meet the principle of discrimination, a lawful sanctions program should undergo "a preliminary 'impact assessment' study, based on contextual inquiry."[129] The impact assessment should consider the sanction's "essential character" and the political structure of the target regime.[130] A sanction's essential character cannot be based on any single theory of development or abstract objective. For example, a "trickle up" sanctions theory, in which depriving the lower socio-economic strata of economic necessities will somehow favorably influence elite decision-making is highly unsatisfactory.[131] In that scenario, the sanction is targeting resources essential for civilian survival without any guarantee that the harm will achieve the desired adjustments in the target regime's policies. This is no more defensible than indiscriminate bombing tactics.[132]

In regards to the political structure of the target regime, more collateral damage might be tolerated if there is a high probability that the target will be receptive to the program. For example, democracies (or regimes approaching a democracy) are the most vulnerable to economic sanctions given the "polarization of political groupings" and "the relative real influence of interest groups."[133] By contrast, economic sanctions are likely to be less effective against despotic regimes where the channels of political dissent are less fluid and education levels are low.[134] Notably, even "successful" economic sanctions often fail when the target suffers because a counter-

123. *Compare* KOLB & HYDE, *supra* note 80, at 126 (explaining that the principle of distinction prohibits attacks on civilians and indiscriminate attacks in general), *with* Reisman & Stevick, *supra* note 1, at 132–33 (discussing how the principle of discrimination values the minimization of civilian harm, while acknowledging that it is impossible to limit harm to military targets alone).

124. *See* Reisman & Stevick, *supra* note 1, at 132 ("Economic sanctions have caused large amounts of collateral damage in the form of civilian loss of life and property.").

125. *See id.* at 89 (commenting on the effectiveness of economic sanctions).

126. *Id.* at 132.

127. *Id.*

128. *Id.*

129. *Id.*

130. Reisman & Stevick, *supra* note 1, at 131–32.

131. *See id.* at 131 (criticizing poorly designed economic sanctions).

132. *Id.*

133. *Id.* at 137.

134. *Id.*

elite exploits the power vacuum, increasing the target's financial resources through black market trade or other transactions that have become profitable in response to the sanctions.[135]

Failing to consider the political structure of the target regime can have grave unintended consequences. For example, U.S. sanctions against Iran have ultimately reinforced Iranian intransigence because the political cost of engaging in any type of compromise with the United States largely outweighs any economic benefit that may result from meeting its demands.[136] Furthermore, Iran's conservative power structure has become particularly adept at mitigating the economic effects of the sanctions through restructuring the Iranian economy and rallying public support behind nationalist sentiments.[137] As Reisman and Stevick explained, "the political elite of the target will easily be able to recharacterize the economic sanctions to the domestic polity as part of a larger military programme of foreign intruders aimed at destroying the nation's or group's physical or symbolic integrity."[138] If the United States had prospectively examined the domestic political arrangement in Iran and the political effectiveness of a projected sanction, it might have avoided the perverse outcome it faces today.[139]

Other notable considerations highlighted in Reisman and Stevick's analysis include whether there is a high degree of interdependence between the sanctioning state and its target.[140] If so, domestic pressures to turn the sanction into nothing but a symbolic effort will reduce its efficacy.[141] Also, if the target state has the capacity to turn to other States to counteract economic deprivations, this will further reduce its efficacy.[142] Consequently, to avoid having other states undermine its objectives, the sanctioning state should channel its program through international organizations.[143] A narrow, multilateral program seems more effective than a broad, unilateral program.

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135. *E.g.*, *id.* at 138 ("[I]n Haiti, the existing wealth elite suffered from the sanctions, but . . . [this] was more than counter-balanced by a new elite which was enriching itself through trade in contraband and other transactions that had become profitable, thanks to the sanctions programme itself.").

136. *See* Ray Takeyh & Suzanne Maloney, *The Self-Limiting Success of Iran Sanctions*, 87 INT'L AFF. 1297, 1308–09 (2011) (examining why Iran does not yield to pressure from U.S. sanctions).

137. *See id.* at 1309 (reporting on Tehran's ability to withstand sanctions); Nickolaj Werk, *Misunderstanding Rationality: The Failure of Sanctions against Iran*, YALEJOURNAL.ORG (July 30, 2012), http://yalejournal.org/2012/07/misunderstanding-rationality-the-failure-of-sanctions-against-iran/ (noting that the Iranian government has appealed to nationalism in response to sanctions). *But see* Dina Esfandiary, *Why Iranian Public Opinion is Turning Against the Nuclear Program*, THE ATLANTIC (Mar. 16, 2012), http://www.theatlantic.com/international/archive/2012/03/why-iranian-public-opinion-is-turning-against-the-nuclear-program/254627/ ("[C]ontinued pressure and the rising cost of sanctions is now changing Iranian public opinion, and the nuclear program may not be as popular as it once was.").

138. Reisman & Stevick, *supra* note 1, at 136.

139. *See* Takeyh & Maloney, *supra* note 136, at 1310–11 (comparing American views on the effectiveness of sanctions with the views of other nations).

140. Reisman & Stevick, *supra* note 1, at 139.

141. *Id.*

142. *Id.*

143. *Id.*

C. *Applying IHL Principles to Section 1502*

A review of Section 1502 indicates that there was no real examination of its lawfulness before any political decisions were made on its behalf. This section will apply Reisman and Stevick's legal framework to Section 1502.

Section 1502 is both an economic and propagandic instrument. It is economic because it has shut down all U.S. minerals trade with the DR Congo. It is propagandic because it attempts to promote corporate social responsibility by influencing U.S. consumers not to buy from U.S. companies that trade with the DR Congo. This type of propaganda is unique in that it is internally focused. Most propaganda programs are poised to influence certain external actors within the target state.[144] By contrast, Section 1502 aims to directly influence consumer behavior at home, thereby indirectly influencing the behavior of those immediately responsible for the violence in the DR Congo.

Section 1502 is problematic on a number of different levels. The Act initiated the second stage (the application stage)[145] without communicating to the DR Congo its manifest objectives.[146] The legislation has adopted a "shoot first and ask questions later approach" in the hopes of achieving some remote advantage for the civilian population in the DR Congo.[147] Had the United States given adequate consideration to international law standards before implementing Section 1502, it would likely have made adjustments to the program or abandoned it altogether.

The principle of necessity requires decision-makers to weigh the Act against other potential enforcement strategies and determine which one is the least destructive measure capable of accomplishing the desired outcome (i.e., of ending violence in the eastern DR Congo). There are a number of available alternatives that may prove more viable. One alternative would be to send troops into the eastern DR Congo. A second alternative would be to take the estimated $7.93 billion required to implement Section 1502 and put it toward promoting peace and security in the DR Congo, e.g., supporting good governance efforts and economic institutions that facilitate and improve transparency in cross-border trade.[148] As critics have pointed out, the root cause of conflict in the DR Congo is not the minerals trade but poor governance and institutional degradation.[149] Promoting peace and security in the area may do a better job of addressing the actual causes of conflict in the area and not simply their symptoms.

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144. *Id.* at 89 ("[T]he ideologic or propagandic instrument, involv[es] the modulation of carefully selected signs and symbols to politically relevant parts of the rank and file as a means of influencing the elite that governs.").

145. *Id.* at 90 (discussing the application stage and the communication stage).

146. *See* Aronson, *supra* note 29 ("But once the advocacy groups succeeded in framing the debate as a contest between themselves and greedy corporate interests, no one bothered to solicit the opinion of local Congolese."); Reisman & Stevick, *supra* note 1, at 90 ("The first stage involves the credible communication of capacity and intention to carry out a particular programme . . . .").

147. *See* Dodd-Frank Act, *supra* note 9, at 2213 (highlighting the civilian harm being brought about from the trading of conflict minerals).

148. *See* BAYER, *supra* note 60, at 3 (estimating that it cost $7.93 billion to implement Section 1502).

149. *See* GARRETT & MITCHELL, *supra* note 18, at 5 ("[This report] suggests these outcomes to be less microeconomic or trade issues, but [instead] the product of poor mineral governance as part of broader governance weakness.").

The next question is whether Section 1502 is proportional. Given that Section 1502 has indirectly contributed to local unemployment problems, stifled the artisanal mining industry, and failed to demobilize the militias,[150] the program in its present form cannot be considered proportional.

Finally, Section 1502's most glaring failure is a complete lack of consideration for important legal considerations enshrined in the discrimination principle. As discussed above, Section 1502 makes no attempt to concentrate harm on those who can reduce the violence in the eastern DR Congo, nor does it target resources whose neutralization will lead to the desired adjustments. The Act is a blunt instrument that ignores the duality of the minerals market entirely, penalizing hundreds of thousands of innocent civilians who rely on the trade for their livelihood. There are legitimate mining ventures in the DR Congo whose security is sponsored by the UN, the Congolese government, and privately contracted security forces.[151] This trade could be used to promote peace and economic security in the area. Unfortunately, Section 1502 ostracizes the *entire* Congolese population from the minerals trade, not just those warlords who have turned the eastern DR Congo into a deadly conflict zone. Furthermore, most of the militias that once wreaked havoc on the area have since been incorporated into the Congolese Army. For those that remain, the law has not stopped their depredations.

CONCLUSION

The preceding analysis suggests that greed-related explanations for civil war conflicts do not have greater explanatory power than other models. In fact, basing an understanding of conflict in the DR Congo on greed has, ultimately, steered policy-makers in a dangerous direction. In its present state, Section 1502 is a form of war waged on a civilian population by a government unwilling to employ less politically popular or more costly strategies. The grave humanitarian situation created by Section 1502 poses a serious moral dilemma for the United States and any state that relies on coercive, non-military instruments to promote its foreign policies abroad. Only a nuanced, narrowly focused solution can overcome the host of underlying factors that place Congolese civilians at constant risk of violent conflict.

An analysis of the actual consequences of Section 1502 illustrates how aggressively applied sanctions can be analogous to the military instrument and objectionable on the same grounds. Given the coercive nature of influence strategies like economic sanctions, these instruments should be regulated in light of the broad IHL principles of necessity, proportionality, and discrimination. Finally, policy-makers should look to ground their legal appraisals in the contextual realities that plague the target state.

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150. Aronson, *supra* note 29; *see also* Drajem, *supra* note 68 (discussing Section 1502's contribution to unemployment problems).

151. Letter from Anna Stanford, Research Associate, Competitive Enterprise Inst. & John Berlau, Director for Investors and Enterpreneurs, Competitive Enterprise Inst. to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Mar. 2, 2011), *available at* http://www.scribd.com/doc/66075962/John-Berlau-Comments-on-Section-1502-of-Dodd-Frank.


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