

CONTENTS

Feature Articles

- Lessons Learned from Ethiopia's *Trademarking and Licensing Initiative*:
Is the European Union's Position on Geographical Indications Really
Beneficial for Developing Nations?
Mary O'Kicki 311
- Health Care Refugees
Patricia C. Gunn 339
- The International Community Responds To Darfur: ICC Prosecution
Renews Hope for International Justice
John E. Tanagho and John P. Hermina 367

Student Articles

- Right to Work? A Comparative Look at China and Japan's Labor Rights
for Disabled Persons
Cerise Fritsch 403
- The Rape Epidemic in the Congo: Why Impunity in the Congo Can be
Solved by International Intervention
Jeanine Oury 421

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW
2008-2009

Executive Board

DONALD COLE
Editor-in-Chief

KATHERINE STABA
Executive Editor, Articles

CAROLINE KWAK
Executive Editor, Publication

CHRISTINA COTTER
Symposium Editor

BETHANY LEGARE
Student Articles Editor

KISA PATEL
Managing Editor

Senior Editors

THOMAS CONCANNON
KATHERINE GLANCY
LINDSAY KELLER

PETER LEE
JOHN LITCHFIELD
BENJAMIN MERCADO
DAVID PATARIU

MEGAN POWERS
YUREE WHANG
HANNAH YOO

Associate Editors

CHARLES BONINI
JASON COELHO
CERISE FRITSCH
MATTHEW GALVIN
NATHANIEL HALL
HAILEY HARREN
ABBIGAYLE HUNTER
LAURA KLEMENT

DONATO LATROFA
HEATHER LIBERMAN
PAULA MORENO
JEANINE OURY
TRACIE PRETET
CLAY REHRIG
LAUREN SANCHEZ-MURPHY
KRZYSZTOF SOBCZAK

LINDSAY STANLEY

Members

ANDREW CAMPBELL
ETHAN CEPLIKAS

FORREST MILLIKIN
EVE-LYNN RAPP

Faculty Advisor

PROFESSOR MARGARET MOSES

Published semi-annually by Loyola University Chicago School of Law
Loyola University Chicago School of Law
Twenty-Five East Pearson Street
Chicago, IL 60611
Cite 6 LOY. U. CHI. INT'L L. REV. — (2009)

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW

Loyola University Chicago School of Law
Twenty-Five East Pearson Street
Chicago, IL 60611
E-mail: International-LawReview@luc.edu
Phone: (312) 915-7490

SUBSCRIPTIONS: **\$10 per year**

Name

School

Address

City, State Zip Code

E-mail Address

If you would like to subscribe, please complete the information above, include a \$10 check payable to **Loyola University Chicago International Law Review**, and send to:

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW
Loyola University Chicago School of Law
Twenty-Five East Pearson Street
Chicago, IL 60611

INTERNATIONAL FOCUS AT
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

Curriculum

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

International Centers

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

Study Abroad

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

International Programs

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

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, and afterward meet with judges and barristers to discuss the substantive and procedural aspects of the trial that are uniquely British. Students also visit the Inns of the Court and the Law Society, and have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas* which offers students the opportunity to travel to Chile over the spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado, as well as a variety of lawyers, judges, and business people.

- A one-week site visit experience in San Juan, Puerto Rico. While in Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico’s managed care and regulation.
- A comparative law seminar focused on African legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. The course includes a required field study component over spring break in South Africa, focusing on community development and volunteerism.

International Moot Court Competition

Students also hone their international skills in three moot competitions: (1) the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law; (2) the Niagara Cup Competition which involves a moot court argument on a problem involving an area of dispute between the United States and Canada, with teams representing both U.S. and Canadian law schools; (3) the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. Two separate teams of student oralists argue against law school teams from all over the world, one team competing in Hong Kong, and the other in Vienna, Austria.

Wing-Tat Lee Lecture Series

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

Acknowledgments

We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program, specifically to the Willem C. Vis International Commercial Arbitration Moot Program:

Mayer Brown LLP
 Silvia Rota and Attilio Rota in memory of Dr. Aminta Rota
 Peter B. Carey
 John H. Calhoun
 Freddi L. Greenberg
 CIDRA
 Chartered Institute of Arbitrators
 Michael Barranda
 Ellen M. Carey
 Anthony B. Cartee
 Hanh Diep
 Melissa King
 John Meyers
 Kelly O’Brien
 Jon Robilotto
 James Saranteas

LESSONS LEARNED FROM ETHIOPIA’S *TRADEMARKING AND LICENSING INITIATIVE*: IS THE EUROPEAN UNION’S POSITION ON GEOGRAPHICAL INDICATIONS REALLY BENEFICIAL FOR DEVELOPING NATIONS?

Mary O’Kicki[†]

Abstract

This paper examines Ethiopia’s *Trademarking and Licensing Initiative*; specifically, Ethiopia’s choice to use trademarks and not Geographical Indications (“GIs”) to protect its intellectual property rights in its heritage coffees. This paper argues that the European Union’s (“EU”) proposed greater protection of GIs and request for a multilateral registry of GIs may create a hurdle for developing nations to enter the worldwide market and, quite possibly, force developing nations to rely upon archaic agricultural methods instead of developing new, innovative farming techniques. It also argues that the EU’s proposed “claw back” provision is, ultimately, a mechanism to extract a premium for what is, or was, Traditional Knowledge (“TK”) of different European cultures and questions the possible consequences if the EU succeeds in its efforts to reclaim words that have become generic.

I. Introduction	312
II. Ethiopia	314
III. Ethiopia’s Heritage Coffees	316
IV. Trademarks, Geographical Indications and Traditional Knowledge	318
A. Trademarks	318
B. Geographical Indications (GIs)	320
1. Geographical Indications in the United States	321
2. Geographical Indications in the EU and its member countries	322
3. The TRIPs Agreement and GIs	324
C. Traditional Knowledge (TK)	325
V. Ethiopia’s Choice to Trademark its Heritage Coffees	327
VI. Ethiopia’s Trademarking and Licensing Initiative	329
VII. Benefits of Trademark versus GI Certification	331
VIII. The World Wide Web: A Valuable Tool	332
IX. What Other Developing Nations Can Learn from Ethiopia	334
X. Conclusion	335

[†] J.D., UCLA School of Law 2008. The author thanks Stephen R. Munzer, Professor of Law, UCLA School of Law, for his support, guidance and instructive comments. The author also thanks the editors and staff of the Loyola University Chicago International Law Review.

I. Introduction

In 2005, the government of the Federal Republic of Ethiopia (“Ethiopia”) filed trademark applications with the United States Patent and Trademark Office (“USPTO”) for three of Ethiopia’s heritage coffees: Harar,¹ Sidamo² and Yirgacheffe.³ The National Coffee Association (“NCA”) filed an objection to the trademark contending that Sidamo was a generic term for coffee from the Sidamo region of Ethiopia and therefore did not meet the legal criteria to qualify for trademark registration. The NCA submitted over six hundred documents to support its claim.⁴ Despite the objection, USPTO granted the trademarks.⁵ To date, all twenty-six member countries of the EU have granted Ethiopia trademarks for all three terms and Japan has granted trademarks to Sidamo and Yirgacheffe.⁶

The worldwide filing of trademarks by a country that is still waiting for approval for accession into the World Trade Organization⁷ (“WTO”) is both remarkable and noteworthy. Ethiopia’s choice to use a trademark instead of a GI to protect its intellectual property rights (“IPRs”) in an indigenous crop occurs at a pivotal time in the worldwide debate concerning the most effective way to protect IPRs for goods that are specific to a particular geographic region or locale. In 2003, the EU made an aggressive move to strengthen GI protection provisions in the Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) Agreement.⁸ The TRIPs Agreement⁹ is a multilateral agreement that governs the

¹ Ethiopia filed a separate application ‘Harrar’ which is an alternative spelling of ‘Harar.’ When the word ‘Harar’ is used in this paper, it also refers to ‘Harrar.’ U.S. Trademark Application Serial No. 78,589,319 (filed Mar. 17, 2005), *available at* <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=jjjrrj.1.1>.

² U.S. Trademark Application Serial No. 78,589,307 (filed Mar. 17, 2005), *available at* <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=jjjrrj.1.1>.

³ U.S. Trademark Application Serial No. 78,589,325 (filed Mar. 17, 2005), *available at* <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=jjjrrj.1.1>.

⁴ National Coffee Association of U.S.A., *NCA Statement on Ethiopian Coffee Trademarks*, <http://www.ncausa.org/custom/headlines/headlinedetails.cfm?id=488&returnto=1> (last visited Mar. 15, 2009). The United States Patent and Trademark Office [USPTO] Trademark Document Retrieval database has all six hundred documents. USPTO, TDR Database, <http://tportal.uspto.gov/external/portal/tow> (search U.S. Trademark Application Serial No. 78,589,307; then open “Administrative Response” dated Aug. 17, 2006).

⁵ U.S. Trademark No. 3,457,979 (filed July 1, 2008); U.S. Trademark No. 3,381,739 (filed Feb. 12, 2008); U.S. Trademark No. 3,126,053 (filed Aug. 8, 2006).

⁶ The trademarks have been registered with the Office for Harmonization in the Internal Market [OAMI] as community trade marks in the European Union. OAMI Trade Mark No. 004348777 (registered Feb. 14, 2006) (Harar); OAMI Trade Mark No. 004348751 (registered Feb. 27, 2008) (Sidamo); OAMI Trade Mark No. 004348744 (registered Feb. 14, 2006) (Yirgacheffe). Japan has also granted registration. Japan Trademark No. 4955560 (registered May 26, 2006) (Yirgacheffe); Japan Trademark No. 4955562 (registered May 26, 2006) (Yirgacheffe in Japanese) Japan Trademark No. 4955561 (registered May 26, 2006) (Sidamo); Japan Trademark No. 4955563 (registered May 26, 2006) (Sidamo in Japanese).

⁷ For example, Ethiopia filed for accession to the WTO in January 2003, almost two years before filing its U.S. trademark applications. The General Council established a Working Party to examine Ethiopia’s application on February 10, 2003. The Memorandum on the Foreign Trade Regime was circulated in January 2007. The Working Party met on May 16, 2009. For Ethiopia’s current WTO Accession Status, see http://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm.

⁸ European Commission, External Trade, Trade Issues, *Intellectual Property: Special Names for Special Products*, Jan. 19, 2009, http://ec.europa.eu/trade/issues/sectoral/intell_property/argu_en.htm

Lessons Learned from Ethiopia

availability, scope and use of intellectual property rights for WTO member countries. The EU contends that GIs are the preferred method to protect IPRs in agricultural goods that originate from a specific region.¹⁰ In 2003, the EU requested the development of a multilateral registry for GIs¹¹ and for the extension of the additional legal protections given to GIs for wines and spirits by the TRIPS Agreement to all GIs in the registry.¹²

The most controversial request by EU member countries is for the termination of the use of forty-one names of European-originated foods including, among others, *parmesan*, *Chablis*, and *bologna*, by manufacturers who are not located within the historical regions of origin of these food products.¹³ The “claw back” provision is supported mainly, if not entirely, by the EU¹⁴ and aims to “remove prior trademarks and, if necessary, grant protection for EU GIs that were previously used or have become *generic* so that [EU] GI products can gain market access.”¹⁵ The EU contends that these terms indicate well-established quality goods that are distinctive to their regions of origin.¹⁶ These food terms, the EU argues, are being misused by manufacturers not from the region of origin, including manufacturers in the United States and other countries, who profit by using the original term to identify their product.¹⁷ To provide even greater protection for GIs, in June 2005, the EU requested that the TRIPs Agreement be amended to include a provision that creates a rebuttable presumption that any term included in the multilateral registry of GIs is recognized and protected in all WTO member countries.¹⁸

The United States and other countries do not support the EU’s proposed “clawback” provision and argue that the listed forty-one food terms have become generic because European émigrés used these terms to identify the goods they produced in their new homelands.¹⁹ Therefore, as generic words, the United

(last visited Feb. 25, 2009) [hereinafter *Special Names for Special Products*] (see section titled Why Do Geographical Indications Matter?).

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 108 Stat. 4809, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement].

¹⁰ See *Special Names for Special Products*, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ Bruce A. Babcock & Roxanne Clemens, Geographical Indications and Property Rights: Protecting Value-Added Agricultural Products, MATRIC Briefing Paper 04-MBP-7 (May 2004), at 8.

¹⁴ See, e.g., Tegan Brink, *Perspectives on Geographical Indications: Prospects for the Development of the International Legal Framework*, June 2007, http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bei_07/wipo_geo_bei_07_www_81778.pdf (defining “claw back” as “a list of 41 names submitted in the agriculture negotiations that the EC would like to reserve, or claw-back, for the exclusive use of its producers”).

¹⁵ *Special Names for Special Products*, *supra* note 8 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ WTO, TRIPS Geographical Indications: Background and the Current Situation, http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm (last visited Feb. 23, 2009).

Lessons Learned from Ethiopia

States contends that the EU cannot reclaim them for GI protection. Additionally, the United States does not support the EU's push for stronger protection of GIs under the TRIPs Agreement or the implementation of a mandatory register that creates a rebuttable presumption in favor of the registered term.²⁰ The United States contends that its current intellectual property ("IP") system, which includes GIs as a subset of trademarks, provides sufficient, indeed "TRIPs-plus," protection for agricultural products.²¹ Nations that support the EU's position and favor stronger GI protection include Bulgaria, Kenya, India, Sri Lanka, Switzerland, and Thailand.²² Nations that favor the position of the United States include Argentina, Australia, Canada, Chile, Costa Rica, Guatemala, Japan, Namibia, and Taiwan.²³

Notably, the EU contends that stronger GI protection in the TRIPs agreement will benefit developing countries by enabling them to claim ownership of their native products. "GIs are key to EU and *developing* countries cultural heritage, traditional methods of production and natural resources."²⁴ This claim has not yet been tested. However, an examination of Ethiopia's decision to pursue trademark protection and not seek a GI for its native coffees provides valuable information which can inform the debate regarding the benefits and drawbacks that GI protection can provide to a developing nation.

This paper examines *Ethiopia's Trademarking and Licensing Initiative*, Ethiopia's use of modern day law and technology and what other developing nations that are struggling to comply with the TRIPs Agreement can learn from Ethiopia's innovative strategy. This paper concludes that the EU's proposed greater protection of GIs may create a hurdle for developing nations to enter the worldwide market and, quite possibly, force developing nations to rely upon archaic agricultural methods instead of developing more environmentally friendly or more efficient farming methods. It also concludes that the EU's proposed "claw back" provision is, ultimately, a mechanism to extract a premium for what is, or was, TK of different European cultures and questions the possible consequences if the EU succeeds in its efforts to reclaim food terms that have become generic. Most importantly though, this paper highlights that Ethiopia, a developing nation, is successfully using modern day law and technology to develop an IP system that meets the needs of Ethiopia, allows Ethiopia to claim its place in the worldwide marketplace as well as claim ownership of its culture, heritage and TK.

II. Ethiopia

Ethiopia is a landlocked country located in the northeast corner of Africa with a population of approximately seventy-seven million and a history that dates

²⁰ *Id.*

²¹ USPTO, Geographical Indications, Protection, http://www.uspto.gov/web/offices/dcom/olia/global/ip/gi_protection.htm (last visited Feb. 23, 2009) [hereinafter USPTO, Geographical Indications].

²² Carsten Fink & Keith Maskus, *The Debate on Geographical Indications in the WTO*, in TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES, 201, 201 (Richard Newfarmer ed., 2006).

²³ *Id.*

²⁴ *Special Names for Special Products*, *supra* note 8 (emphasis added).

Lessons Learned from Ethiopia

back over two thousand years. Unlike other African nations, Ethiopia remains relatively unaffected by colonialism because it was only occupied briefly by the Italians from 1936-1941. Nonetheless, similar to some other African nations, Ethiopia has been plagued by drought, famine, infectious diseases, internal conflict, war and an unstable economy. In 2007, Ethiopia ranked 105th among 108 developing nations for poverty.²⁵

Less than fifteen years ago, Ethiopia moved from a state-run economy to a market economy.²⁶ Agriculture is an essential element of Ethiopia's new market economy, accounting for approximately half of Ethiopia's Gross Domestic Product ("GDP"), sixty percent of its exports, and eighty percent of its total employment.²⁷ The coffee industry is a critical component of Ethiopia's agricultural industry, and thus a critical component of its overall economy. Approximately twenty-five percent of Ethiopians depend on coffee production either directly or indirectly for their livelihood.²⁸ In 2006, Ethiopian coffee exports were 350 million dollars, making Ethiopia the largest producer of coffee in Africa.²⁹

In 1989, the International Coffee Agreement³⁰ collapsed, resulting in a crisis in the coffee industry which continues today due to drought and other factors including internal conflict within nations that produce coffee.³¹ The effect has been a worldwide overproduction of coffee and historically low coffee prices.³² Ethiopia has suffered the greatest losses from the coffee crisis with a drop of forty-two percent in its coffee revenue in a single year and the insolvency of one of its larger state owned plantations.³³ Ethiopia's own problems with drought, disease and war have added to the desperation of its situation.

In 2003, the World Bank conducted a study to assess the impacts of the coffee crisis and to develop strategies to enable countries to recover from it.³⁴ Though the study focused on Central America, many of the recommendations could apply to any coffee producing country. Some of these suggestions include:

²⁵ Human Development Report 2007/2008, http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_ETH.html (last visited Feb. 23, 2009) (The Human Poverty Index (HPI-1) measures severe deprivation in health by the proportion of people who are not expected to survive age 40. Education is measured by the adult illiteracy rate. And a decent standard of living is measured by the unweighted average of people without access to an improved water source and the proportion of children under age 5 who are underweight for their age).

²⁶ Ministry of Foreign Affairs of Ethiopia, General Profile, Socio Economic Context, http://www.mfa.gov.et/Facts_About_Ethiopia/Facts.php?Page=general_Profile_5.htm (last visited Feb. 23, 2009).

²⁷ Central Intelligence Agency [CIA], World Fact Book, Ethiopia, <https://www.cia.gov/library/publications/the-world-factbook/geos/et.html> (last visited Feb. 23, 2009) [hereinafter World Fact Book].

²⁸ Mekuria et al., Conference on International Agricultural Research for Development, Berlin, Oct. 5-7, 2004, in *The Status of Coffee Production and the Potential for Organic Conversion in Ethiopia*, <http://www.tropentag.de/2004/abstracts/full/293.pdf> (last visited Feb. 25, 2009).

²⁹ World Fact Book, *supra* note 27.

³⁰ International Coffee Agreement, Sept. 16, 1982, T.I.A.S. No. 11095.

³¹ Independent Lens, Black Gold, The Economics of Coffee, <http://www.pbs.org/independentlens/blackgold/economics.html> (last visited Feb. 26, 2009).

³² Mekuria et al., *supra* note 28.

³³ *Id.*

³⁴ Varangis et al., Dealing With the Coffee Crisis in Central America: Impacts and Strategies 42-44 (World Bank Policy Research Working Paper No. 2993), available at <http://ssrn.com/abstract=636355>.

Lessons Learned from Ethiopia

- Work directly with retailers to bypass the traditional trading channels
- Reduce dependence on middlemen
- Seek brand recognition
- Capture product-oriented value markets such as “eco-certified,” “organic,” or “Bird-Friendly®.”
- Incorporate promotional strategies that include participating in the “Cup of Excellence” competition
- Use the internet for more than just traditional marketing including sharing information regarding certification, land use and Geographic Indications of Origin.

Ethiopia started to take all of these steps and several more in 2003, beginning with the formation of the Ethiopian Intellectual Property Office (“EIPO”). One of the first tasks taken by the EIPO was to ascertain and catalog Ethiopia’s intellectual property assets.³⁵ The EIPO identified Ethiopia’s single-origin heritage coffees as one of Ethiopia’s most valuable intellectual property assets as well as one that affected a large sector of its population.³⁶ As noted before, almost a quarter of the nation’s people are involved at some level in the production of Ethiopia’s coffees.³⁷

III. Ethiopia’s Heritage Coffees

Ethiopia is the birthplace of coffee. The word “coffee” is believed to be a derivation of the word *Kafa*, which, loosely translated, means “the land or plant of God.”³⁸ Coffee flavors are complex and varied, containing 700-850 substances that contribute to the flavor of coffee when it’s roasted.³⁹ For more than a hundred years Ethiopia has differentiated its coffee for export based upon the regions in which they are grown and the distinctive flavors of these regional coffees. The flavors of Ethiopia’s coffees are not just a result of the soil and climate of Ethiopia, but also of the cultivation methods developed and used by Ethiopian farmers for many generations. The coffees of Ethiopia are known throughout the world for their excellence. “Ethiopia. . . produces the most varied range of coffee taste experience of any country. . . in the world.”⁴⁰

The Specialty Coffee Association of America (“SCAA”) defines specialty coffees as those that are “made from exceptional beans grown only in ideal coffee-producing climates. They tend to feature distinctive flavors, which are shaped by

³⁵ Ethiopian Coffee Network, About the Trademark and Licensing Initiative, Who is the Ethiopian Intellectual Property Office?, <http://www.ethiopiancoffeenetwork.com/about4.shtml> (last visited Feb. 22, 2009).

³⁶ Ethiopian Coffee Network, About the Trademark and Licensing Initiative, Specialty Market Growth, <http://www.ethiopiancoffeenetwork.com/about2.shtml> (last visited Feb. 22, 2009).

³⁷ T. Mekuria et al., *supra* note 28, at 2.

³⁸ *Id.* at 1.

³⁹ *Id.* at 9.

⁴⁰ KENNETH DAVIDS, HOME COFFEE ROASTING, ROMANCE AND REVIVAL 92 (St. Martin’s Griffin 2003).

Lessons Learned from Ethiopia

the unique characteristics of the soil that produces them.”⁴¹ Specialty coffees command a premium in the retail market—up to three times that of the average roasted coffee.⁴² For example, 100% Kona® and Jamaica Blue Mountain® coffees are SCAA recognized specialty coffees and command some of the highest prices in the coffee retail market. From August to December 2006, 100% Kona® and Jamaica Blue Mountain® roasted coffees sold for \$29.37 and \$43.44 per pound respectively with a return to the producers of up to forty-five percent of their retail prices.⁴³ In contrast, during the same time period, the average retail roasted coffee sold for \$3.17 per pound while the average price for roasted Yirgacheffe and Harar was \$11.45 and \$11.28 per pound⁴⁴ with Ethiopian farmers recouping approximately six percent of the retail price.⁴⁵

The discrepancy between both the retail prices and the amount paid to the producers of specialty coffees compared to the prices of Ethiopian coffees and the amount paid to Ethiopian farmers is because the coffees are sold in two different markets. Most of Ethiopia’s coffees are sold as a commodity and are priced according to the London Exchange. Coffees sold on the commodity market pass through several middlemen before they reach the roaster at the end of the distribution channel. Because they are sold as commodities, the farmers do not have the ability to negotiate the price they receive for their coffees. In contrast, specialty market coffee producers, such as the producers of 100% Kona® and Jamaican Blue Mountain® are able to establish relationships directly with the end distributor or roaster and, therefore, are able to negotiate a higher price for their coffees, resulting in a much higher return for the farmers.⁴⁶ Both 100% Kona® and Jamaica Blue Mountain® are registered certification marks with the USPTO.⁴⁷

Since the 1990s, the sale of specialty coffees has become one of the fastest growing food service markets in the world, netting an estimated \$8.4 billion in the United States in 2002.⁴⁸ In 2004, due to the rapid growth of the specialty coffee industry, the SCAA predicted that a shortage of specialty coffees would

⁴¹ Specialty Coffee Association of America, What is Specialty Coffee?, <http://members.scaa.org/lounge/CoffeeLoungeDocs/WhatIsSpecialty.aspx> (last visited Mar. 15, 2009).

⁴² Ramona Teuber, *Geographical Indications of Origin as a Tool of Product Differentiation—The Case of Coffee* 640 (2007), <http://ageconsearch.umn.edu/bitstream/7866/1/cp070042.pdf> (Paper presented at the 105th EAAE Seminar, International Marketing and International Trade of Quality Food Products, in Bologna, Italy, Mar. 8-10, 2007).

⁴³ *Id.* at 649.

⁴⁴ *Id.*

⁴⁵ Light Years IP, Ethiopia: Coffee Trademarking and Licensing Project, [http://www.lightyearsip.net/ethiopiacoffee.shtml](http://www.lightyearsip.net/ethiopiacooffee.shtml) (last visited Feb. 22, 2009).

⁴⁶ Lewin et al., *Coffee Markets: New Paradigms in Global Supply and Demand* 98 (World Bank Agric. & Rural Dev. Discussion Paper No. 3), available at http://www.csa-be.org/IMG/pdf_CoffeeMarkets-ArdDp3.pdf.

⁴⁷ “100% Kona Coffee” is registered as Certification Mark No. 2322867 and is owned by the Hawaii Department of Agriculture. “Jamaica Blue Mountain” is registered as Certification Mark No. 1414598 and is owned by Coffee Marks Limited.

⁴⁸ Lewin et al., *supra* note 46, at 100.

Lessons Learned from Ethiopia

occur in the near future and stated that the market for specialty coffees is “far from saturated.”⁴⁹

Because of the distinct flavors of Ethiopia’s coffees as well as their already established reputation as some of the finest coffees in the world, Ethiopia is well-positioned to move its coffees from the commodity market into the specialty coffee market. However, entering the specialty market without a partner in the targeted country or without costly branding and promotional strategies is difficult.⁵⁰ Ethiopia has chosen to confront these difficulties and distinguish its coffees in the marketplace via a trademarking and licensing initiative rather than by seeking GI protection for them.

In light of the EU’s push for stronger protection of GIs, its assertions that GIs are the proper way to protect agricultural goods from a specific region, and its assertion that GI protection will help developing nations, Ethiopia’s decision to seek trademarks and not GIs to differentiate its coffees in the world marketplace warrants examination.

IV. Trademarks, Geographical Indications and Traditional Knowledge

To understand Ethiopia’s strategic decision to trademark several of its heritage coffees and not seek a GI for them requires a basic understanding of several IP concepts including trademarks, GIs and TK; how they are related to each other; and to what extent they are protected under the TRIPs Agreement. Notably, there is no mention of TK in the TRIPs Agreement.⁵¹ Thus, developing nations seeking IP protection for their TK in the international market must find a category of IP that is provided protection in the TRIPs Agreement.

This brief, but important, overview of trademarks, GIs and TK provides an introduction to a few of the intellectual property concepts that governments of developing nations need to understand to be able to assert legal rights in their intellectual property. And, if the nation is a member of the WTO, or is acceding to the WTO, these concepts are ones that the nation’s IP legal framework needs to adequately address and protect to be in compliance with the TRIPs Agreement.⁵²

A. Trademarks

A trademark, as recognized by both the EU and the United States, identifies the source of a product or service and serves to distinguish the product or service from other similar goods or products or services.⁵³ A trademark can be a word such as the recently registered Harar® which identifies coffee grown in Ethiopia of a certain variety and quality. In the United States, a registered trademark can

⁴⁹ *Id.*

⁵⁰ *Id.* at 97.

⁵¹ BERNARD O’CONNOR, THE LAW OF GEOGRAPHICAL INDICATIONS 308 (Cameron May 2004).

⁵² Fink & Maskus, *supra* note 22, at 205.

⁵³ O’CONNOR, *supra* note 51, at 107.

Lessons Learned from Ethiopia

also be a logo, a device, a slogan,⁵⁴ and has been interpreted as including a package design, a personal name a sound, a scent, a color, a shape, a building or a numeral. Some examples of well-known American trademarks include Nike's® famous "swoosh" mark logo that adorns its products; a package design such as the shape of the Coca-Cola® bottle; and the sound of the Yahoo!® yodel. Each member country of the WTO has its own intellectual property system that defines the parameters of a protected trademark. Not all member countries' systems extend trademark protection to sounds and scents as the United States does. The previous three examples of well-known trademarks are owned by companies, but trademarks can also be owned by a government entity, as is Harar®. For example, BE ALL THAT YOU CAN BE® is a registered trademark of the United States Army.⁵⁵

A trademark can last forever if properly registered and monitored over time. The registration of a U.S. trademark can cost as little as \$275 US.⁵⁶ Trademarks, once registered, become the private property of the registering party and can only be used by that party on the goods or services identified in its application.⁵⁷ Because trademarks are private property, they can be sold or licensed to another entity.

Trademarks serve to lead the consumer to the product they seek and help avoid consumer confusion. A trademark itself does not indicate the standards or quality of the *processes* used to manufacture the good. Rather, a trademark attaches to a good or service regardless of either the manufacturing process or the location of the manufacturing process. The value of a trademark is realized by the *quality* of the goods or services itself. Because trademarks serve to distinguish one good from another and are indicators of consumer-perceived quality, they can be extremely valuable rights. However, the value of a trademark diminishes when the quality of the product relative to similar goods or services diminishes. A trademark can become "diluted" by the unauthorized use of the trademark by third parties that make inferior quality goods causing consumers to believe the authentic trademarked product itself has deteriorated. Trademarks owners in the United States must protect their trademark by policing for its unauthorized use and actively enforcing their right to exclude others from using their trademark.⁵⁸

The words "brand" and "trademark" are used interchangeably in the marketing world. However, "trademark" is the legal term that designates the mark or word associated with a product; the word "brand" generally refers to the "successes of a trademark in terms of contribution to market share, sales, profit margins, loy-

⁵⁴ Lanham Act, 15 U.S.C.1127 (2007) ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof . . .").

⁵⁵ U.S. Trademark Application Serial No. 78,888,832 (abandoned Mar. 9, 2009).

⁵⁶ International Trademark Association [INTA], *Top Ten Reasons Why You Should Care About Trademarks* 28, <http://www.docstoc.com/docs/3283313/Top-Ten-Reasons-Why-You-Should-Care-About-Trademarks.pdf> (last visited Feb. 22, 2009).

⁵⁷ USPTO, *Basic Facts About Trademarks*, http://www.uspto.gov/web/offices/tac/doc/basic/trade_defin.htm (last visited Mar. 15, 2009) [hereinafter *Basic Facts about Trademarks*].

⁵⁸ *Basic Facts About Trademarks*, *supra* note 57.

Lessons Learned from Ethiopia

alty and market awareness.”⁵⁹ Thus, the “brand value” reflects the market value of a trademark and can be one of the most valuable assets a company owns. The brand values of a few, well-known companies are shown in Table 1.

<i>Company</i>	<i>Sector</i>	<i>Brand Value (U.S. \$bn)</i>
Coca Cola	Beverages	65.3
McDonald’s	Restaurants	29.3
Marlboro	Tobacco	21.3
Google	Internet Services	17.8
Budweiser	Alcohol	11.6
Starbucks	Restaurants	3.6

Source: Interbrand & Business Week (2007)⁶⁰

Given the possible market value of a trademark—which is only one intangible asset recognized and protected by IP law—the importance of developing nations cataloging, registering and capitalizing on their intellectual property rights cannot be over-emphasized.

Under Article 15 of the TRIPS Agreement “any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings shall be capable of constituting a trademark.”⁶¹ Within the EU, an entity can register a trademark with all member countries in the EU at once via the European Community’s uniform system of registration.⁶²

B. Geographical Indications (GIs)

A GI is a word or symbol that indicates the region of origin of a specific good or service and signifies some standard of quality associated with the good or service. GIs can include certification marks, designated geographical indications, protected designations of origin, protected geographical indications and appellations of origin.⁶³ Each member country of the WTO maintains its own IP system which defines the breadth and scope of protection afforded to GIs within its own nation.⁶⁴ GI protection within individual nations is granted to a wide variety of

⁵⁹ *The Role of Trademarks in Marketing*, Feb. 2002 WIPO MAG. 10, available at http://www.wipo.int/sme/en/documents/wipo_magazine/02_2002.pdf.

⁶⁰ INTERBRAND & BUSINESSWEEK, BEST GLOBAL BRANDS 2007 13-16 (2007), http://www.ourfishbowl.com/images/surveys/Interbrand_BGB_2007.pdf.

⁶¹ TRIPS Agreement, *supra* note 9, art. 15.

⁶² O’CONNOR, *supra* note 51, at 109.

⁶³ TRIPS Agreement, *supra* note 9, art. 22.1.

⁶⁴ *Id.* art. 22.2.

Lessons Learned from Ethiopia

products including agricultural goods and non-foodstuff items including crystal,⁶⁵ watches and many others. However, EU's GI regulations govern only products for human consumption and foodstuffs.⁶⁶ This paper discusses GIs that are, or can be, afforded legal protection under the TRIPs Agreement.

1. *Geographical Indications in the United States*

In the United States, GIs are a subset of trademarks.⁶⁷ Like trademarks, GIs identify the source of the good or service, indicate the quality of the good or service and are a valuable, intangible asset of the owner of the GI. The United States has recognized GIs since 1946.⁶⁸ The U.S. system provides GI protection via a certification mark that is registered with the USPTO. A certification mark indicates that the goods or services bearing the mark meet standards of quality as determined by a third party, such as a trade group, and not the manufacturer itself.⁶⁹ Not all certification marks are GIs since an association with a geographical locale is not necessary to qualify for a certification mark. Rather, the mark indicates that the manufacturer adhered to third party standards when producing the product.

Certification marks tend to be owned by a collective group such as a trade group or a government entity—including state agricultural agencies—who establish the standards and criteria that a product must meet to bear the organization's certification mark. For example, IDAHO PREFERRED is a certification mark owned by the Idaho State Department of Agriculture⁷⁰ that, "as used by persons authorized by the certifier, certifies that the food and agricultural products, excluding potatoes and potato products, provided are grown, raised or processed in the State of Idaho."⁷¹ IDAHO POTATOES GROWN IN IDAHO is a certification mark owned by the State of Idaho Potato Commission that "certifies the regional origin of potatoes grown in the State of Idaho and certifies that those potatoes conform to grade, size, weight, color, shape, cleanliness, variety, internal defect, external defect, maturity and residue level standards promulgated by the certifier."⁷² Certification marks can be the registered words themselves or an

⁶⁵ "For example, 'Bohemia' is recognized as a geographical indication in many countries for specific products made in the Czech Republic, in particular crystal ware." WTO, About Geographical Indications, http://www.wipo.int/geo_indications/en/about.html (last visited Mar. 9, 2009).

⁶⁶ European Commission, Directorate-General for Agriculture, *Food Quality Policy in the European, Protection of Geographical Indications, Designations of Origin and Certificates of Special Character for Agricultural Foodstuffs* 8 (Working Document of the Comm'n Services, Aug. 2004), available at http://ec.europa.eu/agriculture/publi/gi/broch_en.pdf.

⁶⁷ USPTO, GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES 1 (2005), http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf.

⁶⁸ USPTO, Geographical Indications, *supra* note 21.

⁶⁹ *Id.*

⁷⁰ U.S. Trademark No. 3,107,838 (filed June 29, 2004), available at <http://tess2.uspto.gov/bin/showfield?f=doc&state=4007:5b9367.3.1>.

⁷¹ *Id.* (see the Goods and Services description).

⁷² U.S. Trademark No. 2,914,309 (filed Dec.28, 2004), available at <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=76542380>.

Lessons Learned from Ethiopia

associated ‘mark’ or graphic to indicate the good. The United States offers the same level of GI protection for foreign products that qualify for a certification mark and are registered with the USPTO.⁷³ For example, ROQUEFORT is a USPTO registered certification mark owned by the Community of Roquefort, The Municipality of France that is used “to indicate the that the [product] has been manufactured from sheep’s milk only, and has been cured in the natural caves of the community of Roquefort, France.”⁷⁴

Though certification marks are a subset of trademarks, there are several notable differences between a trademark and a U.S. certification mark. First, a U.S. certification mark is not used by a manufacturer itself, but is used by a third party to indicate some attribute or quality of the goods.⁷⁵ Second, and importantly, unlike trademarks, a U.S. certification mark has a limited right to exclude.⁷⁶ Trademark owners are *required* to exclude every other entity from using their trademark to prevent it from becoming diluted or generic. In contrast, a U.S. certification mark owner cannot exclude manufacturers that meet the standards and criteria as defined by the registered certification mark.⁷⁷ To benefit from the goodwill or value associated with a U.S. certification mark, a producer must meet the requirements established by the U.S. certification mark owner. The U.S. system of certification marks allows opportunities for new producers to enter the “club” associated with a particular certification mark. Such a certification mark can be a very valuable IPR. A study found that consumers would be willing to pay sixty percent more for a wine labeled “Napa Valley” versus a wine labeled “California.”⁷⁸ Though this is only one study, it nonetheless demonstrates the possible value of a certification mark.

2. *Geographical Indications in the EU and its member countries*

GI protection is a core element of the EU’s trade and agricultural policy: “GIs constitute the main pillar of the EU’s quality policy on agricultural products.”⁷⁹ Because of the variations in the legally recognized definitions of the term “appellation of origin” and other GIs among EU member countries, in 1992, the EU enacted Regulation 2081/92.⁸⁰ This regulation established a single system for the registry of GIs for some products intended for human consumption and certain foodstuffs, but not all.⁸¹ The EU’s system provides protection for two categories

⁷³ GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES, *supra* note 67, at 1.

⁷⁴ U.S. Trademark No. 0571798 (filed Feb.13, 1952), *available at* <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=71624872>.

⁷⁵ GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES, *supra* note 67, at 3.

⁷⁶ *Id.*

⁷⁷ USPTO, Geographical Indications, *supra* note 21.

⁷⁸ Fink & Maskus, *supra* note 22, at 203.

⁷⁹ *Special Names for Special Products*, *supra* note 8, at 2.

⁸⁰ Council Regulation 2081/92, 1992 O.J. (L 208/1).

⁸¹ *Food Quality Policy in the European, Protection of Geographical Indications, Designations of Origin and Certificates of Special Character for Agricultural Foodstuffs*, *supra* note 66, at 4.

Lessons Learned from Ethiopia

of GIs: Protected Designation of Origin (“PDO”) and Protected Geographical Indications (“PGI”).⁸²

A PDO refers to goods that originate within a region, place or country, and whose characteristics and quality are specifically linked to the geographic environment of that region.⁸³ To qualify for a PDO, the production, processing and preparation of the product must take place in a defined geographical area.⁸⁴ Thus, a PDO product is one that is tied both to the land via production and to the people who process and prepare the good. Notably, the EU places a high value on the human skill associated with the preparation of a good. For example, in 2003 the Court of Justice of the European Communities ruled that PROSCIUTTO DI PARMA (English equivalent is Parma Ham) is a PDO and thus all aspects of its production, including the slicing of the ham, must occur in the Province of Parma, Italy and under the supervision of the Consorzio del Prosciutto di Parma.⁸⁵

To qualify for PGI protection, the geographic link to a particular region needs to occur at only “one of the three stages of production, processing, or preparation” of the product.⁸⁶ Because only one of the three stages needs to occur within the designated region, PGIs are not as closely tied to the land as PDOs. Beef from Scotland provides a sound example of the important differences between a PDO and a PGI. The term SCOTCH BEEF is registered as a PGI with the EU.⁸⁷ Only cattle that have been “born and raised on assured Scottish farms and then slaughtered at approved Scottish slaughterhouses in Scotland” can be labeled as SCOTCH BEEF.⁸⁸ The flavor and quality of SCOTCH BEEF, therefore, is attributable to “the specific quality, reputation or other characteristic [of Scotland].”⁸⁹ However, the quality and flavor of ORKNEY BEEF has been determined to be “*essentially* due to the area [Orkney, Scotland]” and therefore qualifies for PDO protection.⁹⁰

Several European nations including France, Portugal, Spain, Italy and Switzerland provide protection for other GIs, including appellations of origin.⁹¹ The recognition of this GI has a long history in several of these nations, particularly

⁸² *Id.* at 6-7.

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ O’CONNOR, *supra* note 51, at 134.

⁸⁶ *Food Quality Policy in the European, Protection of Geographical Indications, Designations of Origin and Certificates of Special Character for Agricultural Foodstuffs*, *supra* note 66, at 14.

⁸⁷ Application for Registration, National File No, PGI/00311, available at www.land.gov.sk/politikakvality/download.php?250 (last visited Mar. 15, 2006).

⁸⁸ Quality Meats of Scotland, Ensuring Quality, <http://www.chefsguidetoscotchbeef.org/plate/ensuring-quality.html> (last visited Feb. 22, 2009).

⁸⁹ *Id.* (see the chart by Department for Environment, Food and Rural Affairs (DEFRA) for the UK explaining the PGI distinction).

⁹⁰ *Id.* (emphasis added).

⁹¹ Appellation systems including: Appellation d’origine contrôlée (AOC) in France; Denominazione di origine controllata (DOC) used in Italy; Denominação de Orígem Controlada (DOC) used in Portugal, and Denominación de Orígen (DO) system used in Spain.

Lessons Learned from Ethiopia

in France. Appellations of origin refer to the “geographical name of a country, region or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”⁹² Because appellations of origin relate to the quality and characteristics of a product, they are protected as GIs under international treaties including the TRIPs Agreement.⁹³ Some examples of well-known European appellations of origin include SWISS-MADE to identify watches, WATERFORD to identify crystal and CHAMPAGNE to identify a sweet, sparkling wine from France. Many agricultural products that are protected as appellations of origin in their native country are also registered as a PDO or a PGI with the EU. For example, PROSCIUTTO DI PARMA is protected as an appellation of origin under Italian law⁹⁴ and is also registered with the EU as a PDO.⁹⁵ The same is true for ROQUEFORT which was first registered as an appellation of origin in 1925 in France⁹⁶ and is now an EU recognized PDO.

3. *The TRIPs Agreement and GIs*

Article 22.1 of the TRIPs Agreement defines a GI as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”⁹⁷ This broad definition incorporates many of the different permutations of GIs that are legally recognized by WTO member countries and could include all of the previously discussed forms of GIs. The TRIPs Agreement requires that all WTO members provide a minimum level of protection for IPRs including the legal means for a member country to assert and enforce its legal rights of its IPRs.⁹⁸

For products other than wines and spirits, a GI may be used on a product label provided it does not cause consumer confusion concerning the origin of the product. For example, the mark ROQUEFORT indicates that the cheese was made from sheep’s milk and cured in Roquefort, France, in accordance with their traditional and established standards. However, under the TRIPs Agreement, manufacturers in other parts of the world may produce cheeses that are similar to ROQUEFORT if they correctly label them to ensure that there is no consumer confusion over the origin of the cheeses.⁹⁹ For example, “Roquefort-style cheese

⁹² O’CONNOR, *supra* note 51, at 25; *see also* TRIPs Agreement, *supra* note 9, art. 22.

⁹³ O’CONNOR, *supra* note 51, at 24.

⁹⁴ PAOLO GARZOTTI & ELISABETH CAVARERO, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE: TBR PROCEEDINGS CONCERNING CANADIAN PRACTICES AFFECTING COMMUNITY EXPORTS OF PROSCIUTTO DI PARMA 10 (1999), <http://trade.ec.europa.eu/doclib/html/112191.htm>.

⁹⁵ Commission Regulation 102/2008, 2008 O.J. (L 31/29) (EC).

⁹⁶ O’CONNOR, *supra* note 51, at 167.

⁹⁷ TRIPs Agreement, *supra* note 9, art. 22.1.

⁹⁸ TRIPs Agreement, *supra* note 9, art. 43.

⁹⁹ *See generally*, TRIPs Agreement, *supra* note 9, art. 22.

Lessons Learned from Ethiopia

made in Australia” or “Cheese made using Roquefort-like methods” are acceptable labels.

The TRIPs Agreement provides *additional* protection for wines and spirits. Under Article 23.1 of the TRIPs Agreement, only producers of CHAMPAGNE from the Champagne region of France can use the term CHAMPAGNE to identify their products.¹⁰⁰ “Champagne-like” or “in the style of Champagne” or “produced by the Champagne method” are all prohibited product designations under the TRIPs Agreement. The EU would like the additional protection afforded to wines and spirits to be granted to all registered GIs.¹⁰¹ Thus, product designations such as “Roquefort-like cheese made in Australia” would no longer be permitted if the EU succeeds in its efforts.

The strong legal protection afforded wine and spirit GIs under the TRIPs Agreement is essentially the same legal protection that a trademark provides. That is, just as only the Ethiopian government has the legal right to use the word Harar® on its coffees, only producers who meet the criteria to call their beverage CHAMPAGNE can label it as such. Because the word Harar® is a registered trademark, “Harar-like” or “in the style of Harar” are unacceptable uses of the word.

This brief introduction to two intellectual property concepts, how they differ in the United States, European Nations and the EU exemplifies the complexities of international IP law. For many developing nations, the concept of “intangible assets” is new. Therefore, understanding, developing and implementing an IP system that is in compliance with the TRIPs Agreement could be challenging, if not daunting. Though the concepts of trademark and geographical indications may be relatively new to a developing nation, the concept of TK is not.

C. Traditional Knowledge (TK)

One of the biggest challenges facing international intellectual property law is to identify a means to adequately protect TK, specifically, the TK of developing countries. As stated previously, there is no mention of TK in the TRIPs Agreement.¹⁰² Thus, countries seeking IP protection for their TK in the international market must fit it into a category of IP that is currently protected under the TRIPs Agreement. Because GIs are “not intended to reward innovation, but rather to reward members of an established group or community adhering to traditional practices belonging to the culture of that community or group,”¹⁰³ it is understandable that some developing nations would embrace the GI system as a means to protect their TK. The World Intellectual Property Organization (“WIPO”) defines TK as:

¹⁰⁰ TRIPs Agreement, *supra* note 9, art. 23.1.

¹⁰¹ See, e.g., Communication from the European Communities–Geographical Indications, TN/IP/W/11, (June 14, 2005) (“[A] proposal for amending Section 3 of the TRIPs Agreement with a view to extending the regime of protection today available for geographical indications on wines and spirits to geographical indications on all products.”).

¹⁰² O’CONNOR, *supra* note 51, at 380.

¹⁰³ *Id.* at 374.

Lessons Learned from Ethiopia

tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. . . . Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge. . . .¹⁰⁴

This broad definition highlights one important aspect of TK that illustrates its intersection with European GIs: TK, like European GIs, is tradition-based. However, the WIPO definition does not provide any clarity regarding the community that can claim IP rights associated with a tradition-based practice. A more succinct definition of TK is: “the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continue to use.”¹⁰⁵

This definition provides more guidance in defining the boundaries of TK. It also more clearly illustrates the overlap of European GIs and TK. A closer inspection of the GI for CHAMPAGNE exemplifies the intersection of European GIs and TK. As early as the medieval times, the winemakers in the Champagne region of France became known for the sparkling, sweet wine they produced.¹⁰⁶ Over time, the *people of that region continued to use the information* of their ancestors to *adapt to the local culture and environment*.¹⁰⁷ The CHAMPAGNE that is produced today is similar to the CHAMPAGNE that was produced in the late 1800s.¹⁰⁸ Thus, CHAMPAGNE is the TK of people from the Champagne region of France. The continued reputation for excellence of the flavor and quality of this sparkling, sweet wine firmly established its position in the marketplace over time. The producers of CHAMPAGNE today, who use methods that were developed by their ancestors, benefit from the TK of their community. Thus, EU GIs are a means to protect the TK of different European cultures as well as reward the people who live within the region and continue to use the TK.

The appellation of origin SWISS-MADE for watches provides a sound illustration that EU GIs are protection of the TK of past generations. To qualify to be labeled a SWISS-MADE watch, both the assembly on the motor and on the watch itself needs to be done in Switzerland, but only fifty percent of the compo-

¹⁰⁴ See WIPO, Glossary of Definitions, <http://www.wipo.int/tk/en/glossary/> (last visited Mar. 15, 2009).

¹⁰⁵ STEPHEN HANSEN & JUSTIN VANFLEET, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON THE ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY 2 (Am. Ass’n Advancement Sci. 2003).

¹⁰⁶ Wine and Wines, Everything About Wine, <http://www.wineandwines.com/perso-22918.htm> (last visited May 1, 2009).

¹⁰⁷ The history of Champagne illustrated through the language of WIPO’s definition of TK.

¹⁰⁸ History of Wine and Champagne, <http://www.openthatbottlenight.com/open-that-bottle-night-history.shtml> (last visited May 1, 2009) (“The designation Brut Champagne, the modern Champagne, was created for the British in 1876.”).

Lessons Learned from Ethiopia

nents need to be manufactured in Switzerland.¹⁰⁹ Thus, much of the production of the watches can be performed outside of Switzerland and still qualify to be labeled as SWISS-MADE. Unlike an agricultural crop, the components of a watch are in no way connected to the soil or climate of Switzerland. If “geography is the heart”¹¹⁰ of GIs, it is difficult to discern how the appellation of origin SWISS-MADE qualifies for GI protection. The GI SWISS-MADE for watches can readily be seen to be a reward to the native people of Switzerland for their technological contributions to the development of fine watches.

Understandably, many producers would like GI protection for their products. Numerous studies show that consumers are willing to pay a premium for a good that is certified as originating from a particular region.¹¹¹ The amount of the premium that a consumer is willing to pay is dependent upon many factors including the good itself and the market for the good.¹¹² A 1999 survey conducted by the EU showed “that forty percent of consumers were willing to pay a ten percent premium for origin-guaranteed products.”¹¹³ The study did not focus on a specific product, but rather, generally, what a consumer would be willing to pay for a good if he or she was assured of the origin of the good. Thus, GIs are internationally recognized as valuable IPRs.

The premium that consumers are willing to pay for a GI designated product, just like the premium consumers are willing to pay for goods identified by a trademark, is due to the established reputation of the product. In the EU, GIs are a reward for tradition-based practices that produce high quality products such as CHAMPAGNE, or, as in Switzerland’s case, a culture’s technological contribution to a particular field. Thus, GIs would appear to be the likely choice for a developing nation to use to protect its TK.

V. Ethiopia’s Choice to Trademark its Heritage Coffees

Ethiopia’s heritage coffees are excellent examples of agricultural crops that appear to meet the criteria to be a protected GI under both the U.S. system of certification marks and the EU’s system of PGIs and PDOs. The flavors of the coffee are “essentially attributable to the area” where the coffee is grown. Certainly, the “specific quality, reputation or other characteristic is attributable to the area.” Also, Ethiopia’s coffee farming is TK of Ethiopians. Ethiopians have

¹⁰⁹ Federation of the Swiss Watch Industry, A General Overview, <http://www.fhs.ch/en/swissm.php> (last visited Mar. 15, 2009).

¹¹⁰ Dwijen Rangnekar, Int’l Centre for Trade & Sustainable Dev. [ICTSD], The Socio-Economics of Geographical Indications 2 (2004), available at www.iprsonline.org/unctadictsd/docs/CS_Rangnekar2.pdf.

¹¹¹ Why do Geographical Indications matter to us?, EU News, July 30, 2003, <http://trade.ec.europa.eu/doclib/html/113900.htm> (“French GI cheeses are sold at a premium of 2 euro. Italian “Toscano” oil is sold at a premium of 20% since it has been registered as a GI in 1998.”).

¹¹² RANGNEKAR, *supra* note 110, at 33. The difference in premiums paid for origin-based goods is dependent upon numerous factors including the product and the market. *Id.* The example provided serves to illustrate that consumers are willing to pay some premium for GI designated goods. It is not presented as an accurate representation of what consumers would pay for every GI designated good.

¹¹³ Fink & Maskus, *supra* note 22, at 203.

Lessons Learned from Ethiopia

been growing and exporting their coffees for over a hundred years. The flavors of the coffees reflect not just the soils and climate of Ethiopia, but also the agricultural methods used by the people. In some instances, families have been farming the same plot of land for generations.¹¹⁴ Because Ethiopian coffee farmers are an identifiable group of *people in a given community* who have used and *continue to use information that is based on experience and adaptation to a local culture and environment*, coffee farming in Ethiopia is TK that is indigenous to the people who live there.

Additionally, Ethiopia's coffees are already well-established in the marketplace as some of the finest coffees in the world.¹¹⁵ Thus, it is a developing country that is uniquely positioned to fully reap the benefits of GI protection for their distinctive heritage crops. However, developing nations have an additional barrier to overcome in order to receive the benefits of GI certification: they need the resources to develop and implement a GI certification program. Notably, Article 24.9 of the TRIPS Agreement states that "[t]here shall be no obligation under this Agreement to protect geographical indications which are not . . . protected in their country of origin."¹¹⁶ Thus, a country claiming protection for a GI in WTO member countries must first provide protection for the GI in its country of origin—only then is GI protection reciprocally available.

At this time, the development and implementation of an internal GI system for Ethiopia's heritage coffees would be extremely difficult, if not impossible, given Ethiopia's limited resources. "[N]inety-five percent of the coffee is produced by two million subsistence-level farmers."¹¹⁷ Therefore, identifying all of the coffee farmers, creating internal certification standards, and then implementing and monitoring the standards would be an extremely resource intensive endeavor.

Seeking a trademark instead of a GI for a regional crop is an innovative strategy and perhaps the only viable one if Ethiopia wants to compete in the international marketplace today. Instead of developing a GI system for its heritage crops, Ethiopia chose to focus its resources on developing its crops, its products' reputations, and building partnerships with coffee distributors. Trademark protection can protect Ethiopia's IPRs for its coffees today and, if necessary, Ethiopia can develop a sophisticated GI system at some point in the future that is tailored to meet its own needs.

Both the United States and the EU GI systems developed from their respective IP needs that arose and evolved over time. Their systems reflect the culture, form of government and economic policies of their nations. Ethiopia's IP sys-

¹¹⁴ BLACK GOLD: WAKE UP AND SMELL THE COFFEE (Speak It Films, Fulcrum Productions 2004).

¹¹⁵ *Safeguarding biodiversity in Ethiopia's coffee forests: Opportunities and challenges related to intellectual property rights*, ICTSD, MAY 2008, <http://ictsd.net/i/news/bioresreview/12089/> ("Ethiopia is considered the birthplace of coffee. Coffee arabica, the aromatic and mild species of coffee used to produce the highest quality—and priciest—blends originated in the highland rainforests of south-western Ethiopia.").

¹¹⁶ TRIPS Agreement, *supra* note 9, art. 24.9.

¹¹⁷ Stephan Faris, *Starbucks vs. Ethiopia*, FORTUNE, Feb. 26, 2007, available at http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401343/index.htm (quote of Ron Layton, Founder and Chief Executive, Light Years IP).

Lessons Learned from Ethiopia

tem, as well as the IP system of other developing nations, needs to be developed to fit its own unique needs.

Ethiopia may also have learned a valuable lesson from Indonesia regarding the importance of claiming IPRs in one's indigenous crops without seeking GI certification. As of November 2005, no products in Indonesia were protected by GIs because the Indonesian government was still completing its rules to implement an internal GI registration system as required by the TRIPs Agreement. Toraja is a region of Indonesia where the Toraja, a distinct ethnic culture, reside and grow coffee. Its coffee was first exported to Japan in 1934.¹¹⁸ In 1977, a Japanese company registered the word Toraja in association with the Toraja coffee it distributed.¹¹⁹ Now the word Toraja does not belong to the people of Toraja and it is the Japanese distribution company that benefits from the goodwill generated by the coffee of Toraja, not the people of Toraja themselves.¹²⁰ Although Indonesia began its implementation of an internal GI registration system in 2002, the first Indonesian GI was not registered until December 5, 2008 for Kintamani Bali arabica coffee.¹²¹

VI. Ethiopia's Trademarking and Licensing Initiative

In 2004, the EIPO launched its Trademarking and Licensing Initiative ("Initiative") to gain worldwide recognition of the value of Ethiopia's coffees, to create greater demand for its coffees and to recoup more of the retail value of the coffees for its farmers. The Initiative received preliminary funding from the United Kingdom's Department for International Development and continues to receive the assistance of a non-profit IP organization and the *pro bono* legal services of a top Washington, D.C. based law firm.¹²² The Initiative has already shown to be successful. Since 2007, more than sixty companies have signed licensing agreements with Ethiopia.¹²³

The Initiative is being implemented in phases. During the first phase, Ethiopia will seek to obtain trademarks worldwide for twelve of its heritage coffees and to obtain licensing agreements directly with retailers to sell these coffees. Harar®, Yirgacheffe® and Sidamo® are the first three coffees Ethiopia will trademark.¹²⁴ Ethiopia's move to trademark its coffees in March 2005 took some enterprises—

¹¹⁸ Surip Mawardi, *Geographical Indication Application in Indonesia: Opportunities and Challenges* (2005), http://www.ecaproject.org/fileadmin/ecapII/pdf/en/activities/national/indonesia/gi_dec05_2/SuriMawardi_GI_PROMOTING_.pdf.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ WIPO, *Worldwide Symposium on Geographical Indications: Establishment of Geographical Indication Protection System in Indonesia, Case in Coffee*, ¶¶ 3-4, WIPO/GEO/SOF/09/3 (June 11, 2009).

¹²² The EIPO receives consulting services from LightYears IP, a non-profit organization "dedicated to alleviating poverty by assisting developing country producers gain ownership of their Intellectual Property" and legal services from the Washington, D.C. office of Arnold & Porter, LLP. Light Years IP, <http://www.lightyearsip.net/aboutus.shtml> (last visited Feb. 14, 2009).

¹²³ Ethiopian Coffee Network Homepage, <http://www.ethiopiancoffeenetwork.com/> (last visited Mar. 15, 2009).

¹²⁴ Faris, *supra* note 117.

Lessons Learned from Ethiopia

including Starbucks, the NCA and the SCAA—by surprise.¹²⁵ In 2004, Starbucks applied for trademark registration of, “Shirkina Sun-Dried Sidamo.”¹²⁶ This coffee blend was produced as part of Starbucks’ Black Apron Exclusives¹²⁷ line of limited edition coffees. The coffee was priced at \$26 per pound and released for purchase in October 2005.¹²⁸

Ethiopia requested that Starbucks withdraw its trademark application to allow its own trademark application to move forward.¹²⁹ Starbucks’ initial response to Ethiopia was that Starbucks believed a certification mark or a GI was a more appropriate designation for Ethiopia’s heritage coffees because a GI would establish standards and guarantee the quality of the coffees.¹³⁰ Ethiopia responded that the form of intellectual property it would seek for its heritage coffees was Ethiopia’s decision to make, not Starbucks.¹³¹ Starbucks withdrew its application for “Shirkina Sun-Dried Sidamo” stating it was a limited edition coffee, but the dispute did not end there.

Two weeks prior to Starbucks’ withdrawal of its application, the NCA filed a letter of opposition with the USPTO claiming that the word “Sidamo” was a generic word for coffee from a particular region in Ethiopia and thus not entitled to trademark registration. The NCA filed over six hundred pieces of evidence to support its claim.¹³² Sidamo was initially denied trademark registration based upon this evidence.¹³³ Ethiopia appealed the decision. The dispute was resolved in Ethiopia’s favor, but not before the controversy received worldwide publicity.¹³⁴

¹²⁵ *Id.*

¹²⁶ U.S. Trademark Application Serial No. 78,589,307 (filed Mar. 17, 2005), available at <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=jjjrrj.1.1> (“Sidamo”); U.S. Trademark Application Serial No. 78,431,410 (abandoned July 8, 2006), available at <http://www.uspto.gov/main/trademarks.htm> (“Shirkina Sun-dried Sidamo”).

¹²⁷ Starbucks Coffee Co. Canada Homepage, Starbucks Black Apron Exclusives, http://www.starbucks.ca/en-ca/_Worlds+Best+Coffee/Black+Apron+Exclusives.htm (last visited Feb.13, 2009).

¹²⁸ Press Release, Starbucks Corporation, Savor Shirkina Sun-Dried Sidamo Exclusively at Starbucks; Taking a Risk, Starbucks Helps Create New Coffee, Potential New Revenue Stream for Farmers (Oct. 3, 2005), http://www.csrwire.com/press/press_release/24558-Savor-Shirkina-Sun-Dried-Sidamo-Exclusively-at-Starbucks-Taking-a-Risk-Starbucks-Helps-Creat-New-Coffee-Potential-New-Revenue-Stream-for-Farmers.

¹²⁹ Faris, *supra* note 117.

¹³⁰ *Id.*

¹³¹ Letter from Getachew Mengiste, Dir. Gen. Eth. Intellectual Prop. Office, to Jim Donalds, Starbucks Chief Executive (Nov. 3, 2006) (responding to Starbucks’ assertion that certification marks were Ethiopia’s best form of protection, Director General of the Ethiopian Intellectual Property Office, Getachew Mengiste, asserts that trademark protection “would strengthen the position of farmers, enabling them to get a reasonable return for their product”) (on file with Loyola Chicago International Law Review).

¹³² National Coffee Association, *supra* note 4.

¹³³ USPTO, TDR Database, <http://tportal.uspto.gov/external/portal/tow> (search U.S. Trademark Application Serial No. 78,589,307; then open “Administrative Response” dated Aug. 17, 2006).

¹³⁴ Numerous articles regarding the controversy were printed in newspapers internationally and can be found on the internet. See, e.g., Faris, *supra* note 117; Acey, *supra* note 131.

VII. Benefits of Trademarks versus GIs

Ethiopia can derive many benefits from trademark that would not have been available had Ethiopia chosen to pursue GI certification for its heritage coffees. As stated, GIs require a country to have an internal registration and certification process which is resource intensive and virtually impossible for nations with very little infrastructure to develop. Thus, GI certification and registration rewards developed nations that already have established—over many decades—IP systems and infrastructures that can support GI certification systems. It burdens less developed countries by requiring them to expend valuable resources to create a GI system just to be able to enter the international marketplace and, possibly, even just to lay claim to their own TK. The nations that will benefit the most from the EU's proposal for a mandatory multilateral registry of GIs are the nations that have spent years developing, implementing and perfecting their GI legal regimes to meet their needs. Many developing nations have yet to adequately catalog their IP assets. Requiring developing nations to spend resources to create a system to identify standards to ensure the quality of their products will only create another hurdle for them to enter the marketplace.

By seeking a trademark and not a certification mark, Ethiopia not only avoided incurring the costs to establish and implement a GI system, but also enabled itself to honor its culture while moving towards the future. GIs are not just tied to a region, but also to the methods and practices used to produce a product. Therefore, GIs could potentially leave developing nations “in the past” forcing them to rely upon archaic methods of production instead of developing new, more efficient or environmentally-friendly technologies.

The words Harar, Sidamo and Yirgacheffe are unique to Ethiopia. By trademarking these words, Ethiopia ensured that they will always be associated with Ethiopia and its coffees. Because the value of Ethiopia's trademarks will depend solely upon the quality of its coffees and not on its production process, Ethiopia can explore alternative agricultural and processing methods without seeking or approving amendments to standards described in its internal GI certification standards. For example, Ethiopia can seek to have some of its crops certified as organic or Bird-Friendly®. Bird-Friendly® identifies organic certified coffee grown on farms with a shade cover that provides substantial habitat for migratory and resident birds in tropical landscapes.”¹³⁵ Shade-grown coffee plantations provide habitat not just for migratory birds but also for insects, mammals and other inhabitants of forests.¹³⁶ In February 2008, the Anifilo Specialty Coffee Enterprise in Ethiopia became the first coffee farm in Africa to be certified by the Smithsonian Migratory Bird Center as Bird-Friendly®.¹³⁷ The article

¹³⁵ Smithsonian Nat'l Zoological Park Homepage, Bird Friendly® Coffee Program History and Quick Facts, <http://nationalzoo.si.edu/ConservationAndScience/MigratoryBirds/Coffee/history.cfm> (last visited Feb. 13, 2009).

¹³⁶ *Id.*

¹³⁷ Smithsonian Nat'l Zoological Park Homepage, Bird Friendly® Coffee: Back to Origin, http://nationalzoo.si.edu/ConservationAndScience/MigratoryBirds/Coffee/Bird_Friendly/ethiopia_certification.cfm (last visited Feb. 13, 2009).

Lessons Learned from Ethiopia

announcing the certification was placed prominently on the Bird-Friendly® web page and provided a link to where one could find and buy Bird Friendly® coffees, including the coffees from Anifilo. Bird Friendly® is a registered certification mark with the USPTO.¹³⁸ Certification marks such as Bird-Friendly® can add value to Ethiopia's coffees by offering consumers the opportunity to purchase a product that reflects their values—whether they are about the environment or fair labor practices. They can also provide additional advertising for the products they certify.

In 2004, a study conducted by the Institute of Organic Agriculture at the University of Bonn concluded that “Ethiopia has the potential to produce certified high quality organic coffee due to favorable growing conditions and the high diversity of genetic resources” and that Ethiopian “coffee farmers [are] in a position to pioneer certified organic crop production.”¹³⁹ Thus, Ethiopia is uniquely positioned to produce certified organic coffee—a growing niche market.

Obtaining trademarks has provided Ethiopia with strong IPRs in its heritage coffees and enabled it to keep the flexibility to continue to add value to its crops via international certification marks such as Bird-Friendly® while Ethiopian farmers continue to develop their agricultural practices. GI certification at this point, might well have left Ethiopia stuck in the past instead of moving towards the future.

VIII. The Internet: A Valuable Tool

Ethiopia has wisely made use of the internet and other modern day technologies to advertise its coffees, garner support for its cause, and inform the world about the poverty and plight of its farmers. Innovatively, Ethiopia is also effectively using the internet to create a licensing network with distributors of its coffees. This innovative approach to marketing and licensing shows how a developing nation can use today's technology to build relationships with the end users of its goods.

The EIPO established a separate website, the Ethiopian Coffee Network, specifically for the Initiative.¹⁴⁰ On the website, one can find information about the Initiative, press releases and information on how an individual can help support the Initiative. More than 100,000 people around the world have joined in the effort to spread the word about Ethiopian coffees and support the Initiative.¹⁴¹ Thus, the Initiative has created a grassroots movement to garner support for Ethiopia, as well as its coffees, farmers and viewpoints. The Initiative invites people to join its “network” or “partnership,” and thereby emphasizes that Ethiopia is seeking to collaborate with all people in the distribution channel, including con-

¹³⁸ U.S. Trademark No. 3,092,532 (registered May 16, 2006), *available at* <http://tess2.uspto.gov/bin/showfield?f=doc&state=4008:ihe24t.2.1>.

¹³⁹ Mekuria et al., *supra* note 28, at 5.

¹⁴⁰ *See generally* Ethiopian Coffee Network, <http://www.ethiopiancoffeenetwork.com> (last visited Feb. 14, 2009).

¹⁴¹ *Id.*

Lessons Learned from Ethiopia

sumers. Ethiopia's partnership approach will help to create goodwill—the crucial element to increase the brand value of an entity's trademark.

This grassroots approach to garner support for its Initiative appears, so far, to be successful. When Starbucks did not sign a licensing agreement with Ethiopia within a reasonable timeframe, as determined by Ethiopia and its supporters which include Oxfam America, Oxfam America took action. Oxfam created a “Starbucks Day of Action Toolkit” and posted it on its website.¹⁴² The toolkit consisted of three pieces of paper including instructions for the day of protest and a petition to show support for Ethiopia. Oxfam initiated a campaign for supporters to download the toolkit and chose December 17, 2006 for consumers to “take action.” On “Starbucks Action Day,” the supporter (or protester, depending on one's viewpoint) entered a Starbucks' store, asked for a cup of Ethiopian coffee and then gave the store manager a petition and asked the manager to show his or her support for Ethiopia and sign the petition.¹⁴³ Oxfam declared the day a huge success with thousands of activists participating and showing their support for Ethiopia's Initiative.¹⁴⁴

Yet another innovative way the Initiative is using the internet is to secure licenses with coffee retailers. The Ethiopian Coffee Network's standard trademark licensing agreement is posted in Adobe format on its website. *All visitors* to the website—not just coffee house owners or coffee distributors—are encouraged to read the document, download it, print it, hand it to their local coffee shop and inform the owner that if he or she is selling Harar®, Sidamo® or Yirgacheffe® then he or she needs to sign the agreement and mail it or fax it to one of the contacts listed. Or the visitor can inform Ethiopia about where he or she saw their coffees being sold and let Ethiopia contact the coffee shop directly.

Wherever you are in the world, please write and tell us about coffee products that you have seen on your local coffee shop or supermarket shelves which especially feature one of these three coffees.

The information we need to know is:

- The brand name of the product
- The name of the coffee company that produces the product
- Where you saw it - the name of the retailer chain or shop
- What price and currency per oz/lb or kilo was it on sale for

Once you have gathered this information, please send it to:
*licensing@ethiopiancoffeenetwork.com*¹⁴⁵

This unique approach to obtain licenses for its coffees capitalizes on the energy and political sensibilities of people who are committed to fair trade initia-

¹⁴² Oxfam America, Starbucks Day of Action Toolkit (2006), http://www.oxfamamerica.org/whatwedo/campaigns/coffee/starbucks/news_publications/dayofactiontoolkit/sbux_dayofactiontoolkit.

¹⁴³ *Id.*

¹⁴⁴ Oxfam America, Starbucks Day of Action: Results, <http://www.oxfamamerica.org/whatwedo/campaigns/coffee/starbucks/dayofaction> (last visited Mar. 10, 2009).

¹⁴⁵ Ethiopian Coffee Network, Trademark & Licensing Initiative, <http://www.ethiopiancoffeenetwork.com/about8.shtml> (last visited Mar. 10, 2009).

Lessons Learned from Ethiopia

tives. These people are tapped into the internet culture, have the time, and are willing to make the effort to ensure their local coffee house, if it is selling any of Ethiopia's coffees, has the appropriate license to do so. Importantly, these coffee consumers are also helping Ethiopia to comply with the requirements of trademark use including policing and enforcing how its trademarks are used.

The licensing agreement—available for the United States, Canada, EU/UK and Australia—sets out standard terms for use of the trademarks.¹⁴⁶ The agreement is for a period of five years, does not require payment of royalty of any kind during that time, but does require the licensee to abide by several requirements.¹⁴⁷ Of course, one requirement is that the licensee will only use the trademarks to identify coffees that are 100% Harar®, Sidamo® or Yirgacheffe®.¹⁴⁸ Also, the licensee agrees to not use the marks on any coffee blends the retailer sells unless Ethiopia has granted permission to do so.¹⁴⁹ This condition ensures that Ethiopia's coffees will remain distinctive in flavor and taste.

Additionally, the licensee accepts the burden to comply with all relevant local laws regarding advertising and display of the trademarks.¹⁵⁰ The licensee also agrees to cooperate with Ethiopia in defending and protecting the trademarks against infringement by other users.¹⁵¹ This affirmative duty on the licensee's part to defend the trademarks is noteworthy because it helps to shift or share the burden of enforcement of the trademarks solely from Ethiopia to the licensees as well. The rationale for licensees to accept this obligation is that the coffees for which they have licenses will only retain their value if use of the trademarks is properly enforced. Finally, the licensee agrees to share with Ethiopia sales information and other information as Ethiopia may reasonably request.¹⁵² This provision is an inventive method for Ethiopia to gather important data regarding the sales and pricing of its products so that Ethiopia will be better able to estimate the value of its coffees in the marketplace.

IX. What Other Developing Nations Can Learn from Ethiopia

It is too early to determine if Ethiopia's Initiative will succeed in the long term. For now, Ethiopia's coffees are being heralded as some of the best in the world. Ethiopia was the portrait country for the SCAA's 20th Annual Conference & Exhibition which took place in May 2008 in Minneapolis, Minnesota.¹⁵³

¹⁴⁶ Ethiopian Coffee Network, Trademark and License Agreements, <http://www.ethiopiancoffee-network.com/licensing3.shtml> (last visited Apr. 1, 2009).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Press Release, Specialty Coffee Association of America, Specialty Coffee Association of America Previews 20th Annual Conference & Exhibition (Dec. 10, 2007), http://www.scaa.org/press_article.asp?article_id=124379074.

Lessons Learned from Ethiopia

If Ethiopia can provide high quality coffees and find a market that is willing to pay for its premium coffees, its Initiative may provide the returns Ethiopia seeks.

Regardless of the success of the Initiative, it will provide other developing nations with valuable information that may aid them as they develop their own IP systems. Notably, the EIPO was established in 2003—just six years ago. As stated, one of the first tasks taken by the EIPO was to determine and catalog Ethiopia's IP assets. From this assessment, EIPO moved forward with the assistance of a non-profit consulting firm and the legal aid from a premium law firm to advice them. Most importantly, Ethiopia is designing its IP system to specifically meet the political, economic and cultural needs of its people. For example, all land in Ethiopia is owned by the government. Thus, the government has primary control over how the land is used. Therefore, an IP scheme that first focused on land-use, specifically, agricultural crops, was one that was within the government's control. Other tradition-based practices including medicinal therapies and how Ethiopia can protect IPRs in them will be addressed in the future.¹⁵⁴

Whether asserting a trademark in indigenous TK is the best strategy for another developing nation depends on that nation's infrastructure including its form of government, property ownership scheme, its IP assets, and the financial, legal and marketing support it has or can obtain. What the Ethiopian Trademark and Licensing Initiative has shown is that with the proper support, a developing nation that has yet to become a member of the WTO can compete in the worldwide marketplace. In June 2007, after much discussion, Starbucks signed a licensing agreement with Ethiopia.¹⁵⁵ In December 2007, Starbucks announced that the company will open a Starbucks Farmer Support Center in Addis Ababa.¹⁵⁶ The Support Center will provide resources to coffee communities throughout Ethiopia to improve coffee quality and increase the number of farmers who participate in Starbucks' sustainable coffee buying guidelines. Perhaps the call for "Free trade, not aid," should be changed to "Free trade and some legal aid."

X. Conclusion

Ethiopia's Trademarking and Licensing Initiative provides credible evidence that a developing nation can claim its place in the world marketplace as well as claim ownership of its culture, heritage and TK without claiming a GI. It thus calls into doubt the EU's assertion that stronger GI protection will benefit developing nations. Stronger GI protection very well could benefit developing nations in the future, but implementing a complex IP system that incorporates GI standards and certification criteria would likely command more resources than many developing nations can afford. Thus, a mandatory multilateral registry will cre-

¹⁵⁴ Podcast 58-*Yirgacheffe, Sidamo, Harrar. . . oh my!*, <http://www.portafilter.net/2006/12/podcast-58-yirgacheffe-sidamo-harrar-oh.html> (last visited March 10, 2009).

¹⁵⁵ *Ethiopia and Starbucks Reach Coffee Agreement*, ICTSD, July 6, 2009, <http://ictsd.net/i/news/biores/9121/>.

¹⁵⁶ Press Release, Light Years IP, Ethiopian Prime Minister & Starbucks Chairman Discuss Ways to Support Ethiopian Coffee Industry (Dec. 3, 2007), <http://www.csrwire.com/PressReleasePrint.php?id=10270>.

Lessons Learned from Ethiopia

ate a hurdle for developing nations to enter the world market because of the costs and infrastructure needed to comply with such a system. For Ethiopia, GI certification at this time was not a possibility. If Starbucks had successfully registered its trademark for “Shirkina Sun-Dried Sidamo,” the word “Sidamo” may have been lost to the people of Ethiopia in the same way the word “Toraja” was lost to the people of Toraja.

The EU’s call for stronger GI protection, upon closer inspection, is clearly self-serving. It will be years before developing nations can benefit from stronger GI protection because it will take years for many developing nations to catalog their IP assets and create an IP system that fits both their needs and meets the requirements of the TRIPs Agreement. Meanwhile, the EU’s TK is protected by its current GI system—a system that took many decades to develop and is still being developed. The EU’s proposed “claw back” provision appears to be a mechanism to extract a premium for TK word terms that have entered the public domain.

Though the dispute regarding the “claw back” provision seems to be predominantly between the EU and the United States, the result could have a longstanding impact. If the EU is successful in its quest to reclaim its TK word terms and invalidate trademarks and trade names that incorporate words that originated in the EU, it is undeniable that it will have an impact on the U.S. agricultural industry. But it is also possible that through creative marketing and advertising of the new word terms U.S. producers use to identify foods once associated with the foods’ countries of origin, the United States will be able to minimize the impact. The likely result will not be that the demand for FETA will be greater in America in ten years, but rather that the next generation of Americans will not know what FETA is to ask for it by name.

If producers in the EU are unable to capitalize on the goodwill associated with being the “original” or the “authentic” producer of a particular product, or by distinguishing themselves in the marketplace by the quality of their products, removing the name of the product from public use and thus public knowledge does not appear to be a sound marketing strategy. Another way for EU producers to view the labels “Roquefort-style” on American or Australian manufactured cheese is to see them as free advertising for the “original” Roquefort cheese. If “Roquefort-style” did not exist, would consumers know to look for or ask for the original Roquefort cheese? Perhaps instead of requesting the “claw back” of these generic food terms, a better strategy would be to request that every product labeled made “in the style of” or “like” an EU PDO or PGI agricultural product should be required to clearly state on its label the origin of the food product. Thus, if a consumer wants to seek the “original” or “authentic” version of the product, he or she will know what to ask for.

An issue of greater concern though regards the precedent the “claw back” provision could establish for the future. Many developing nations were colonized by nations in the EU. An audit of both company names and products manufactured in the EU would invariably show that some of the trademarked company names and goods are word terms from cultures outside of the EU. If the EU can reclaim word terms that have become generic and have been incorpo-

Lessons Learned from Ethiopia

rated into trade names and products of nations outside of its boundaries, what possible rationale could the EU present for not allowing other nations to reclaim their indigenous word terms at some time in the future as well?

HEALTH CARE REFUGEES

Patricia C. Gunn[†]

Introduction

Developed nations¹ of the world have long helped refugees who have been forced to flee their homes because of natural disasters, wars, genocides, and other catastrophes. Developed nations should now consider giving special humanitarian protection to a new class of refugees: the “health care refugee”. Life-threatening illnesses or injuries are no less pernicious than the aforementioned disasters to their victims, whose lives may be lost or irreparably damaged unless they receive help from those in a position to do so. When the victims of life-threatening illnesses or injuries live in a country that has the ability to give them life-saving medical care, and the government of that country refuses to provide the necessary health care, then the global community must address this deliberate threat to human life.

[T]he state is obliged to provide a considerable array of protections for the life and personal security of all persons who fall under its jurisdiction [A] state that fails to provide basic law and order usually is respon-

[†] The author is a graduate of Boston College Law School. She practiced law at the United States Department of Justice in Washington, D.C. for eleven years; nine of those as a Senior Trial Attorney in the Office of International Affairs. She is currently an Associate Professor of Law in the Department of African American Studies at Ohio University.

¹ In theory, any country in the world could grant health care refugee status to any person who might seek such assistance. In practicality, however, only developed countries with strong economies and health care systems should be asked to accommodate health care refugees. For example, U.N. member states such as those comprising the G-8 might be called upon to grant “health care refugee” status to persons in need of such humanitarian protection. Canada, France, Germany, Italy, Japan, and the United Kingdom, all members of the G-8, have universal health care for their citizens. Furthermore, the G-8, of which the United States is a member, has taken a strong position on the importance of the universal access to health services. In the July 8, 2008 Toyako Framework for Action on Global Health, the G-8 Health Experts Group recommended to the leaders of the G-8, the following:

8. In addressing global health challenges, the human security perspective focusing on protection and empowerment of individuals and communities is critical, given that the health challenges directly affect human dignity and, in the words of the preamble to the World Health Organization Constitution, the right to the highest attainable standard of health, which is one of the fundamental human rights of every human being.

. . . .

11. Health systems are multi-dimensional. The international community should tackle various aspects of health systems such as the health workforce and human resources for health; health information; good governance; essential infrastructure; quality assurance; management of medical products and essential drug supply systems; and sustainable and equitable health financing of the health systems. **Aiming to work towards universal access to health services, the G8 emphasizes the importance of comprehensive approaches to address the strengthening of health systems including social health protection, and will work with partner countries to promote adequate coverage of recurrent costs in health systems.** (Emphasis added).

G8 Summit, Hokkaido Toyako Summit, Toyako, Japan, July 8, 2008, *Toyako Framework for Action on Global Health: Report of the G8 Health Experts Group*, ¶¶ 8, 11 [hereinafter Toyako Report].

Health Care Refugees

sible for violations of rights that they “merely” allow, through inaction, to occur.

The state, of course, is not obliged to protect every person against all possible threats to life or security. Denial of guaranteed access to health care, however, is neither an obscure nor an uncharted threat.²

In this article, “health care refugee” is defined as a person who lacks the means to pay for needed life-saving medical care and whose government refuses to provide the means for such care, despite having the financial, medical, and technical wherewithal to do so, and where said government’s refusal is based on the person’s race, ethnicity, religion, nationality, political opinion, or membership of a particular social or economic group. This definition both captures and expands the definition of refugee set forth in Article 1(A)(2) of the 1951 United Nations Convention relating to the Status of Refugees,³ which applies to any person who:

As a result of events occurring before 1 January 1951 owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In later years it became clear to the international community that the term “refugee” as defined by the 1951 Convention relating to the Status of Refugees was too narrow, because there were many people inside and outside of war-torn Europe who had, become *de facto* refugees *after* January 1, 1951. In 1967, the world community acknowledged this in the preamble to the Protocol to the Convention relating to the Status of Refugees⁴ and in Article 1 thereof.⁵

In this century, the world community has again recognized that the term “refugee” does not fully capture the status of persons who are displaced as a result of natural disasters, wars, genocides and other catastrophes that may cause persons to leave their country for equally forceful reasons. The community of nations, acting through the Office of the United Nations High Commissioner for Refu-

² JACK DONNELLY, *International Human Rights and Health Care Reform*, in HEALTH CARE REFORM: A HUMAN RIGHTS APPROACH, 134-35 (Audrey R. Chapman ed., Georgetown University Press 1994).

³ Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150.

⁴ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

⁵ *Id.* art. I (expanding the definition of refugee to include persons who fall within the definition of Article 1 of the Convention but became refugees after January 1951).

Health Care Refugees

gees⁶ (“UNHCR”), has determined that “persons of concern” to the UNHCR include seven groups:⁷

- (a) refugees; (b) asylum-seekers; (c) internally displaced persons (IDPs);
- (d) refugees who have returned home (returnees); (e) IDPs who have returned home; (f) stateless persons; and (g) other people who do not fall under any of the above categories but to whom the Office extends its protection and/or assistance activities.⁸ Two additional sub-categories have been added: (i) people in refugee-like situations (included under refugees); and (ii) people in IDP-like situations (included under IDPs).⁹

The UNHCHR has interpreted “refugees” to “include individuals recognized under the 1951 Convention Relating to the Status of Refugees; its 1967 Protocol; the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; those recognized in accordance with the UNHCR Statute; individuals granted complementary forms of protection;¹⁰ or, those enjoying ‘temporary protection.’”¹¹

To grant a “health care refugee” some type of subsidiary protection¹² for medical treatment within a given developed country, would fall well within the meaning of “complementary protection”. In this sense, complementary protection “refers to formal permission, under national law, provided on humanitarian grounds to persons who are in need of international protection to reside in a country, even though they might not qualify for refugee status under conven-

⁶ UNHCR – Basic Facts, <http://www.unhcr.org/basics.html> (last visited Nov. 10, 2008).

The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.

Id.

⁷ Field Info. and Coordination Support Section (FICSS), Division of Operational Services at UNHCR, 2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons 4 (June 2008), [http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7FPK47/\\$file/UNHCR_jun2008.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7FPK47/$file/UNHCR_jun2008.pdf?openelement) [hereinafter Global Trends].

⁸ *Id.* In addition to those who fall within the enumerated categories, UNHCR extends its protection or assistance activities to individuals whom it considers “of concern.” *Id.* at 20. “These activities are based on humanitarian or other special grounds and might, for instance, include asylum-seekers who have been rejected, but who are deemed by UNHCR to be in need of international protection.” *Id.* at 20.

⁹ *Id.* at 4.

¹⁰ “Complementary protection refers to formal permission, under national law, provided on humanitarian ground[s] to persons who are in need of international protection to reside in a country, even though they might not qualify for refugee status under conventional refugee criteria.” *Id.* at 4 n.8.

¹¹ “Temporary protection refers to arrangements developed by States to offer protection of a temporary nature to persons arriving en masse from situations of conflict or generalized violence without the necessity for formal or individual status determination.” *Id.* at 4 n.9.

¹² For example, in Council Directive 2004/83/EC of 29 April 2004, Council Directive, 2004/83, 2004 O.J. (L 304) 12, 13 (EC) [hereinafter Council Directive 2004/83/EC], the European Union had already begun to address “the situation of persons whose need of international protection can only be met by the attribution of subsidiary protection.” Freedom Security and Justice—Asylum—Refugee Subsidiary Protection. The European Union Clarifies What it Means by Refugee and Subsidiary Protection, http://ec.europa.eu/justice_home/fsj/asylum/subsidiary/fsj_asylum_subsidiary_en.htm (last visited May 1, 2009).

Health Care Refugees

tional refugee criteria.”¹³ For example, the European Union has adopted a directive¹⁴ that allows its member states to grant subsidiary protection status to persons on three grounds:

1. Where there is a well-founded fear of torture, inhuman or degrading treatment or punishment;¹⁵
2. **Where there is a well-founded fear of violation of other human rights;**¹⁶ and
3. In situations involving the mass influx of displaced persons, where a person establishes a well-founded fear for his or her life on an individual basis.¹⁷

Allowing a developed country the decision to grant “health care refugees” the opportunity to receive medical care on a case-by-case basis in that country should also come within the purview of conventional refugee criteria: A health care refugee is a person who lacks the means to pay for life-saving medical care and whose government has the means to provide medical care but refuses, for reasons of race, ethnicity, religion, nationality, political opinion, or membership of a particular social or economic group.

Methodology

Though a health care refugee could be of any nationality, for purposes of this paper, the concept will be examined through the lens of the American health care system¹⁸ and focus on American citizens.¹⁹ Because the United States government has willfully failed to provide adequate health care for its citizens for so long, many Americans who lack financial security have a well-founded fear of being left to suffer and die from serious illnesses or injuries, for the sole reason

¹³ GLOBAL TRENDS, *supra* note 7, at 4 n.8.

¹⁴ Council Directive 2004/83/EC, *supra* note 12. The Directive’s subsidiary protection provisions are consistent with the proposed provisions of the Commission from 2001. *Commission Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, at 26-27, COM (2001) 510 final (Sept. 12, 2001).

¹⁵ Council Directive 2004/83/EC, *supra* note 12, art. 15(a).

¹⁶ *Id.* art. 15(b).

¹⁷ *Id.* art. 15(c).

¹⁸ The author is familiar with the health care system in the United States and can, therefore, best test her proposed theory by using this country as an example of one whose citizens might choose to seek health care refugee status.

¹⁹ Citizens of the United States have given billions of dollars in foreign aid and charity to benefit people around the world since World War II. For example, American tax dollars have been used to fund: the U.N. Relief and Rehabilitation Administration, the Marshall Plan (a.k.a. the European Recovery Program), the North Atlantic Treaty Organization, President Truman’s “Point 4” Technological Assistance Program, the U.S. Agency for International Development, many U.N. programs, and countless other programs. See Columbia Electronic Encyclopedia— Foreign Aid, <http://www.infoplease.com/ce6/history/A0858180.html> (last visited Aug. 18, 2009). Citizens of the United States have, for decades, given generously of their treasure, time, and lives to needy people around the world. In their season of need Americans too poor to buy life-saving medical treatment will, hopefully, receive help from their fellow human beings living in developed countries.

Health Care Refugees

that they cannot afford to purchase needed medical care. While the United States Government provides health insurance for some Americans,²⁰ nearly forty-six million Americans have no health insurance.²¹ Of those, approximately twenty-two thousand are too poor to buy health insurance, but too *rich* to qualify for a government sponsored insurance program, and will die for lack of adequate health care.²²

The abandonment by the United States government of its citizens who are too poor to purchase medical care, who receive no health insurance coverage or too little coverage through their employers, or who earn too much to qualify for any of the government-sponsored health insurance programs is tantamount to persecution of a particular socio-economic group: low and middle-income Americans. Undoubtedly such hard working Americans would seek health care treatment in the United States were the government willing to provide them with such health care.²³ However, this group has no real expectation that such protection will become available to them in the foreseeable future, especially given the current financial crisis facing the United States.²⁴

This paper proposes that health care refugees should be permitted to apply for health care refugee status to United Nations member states with developed economies. Because this concept is being examined through the lens of the American health care system, this paper examines a number of human rights treaties, the international law principle of *jus cogens*, and United States law to determine whether they provide a legal basis to support this proposal.

I. Health Care Background

People who can afford to buy medical services find some of the best physicians, medical facilities, and medical technology in the world in the United States. Unfortunately, American citizens who lack the financial resources to buy themselves quality health care discover that the United States health care system is ailing almost as much as they are.²⁵ The United States spends more on health

²⁰ See *infra*, note 44 and accompanying text.

²¹ See *infra*, note 47.

²² See *infra*, note 86 and accompanying text.

²³ See e.g., Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CAL. L. REV. 1151, 1154 (2007).

Americans believe that access to health care should not be limited to those who can afford it, yet the federal government has not managed to ensure universal access to health care. Creating a judicially cognizable right to health care may effectively break the political stalemate and achieve universal access by requiring the government to take action. An affirmative legal obligation, either statutory or constitutional, to ensure access to health care (combined with judicial enforcement) would create the positive pressure needed to force the political branches to make the difficult decisions and compromises necessary to create a comprehensive health care system that they heretofore have proven reluctant to make.

²⁴ See *infra* note 58 and accompanying text.

²⁵ See Karen Davis et al., *Mirror, Mirror on the Wall: An International Update on the Comparative Performance of American Health Care*, THE COMMONWEALTH FUND, May 2007, http://www.commonwealthfund.org/usr_doc/1027_Davis_mirror_mirror_international_update_final.pdf?section=4039. “The U.S. health system is the most expensive in the world, but comparative analyses consistently show the United States underperforms relative to other countries on most dimensions of performance.” *Id.* at vii.

Health Care Refugees

care than any other industrialized nation,²⁶ yet the United States ranks last among six OECD countries in a recent survey²⁷ comparing overall health outcomes²⁸ of patients.²⁹ Unless America's elected officials summon the political will and courage³⁰ to help all Americans who are uninsured,^{31,32} underinsured,³³ chroni-

²⁶ See *CR Investigates Health Care: Are You Really Covered?*, CONSUMER REP., Sept. 2007 [hereinafter CONSUMER REP.]. "The U.S. spends an average of \$7,000.00 per capita on health care. According to a 2007 analysis by McKinsey Global Institute, that's 28 percent more than any other industrialized country, even after adjusting for its relative wealth." *Id.* at 19.

²⁷ Davis et al., *supra* note 25, at vii, 5. In a study of six Organization for Economic Cooperation and Development (OECD) nations—Australia, Canada, Germany, New Zealand, the United Kingdom, and the United States—the authors determined that in 2004 the United States spent \$6,102 per capita on health expenditures, almost twice as much as Canada (\$3,165), Germany (\$3,005 - 2003), and Australia (\$2,876 - 2003); almost 2.4 times as much as the U.K. (\$2,546) and almost three times as much as New Zealand (\$2,083). *Id.*

²⁸ *Id.* at viii, 4. "The U.S. ranks last overall across the five dimensions (Quality Care, Access, Efficiency, Equity, Healthy Lives) of a high performance health system." The overall rankings were: first, U.K.; second, Germany; Australia and New Zealand tied at 3.5; fifth, Canada; and sixth, United States. *Id.* at 4.

²⁹ Recipients of health care in the other five countries studied were all beneficiaries of universal health care systems. The United States is the only one of the six countries that does not provide universal health insurance coverage to its citizens. *Id.* at vii. "It is difficult to disentangle the effects of health insurance coverage from the quality of care experiences reported by U.S. patients." *Id.* at 22.

³⁰ See David Mechanic, *The Truth About Health Care, Why Reform Is Not Working in America* (Rutgers University Press 2006).

At some point, we as a nation will have to decide whether we wish to design our health care system primarily to satisfy those who profit from it or to protect the health and welfare of all Americans. No one promises that achieving universal or higher quality health care will be easy or even that they are inevitable. But anything is possible if the public begins to appreciate how little it gets for what it really pays and [then] organizes politically to promote a health care system that is fairer, more inclusive, and offers more value for money.

Id. at 188.

³¹ Compare Center for Disease Control and Prevention, Health Insurance Coverage, <http://www.cdc.gov/nchs/fastats/hinsure.htm> (last visited Nov. 11, 2008) (In 2007, the CDC estimated that 43 million (16.4%) of the population under age 65 were uninsured.), with U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, 27 (Aug. 2008), <http://www.census.gov/prod/2008pubs/p60-235.pdf> (The U.S. Census Bureau reported that in 2007 approximately 45.7 million (15.3%) of the population were without health insurance.) [hereinafter U.S. CENSUS BUREAU 2007]. This comparison is hereafter referred to as CDC v. Census Comparison.

³² See J. Michael McWilliams, M.D. et al., *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, 357 NEW ENG. J. MED. 143 (2007). The study found that:

In this nationally representative longitudinal study, obtaining Medicare coverage at 65 years of age was associated with greater increases in doctor visits, hospital stays, and total medical expenditures for previously uninsured beneficiaries than for previously insured beneficiaries. Previously uninsured adults reported consistently greater use of health services and total medical expenditures after age 65 than previously insured adults with similar characteristics at ages 59 to 60 and comparable coverage after age 65. Self-reported use of health services for previously uninsured adults with cardiovascular disease or diabetes remained elevated through 72 years of age, indicating that the earlier lack of insurance was associated with persistent increases in health care needs rather than with transient spikes. These findings support the hypothesis that previously uninsured adults used health services more intensively and required costlier care as Medicare beneficiaries than they would have if previously insured.

. . . .

. . . Our findings have important policy implications. Near-elderly adults who were uninsured required more intensive and costlier care in the Medicare program after the age of 65 years than previously insured adults who were otherwise similar at ages 59 to 60. Therefore, providing health insurance coverage for uninsured near-elderly adults may improve their health outcomes and reduce their health care use and spending after age 65. Particularly for those with cardiovas-

Health Care Refugees

cally ill,³⁴ mentally ill,³⁵ aged,³⁶ or receiving disparate care³⁷ because of race,^{38,39}

cular disease or diabetes, these benefits may be substantial and may partially offset the costs of expanding coverage. *Id.* at 149-51.

³³ See Cathy Shoen et al., *How Many Are Underinsured? Trends Among U.S. Adults, 2003 and 2007*, HEALTH AFFAIRS WEB EXCLUSIVE, June 10, 2008, http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=688615.

The number of underinsured U.S. adults [ages of 19-64] – that is people who have health coverage that does not adequately protect them from high medical expenses - has risen dramatically, a Commonwealth Fund study finds. As of 2007, there were an estimated 25 million underinsured adults in the United States, up 60 percent from 2003. Much of this growth comes from the ranks of the middle class. While low-income people remain vulnerable, middle-income families have been hit hardest. For adults with incomes above 200 percent of the federal poverty level (about \$40,000 per year for a family), the underinsured rates nearly tripled since 2003.

Id.

³⁴ See, James S. Marks, “A chronic illness is a disease that has a prolonged course, does not resolve spontaneously, and rarely is completely cured. Typical examples include cancer, heart disease, diabetes, and arthritis. These illnesses are usually more common as a population ages. In the United States, as in most developed countries, chronic diseases account for approximately 70 percent of all deaths, and a similar proportion of all health care costs.” Healthline, Chronic Illness, <http://www.healthline.com/galecontent/chronic-illness> (last visited Aug. 18, 2009).

³⁵ See National Alliance on Mental Illness, *Grading the States 2006: A Report on America’s Health Care System for Serious Mental Illness*, http://www.nami.org/gtsTemplate.cfm?Section=project_Overview&Template=/ContentManagement/ContentDisplay.cfm&ContentID=30919 (last visited Aug. 18, 2009).

This report is the first comprehensive survey and grading of state adult public mental healthcare systems conducted in more than 15 years. . . . The report confirms in state-by-state detail what President Bush’s New Freedom Commission on Mental Health called a fragmented “system in shambles.” Nationally, the system is in trouble. Its grade is no better than a D. *Id.*

³⁶ “The first U.S. Baby Boomers [people born between 1946 and 1964] will turn 65 in 2011, inaugurating a rapid increase in the older population during the 2010 to 2030 period. The older population in 2030 is projected to be double that of 2000, growing from 35 million to 72 million.” See WAN HE ET AL., U.S. CENSUS BUREAU, *65+ IN THE UNITED STATES: 2005, 12* (U.S. Gov’t Printing Office 2005), <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

³⁷ See Joan Redmond Leonard et al., *Health Disparities: A Selected Bibliography from the National Center for Chronic Disease Prevention and Health Promotion, January 2000-January 2005* (March 2005), <http://www.cdc.gov/nccdphp/publications/healthdisparities/pdf/bibliography.pdf>. There is reason to hope that disparities in health care might someday be eliminated, since that “is an overarching goal of the *Healthy People 2010* national public health agenda and . . . a top priority for the Centers for Disease Control and Prevention (CDC).” *Id.* at vi.

³⁸ See Vickie L. Shavers & Brenda S. Shavers, *Racism and Health Inequity Among Americans*, 98 J. NAT’L MED. ASS’N 386, 386 (2006). “Racial/ethnic minorities suffer disproportionate morbidity and mortality from chronic diseases, such as cancer, heart disease, diabetes, and stroke.” See also Junling Wang et al., *Disparities in Access to Essential New Prescription Drugs between Non-Hispanic Whites, Non-Hispanic Blacks, and Hispanic Whites*, 63 MED. CARE RES. & REV. 742, 758 (2006). “[The] findings concur with previous work by Mayberry, Mili, and Ofili (2000), which found that while racial and ethnic groups frequently do not have the same access to services, access appears to be particularly problematic for blacks.” *Id.* at 758. See also DAVID M. SATCHER, *Securing The Right To Healthcare and Well-being, Introduction to THE COVENANT WITH BLACK AMERICA 3* (Third World Press 2006).

[I]f we had eliminated disparities in health in the last century, there would have been 85,000 fewer black deaths overall in 2000. Among others, these include: 24,000 fewer deaths from cardiovascular disease; 4,700 fewer black infant deaths in the first year of life; 22,000 fewer deaths from diabetes; and almost 2,000 fewer black women would have died from breast cancer.

Id.

See generally, David Barton Smith, *Eliminating Disparities in Treatment and the Struggle to End Segregation*, THE COMMONWEALTH FUND, Aug. 2005, <http://www.commonwealthfund.org/Content/Publications/Fund-Reports/2005/Aug/Eliminating-Disparities-in-Treatment-and-the-Struggle-to-End-Segregation.aspx> (concluding that segregation in the health care system increases the cost and reduces the quality of care for everyone and suggesting four strategies for reducing racial, ethnic, and economic disparities in treatment).

Health Care Refugees

or ethnicity, then increasing numbers of Americans will suffer health care persecution primarily because of their socio—economic status.⁴⁰

The United States is a great country and we are a good people.⁴¹ Yet, our elected representatives allow millions of low and middle-income Americans to live on the brink of medical and financial disaster⁴² by failing to provide all Americans with an adequate level of health care. While most Americans⁴³ do have some type of health insurance,⁴⁴ either private⁴⁵ or public,⁴⁶ a survey by the U.S. Census Bureau reported that in 2007 approximately 45.7 million people,

³⁹ For an excellent on-line tutorial on this topic see Cara James, *Race, Ethnicity and Health Care*, <http://www.kaiseredu.org/tutorials/REHealthcare/player.html> (last visited Aug. 18, 2009).

⁴⁰ See Davis et al., *supra* note 25, at 18. “The Institute of Medicine defines equity as ‘providing care that does not vary in quality because of personal characteristics such as gender, ethnicity, geographic location, and socioeconomic status.’” *Id.* (emphasis added).

The U.S. ranks last on all the access to care measures and, as a result, ranks a clear sixth [when compared with Australia, Canada, Germany, New Zealand, and the United Kingdom] on all measures of equity. Americans with below-average incomes were much more likely than their counterparts in other countries to report not visiting a physician when sick and not getting a recommended test, treatment, or follow-up care, not filling a prescription, or not seeing a dentist when needed because of costs. On each of these indicators, more than two-fifths of lower-income adults in the U.S. said they went without needed care because of costs in the past year. *Id.* at 20.

⁴¹ French lawyer, historian, and politician Alexis de Tocqueville is credited with having said, “America is great because she is good. If America ceases to be good, America will cease to be great.” One wonders how much longer we can consider ourselves to be good if we stand by and watch millions of our fellow Americans suffer physically, mentally, emotionally and financially, and in some instances, die, because they have no health insurance or because they are underinsured.

⁴² See David U. Himmelstein et al., *MarketWatch: Illness and Injury As Contributors To Bankruptcy*, HEALTHAFFAIRS.ORG, Feb. 2, 2005, available at <http://www.silverbankruptcy.com/images/Harvard.pdf> (last visited Aug. 18, 2009). Some of the study’s findings are included in the article’s abstract:

In 2001, 1.458 million American families filed for bankruptcy. To investigate medical contributors to bankruptcy, we surveyed 1,771 personal bankruptcy filers in five federal courts and subsequently completed in-depth interviews with 931 of them. About half cited medical causes, which indicates that 1.9–2.2 million Americans (filers plus dependents) experienced medical bankruptcy. Among those whose illnesses led to bankruptcy, out-of-pocket costs averaged \$11,854 since the start of illness; 75.7 percent had insurance at the onset of illness. Medical debtors were 42 percent more likely than other debtors to experience lapses in coverage. Even middle-class insured families often fall prey to financial catastrophe when sick. *Id.* at 1.

⁴³ “The number of people with health insurance increased to 253.4 million in 2007 (up from 249.8 million in 2006).” See U.S. CENSUS BUREAU 2007, *supra* note 31, at 19.

⁴⁴ Most people have private health insurance, “provided through an employer or union or purchased by an individual from a private health insurance company,” or Government-sponsored insurance. See U.S. Census Bureau, Health Insurance, <http://www.census.gov/hhes/www/hlthins/hlthinstypes.html> (last visited Nov. 9, 2009). The U.S. Census Bureau’s Current Population Survey (CPS), defines the following eight types of Government-sponsored health insurance programs:

Health Care Refugees

which represents 15.3 percent of the population, were without health insurance.⁴⁷ Of that number, approximately 20.5 million non-Hispanic Whites and 14.8 million Hispanics were uninsured,⁴⁸ while approximately 7.4 million Blacks were without insurance.⁴⁹ It is alarming to note that of the nearly 46 million Americans who were without health insurance in 2007, approximately 8.1 million were

Government Insurance Program	Type of Coverage
Medicare	Federal program - helps pay health care costs for people 65 and older and for certain people under 65 with long-term disabilities.
Medicaid	Program administered at the state level - provides medical assistance to the needy. Families with dependent children, the aged, blind, and disabled who are in financial need are eligible for Medicaid. It may be known by different names in different states.
State Children's Health Insurance Program (CHIP)	Program administered at the state level - provides health care to low-income children whose parents do not qualify for Medicaid. CHIP may be known by different names in different states.
Civilian Health and Medical Program of the Uniformed Services (TRICARE/CHAMPUS)	Military health care program for active duty and retired members of the uniformed services, their families, and survivors.
Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA)	Medical program through which the Department of Veterans Affairs helps pay the cost of medical services for eligible veterans, veteran's dependents, and survivors of veterans.
Department of Veterans Affairs (VA)	Provides medical assistance to eligible veterans of the Armed Forces.
State-specific plans	Some states have their own health insurance programs for low-income uninsured individuals. These health plans may be known by different names in different states.
Indian Health Service (IHS)	Health care program through which the Department of Health and Human Services provides medical assistance to eligible American Indians at IHS facilities. In addition, the IHS helps pay the cost of selected health care services provided at non-IHS facilities.

⁴⁵ See Jonathan Cylus & Gerard F. Anderson, *Multinational Comparisons of Health Systems Data, 2006*, THE COMMONWEALTH FUND, May 2007, <http://www.commonwealthfund.org/Content/Publications/Chartbooks/2007/May/Multinational-Comparisons-of-Health-Systems-Data—2006.aspx>.

The United States spent over 17 times more than the median OECD [Organization for Economic Cooperation and Development] country on PRIVATE HEALTH CARE SPENDING (excluding out-of-pocket spending). While private health insurance coverage is the most common source of health insurance coverage in the United States, in other countries private insurance is usually supplementary to public insurance coverage. Out-of-pocket spending per capita in the United States was more than twice as high as in the median OECD country.

Id. at 8 (emphasis added).

⁴⁶ "Among all OECD countries, the United States had the highest level of spending from PUBLIC SOURCES in 2004. This is somewhat surprising because only one quarter of all Americans have publicly financed health insurance." *Id.* (emphasis added).

⁴⁷ See U.S. CENSUS BUREAU 2007, *supra* note 31, at 20.

⁴⁸ *Id.*

⁴⁹ See U.S. Census Bureau, Health Insurance Coverage: 2007, <http://www.census.gov/hhes/www/hlthins/hlthin07/hlth07asc.html> (last visited Aug. 18, 2009).

Health Care Refugees

children.⁵⁰ In other words, one of every five uninsured Americans is a child,⁵¹ and that is even with the State Children's Health Insurance Program.⁵² Sadly, even amongst Americans who are fortunate enough to have health insurance, many are underinsured.⁵³ Being without insurance⁵⁴ or being underinsured can have seriously adverse financial⁵⁵ and medical consequences.⁵⁶

⁵⁰ See U.S. CENSUS BUREAU 2007, *supra* note 31, at 28. The CDC reports that 8.9 million children under age 18 were uninsured in 2007. See also CDC v. Census Comparison, *supra* note 31.

⁵¹ For an excellent discussion of the "often-overlooked fact that [o]ne out of every five uninsured Americans is a child," see FAMILIES USA, NO SHELTER FROM THE STORM: AMERICA'S UNINSURED CHILDREN, CAMPAIGN FOR CHILDREN'S HEALTH CARE (Sept. 2006), <http://www.familiesusa.org/assets/pdfs/campaign-for-childrens-health-care/no-shelter-from-the-storm.pdf>.

⁵² The Balanced Budget Act of 1997, Title XXI State Children's Health Insurance Program (SCHIP), PL 105-33, H.R. 2155, 105th Congress (1997). SCHIP is "jointly financed by the Federal and State governments and administered by the States." Centers for Medicare & Medicaid Services, Low Cost Health Insurance For Families and Children, <http://www.cms.hhs.gov/LowCostHealthInsFamChild/> (last visited Feb. 25, 2009). In 2008, SCHIP provided health insurance coverage to approximately 7.4 million low-income children whose families earned too much to be eligible for Medicaid and were unable to afford private insurance. Centers for Medicare & Medicaid Services, CHIP Ever Enrolled Graph, <http://www.cms.hhs.gov/NationalCHIPPolicy/downloads/CHIPEverEnrolledYearGraph.pdf> (last visited May 1, 2009). In February 2009, President Barack Obama signed the Children's Health Insurance Program Reauthorization Act of 2009 (previously known as SCHIP). The Act will finance the Children's Health Insurance Program (CHIP) through FY 2013.

⁵³ A survey conducted by Consumer Reports National Research Center in May 2007, sampled 2,905 Americans between ages 18 and 64. The survey found evidence that middle-income Americans are increasingly underinsured. The survey showed that, "the median household income of respondents who were underinsured was \$58,950, well above the U.S. median; 22 percent lived in households making more than \$100,000 per year." CONSUMER REP., *supra* note 26, at 17-18.

⁵⁴ See SHARON K. LONG & JOHN A. GRAVES, URBAN INST., WHAT HAPPENS WHEN PUBLIC COVERAGE IS NO LONGER AVAILABLE?, 6 (Jan. 2006), <http://www.kff.org/medicaid/upload/7449.pdf>. The uninsured have higher rates of morbidity and mortality, are less likely to have prevention service, and generally receive less care. *Id.* at 6. These results yield negative economic impacts on their communities: higher job absenteeism rates; lost productivity; and strain on local health care systems. *Id.* at 6.

⁵⁵ Himmelstein et al., *supra* note 42, at 9-10. Four policy implications result from their findings:

1) [E]ven brief lapses in insurance coverage may be ruinous and should not be viewed as benign. While 45 million Americans are uninsured at any point in time, many more experience spells without coverage. We find little evidence that such gaps were voluntary. Only a handful of medical debtors with a gap in coverage had chosen to forego insurance because they had not perceived a need for it; the overwhelming majority had found coverage unaffordable or effectively unavailable.

...

2) [M]any health insurance policies prove to be too skimpy in the face of serious illness. We doubt that such underinsurance reflects families' preference for risk; few Americans have more than one or two health insurance options. Many insured families are bankrupted by medical expenses well below the "catastrophic" thresholds of high-deductible plans that are increasingly popular with employers.

...

3) [E]ven good employment-based coverage sometimes fails to protect families, because illness may lead to job loss and the consequent loss of coverage. Lost jobs...also leave families without health coverage when they are at their financially most vulnerable.

...

4) [I]llness often leads to financial catastrophe through loss of income, as well as high medical bills. Hence disability insurance and paid sick leave are also critical to financial survival of a serious illness.

⁵⁶ "A new study commissioned by the Kaiser Family Foundation and . . . featured in the March 14, 2007, *Journal of the American Medical Association* . . . documents that people who are uninsured receive

Health Care Refugees

With more low and middle-income Americans suffering financial hardship⁵⁷ it will be increasingly difficult for them to purchase health insurance and medical care. With our country facing trillions of dollars in debt,⁵⁸ and with an ailing health care system⁵⁹ that will only increase the debt, it is time for the United States Congress, the medical community, the legal profession, and the American public to begin working together to overhaul the existing health care system⁶⁰ and start afresh.⁶¹ Until that happens, however, low and middle-income Americans who cannot afford to buy life-saving medical care in the United States and who do not qualify for help pursuant to any governmental program, should be

less care and have worse outcomes following an accident or the onset of a new chronic condition than those with insurance.” Kaiser Commission on Medicaid & the Uninsured, Lesson Shows Uninsured Receive Less Care and Experience Worse Outcomes, Mar. 14, 2007, <http://www.kff.org/uninsured/kcmu031407oth.cfm>.

⁵⁷ See DIRECTORATE FOR EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS, GROWING UNEQUAL? INCOME DISTRIBUTION AND POVERTY IN OECD COUNTRIES (OECD Oct. 2008), available at <http://www.oecd.org/dataoecd/47/2/41528678.pdf> (last visited Aug. 18, 2009).

The United States is the country with the highest inequality level and poverty rate across the OECD, Mexico and Turkey excepted. Since 2000, income inequality has increased rapidly, continuing a long-term trend that goes back to the 1970s. . . . Rich households in America have been leaving both middle and poorer income groups behind. This has happened in many countries, but nowhere has the trend been so stark as in the United States. . . . The distribution of earnings widened by 20% since the mid-1980s, which is more than in most other OECD countries. This is the main reason for widening inequality in America.

Id. at Country Note: United States.

⁵⁸ The General Accountability Office (GAO) calculates that the United States has “major fiscal exposures” totaling approximately \$52.7 trillion dollars. See Major Fiscal Exposure, http://www.gao.gov/special.pubs/longterm/1207fiscal_exposures.pdf (last visited Feb. 25, 2009). Furthermore, the GAO has concluded that:

[C]urrent fiscal policy is unsustainable over the long term. Absent reform of federal retirement and health care programs for the elderly - - including Social Security, Medicare, and Medicaid - - federal budgetary flexibility will become increasingly constrained. Assuming no changes to projected benefits or revenues, spending on these entitlements will drive increasingly large, persistent, and ultimately unsustainable federal deficits and debts as the baby boom generation retires.

See The Nation’s Long-Term Fiscal Challenge, <http://www.gao.gov/special.pubs/longterm/challenge.html> (last visited Feb. 25, 2009).

⁵⁹ See generally, DONALD L. BARLETT & JAMES B. STEELE, CRITICAL CONDITION: HOW HEALTH CARE IN AMERICA BECAME BIG BUSINESS AND BAD MEDICINE (Doubleday, New York, 2004). After detailing myriad causes that have resulted in the critical condition of the U.S. health care system, the authors explain that, “[i]t is really no system at all. Rather it’s a stunningly fragmented collection of businesses, government agencies, health care facilities, educational institutions, and other special interests wasting tens of billions of dollars and turning the treatment of disease and sickness into a lottery where some losers pay with their lives.” *Id.* at 235-36.

⁶⁰ *Id.* at 237. Barlett & Steele propose the following:

The simplest and most cost-effective remedy would be to provide universal coverage and to create one agency to collect medical fees and pay claims. This would eliminate the staggering overlap, duplication, bureaucracy, and waste created by thousands of individual plans, the hidden costs [of which] continue to drive health care out of reach for a steadily growing number of Americans. Under a single-payer system, all health care providers – doctors, hospitals, clinics – would bill one agency for their services and would be reimbursed by the same agency. Every American would receive basic comprehensive health care, including essential prescription drugs and rehabilitative care. Any one who needed to be treated or hospitalized could receive medical care without having to wrestle with referrals and without fear of financial ruin. Complex billing procedures and ambiguities over what is covered by insurance would be eliminated.

⁶¹ “Consumers Union, the nonprofit publisher of Consumer Reports, believes that any reform should ensure that financial barriers don’t stop people from getting the care they need and that the U.S. should move rapidly toward a system that makes clinical decisions based on scientific evidence instead of profit and [that] moderates health-care cost inflation.” See CONSUMER REP., *supra* note 26, at 20.

Health Care Refugees

permitted to seek “health care refugee” status from developed countries that are willing to provide them with needed health care treatment they cannot afford to buy in the United States.

II. Legal Issues

This section will examine certain U.N. treaties⁶² to determine whether they create a legal right to health care and, if so, whether the U.N. treaties⁶³ are binding on the United States. This section will also examine United States law to determine whether United States citizens may use an international treaty as a basis for requiring the United States Government to provide an adequate level of health care to all its citizens.

A. Human Rights Treaties Encompassing the Right to Health Care⁶⁴

There are a number of U.N. human rights treaties encompassing the right to health care,⁶⁵ some of which the United States has signed and ratified, others of which we have signed, but not ratified. There are also some treaties the United States has neither signed nor ratified.⁶⁶ Additionally, even though they are not treaties, there are many international declarations and standards relevant to health and human rights to which the United States may in theory be bound, because

⁶² See Vienna Convention on the Law of Treaties art.2-1(a), May 23, 1969, 1155 U.N.T.S. 331, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention] (defining a “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”).

⁶³ In addition to U.N. treaties addressing the right to health care, there are declarations, regional agreements, and national constitutions that recognize health care as a fundamental human right. See, e.g., European Social Charter arts. 11,13, Feb. 26, 1965, 529 U.N.T.S. 89; African Charter on Human and Peoples’ Rights art. 16, June 27, 1981, 21 I.L.M. 58; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 10, Nov. 17, 1988, 28 I.L.M. 156.

⁶⁴ See Stephen D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1 (1994) (discussion of health care as a human right).

⁶⁵ Numerous U.N. human rights treaties and conventions subsume health care rights: U.N. Charter art. 55; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, para. (e)(iv), Dec. 21,1965, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights art. 22, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social & Cultural Rights art.12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, ¶ 12, U.N. Doc. A/34/46 (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 24, U.N. Doc. A/44/49 (Nov. 20, 1989); Convention on the Rights of Persons with Disabilities, G.A. Res. 56/168, ¶ 25, U.N. Doc. A/RES/61/106, Annex I (Dec. 13, 2006).

⁶⁶ See, e.g., International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, ¶ 28, U.N. Doc. A/45/49 (July 1, 2003).

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Id. ¶ 28.

Health Care Refugees

such declarations and standards might express peremptory norms⁶⁷ of conduct widely accepted by the world community as *jus cogens*.⁶⁸

The principle that every human being is entitled to health care or medical care has been enshrined in international law since the first half of the Twentieth Century,⁶⁹ as illustrated by an examination of certain provisions in the following international agreements.

1. *The Charter of the United Nations*

When the Charter of the United Nations came into force on October 24, 1945, the United States became one of its charter members.⁷⁰ Article 55 of the U.N. Charter provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on the principle of equal rights . . . the United Nations shall promote:

- a. **higher standards of living**, full employment, and conditions of economic and social progress and development.
- b. solutions of international economic, social, **health**, and related **problems**; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁷¹

The right to health care is a fundamental human right that requires that citizens receive the help they need from their governments to achieve the highest attainable standard of health. Health is one of several measures that may be used to determine a country's standard of living.⁷² By improving the health of its citi-

⁶⁷ Vienna Convention, *supra* note 62, art. 53. The Vienna Convention states that, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* For a discussion of the Vienna Convention's binding nature on the United States, *See* Jamar, *supra* note 64, 17-18, n.37.

⁶⁸ The Oxford Dictionary of Law defines "jus cogens" as "a rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions. Such rules . . . will only amount to *jus cogens* rules if they are recognized as such by the international community as a whole." OXFORD DICTIONARY OF LAW (Elizabeth A. Martin & Jonathan Law eds., 2006). Under this definition, a conflicting treating is void, and states cannot create regional customary law contrary to *jus cogens* rules. *Id.* "Most authorities agree that the laws prohibiting slavery, genocide, piracy, and acts of aggression or illegal use of force are *jus cogens* laws. Some suggest that certain human rights provisions (*e.g.* those prohibiting racial discrimination) also come under the category of *jus cogens*." *Id.*

⁶⁹ *See e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 A(III), ¶ 25, U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR].

⁷⁰ List of United Nations Member States, <http://www.un.org/members/list.shtml> (last visited Nov. 10, 2008).

⁷¹ U.N. Charter, art. 55 (emphasis added).

⁷² *See* Richard H. Steckel, *A History of the Standard of Living in the United States*, ECON. HIST. SERVICES, July 22, 2002, <http://eh.net/encyclopedia/article/steckel.standard.living.us>.

Health Care Refugees

zens, a government is likely to improve the standard of living in its country. The countries of Europe,⁷³ as well as many of the world's other countries, have enacted legislation to address a wide-range of human rights issues, including their health care obligations, which likely improves the standard of living and the potential for human development⁷⁴ in those countries. At present the United States has a high potential for human development.⁷⁵ But this could change drastically if the Government continues to abdicate to "market forces" the Government's obligation to provide adequate health care to all of its citizens.

2. *International Convention on the Elimination of All Forms of Racial Discrimination*

The United States became a party to the Convention on the Elimination of All Forms of Racial Discrimination on November 20, 1994. Article 1 defines racial discrimination as:

[A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷⁶

Notably, Article 5 specifically provides for State Parties to guarantee the right to "public health, medical care, social security and social services."⁷⁷

Racial minorities in the United States are disproportionately more likely to suffer serious health problems.⁷⁸ While poverty is a major contributing factor to

⁷³ See The European Social Charter, *supra* note 63, arts. 11, 13 (discussing the rights to protection of health and the rights to social and medical assistance, respectively).

⁷⁴ See UN Development Programme [UNDP], Human Development Concept, <http://hdr.undp.org/en/humandev/> (last visited Aug. 18, 2009).

Human Development is a development paradigm that is about much more than the rise or fall of national incomes. It is about creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests. People are the real wealth of nations. Development is thus about expanding the choices people have to lead lives that they value. And it is thus about much more than economic growth, which is only a means—if a very important one—of enlarging people's choices.

Fundamental to enlarging these choices is building human capabilities—the range of things that people can do or be in life. The most basic capabilities for human development are to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living and to be able to participate in the life of the community. Without these, many choices are simply not available, and many opportunities in life remain inaccessible.

Id.

⁷⁵ Among the 179 countries listed on the UN Human Development Index for 2008, the United States is ranked as number fifteen. United Nations Human Development Index, <http://hdr.undp.org/en/statistics/> (last visited Aug. 18, 2009).

⁷⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 65, art. 1.

⁷⁷ *Id.* art. 5(e)(iv).

⁷⁸ See Shavers & Shavers, *supra* note 38, and James, *supra* note 39, for a discussion on disparities in health care in the United States and the deleterious effect on racial minorities.

Health Care Refugees

poor health⁷⁹ among such groups,⁸⁰ the disparities in health care they experience, both qualitatively and quantitatively, raise the specter that racial discrimination⁸¹ might also be responsible for the differences in rates of disease, access to medical care and course of treatment, and medical outcomes.⁸² Providing adequate levels of health care to all its citizens may be the only way the United States can realistically eliminate the health care gap experienced by many of its minority citizens.⁸³ Unless the United States Government does this, minorities who cannot afford to buy life-saving medical care in America, may be able to obtain such care only if they are granted health care refugee status by countries with well-developed health care systems and economies.

3. *The International Covenant on Civil and Political Rights (ICCPR)*⁸⁴

The United States became a party to the ICCPR on September 8, 1992. Article 6(1) of the ICCPR provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁸⁵

A person who has a serious illness or medical condition, which if left untreated will result in death, in essence has been sentenced to die if she is refused medical treatment because she has neither money nor insurance.⁸⁶ If said person

⁷⁹ See generally, GAO, Poverty In America: Economic Research Shows Adverse Impacts on Health Status and Other Social Conditions As Well As The Economic Growth Rate 9 (GAO Report 07-344, Jan. 24, 2007), <http://www.gao.gov/new.items/d07344.pdf> at p. 13 Of 35 (last visited Aug. 18, 2009) (discussing health outcomes for individuals with low incomes and their limited access to health insurance and health care).

⁸⁰ “As defined by the Office of Management and Budget and updated for inflation using the Consumer Price Index, the weighted average poverty threshold for a family of four in 2007 was \$21,203; for a family of three: \$16,530; for a family of two: \$13,540; and for unrelated individuals: \$10,590.” Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down (Aug. 26, 2008), http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html (last visited Aug. 18, 2009). In 2007, 24.5 percent of Blacks, 21.5 percent of Hispanics, 10.2 percent of Asians, and 8.2 percent of non-Hispanic Whites lived in poverty. *Id.*

⁸¹ See generally, WORLD HEALTH ORGANIZATION, HEALTH & HUMAN RIGHTS PUBLICATION SERIES, ISSUE No. 2, HEALTH AND FREEDOM FROM DISCRIMINATION 8 (2001) (discussing health disparities, and the underlying social inequalities that produce them).

⁸² See generally, Susan D. Cochran & Namdi W. Barnes, *Discrimination Contributes To African-Americans Health Disparities*, MEDICAL NEWS TODAY, Nov. 1, 2006, <http://www.medicalnewstoday.com/articles/55345.php> (discussing race-based discrimination as an underlying source for increased health issues in African Americans).

⁸³ See *Addressing Disparities in Health and Health Care: Issues for Reform: Hearing Before the United States H.R. Comm. on Ways and Means Health Subcomm.*, 113th Cong. (2008), available at <http://www.kff.org/minorityhealth/upload/7780.pdf> (testimony of Marsha Lillie-Blanton, Dr. P.H., Senior Advisor on Race, Ethnicity, and Health Care, Henry J. Kaiser Family Foundation discussing the role of influence of health insurance on racial disparities in health care).

⁸⁴ ICCPR, *supra* note 65.

⁸⁵ *Id.* art. 6(1).

⁸⁶ See STAN DORN, UNINSURED AND DYING BECAUSE OF IT: UPDATING THE INSTITUTE OF MEDICINE ANALYSIS ON THE IMPACT OF UNINSURANCE ON MORTALITY 6 (The Urban Institute January 2008), http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf (estimating that 137,000 uninsured Americans from age 25-64 died from 2000-2006, because they lacked health insurance).

Health Care Refugees

resides in the United States, it is arguable that she has been arbitrarily deprived of her life because she is poor. A wealthier American with the same medical condition and sufficient financial means and insurance would be able to receive the necessary medical treatment and have a much better chance of living. The willful failure of the United States government to provide adequate health care for all its citizens is, in effect, an arbitrary death sentence to many of its poor, low-income, and uninsured citizens, as well as for many of its underinsured middle-class citizens.⁸⁷

4. *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

The United States signed the ICESCR on October 5, 1977, but has yet to ratify it.⁸⁸ Article 12 of ICESCR provides as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the **highest attainable standard of physical and mental health.**

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

. . . .

(d) **The creation of conditions which would assure to all medical service and medical attention in the event of sickness.**⁸⁹

Though the United States signed the ICESCR in 1977, the U.S. Government has still not chosen to provide an adequate level of health care to all its citizens. As a result, many poor and middle-class Americans, who do not have and cannot afford to buy health insurance, suffer “a range of [adverse] consequences, including lower quality of life, increased morbidity and mortality, and higher financial burdens.”⁹⁰

⁸⁷ JACK DONNELLY, *International Human Rights and Health Care Reform, in HEALTH CARE REFORM: A HUMAN RIGHTS APPROACH* 134 (Georgetown University Press 1994):

[I]t is still of great moral significance to let people die (or suffer)—at least when one is aware of their impending death (or injury), possesses the resources needed to prevent death, and is not severely constrained from acting. The offense is especially great if the resulting deaths (or injuries) are systematic. This is precisely the case with access to health care. Despite our immense wealth and considerable spending on health care, the performance of the United States as measured by such standard statistical measures as life expectancy and infant mortality is dismal.

⁸⁸ See U.N. Treaty Collection, Status of International Covenant on Economic, Social and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Aug. 19, 2009).

⁸⁹ ICESCR, *supra* note 65, art.12 (emphasis added).

⁹⁰ DORN, *supra* note 86, at 2.

Health Care Refugees

5. *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*

The United States signed the CEDAW on July 17, 1980, but has not yet ratified it.⁹¹ Article 12 of the CEDAW provides as follows: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”⁹²

“Approximately 16.7 women [in the United States] are uninsured. This number has grown by 1.2 million since 2004, with half of the growth among low-income women. These individuals lack adequate access to care, get a lower standard of care when they are in the health system, and have poorer health outcomes.”⁹³ Low-income women, young women, and minority women are particularly at risk of being uninsured.⁹⁴ To the extent that the overall well-being of women in the United States ranks 106 out of 156 countries,⁹⁵ it is important that the United States work to improve the health care status of American women. Because women in America generally earn only seventy-six cents for every dollar earned by men,⁹⁶ women have less money with which to purchase health care. Allowing women’s access to health care to be determined by market forces is not acceptable. Until the United States Government acts to ensure adequate levels of health care for all its citizens, some American women may have to seek health care refugee status in order to receive life-saving medical care.

6. *Convention on the Rights of the Child (CRC)*⁹⁷

The United States signed the CRC on February 16, 1995, but has not yet ratified it.⁹⁸ Article 24 of the CRC provides as follows:⁹⁹

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of

⁹¹ See UN CEDAW: States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Aug. 18, 2009).

⁹² Convention on the Elimination of all Forms of Discrimination Against Women, *supra* note 65, art. 12.

⁹³ See THE HENRY J. KAISER FAMILY FOUNDATION, WOMEN’S HEALTH INSURANCE COVERAGE FACT SHEET 2 (Oct. 2008), http://www.kff.org/womenshealth/upload/6000_07.pdf.

⁹⁴ *Id.*

⁹⁵ UNDP, 2007/2008 HUMAN DEVELOPMENT REPORT: UNITED STATES, http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_USA.html. “The greater the gender disparity in basic human development, the lower is a country’s gender-related development index (GDI) relative to its [human development index] HDI. . . . Out of the 156 countries with both HDI and GDI values, 106 countries have a better ratio than the United States’s.” *Id.*

⁹⁶ Amy Caiazza et al., Women’s Economic Status in the States: Wide Disparities by Race, Ethnicity and Region 13 (Inst. for Women’s Policy Res. 2004), <http://www.iwpr.org/pdf/R260.pdf>.

⁹⁷ Convention on the Rights of the Child, *supra* note 65.

⁹⁸ See U.N. Treaty Collection, Status of Convention on the Rights of the Child, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Aug. 19, 2009).

⁹⁹ Convention on the Rights of the Child, *supra* note 65, art. 24.

Health Care Refugees

illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Children are the most vulnerable group in any society. They generally have no voice in the halls of power and are entirely dependent on adults for their well-being, including their health care. Thus it is only fitting that their special status be recognized and protected by a legally binding international agreement. Sadly, the United States of America is one of only two countries¹⁰⁰ that has not ratified the Convention on the Rights of the Child. Equally sad, is the fact that over eight million children in the United States are uninsured.¹⁰¹ In a wealthy nation where politicians repeatedly claim to value life and to care about children, it is incomprehensible that even one child lives without the necessary health care.

¹⁰⁰ Status of Convention on the Rights of the Child, *supra* note 98. Besides the United States, Somalia is the only other member country of the United Nations that has not ratified the Convention on the Rights of the Child.

¹⁰¹ See *CDC v. Census Comparison* *supra* note 31; and U.S. CENSUS BUREAU 2007, *supra* note 31.

Health Care Refugees

Two additional Articles from the CRC must also be mentioned in the discussion of “health care refugees”—Article 22 concerning child refugees, and Article 23 concerning the rights of mentally and physically disabled children.

Article 23 sets forth the rights of the mentally or physically disabled child and states, *inter alia*, that such a child “should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”¹⁰² Recognizing the critically important role that health care plays in achieving these goals, Article 23 says further, in relevant part, that:

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, **health care services, rehabilitation services**, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.¹⁰³

Many physically handicapped and mentally challenged children in the United States have to fight insurance companies, HMOs, and even state governments to obtain the health care they need.¹⁰⁴ Many parents of children with physical and mental disabilities often find it difficult to obtain health insurance, and hence treatment, for their children. Parents of mentally and emotionally challenged children have also confronted barriers to obtaining adequate health care for their children, since insurance companies and HMOs have, until recently, refused to provide parity¹⁰⁵ in treatment to people afflicted with mental illness. American

¹⁰² See Convention on the Rights of the Child, *supra* note 65, art. 23(1).

¹⁰³ *Id.* art. 23(2) & (3) (emphasis added).

¹⁰⁴ See generally *John B. v. Menke*, 176 F. Supp. 2d 786 (M.D. Tenn. 2001); *John B. v. Goetz*, 2007 U.S. Dist. LEXIS 75457 (M.D. Tenn. Oct. 10, 2007), *petition for mandamus granted*, 531 F.3d 448 (6th Cir. 2008). This class-action law suit began in 1998 and the approximately 640,000 children who sued the State of Tennessee to receive the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services to which they are legally entitled pursuant to Title XIX of the Social Security Act (42 U.S.C. §§1396(a)(43), 1396d(r)), are still waging this legal battle despite the defendants having entered into a Consent Decree in 1998. The plaintiffs in this case are represented by the Tennessee Justice Center. For more information about *John B.* and other cases involving medically fragile children, see Tennessee Justice Center, <http://www.tnjustice.org/case/johnb/default.htm> (last visited Aug. 19, 2009).

¹⁰⁵ “Parity” refers to the effort to treat mental health financing on the same basis as financing for general health services. . . . The fundamental motivation behind parity legislation is the desire to cover

Health Care Refugees

parents should not have to fight their children's diseases *and* the American health care system in order to keep their children alive and healthy. Children in the United States should receive health care at least comparable to that given to children in other developed countries¹⁰⁶ as a matter of right. The United States Government owes a duty to each child in America to provide it with an adequate level of health care.

Article 22 of the CRC reads as follows:

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures **shall**, whether unaccompanied or accompanied by his or her parents or by any other person, **receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.**¹⁰⁷

When read in conjunction with Article 24(1), Article 22(1) provides a firm basis to any Party to the Convention on the Rights of the Child to extend humanitarian assistance to any child who might seek health care refugee status in order to receive life-saving medical care. Thus, a child from the United States whose life is in jeopardy because he cannot afford life-saving medical care and whose government refuses to provide him with an adequate level of health care, could be granted "health care refugee" status by any developed country that has the financial wherewithal and heart to help.

7. *Convention on the Rights of Persons with Disabilities (CRPD)*¹⁰⁸

The United States is not a signatory to the CRPD,¹⁰⁹ Article 1 of which reads as follows:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

mental illness on the same basis as somatic illness, that is, to cover mental illness fairly." UNITED STATES SURGEON GENERAL, MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 426 (1999), <http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c6.pdf>.

¹⁰⁶ See Toyako Report, *supra* note 1.

¹⁰⁷ Convention on the Rights of the Child, *supra* note 65, art. 22 (emphasis added).

¹⁰⁸ Convention on the Rights of Persons with Disabilities, *supra* note 65.

¹⁰⁹ See U.N. Treaty Collection, Status of Convention on the Rights of Persons with Disabilities, <http://www2.ohchr.org/english/> (last visited July 1, 2009). As of July 2009, there were 140 Signatories and 59 Ratifications to the Convention.

Health Care Refugees

The CRPD also specifically recognizes health care concerns of disabled persons. Article 25 addresses the right to the “highest attainable standard of health” by enumerating several State Party requirements: provision of the same range and quality of care; early, disability-specific identification of needed health services and interventions; preventative health care; geographically conscious location of care; raising awareness of dignity in care; and preventing discrimination in the provision of health and life insurance, health care, health services, nutrition, and hydration.¹¹⁰

The United States has neither signed nor ratified this Convention or its Optional Protocol,¹¹¹ both of which entered into force on May 3, 2008. “The Convention . . . does not create new rights but aims to ensure that the benefits of existing rights are fully extended and guaranteed to the estimated 650 million people around the world with disabilities.”¹¹² People with physical and mental disabilities, particularly children, are the most fragile within any society. They need and deserve the comprehensive legal protections set forth in the Convention on the Rights of Persons with Disabilities.

B. Is The Right to Health Care *Jus Cogens*?

The international community has acknowledged that the right to health care is a fundamental human right,¹¹³ and has entered into many international agreements intended to ensure that this right is accorded to human beings everywhere. The duties owed to citizens by their governments are set forth in great detail in General Comment 14,¹¹⁴ wherein the U.N. Committee on Economic, Social, and Cultural Rights stated, *inter alia*, the following:

- Health is a fundamental human right including certain components which are legally enforceable.¹¹⁵
- The right to health is not to be understood as a right to be *healthy*.¹¹⁶
- The right to health includes essential elements: availability; accessibility (physical economic, informational, and non-discriminatory); acceptability; and quality.¹¹⁷

¹¹⁰ Convention on the Rights of Persons with Disabilities, *supra* note 65, art. 25.

¹¹¹ See Status of Convention on the Rights of Persons with Disabilities, *supra* note 109; and U.N. Treaty Collection, Status of Optional Protocol to the Convention on the Rights of Persons with Disabilities, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15-a&chapter=4&lang=en (last visited Aug. 19, 2009).

¹¹² *Entry Into Force of Disability Pact Closes Major Gap in Rights Protection*, U.N. NEWS CENTRE, June 6, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=26931&Cr=disab&Cr1=> (last visited Aug. 19, 2009).

¹¹³ See ICESCR, *supra* note 65, art. 12. For Implementation Guidelines for Article 12, see U.N. Econ. & Soc. Council, 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. 14*, ¶ 1, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment No. 14*].

¹¹⁴ *General Comment No. 14*, *supra* note 113.

¹¹⁵ *Id.* ¶ 1.

¹¹⁶ *Id.* ¶ 8.

¹¹⁷ *Id.* ¶ 12.

Health Care Refugees

- Economic accessibility means the “[p]ayment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.”¹¹⁸
- To comply with Article 12 of the International Covenant on Economic, Social and Cultural Rights [ICESCR], State Parties must “prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.”¹¹⁹
- States Parties have a core obligation to: ensure the right of access to and equitable distribution of health facilities, goods and services on a non-discriminatory basis.¹²⁰ These core obligations are nonderogable, and a State Party cannot, under any circumstances, justify its non-compliance with them.¹²¹
- “A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12.”¹²²
- Violations can occur through acts of omission, including the “failure to take appropriate steps towards the full realization of everyone’s right to the enjoyment of the highest attainable standard of physical and mental health”¹²³
- “Violations of the obligation to fulfill occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health.”¹²⁴
- Victims of a violation of the right to health should have access to effective remedies, judicial or otherwise, at the national and international levels.¹²⁵
- The role of the WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent, UNICEF, and other non-governmental organizations is of particular importance in providing humanitarian assistance to refugees.¹²⁶

It is clear from the above-described obligations that the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) creates legal obligations

¹¹⁸ *Id.*

¹¹⁹ *Id.* ¶ 39.

¹²⁰ *Id.* ¶ 43.

¹²¹ *Id.* ¶ 47.

¹²² *Id.*

¹²³ *Id.* ¶ 49.

¹²⁴ *Id.* ¶ 52.

¹²⁵ *Id.* ¶ 59.

¹²⁶ *Id.* ¶ 65.

Health Care Refugees

for parties thereto and gives legally enforceable rights to citizens who live in countries that have ratified the agreement. However, there are countries, including the United States, that are not parties to the ICESCR,¹²⁷ yet are parties to other international agreements that include a right to health as a fundamental human right. If nearly all the world's countries agree that every human being has the right "to the highest attainable standard of health,"¹²⁸ has the human right to health, which subsumes the right to health care, reached the norm of *jus cogens*?

Article 53 of the Vienna Convention on the Law of Treaties ("VCLT")¹²⁹ defines a peremptory norm (aka *jus cogens*) of international law as a "norm accepted and recognized by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹³⁰ To achieve peremptory status a norm must, therefore, have four elements. It must be a norm: (1) of general international law; (2) accepted by the international community of States as a whole;¹³¹ (3) incapable of derogation; and (4) incapable of being modified except by a peremptory norm of the same status.¹³² Article 12 of the ICESCR requires that, "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Examining said article through the lens of Article 53 of the VCLT, it appears that Article 12 of ICESCR is a norm: (1) of general international law;¹³³ (2) accepted by the international community;¹³⁴ (3) incapable of

¹²⁷ As of August 19, 2009, Belize, Comoros, Cuba, Sao Tome and Principe, South Africa, and the United States of America had not ratified the International Covenant on Economic, Social and Cultural Rights. U.N. Treaty Collection, Status of International Covenant on Economic, Social and Cultural Rights, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Aug. 19, 2009).

¹²⁸ ICESCR, *supra* note 65, art. 12; *General Comment No. 14, supra* note 113.

¹²⁹ See Vienna Convention, *supra* note 62, art. 53.

¹³⁰ *Id.*

¹³¹ See Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens, and the Protection of the Global Environment: Developing Criteria for Preemptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101, 112 (1998) for a discussion of identifying a norm as *jus cogens*. "Identifying a norm as *jus cogens* does not require recognition by each and every member of the international community, but only the consent of a very large majority of states reflecting the essential components of the international community. The prevailing doctrine extends the binding effect of peremptory norms even to those states that from the very beginning have objected to such a norm ('persistent objectors')." *Id.* (internal citations omitted).

¹³² Vienna Convention, *supra* note 62, art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.")

¹³³ The right to the highest attainable standard of health has been enshrined in many international treaties. See, e.g., Jamar, *supra* note 64; G.A. Res. 45/158, *supra* note 66; and G.A. Res. 217A (III), *supra* note 69.

¹³⁴ As of August 19, 2009, 160 countries had ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), of which Article 12 is a part. Status of International Covenant on Economic, Social and Cultural Rights, *supra* note 127.

Health Care Refugees

derogation;¹³⁵ and (4) incapable of being modified except by a peremptory norm of the same status.¹³⁶

Therefore, the right to health enunciated in Article 12 of the ICESCR and more fully explained in General Comment 14,¹³⁷ does appear to be *jus cogens*, and therefore is binding even on non-parties.¹³⁸ As one scholar has noted:

As a descriptive matter, it seems clear that there are elements of the present international legal system that are not based on the consent of the states involved. The concept of *jus cogens*, that is, peremptory law, is an example. *Jus cogens* norms are seen by scholars as a sort of superinternational law, trumping other forms of law and only able to be changed by the evolution of a new rule of *jus cogens*. Moreover, these norms are viewed as **capable of [being] binding by all and against all (not just by and against those who have consented to the creation of the norms)**.¹³⁹

Another scholar has examined *jus cogens* in light of human rights and has concluded:

In the context of the sweeping language of human rights, certain human rights principles are recognized as *jus cogens* peremptory norms of international law. *Jus cogens* norms are fundamental tenets of international law **considered accepted by and binding on all states**, from which no derogation is permitted.¹⁴⁰

¹³⁵ See *General Comment No. 14*, *supra* note 113, ¶¶ 43, 47 (explaining generally the depth and breadth of Article 12 of the ICESCR, which includes paragraph 47 stating that paragraph 43 contains core, non-derogable obligations).

¹³⁶ There are very few peremptory norms of higher status than the fundamental human right to health embodied in Article 12 of the ICESCR, *supra* note 65, except perhaps the fundamental right to life itself, as expressed in Article 6(1) of the International Covenant on Civil and Political Rights [ICCPR], *supra* note 65. For a general discussion of the fundamental rights expressed in the International Bill of Human Rights, see Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (explaining that the International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights).

¹³⁷ See *General Comment 14*, *supra* note 113 (addressing the need to establish health as a fundamental human right that creates legally enforceable obligations).

¹³⁸ *But see* Prosper Weil, *Towards Relative Normativity in International Law?* 77 AM. J. INT'L L. 413, 420 (1983) (questioning the wisdom of having *jus cogens* norms and asserting that international law requires voluntarism to perform its functions).

¹³⁹ Eduardo Moises Peñalver, *The Persistent Problem of Obligation in International Law*, 36 STAN. J. INT'L L. 271, 282 (2000); *see also* Uhlmann, *supra* note 131, at 113 (stating that the consent of a large number of nations is necessary to create a binding effect of a specific norm and that no nation, small group of nations, or persistent objector can veto the formation of the norm if its purpose is to protect a state community interest, as that is the essence of *jus cogens*).

¹⁴⁰ See Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 110 (2008) (emphasis added) (arguing that sovereignty needs to change for the twenty-first century legal model by shifting towards individual rights and should be applicable only to acts consistent with global ideals and denied for acts that are in direct violation of international law).

Health Care Refugees

Furthermore, in distinguishing customary international law¹⁴¹ from *jus cogens* norms, a United States Circuit Court for the Ninth Circuit has observed that:

[*Jus cogens* ‘embraces customary laws considered binding on all nations,’ and ‘is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.’ Whereas customary international law derives solely from the consent of states, **the fundamental and universal norms constituting *jus cogens*** transcend such consent . . . Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they ‘enjoy the highest status within international law.’¹⁴²

This author posits the following additional argument: If one believes the fundamental human right to life encompasses the fundamental right to health, then the United States may be bound by treaty as well as *jus cogens* to provide an adequate level of health care to all its citizens. The ICESCR (enunciating Article 12 on the right to health) came into force on January 3, 1976.¹⁴³ The International Covenant on Civil and Political Rights (ICCPR) (enunciating Article 6 (1) on the right to life) came into force on March 23, 1976.¹⁴⁴ The United States is a party to the ICCPR which, as a document that came into force later in time, could be viewed as enunciating a new peremptory norm that subsumes a prior peremptory norm, *i.e.*, the right to life subsumes the right of health. Thus, the ICCPR would bind the United States both by treaty obligation and *jus cogens* to provide an adequate level of health care to all its citizens.

C. Legal Remedies Available for Failure of the U.S. Government to Provide An Adequate Level of Health Care to All Its Citizens¹⁴⁵

The United States has not ratified the ICESCR and ratified the ICCPR subject to a declaration of non-self execution,¹⁴⁶ which means Congress must pass ena-

¹⁴¹ Customary international law is a source of international law set forth in Article 38 of the Statute of the International Court of Justice. *See e.g.*, U.N. Charter arts. 92-96, 59 Stat. 1031 (1945). The ICJ Statute provides that the Court’s function is to resolve disputes by applying a prescribed hierarchy of international laws to the facts in a given matter.

¹⁴² *Siderman de Blake v. Republic of Arg.*, 965 F. 2d 699, 715 (9th Cir. 1992) (internal citations omitted) (remanding the case to the district court for a more complete investigation of the jurisdictional basis for the plaintiffs’ claims of torture against the Argentine government because the lower court applied sovereign immunity to Argentina, without the government’s appearance, when it needed to offer some evidence that it acted in its sovereign capacity for engaging in tyrannical, anti-Semitic and torturous acts).

¹⁴³ ICESCR, *supra* note 65.

¹⁴⁴ ICCPR, *supra* note 65.

¹⁴⁵ Paragraph 59 of *General Comment 14*, *supra* note 114, states that “[a]ny person or group victim of a violation of the right to health *should have access to effective judicial or other appropriate remedies at both national and international levels.*”

¹⁴⁶ *See generally* David Sloss, *The Domestication of International Human Rights: Non Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L. L. 129, 135 (1999). Sloss argues that “[non-self-executing] declarations, properly construed, permit courts to apply the treaties directly to provide a judicial remedy in some, but not all, cases that raise meritorious treaty-based human rights claims.” *Id.*

Health Care Refugees

bling legislation before the ICCPR can be enforced in this country. The Supreme Court of the United States has recently stated:

[When treaty] ‘stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.’ In sum, while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’¹⁴⁷

The Supreme Court defines a “self-executing” treaty as one that “has automatic domestic effect as federal law upon ratification,” and a “non-self-executing” treaty as one that “does not itself give rise to domestically enforceable federal law.”¹⁴⁸ “Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.”¹⁴⁹

The ICCPR is non-self-executing and Congress has enacted no legislation to implement it. Thus, an American citizen in need of life-saving medical care, who lacks health insurance and the money with which to purchase medical care, and who earns too much to qualify for any of the government insurance programs,¹⁵⁰ would likely be unsuccessful were she to invoke the ICCPR as a legal basis in a suit to require the federal government¹⁵¹ to pay for her medical care. Furthermore, the consensus of opinion among legal scholars and jurists in the United States is that, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in the domestic courts.’”¹⁵² Thus, low or middle-income Americans in dire medical and financial straits might be

¹⁴⁷ *Medellín v. Texas*, No. 06-984, at 8-9 (U.S. Mar. 25, 2008) (internal citations omitted) (holding, *inter alia*, that a decision of the International Court of Justice is not directly enforceable in the United States as domestic law in the absence of implementing legislation).

¹⁴⁸ *Id.* at 9 n.2.

¹⁴⁹ *Id.*

¹⁵⁰ See Current Population Survey, *supra* note 44.

¹⁵¹ This article does not examine the issue of sovereign immunity. Suffice it to say that there are limited circumstances under which an American citizen may sue the United States Government. The Federal Tort Claims Act provides such a limited grant of authority.

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671-2680, is the statute by which the United States authorizes tort suits to be brought against itself. . . . [B]y enacting the FTCA, Congress waived sovereign immunity for some tort suits. With exceptions, it made the United States liable: ‘for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.’ 28 U.S.C. § 1346(b).

Henry Cohen & Vanessa K. Butows, CRS REPORT FOR CONGRESS: FEDERAL TORT CLAIMS ACT 1 (2007), <http://www.fas.org/sgp/crs/misc/95-717.pdf>; see also Humes-Schulz, *supra* note 140 (asserting that an individual’s ability to enforce *jus cogens* human rights should not be precluded by outdated notions of sovereign immunity. The case involved a domestic court that should have awarded damages, based on violations of the *jus cogens* human right prohibiting torture, to one of its citizens who had been tortured by a foreign government).

¹⁵² *Medellín v. Texas*, No. 06-984, at 9 n.3.

Health Care Refugees

required to look beyond the shores of the United States when they need life-saving medical care.

Conclusion

To provide an adequate level of health care to all its citizens is a *jus cogens* norm of international law to which all member states of the United Nations are bound. When a government refuses to fulfill this obligation toward its citizens, such persons should be permitted to apply for health care refugee status to United Nations member states with developed economies. Given the willful failure of the United States government to provide an adequate level of health care to all its citizens, many low and middle-income Americans have a well-founded fear that they might die because their government will not fulfill its international legal obligation to provide them with an adequate level of health care. Furthermore, given that low and middle-income Americans would likely be unsuccessful in U.S. courts in invoking international law as a basis to require the federal government to provide such care, they have no effective judicial remedy at the national level.¹⁵³ Therefore, an appropriate remedy at the international level¹⁵⁴ would be to grant them health care refugee status.

The U.N already recognizes complementary refugee status¹⁵⁵ for some persons based on humanitarian grounds. For a given developed country to grant a health care refugee protection within its borders for the purpose of providing her with life-saving medical treatment would fall well within the meaning of the complementary refugee status recognized by the United Nations. It would also be consistent with the trend in the European Union to grant subsidiary protection to individuals who have a “well founded fear of violation of [their] human rights.”¹⁵⁶ It is time for the community of nations to extend their hearts and hands to health care refugees.¹⁵⁷

¹⁵³ See *General Comment 14*, *supra* note 113, art. 59 (“Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.”).

¹⁵⁴ *Id.*

¹⁵⁵ See GLOBAL TRENDS, *supra* note 7, at 4 n.8.

¹⁵⁶ See Council Directive 2004/83/EC, *supra* note 12, art. 15(a)-(c).

¹⁵⁷ The United States will weather the financial storm currently pummeling its shores. When the storm has passed, hopefully the United States Government will be ready to honor its international law obligations by taking measures now to ensure that all Americans receive adequate levels of health care. Unless and until such legislation is passed, however, low and middle-income Americans may require help from their fellow human beings in countries with well-developed health care systems and economies.

THE INTERNATIONAL COMMUNITY RESPONDS TO DARFUR: ICC PROSECUTION RENEWS HOPE FOR INTERNATIONAL JUSTICE¹

John E. Tanagho and John P. Hermina

I. Introduction

Meet Hamid Saleem. Saleem lived with his wife and four children in a small village in northern Darfur called Boba.² On April 30, 2004 all that changed. That day a Sudanese military aircraft attacked his village. He and his family fled into the surrounding mountains. It was the last time he saw his family. The Janjaweed militia killed his brother and fifteen other Darfuris in a raid and then buried them in a pit. Now safe in London, Saleem said: “What is happening there is genocide. A specific race is being targeted - my Zagawa tribe.”³

Six years old—that is the current age of the first genocide of the twenty-first century.⁴ Over the past six years, the mostly Arab Islamic government of Sudan has waged a violent war against the mostly Black African tribes of Darfur.⁵ Through an orchestrated campaign of violence and extermination, Sudan’s Armed Forces (SAF) and its proxy Arab Militias, the Janjaweed,⁶ have killed

¹ This article grew out of a paper submitted for the spring 2008 International Criminal Law Seminar co-taught by Professors Jerry E. Norton and Alan Raphael at Loyola University Chicago School of Law. John Tanagho is an associate at the law firm of Schiff Hardin LLP where he focuses in a wide range of general litigation, with a concentration in white collar and corporate compliance matters. John thanks his wife Wendy for all her support. John Hermina received his Juris Doctor from Loyola University Chicago School of Law in May 2009. He is currently pursuing a career in human rights. John thanks his parents and his fiancé for all their support.

² The story of Hamid Saleem is taken from Hamid’s self-told story provided to BBCArabic.com. *Displaced by Darfur: Your Stories*, BBC NEWS, Oct. 2, 2006, <http://news.bbc.co.uk/2/hi/africa/5391656.stm>.

³ *Id.* Mohamed Baraka Mohamed, 56, a lawyer and former minister in Sudan’s Parliament from 2001–2005 “confirm[s] that what is going on is genocide.” *Id.* Mohamed was beaten in school if he did not speak Arabic. *Id.* He says the attitude of forced Arabisation “is not confined to the Sudanese government - other Arab and Muslim countries are included. Has a single Arab or Muslim country condemned what is happening in Darfur?” *Id.*

⁴ Genocide Intervention Network Darfur Page, <http://www.genocideintervention.net/educate/darfur> (last visited Feb. 14, 2008).

⁵ See Eric Reeves, *Genocide by Attrition in Sudan*, WASH. POST, Apr. 6, 2008, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/04/AR2008040403087.html> [hereinafter Reeves, *Genocide by Attrition*]. “Sudan’s National Islamic Front regime” was in its “sixth year of genocidal counterinsurgency warfare in the vast western region of Darfur, targeting African civilian populations.” *Id.* Eric Reeves, a professor at Smith College, is the author of *A LONG DAY’S DYING: CRITICAL MOMENTS IN THE DARFUR GENOCIDE*. He is a consultant to several human rights and humanitarian organizations in Sudan.

⁶ The term “janjaweed” means “devils on horseback.” Martin Fletcher, *Janjaweed Defector Confesses Sudan’s Atrocities in Darfur*, SUDAN TRIB., Oct. 19, 2006, available at <http://www.sudantribune.com/spip.php?article18203>.

The International Community Responds To Darfur

almost 400,000 people.⁷ Sudan claims to be conducting a counterinsurgency against rebel groups in Darfur;⁸ however, the world, including the International Criminal Court (ICC),⁹ has documented Sudan's systematic attack against innocent and unarmed (non-combatant) Darfur civilians and their villages.¹⁰ In addition to the murders, almost 2.5 million people are displaced; and the violence continues virtually unabated to this day.¹¹

Non-governmental organizations and advocacy groups have criticized and lamented, with good reason, the international community's failure to timely and adequately respond to the atrocities in Darfur.¹² The international community has, however, slowly responded most recently with the ICC's historic issuance of an arrest warrant for Sudan's President Omar Hassan Ahmad Al-Bashir for five counts of crimes against humanity and two counts of war crimes for his "essential role" in the murder, torture, rape, and displacement of millions of civilians in

⁷ Eric Reeves, *How Many Deaths in Darfur?*, THE GUARDIAN (ON-LINE), Aug. 20, 2007, <http://www.sudanreeves.org/index.php?name=news&file=article&sid=181&theme=Printer> "We could easily be talking about 400,000 deaths." (quoting John Hagan, a sociologist at Northwestern University, in Jeffrey Gettleman, *Toll of Darfur Underreported, Study Declares*, N.Y. TIMES, Sept. 15, 2006, available at http://www.nytimes.com/2006/09/15/world/africa/15darfur.html?_r=1&scp=1&sq=sept.%2015,%202006,%20Hagan&st=cse).

⁸ See *infra* Part III.A (discussing rebel attacks on Sudanese government installations).

⁹ Established through the Rome Conference in July 17, 1998, and codified by the Rome Treaty, the ICC is the world's first permanent international court. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Thus far, 105 States are Parties to the Rome Treaty. In the words of ICC Prosecutor Luis Moreno-Ocampo, the Court is "a tool to manage violent international conflicts." ICC Chief Prosecutor, Luis Moreno-Ocampo, Presentation at the Midwest Regional Conference on International Justice: The International Criminal Court 10 Years after the Rome Conference, Harold Washington Library, Chi., Ill. (Apr. 25, 2008) [hereinafter Conference on International Justice].

¹⁰ Google Maps reveals the product of Sudan's scorched-earth campaign and the aftermath of burned Darfur villages. Google Maps, <http://maps.google.com> (search for "Darfur;" then click on "Satellite" hyperlink in upper right corner of map).

¹¹ See Amber Henshaw, *Darfur: Little Hope Five Years On*, BBC NEWS, Feb. 26, 2008, <http://news.bbc.co.uk/2/hi/africa/7263663.stm>. Auriol Miller, head of Oxfam, head of Oxfam in Sudan, stated that "[t]he situation is not better than it was five years ago." *Id.* Eighty thousand Darfur civilians had been displaced as of April 2008. Ambassador Richard Williamson, Presidential Special Envoy to Sudan, Conference on International Justice, *supra* note 9.

¹² Save Darfur Coalition President, Jerry Fowler, spoke with Darfur refugees in Chad in the middle of 2005, right after the U.N. Security Council referred the situation in Darfur to the ICC. Jerry Fowler, President of the Save Darfur Coalition, Conference on International Justice, *supra* note 9. At that time, Darfur refugees asked him "when will Bashir be in the Hague?" *Id.* Fowler remembers that the people genuinely expected that when the rest of the world found out what was happening in Darfur, they would be protected and able to return home. *Id.* Fowler contends, however, that as of April 2008, there had been "no effective international response to Darfur." *Id.* See also Amnesty International, *Support the Work of the International Criminal Court in Darfur, Sudan!*, <http://www.amnestyusa.org/justice/page.php?id=1011445> (last visited Feb. 25, 2009) ("Despite international outrage, not a single person responsible for war crimes or crimes against humanity in Darfur has been brought to justice."); *The Crisis in Darfur*, ReliefWeb, Aug. 21, 2006, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/AMMF-6SWE2D?OpenDocument> ("International response to this crisis has been shockingly slow and ineffective. Despite widespread awareness of the extent of the human rights violations in Darfur, the government of Sudan and its allies on the U.N. Security Council have successfully blocked the imposition of punitive international sanctions on officials responsible for masterminding the violent campaign in Darfur.").

The International Community Responds To Darfur

Darfur.¹³ The international community's main failure has been its apparent inability, or simply reluctance (lack of "will"), to physically intervene and protect civilians from brutal violence, death, and displacement.¹⁴ The failure to ensure the safe and effective delivery of humanitarian aid to Darfur's 2.5 million displaced persons comes in a close second to the failure to stop the intentional physical violence.¹⁵ The United Nations Security Council has allowed Sudan's allies with embedded self-interest, such as China and Russia, to veto or otherwise block most, but not all, attempts at a meaningful response.¹⁶

We, however, should not overlook what the international community, through the U.N., ICC, and other actors, has done in response to the crisis in Darfur; even if that response is, to date, insufficient. While it is easy to belie the international community's response, it is also beneficial to observe and analyze what the international community has done right.

This article discusses and examines the international community's response to Darfur. The article does this by focusing on the varied responses of the African Union (AU), the U.N. High Commission for Human Rights (UNHCR), the U.N. Security Council and Secretary-General, and the United States. The article especially focuses on the historic indictments and arrest warrants issued by the ICC against three individuals, one of them being Sudan's sitting President Omar Al-Bashir.

¹³ Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter Bashir Warrant, Case No. ICC-02/05-01/09]. On July 14, 2008, the ICC Chief Prosecutor requested an arrest warrant from the ICC Pre-trial Chamber for President Al-Bashir for ten counts of crimes of genocide, crimes against humanity, and war crimes in Darfur. Press Release, ICC, Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, For Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008), available at http://www.icc-cpi.int/pressrelease_details&id=406&l=en.html. This article does not extensively discuss the ICC's historic issuance of a warrant for Bashir because this article was written several months prior.

¹⁴ Ambassador Richard Williamson, Presidential Special Envoy to Sudan, Conference on International Justice, *supra* note 9 ("We have done very little on the ground to prevent the people of Darfur from experiencing suffering.").

¹⁵ Reeves, *Genocide by Attrition*, *supra* note 5. "The consensus among nongovernmental aid organizations is that they have access to only 40 percent of the population in need; 2.5 million of the 4.3 million Darfuris affected by conflict—primarily women and children—can't be securely reached by those attempting to provide food, clean water, shelter and primary medical care." *Id.* The failed delivery of sufficient aid is a byproduct of the failure to end the violence. *Id.* "Violence in Darfur also targets aid workers and peacekeepers, limiting the ability of the international community to conduct humanitarian operations." Genocide Intervention Network Darfur Page, *supra* note 4. There has also been at least one reported attack on an international organization's vehicle. High Commissioner for Human Rights, *Situation of Human Rights in the Darfur Region of the Sudan*, ¶ 19, delivered to the Chairperson of the Commission of Human Rights, U.N. Doc. E/CN.4/2005/3 (May 7, 2004) [hereinafter *Report of the High Commissioner*] (reporting an attack by Janjaweed militia on a international organization's vehicle).

¹⁶ John Prendergast & Colin Thomas-Jensen, *Darfur*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 2.0, 150 (Roy Gutman et al. eds., 2007). China's interest lies primarily in its economic desire to drill and extract oil from Sudan's oil fields. Currently, "[t]hrough its state-owned companies, China controls almost all of the known oil potential in Sudan. . . . China holds the majority rights to drill in eight" of Sudan's nine significant oil blocks. HUMAN RIGHTS FIRST, INVESTING IN TRAGEDY: CHINA'S MONEY, POLITICS, AND ARMS IN SUDAN 3 (2008), <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>. This fifty-eight page report by Human Rights First painstakingly documents China's deep economic investment in Sudan, even in the face of Sudan's genocide against the people of Darfur.

The International Community Responds To Darfur

Three points are put forward in this article. First, the U.N. Security Council and the ICC can work together to seek to end impunity by bringing international criminals to justice through fair and independent mechanisms. Second, much can be learned about the international community's potential to respond to ongoing international crimes by examining what the international community has done as well as what we can be critiquing what the international community has failed to do. Finally, the international community's failure to protect civilians in Darfur may, one day, help create a new binding rule of international law, namely, the Responsibility to Protect (R2P).

This article proposes that: (1) national and international actors utilize existing mechanisms to execute the outstanding ICC warrants against three of the most culpable people for the atrocities in Darfur: Ahmad Harun, Ali Kushayb, and Omar Al-Bashir;¹⁷ and (2) the U.N., Rome Statute's States Parties, the U.N. Security Council, and other national and international bodies affirm the R2P principle so that it may become a binding rule of international law.¹⁸

In the end, this article concludes that there is hope for the ICC and the international community's ability and willingness to respond to genocide and crimes against humanity by holding those most responsible accountable for their crimes, and, therefore, ending the epidemic of impunity.¹⁹ There is also hope that our collective failure to adequately and timely respond to Darfur and the U.N.'s subsequent response through varied resolutions will help "crystallize"²⁰ a new international norm—the Responsibility to Protect.²¹

¹⁷ See *infra* Part V.1 (proposing that U.N. Member States, States Parties to the Rome Statute, and other, work to execute the outstanding arrest warrants).

¹⁸ See *infra* Part V.2 (proposing that all relevant international and national actors affirm the R2P principle).

¹⁹ "[A]n international system of justice is emerging and the age of impunity is coming to an end." Jonathan Fanton, *Supporting the 'Court of Last Resort'*, SAN DIEGO UNION-TRIB., Apr. 21, 2008, available at http://www.signonsandiego.com/uniontrib/20080421/news_mz1e21fanton.html (discussing the ICC's work to bring Lord's Resistance Army rebels to justice and arguing that the United States should become a State Party to the Rome Statute). Mr. Fanton is President of the John D. and Catherine T. MacArthur Foundation. *Id.* This emergence can be seen in the Prosecutor's indictment of Al-Bashir, which is the first time a sitting head of state has been indicted by a permanent international criminal court. Nicholas D. Kristof, *President Bashir and Genocide*, N.Y. TIMES, July 14, 2008, available at <http://kristof.blogs.nytimes.com/2008/07/14/president-bashir-and-genocide/?scp=4&sq=indictment%20Bashir&st=cse>. See also *infra* notes 220 and accompanying text (discussing the ICC Prosecutor's request for and issuance of a warrant for Bashir).

²⁰ "Crystallization" is the process where a non-binding legal concept becomes a binding rule of international law. See *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 38 (Feb. 20). For a more in-depth look at how the U.N.'s response to Darfur, including the Security Council resolutions, might lead to R2P becoming a binding rule of international law, see Max W. Matthews, *Tracking The Emergence Of A New International Norm: The Responsibility To Protect And The Crisis In Darfur*, 31 B.C. INT'L & COMP. L. REV. 137 (2008). Matthews argues that recent Security Council resolutions in response to the continuing international crimes in Darfur, Sudan, "explicitly invoke R2P while calling for protective actions in accordance with the principle" [and] [i]f the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future."

²¹ See Int'l Comm'n on Intervention & State Sovereignty [ICISS], *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), www.iciss.ca/pdf/Commission-Report.pdf [hereinafter ICISS Report]; see also Michael Clough, *Darfur: Whose Responsibility To Protect*, HUMAN RIGHTS WATCH, <http://hrw.org/wr2k5/darfur/1.htm> (noting that a U.N. Panel

II. Background

This part discusses Sudan's troubled political history, its current demographics, the North-South conflicts, and the events preceding the Darfur conflict.²²

A. Sudan's Troubled Political History

In order to better understand the conflict in Darfur, this article will briefly address the relevant events preceding this crisis, beginning with a brief political history of Sudan. The people of Sudan have experienced constant turmoil since their independence from Egypt and Britain in 1956.²³ The past governments in Khartoum have "hoarded the country's wealth and treated its citizens with the utmost contempt."²⁴

At independence, Northern, Southern, and Western Sudan came together under a single democratic government.²⁵ Democracy, however, lasted for only two years before the first *coups d'état* overthrew the government and established a military regime.²⁶ Sudan attempted to restore democracy on two more occasions: the first from 1965 to 1969, and the second from 1985 to 1989.²⁷ Each democratic rule ended with a *coups d'état* creating a military regime.²⁸ The current government is the result of a 1989 coup led by the current president Omar Hassan Al-Bashir.²⁹

B. Sudan's Current Demographics

Currently, ethnic Black Africans make up fifty-two percent of Sudan's population of forty million, while ethnic Arab Africans make up about thirty nine per-

referred to the emerging norm of the international responsibility to protect civilians where governments are powerless or unwilling to do so).

²² See *infra* Part II (discussing Sudan's troubled political history, its current demographics, the North-South conflicts, and the events preceding the Darfur conflict).

²³ See generally Int'l Comm'n of Inquiry on Darfur [ICOI], *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 2 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [hereinafter ICOI Report]; Prendergast & Thomas-Jensen, *supra* note 16, at 147.

²⁴ Prendergast & Thomas-Jensen, *supra* note 16, at 147.

²⁵ ICOI Report, *supra* note 23, at 18; R.S. O'Fahey, *The Sudan: Past, Present, and Future: Does Darfur Have A Future In The Sudan*, 30 FLETCHER F. WORLD AFF. 27, 27-29 (2006). Modern Sudan is the result of Egyptian and British involvement in the region. *Id.* Egypt controlled Northern Sudan until Britain controlled Egypt and also took control of Northern Sudan. *Id.* Worried about the French, the British quickly captured Southern Sudan in 1898. *Id.* In 1916, the British also managed to gain control over the Darfur region. *Id.* Prior to British control, Darfur was an independent nation. *Id.* At independence, all three regions became the State of Sudan. *Id.*

²⁶ ICOI Report, *supra* note 23, at 18.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Sudan President Marks Coup Anniversary with Promise of Peace*, SUDAN TRIB., June 30, 2003, available at <http://www.sudantribune.com/spip.php?article3>. Omar Hassan El-Bashir is also spelled as Omar al-Bashir in various sources.

The International Community Responds To Darfur

cent of the population.³⁰ The Darfur region's six million people consist mostly of Black African Muslims.³¹ With a life expectancy of about fifty years, the population is growing at a rate of two percent a year.³² Though most of the people in Sudan speak Arabic, 130 other languages are also spoken in Sudan.³³ Sudan's land mass is about one quarter the size of the United States, and most of the population lives in rural areas.³⁴

C. The North-South Conflicts and Other Events Leading to the Darfur Conflict

1. *The 1955 – 1972 Conflict Against the Anya Rebels*

The North and South entered into conflict starting with the rule of General Ibrahim Abbud in 1955. General Abbud supported the spread of Islam and Arabic throughout Sudan.³⁵ The South consisted mostly of Christians and Animist Black Africans, while the North consisted mostly of Arab-Muslim Africans. Frustrated with the decision, the South resisted the changes even to the point of an armed rebellion until they reached an agreement with the former leader, Colonel Gaafar Mohamed Al-Nimeiri in 1972.³⁶ This agreement, among other things, gave autonomy to the South.³⁷

After the discovery of oil in Southern Sudan, Colonel Al-Nimeiri effectively canceled the agreement in order to capitalize on this valuable resource.³⁸ In addition to destroying the South's autonomy and siphoning its oil, Colonel Al-Nimeiri, under the influence of the National Islamic Front³⁹ and the Muslim

³⁰ CIA The World Factbook, Sudan Page, <https://www.cia.gov/library/publications/the-world-fact-book/geos/su.html> (last visited Feb. 15, 2009) [hereinafter CIA Factbook].

³¹ ICOI Report, *supra* note 23, at 20, 22. *The Sudan*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-24339> (last visited Feb. 17, 2009). The Distinction between Arab Africans and Black Africans are vague at best. *Id.* Though the distinctions were not considered to be a source of conflict in the past, the distinction became a justification and instigator in the conflict. *Id.* One's tribal affiliations and his/her perception of identity are among the many factors that comprise this distinction. *Id.* While many claim to be ethnically Arab are actually racially mixed between Africans and Arabs. *Id.*

³² CIA Factbook, *supra* note 30.

³³ Ethnologue Report for Sudan, Languages of Sudan, http://www.ethnologue.com/show_country.asp?name=sd.

³⁴ ICOI Report, *supra* note 23, at 17; CIA Factbook, *supra* note 30.

³⁵ ICOI Report, *supra* note 23, at 18.

³⁶ *Id.* at 18. Gaafar Al-Nimeiri is also spelled Jafar Numayri in other sources.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Who's Who: Significant People and Organisations, <http://www.sudanupdate.org/WHOSWHO/NIF.HTM> (last visited Feb. 15, 2009); *Profile: Sudan's Islamist Leader*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/3190770.stm> [hereinafter *Sudan's Islamist Leader*]. The National Islamic Front (NIF) originated from the Muslim Brotherhood in Egypt. Who's Who: Significant People and Organisations, *supra* note 39. The NIF is a political group seeking the implementation of Sharia Law and is also responsible for the coup removing Sadiq al-Mahdi, Turabi's brother in law. *Id.*

The International Community Responds To Darfur

Brotherhood led by Hassan Al-Turabi,⁴⁰ instated Sharia Law throughout Sudan in 1983.⁴¹

Two more coups took place after 1983, with the second one putting Al-Bashir in power.⁴² Al-Bashir, also supported and influenced by Hassan Al-Turabi, implemented changes into the judicial system to fit his views of political Islam, further fueling the conflict.⁴³ Later, Al-Bashir's party, the National Congress, implemented a Constitution and held elections in 1998.⁴⁴ Still displeased, opposing parties boycotted the elections and Al-Bashir was elected president.⁴⁵ Al-Bashir's party also won most of the parliamentary seats.⁴⁶ Following a dispute between Al-Bashir and the National Congress, Al-Bashir dissolved the Parliament and placed Hassan Al-Turabi and several officials in alliance with Al-Turabi into custody.⁴⁷

2. *The Twenty Year North-South War*

Destroying a peaceful period of eleven years, Colonel Al-Nimeiri triggered a second civil war in 1983 that lasted twenty years.⁴⁸ Like Khartoum's violent strategy in Darfur, the Government sponsored and armed ethnically-based mili-

⁴⁰ Dr. Usha Sanyal, *POLS 304-Politics of the Middle East: Glossary*, Fall 2004, <http://www.queens.edu/undergraduate/courses/POLS304glossary.asp> (last visited Feb. 15, 2009). The Muslim Brotherhood is "a political group, strong in Egypt (1930-1952) and in several other Arab countries, calling for an Islamic political and social system and opposing Western power and cultural influence." *Id.* Both the NIF and the Muslim Brotherhood were lead by Hassan Al-Turabi. *Sudan's Islamist Leader*, *supra* note 39. Hassan Al-Turabi is a Sunni Muslim born in 1932 to a Sufi Muslim sheikh. *Id.* Turabi led the Muslim Brotherhood and, after the 1985 coup, he organized the NIF in prison. *Id.* Currently Turabi is under house arrest after a power struggle with El-Bashir. *Id.*

⁴¹ ICOI Report, *supra* note 23, at 18; *Timeline: Sudan*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/country_profiles/827425.stm.

⁴² ICOI Report, *supra* note 23, at 18-19.

⁴³ *Id.* at 19.

⁴⁴ Ghazi Suleiman & Curtis Francis Doebbler, *Human Rights in Sudan in the Wake of the New Constitution*, 6 No. 1 HUM. RTS. BRIEF 1 (1998), available at <http://www.wcl.american.edu/hrbrief/fall98/ghazi.html>.

⁴⁵ ICOI Report, *supra* note 23, at 19.

⁴⁶ *Sudan's Islamist Leader*, *supra* note 39; ICOI Report, *supra* note 23, at 19.

⁴⁷ ICOI Report, *supra* note 23, at 19.

⁴⁸ Simon Apiku, *Sudan in Danger of Reverting to North-South War*, REUTERS, Sept. 13, 2007, <http://www.reuters.com/article/reutersEdge/idUSAPI25818020070913>; ICOI Report, *supra* note 23, at 18. During the North-South civil war, the North enslaved countless numbers of Southern Sudanese people. AMBASSADOR SHIRIN TAHIR-KHELI REMARKED AT THE 57th Session of the U.N. Commission on Human Rights:

How will history judge the 57th Commission should it fail to acknowledge the heinous practice of slavery of people of southern Sudan? A long series of reports by U.N. special rapporteurs and many others have it made amply clear that the Sudanese Government continues to tolerate, if not encourage slavery. Many of the women taken north by the government-backed militias have been raped, sexually abused, or forced into becoming sex slaves. Others are forced to work as field hands or domestic laborers. In his interim report last fall, then-Special Rapporteur Leonardo Franco, described the conditions these enslaved people face as 'extremely harsh: abuse, torture, rape, and, at times, killing being the norm.'

AMBASSADOR SHIRIN TAHIR-KHELI, HEAD OF THE U.S. DELEGATION, U.N. COMMISSION ON HUMAN RIGHTS Item 9: Violation of Human Rights and Fundamental Freedoms in Any Part of the World (Mar. 30, 2001) (transcript available at <http://2001-2009.state.gov/g/drl/rls/rm/2001/1806.htm>).

The International Community Responds To Darfur

tias to attack Southern rebel groups, “terrorize and forcibly displace civilians, and intimidate humanitarian workers to force their withdrawal.”⁴⁹ By the end of the conflict, two million people had died and four and half million people were displaced.⁵⁰

After North-South peace talks began in 2002, the Sudan People’s Liberation Movement (SPLM) and the government of Sudan⁵¹ signed the Comprehensive Peace Agreement (CPA) in 2004.⁵² At this time, however, it is unclear whether the North-South peace accord will last, as reports show that Al-Bashir’s National Congress Party (NCP) refuses to uphold their end of the agreement.⁵³

In September 2007, Sudanese Security Forces raided a SPLM office in Khartoum.⁵⁴ The SPLM has repeatedly expressed concerns about the sincerity of the NCP because the NCP is selectively implementing the CPA and attempted to renegotiate several provisions.⁵⁵ The biggest disagreements revolve around the protocol on the oil-rich Abyei region, demarcation of the North-South boundary line, and the complete departure of Northern forces from Southern Sudan.⁵⁶ Khartoum refuses to relinquish Abyei’s lucrative oil fields and recently rejected a new boundary proposed by an international commission that would give Abyei to the South.⁵⁷

SPLM officials report that Khartoum is mobilizing Arab tribes, the Misseriya, to sabotage the CPA’s implementation.⁵⁸ SPLM leaders further allege that the NCP is withholding promised money for a census necessary for the 2009 elections and a referendum on the secession of the South from Sudan in 2011.⁵⁹ Hopefully the international community will not lose sight of the importance of the CPA’s implementation, even as it focuses on the crisis in Darfur. History shows that the North-South conflict is never completely unrelated to the Darfur conflict.

Throughout the North-South peace talks, the people of Darfur were left completely out of the process.⁶⁰ Britain incorporated Darfur into Sudan once British

⁴⁹ Prendergast & Thomas-Jensen, *supra* note 16, at 147.

⁵⁰ ICOI Report, *supra* note 23, at 19.

⁵¹ The government of Sudan will also be referred to as “Sudan,” “Sudanese Government,” “Khartoum,” and “Khartoum Government.”

⁵² ICOI Report, *supra* note 23, at 19.

⁵³ Apiku, *supra* note 48.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Alfred de Montesquiou, *A Sudan Town Raises North-South Tensions*, FOX NEWS, Jan. 1, 2008, <http://origin.foxnews.com/wires/2008Jan01/0,4670,SudanVolatileTown,00.html>.

⁵⁸ Derek Kilner, *Clashes on Sudan’s North-South Border Threaten Peace Deal*, VOICE OF AM., Mar. 10, 2008, <http://www.voanews.com/english/2008-03-10-voa49.cfm>.

⁵⁹ Apiku, *supra* note 48. The Misseriya tribes were among the Arab tribes Khartoum armed to fight against the SPLM during the twenty-year civil war, “in much the same way as the Janjaweed were armed in Darfur.” Kilner, *supra* note 58.

⁶⁰ Lydia Polgreen, *An Incomplete Peace: Sudan’s Never-Ending War With Itself*, N.Y. TIMES, May 4, 2008, <http://www.nytimes.com/2006/05/04/world/africa/04darfur.html>.

The International Community Responds To Darfur

rule ended. And once Sudan claimed independence, it incorporated Darfur into Sudan.⁶¹ Administratively, three Governors appointed by the Sudanese government govern the North, South, and Western regions of Darfur.⁶² Under Colonel Al-Nimeiri, the Governors were given judicial and executive powers.⁶³ This move effectively eliminated the tribal systems already in place.⁶⁴ The people of Darfur used these tribal systems to resolve problems resulting from the influx of immigrants and inter/intra-tribal relations.⁶⁵ The people of Darfur perceived the Sudanese government as unnecessary interveners negatively affecting their private affairs, rather than as a neutral party.⁶⁶

Prior to the Darfur crisis and the peace talks between North and South Sudan, tensions were brewing in Darfur. People began to smuggle and import weapons into Darfur, making arms much more available.⁶⁷ Darfur's tribes began to organize themselves militarily.⁶⁸ The Arab African nomadic tribes organized themselves into the "Arab Gathering"⁶⁹ and the Fur started the "African Belt."⁷⁰ These groups clashed and the government intervened, along with several tribal leaders, and temporarily settled the conflict between the groups.⁷¹ The people of Darfur, however, still resented Sudan's refusal to resolve the lingering and growing economic and political tensions.⁷²

III. Discussion

This Part will discuss the five-year conflict in Darfur.⁷³ It will also go through a timeline of important events.⁷⁴ The section on the Pretrial Chamber's findings in Part IV discusses in more detail the specific atrocities in Darfur.⁷⁵

⁶¹ ICOI Report, *supra* note 23, at 20.

⁶² *Id.*

⁶³ *Id.* at 22.

⁶⁴ *Id.*

⁶⁵ *Id.* at 21-22.

⁶⁶ *Id.* at 23.

⁶⁷ ICOI Report, *supra* note 23, at 22. Foreign countries worried about Libya's pursuits with Chad and the war in Southern Sudan have all contributed to the availability of modern weapons in the Darfur region.

⁶⁸ *Id.*

⁶⁹ Emily Wax, *Sudan's Ragtag Rebels*, WASH. POST, Sept. 7, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A1193-2004Sep6?language=printer>. In addition to seeking removal of African tribes that were given land during British Rule, the Arab Gathering came together under the notions of Arab supremacy.

⁷⁰ ICOI Report, *supra* note 23, at 22.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *infra* Part III (discussing the Darfur conflict).

⁷⁴ See *infra* Part III (discussing a timeline of the Darfur conflict). For a detailed timelines of the Darfur conflict, see *The crisis in Darfur, a timeline*, CBC NEWS, <http://www.cbc.ca/news/background/sudan/darfur.html> (last visited Feb. 15, 2009).

⁷⁵ See *infra* Part IV (discussing the findings of the ICC's pretrial chamber).

The International Community Responds To Darfur

A. The Conflict in Darfur.⁷⁶

Sudan's government continued to neglect, marginalize, and discriminate against the people of Darfur. In late 2002, the rebel groups, the Sudan Liberation Movement/Army (SLA) and the Justice and Equality Movement (JEM), attacked government sites, mainly police stations.⁷⁷ The rebels voiced their concerns about the "socio-economic and political marginalization of Darfur and its people."⁷⁸ Sudan's government believed that the people of Darfur supported these rebel groups in their rebellion against the Sudanese government.⁷⁹ The rebels wanted everyone in Sudan to have fairer representation even though the majority of the rebel groups were made up of the Fur, Massalit, and Zaghawa tribes.⁸⁰ The Sudanese government ignored the rebel groups because it wanted to resolve the situation with the South and did not regard the rebels as a serious military issue.⁸¹

On April 25, 2003, the rebels attacked the unsuspecting Sudanese government at military installations in El Fashir, the state capital of North Darfur.⁸² Because Sudan's military was preoccupied in the South, Sudan lacked the immediate capability to deal with the rebel attack.⁸³ Sudan also had another complicated problem preventing its military from responding to the attacks: its military consisted mainly of people from Darfur who were reluctant to attack their own people.⁸⁴ The Government responded to this challenge by calling upon local Darfur tribes to assist in the fighting against the rebels.⁸⁵ Sudan recruited Arab nomadic tribes to join the force, but people from neighboring countries, including Chad and the

⁷⁶ Countless articles, government and NGO reports and whole books have been written about the conflict in Darfur. This article, therefore, does not presume or attempt to fully report on the conflict. For more in depth information and analysis see, e.g., *Report of the High Commissioner*, *supra* note 15; JEN MARLOW WITH AISHA BAIN & ADAM SHAPIRO, *DARFUR DIARIES: STORIES OF SURVIVAL* (Nation Books 2006); ERIC REEVES, *A LONG DAYS DYING: CRITICAL MOMENTS IN THE DARFUR GENOCIDE* (Michael Brassard ed., Key Publishing House, Inc., 2007); and DON CHEADLE & JOHN PRENDERGAST, *NOT ON OUR WATCH: THE MISSION TO END GENOCIDE IN DARFUR AND BEYOND* (Hyperion 2007).

⁷⁷ ICOI Report, *supra* note 23, at 22. The SLA and the JEM were formed by different armed village groups around 2001 and 2002 GlobalSecurity.org, Darfur Liberation Front, Sudan Liberation Movement (SLM) Sudan Liberation Army (SLA) Justice and Equality Movement, <http://www.globalsecurity.org/military/world/para/darfur.htm> (last visited Feb. 15, 2009) [hereinafter GlobalSecurity.org]. "Broadly speaking the SLA and JEM share an ethnic background, coming primarily from the Zaghawa, Fur and Masaalit tribes." *Report of the High Commissioner*, *supra* note 15, ¶ 5, at 6. These two main rebel groups have since "fractured into over a dozen groups." *Save Darfur Emergency Briefing* (Save Darfur Coalition, D.C.) July 2007, at 1, available at http://darfur.3cdn.net/ddc3ff59297f0024eb_ium6i624f.pdf.

⁷⁸ GlobalSecurity.org, *supra* note 77; ICOI Report, *supra* note 23, at 23. *Report of the High Commissioner*, *supra* note 15, ¶ 5, at 4.

⁷⁹ Prendergast & Thomas-Jensen, *supra* note 16, at 146.

⁸⁰ ICOI Report, *supra* note 23, at 23.

⁸¹ *Id.*

⁸² Prendergast & Thomas-Jensen, *supra* note 16, at 148 ("The rebels bombarded and temporarily captured the airport and the local military headquarters . . . destroyed government aircrafts, killed scores of government soldiers, [and] captured the local military commander . . ."). ICOI Report, *supra* note 23, at 23.

⁸³ *Id.*

⁸⁴ *Id.* at 23-24; ICISS, *supra* note 21, at 23-24.

⁸⁵ ICISS, *supra* note 21, at 23-24.

The International Community Responds To Darfur

Central African Republic, also joined in the fighting.⁸⁶ By doing this, Sudan intentionally exploited the existing tensions between the different African and Arab tribes.⁸⁷ The Arab militia members were dually motivated by ethnic and racial hatred and the Sudanese government's promise of "state-sanctioned robbery of land and booty."⁸⁸ In exchange for fighting with the government, Sudan also gave the Janjaweed Arab militias monetary gifts and grants.⁸⁹

Fighting between the rebels and the Sudanese Armed Forces (SAF) and Janjaweed forced hundreds of thousands of refugees into Chad and the Central African Republic.⁹⁰ By September 2003, the SLA and the Sudanese government had agreed to a ceasefire while they discussed the underdevelopment of Darfur.⁹¹ Soon after, however, both parties claimed that the other had violated the agreement.⁹² In December 2003, the Janjaweed renewed their attacks by burning villages, and murdering and raping civilians.⁹³ These new Janjaweed attacks forced 100,000 refugees to flee into Chad.⁹⁴

In early 2004, the media began focusing on Darfur⁹⁵ and the U.N. called the crisis "one of the worst [humanitarian situations] in the world."⁹⁶ The Sudanese government and Janjaweed continued their joint assault on the people of Darfur, causing more refugees to escape into Chad.⁹⁷ In April, the rebels and Sudan's government entered into another ceasefire; however, the agreement lasted only one month as a village was attacked in May and both sides quickly blamed each other.⁹⁸ In the spring of 2004, the United Nations High Commission for Human Rights (UNHCHR) conducted an investigation into the conflict and issued a report in May 2004.⁹⁹ In July and September 2004, two more rounds of peace talks failed as Sudan refused to remove its SAF from Darfur or disarm the Janjaweed.¹⁰⁰

⁸⁶ ICOI Report, *supra* note 23, at 24.

⁸⁷ ICISS, *supra* note 21, at 23-24. Darfur refugees interviewed by staff from the U.N. High Commissioner for Human Rights "described the Janjaweed as being exclusively 'Arab', as opposed to the victims who were described as 'black' or 'African.'" *Report of the High Commissioner, supra* note 15, ¶ 33, at 11.

⁸⁸ Prendergast & Thomas-Jensen, *supra* note 16, at 148.

⁸⁹ ICOI Report, *supra* note 23, at 24.

⁹⁰ *The crisis in Darfur, a timeline, supra* note 74.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Prendergast & Thomas-Jensen, *supra* note 16, at 146 ("Reports of war crimes and crimes against humanity in Darfur, western Sudan, began appearing in the western news media in early 2004.").

⁹⁶ *The crisis in Darfur, a timeline, supra* note 74; *World's worst humanitarian crisis unfolding in Darfur, Sudan*, UN NEWS CENTRE, Mar. 19, 2004, <http://www.un.org/apps/news/story.asp?NewsID=10142&Cr=sudan&Cr1=>.

⁹⁷ *The crisis in Darfur, a timeline, supra* note 74.

⁹⁸ *Id.*; *Report of the High Commissioner, supra* note 15, ¶ 7, at 6-7.

⁹⁹ *See infra* note 133 (discussing some of the report's findings).

¹⁰⁰ *The crisis in Darfur, a timeline, supra* note 74; *New Sudan Resolution 'Unbalanced'*, BBC NEWS, Sept. 15, 2004, <http://news.bbc.co.uk/2/hi/africa/3659204.stm>.

The International Community Responds To Darfur

Through the end of 2004 and most of 2005, the U.N. and the United States released statements concerning the atrocities in Darfur, Sudan's involvement, and the worsening situation.¹⁰¹ Sudan, with the support of China, sluggishly and passively responded to the international community.¹⁰² The Sudanese government stated that they were not intimidated by sanctions or by the U.N.¹⁰³ While the United States accused Sudan of genocide, the U.N. imposed travel bans and froze assets of several individuals accused of committing crimes in Darfur.¹⁰⁴ In March 2005, the U.N. Security Council referred the situation to the ICC, hoping to bring the criminals to justice.¹⁰⁵

In March 2005, Chad began accusing Sudan of supporting Chadian rebels set on overthrowing Chad's government.¹⁰⁶ In September 2005, Sudan and the rebels attempted to achieve peace by engaging in talks in Abuja, Nigeria.¹⁰⁷ Though both the JEM and the SLA joined the talks, a faction from the SLA disagreed to join and boycotted the talks.¹⁰⁸ These talks and a second round of talks in November of 2005 failed to bring about peace.¹⁰⁹ Former U.N. Secretary General Kofi Annan reported to the U.N. that Sudan continually blocked aid from getting to civilians in Darfur.¹¹⁰ The U.N. tried to rally the international community, specifically the United States, China, and Russia, to take action as the situation deteriorated.¹¹¹ The U.N. also called upon Sudan to deliver on its promises to cease attacks on civilians.¹¹² While the U.N. tried to take action and supply resources and peace-keeping troops, Sudan refused to allow the U.N. to enter claiming that the U.N. had an alternative agenda.¹¹³

¹⁰¹ *The crisis in Darfur, a timeline*, *supra* note 74.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Press Release, Secretary-General, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor, U.N. Doc. SG/SM/9797 (Mar. 31, 2005).

¹⁰⁶ *SUDAN-CHAD: Deby accuses Janjawid of killing his civilians, vows punishment*, IRIN NEWS, Sept. 29, 2005, <http://www.globalsecurity.org/military/library/news/2005/09/mil-050929-irin04.htm>; *The crisis in Darfur, a timeline*, *supra* note 74.

¹⁰⁷ *The crisis in Darfur, a timeline*, *supra* note 74.

¹⁰⁸ *Id.* As of early 2008, there are an estimated twenty-seven rebel factions that are roaming around the Darfur region. Zachary Ochieng, *Rebel Factions Thick On the Ground As Hybrid Force Deploys*, E. AFR., Jan. 28, 2008, <http://allafrica.com/stories/200801281522.html>. These factions complicate matters as it becomes more difficult to engage in peace talks and to have all groups approve of the deal. *Id.* The SLA and the JEM both want the groups to reunite before reengaging in peace talks. *Id.*

¹⁰⁹ *The crisis in Darfur, a timeline*, *supra* note 74.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Sudan Rejects 'Colonial' Troops*, BBC NEWS, June 20, 2006, <http://news.bbc.co.uk/2/hi/africa/5097868.stm>.

The International Community Responds To Darfur

On May 8, 2006, an SLA faction and Sudan's government signed the Darfur Peace Agreement (DPA) under strong international pressure.¹¹⁴ The DPA, however, was flawed and incomplete because it "lacked implementation guarantees" for disarming the Janjaweed; compensating Darfur's victims; facilitating the return of displaced people to their homes; and the peacekeeping handover from the AU to U.N.¹¹⁵

Through November 2006, the U.N. continued to call on the international community to take action and for Sudan to cooperate and allow the U.N. to enter.¹¹⁶ The U.N.'s requests fell on deaf ears and Sudan continued to support the Janjaweed militias and blocked aid from reaching civilians. Not much improved on the ground during 2007 or thus far in 2008.¹¹⁷ Sudan continued to refuse the U.N. access into Sudan even when it was under agreement with China to do so.¹¹⁸

China continued its steadfast support of Sudan with millions of dollars in grants, as well as filling the role of being Sudan's largest trade partner.¹¹⁹ Beijing also continued to supply weapons to Sudan in blatant violation of the international arms embargo on Sudan.¹²⁰ Chinese made and imported weapons were being used by the Janjaweed militias to murder Darfur civilians.¹²¹ These illegally imported weapons included not only small arms and light weapons, but also major weapons systems such as tanks and fighter planes.¹²²

¹¹⁴ Darfur Peace Agreement, May 5, 2006, available at http://www.africa.berkely.edu/Sudan/Darfur/DPA_ABUJA-5-05-06-withsignatures.pdf [hereinafter Darfur Peace Agreement].

¹¹⁵ Prendergast & Thomas-Jensen, *supra* note 16, at 151. *But see* Darfur Peace Agreement, *supra* note 114 ("[The DPA is] a fair agreement that addresses the long-standing marginalization of Darfur, and charts a path for lasting peace for the innocent victims of the crisis.").

¹¹⁶ *The crisis in Darfur, a timeline*, *supra* note 74.

¹¹⁷ United States Holocaust Memorial Museum—Committee on Conscience, <http://www.ushmm.org/conscience/alert/darfur/contents/02-current/> (last visited Apr. 20, 2008) [hereinafter USHMM].

¹¹⁸ *Id.*

¹¹⁹ *Id.*; CIA Factbook, *supra* note 30.

¹²⁰ William D. Hartung, *Deadly Traffic: China's Arms Trade With The Sudan*, ARMS AND SECURITY INITIATIVE POLICY BRIEF (New Am. Found., D.C.) Aug. 2008, at 2, available at <http://www.newamerica.net/files/080606PBChinaArmsTrade.pdf>. "Beijing has been by far the most egregious violator of international sanctions on Sudan, providing up to 90 percent of the country's small arms and light weapons between 2004 and 2006 . . ." *Id.* (citing *Investing In Tragedy: China's Money, Politics, and Arms in Sudan* (Human Rights First, New York, N.Y.), Mar. 2008, at 11-12, available at <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>).

¹²¹ *Id.* at 1-2.

¹²² *Id.* at 2-3. In June 2008, BBC News documented how China was "training [Sudanese] fighter pilots who fly Chinese A5 Fantan fighter jet in Darfur." Hilary Anderson, *China 'Is Fuelling War In Darfur'*, BBC NEWS, June 13, 2008, <http://news.bbc.co.uk/2/hi/africa/7503428.stm>. The BBC has proven that "Chinese Fanton fighter jets were flying on missions out of Nyala airport in south Darfur in February [2008]," the very same month when "Kaltam Abakar Mohammed, a mother of seven, watched three of her children blown to pieces as they were attacked by a fighter jet on" February 19. *Id.* According to Clare da Silva, an international lawyer, the BBC's evidence means China is violating the arms embargo on multiple levels. *Id.*

The International Community Responds To Darfur

In 2008, Sudan returned to using scorched-earth tactics, thus worsening the humanitarian situation and increasing the violence.¹²³ In April 2008, Human Rights Watch (HRW) confirmed a U.N. report that claimed soldiers along with the Janjaweed are still raping girls and looting villages.¹²⁴ In addition, HRW claims that the risk of rape¹²⁵ or assault towards women and girls during periods of calm match the same risk during an attack by the Janjaweed.¹²⁶ As recently as early August 2008, reports indicated that Sudan once again was launching attacks on rebels and civilians in northern Darfur, killing an estimated sixteen civilians according to Ibrahim al-Hillo, a commander of the Sudan Liberation Movement.¹²⁷ Author and activist Eric Reeves goes as far as to say that the level of ethnically motivated violence in Darfur is back up to the tragic year of 2004.¹²⁸

IV. Analysis

This Part examines and analyzes the international community's response to the Darfur conflict.¹²⁹ First, it looks at the multi-layered U.N. response.¹³⁰ Then it discusses the ICC's response, including that of the Chief Prosecutor and Pretrial Chamber.¹³¹ Finally, this Part examines the United States' response to Darfur.¹³²

A. The United Nation's Response

The U.N. has responded to the genocide in Darfur, albeit slowly, in several different ways. First, the UNHCHR conducted an investigation into the conflict in the spring of 2004 and issued a report in May 2004 documenting the ongoing

¹²³ *USHMM*, *supra* note 117. "Recently, in a campaign reminiscent of the worst military violence of the genocide's early years, Khartoum's regular ground and air forces coordinated with the Janjaweed in massive scorched-earth assaults against civilian villages in West Darfur." *Genocide by Attrition*, *supra* note 5.

¹²⁴ James Read, *Darfur Women Still Face Rape Risk*, BBC NEWS, Apr. 7, 2008, <http://news.bbc.co.uk/1/hi/7333844.stm>.

¹²⁵ For more about the use of rape as weapon of war and shame in Darfur see Fidele Lumeya, *Rape, Islam, and Darfur's Women Refugees and War-Displaced*, REFUGEES INT'L, Aug. 24, 2004, <http://www.refiefweb.int/rw/rwb.nsf/AllDocsByUNID/e65c85d5058bfd0549256efb0002d443>.

¹²⁶ Read, *supra* note 124.

¹²⁷ Sarah El Deeb, *Rebels Say Sudanese Government Has Launched New Offensive In Northern Darfur*, YAHOO CANADA NEWS, Aug. 13, 2008, <http://www.paherald.sk.ca/index.cfm?pid=13&cpcat=world&stry=69050035>. Sudan's motivation to clear out the area of its current occupants and "eliminate" any potential obstacles to control of the area seems to lie in a desire for oil. Apparently Sudan's "government has designated the area [of northern Darfur] for future oil exploration." *Id.*

¹²⁸ Eric Reeves, *Darfur Boiling Over*, SUDAN TRIB, Feb. 28, 2008, http://www.sudantribune.com/spip.php?page=imprimable&id_article=26172.

¹²⁹ See *infra* Part IV (discussing the response of several key members of the international community).

¹³⁰ See *infra* Part IV.A (examining the response of the UNHCR, U.N. Security Council, Secretary-General, and Commission of Inquiry).

¹³¹ See *infra* Part IV.B (analyzing the response of the ICC, its Chief Prosecutor and the Pretrial Chamber).

¹³² See *infra* Part IV.C (looking at the United States' response through the State Department, Congress, the White House Administration, and U.S. states).

The International Community Responds To Darfur

atrocities.¹³³ Second, the U.N. encouraged the Sudanese Government and the two main rebel groups to cooperate in peace talks that the AU mediated between Sudan's government and the two main rebel groups for nearly three years.¹³⁴

Former Secretary-General Kofi Annan has emphasized that real peace in Darfur can only come from a negotiated settlement between all the parties to the conflict.¹³⁵ When he was Secretary-General, Annan called on the parties to return to the negotiations in Abuja, Nigeria to bring an end to the violence.¹³⁶ By emphasizing the indispensability of peace talks, Secretary General Annan worked towards the critical goals of ending the conflict through diplomatic means and creating a solution to the underlying power and wealth inequities that led to the conflict erupting in 2003.

The U.N. has also responded by passing several resolutions authorizing U.N. and U.N./AU peacekeepers to go into Darfur to stem the violence.¹³⁷ U.N. Resolution 1556, passed on July 30, 2004, also imposed an international arms embargo on all non-government individuals and bodies, including the Janjaweed.¹³⁸ The U.N. strengthened these sanctions by adopting resolution 1591 in 2005.¹³⁹ This resolution broadened the scope of the arms embargo and imposed a travel ban and froze the assets of targeted individuals.¹⁴⁰ Additionally, the U.N. requested and created an International Commission of Inquiry ("ICOI" or the "Commission") to investigate the violence in Darfur.¹⁴¹ After the Commission documented the ongoing violence in a report on the conflict, the U.N. Security Council referred the situation in Darfur to the ICC.

1. *The Security Council Authorized Peacekeepers*

In 2004, the AU established the African Union Mission in Sudan (AMIS).¹⁴² AMIS' principal mission was to perform peacekeeping operations in Darfur.¹⁴³

¹³³ The UHCHR reported that the Janjaweed were engaging in a "reign of terror; that the children are suffering and are dying from starvation and exhaustion; that there is a high prevalence of dysentery, measles and high fever; that Arab African militias with ties to Sudan are destroying food and water supplies; that Sudan is not allowing aid organizations to enter; and that Sudan is complicit in the murder of civilians in the region." *See generally Report of the High Commissioner, supra* note 15.

¹³⁴ *CHAD-SUDAN: President Demands More International Attention On Darfur*, IRIN NEWS, Apr. 18, 2006, <http://www.globalsecurity.org/military/library/news/2006/04/mil-060418-irin04.htm>.

¹³⁵ Press Release, Secretary-General, Secretary-General Welcomes Adoption Of Security Council Resolution Referring Situation In Darfur, Sudan To International Criminal Court Prosecutor, U.N. Doc. SG/SM9797 (Mar. 31, 2005) [hereinafter Secretary-General Welcomes Referral To ICC].

¹³⁶ *Id.*

¹³⁷ *See infra* A.1 (discussing U.N. resolutions authorizing peacekeepers in Darfur).

¹³⁸ S.C. Res 1556, ¶¶ 7-8, U.N. Doc. S/RES/1556 (July 30, 2004).

¹³⁹ S.C. Res 1591, ¶ 7, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

¹⁴⁰ *Id.* ¶ 3(c). Unfortunately, not all countries have abided by the international arms embargo. *See* notes 120-122 and accompanying text (describing China's continued economic and military support of Sudan and its importation of weapons to Sudan during 2004 – 2006).

¹⁴¹ ICOI Report, *supra* note 23.

¹⁴² *See* African Union Mission in Sudan, Mandate, www.amis-sudan.org/amismandate.html (last visited Feb. 17, 2009).

¹⁴³ *Id.*

The International Community Responds To Darfur

However, due to inadequate human and financial resources, AMIS was unable to effectively implement any of the peace agreements or lessen any of the violence in or surrounding Darfur.¹⁴⁴ As a response, U.N. Security Council resolutions in 2004 and 2005 established the United Nations Mission in Sudan (UNMIS).¹⁴⁵

In August 2006, the Security Council voted in Resolution 1706 to send U.N. peacekeepers to Darfur to supplement the small AU force.¹⁴⁶ But, because deployment of the force was made contingent on Sudan's consent, this new and much larger peacekeeping mission was blocked by Sudan and never deployed.¹⁴⁷ This should have come as no surprise to the U.N. and the international community since Khartoum, just two years prior, stalled and delayed the deployment of AU peacekeepers in 2004.¹⁴⁸ After a tenuous year-long confrontation, however, Sudan reluctantly agreed to allow an "AU/UN Hybrid operation in Darfur" (UNAMID) only if it consisted mainly of African troops.¹⁴⁹

In January 2007, the U.N. Security Council approved a plan to send to Darfur about 20,000 peacekeeping troops authorized to use force in the troubled region.¹⁵⁰ The force, currently numbering only 9,000 and far from fully deployed,¹⁵¹ will, in theory, be a hybrid of U.N. soldiers and AU troops and will be under the command of both the U.N. and the AU.¹⁵²

¹⁴⁴ Irene Khan, et al., *International NGOs Call For Strong Force In Darfur: Joint Letter to the U.N. Security Council*, May 25, 2006, <http://hrw.org/english/docs/2006/05/25/sudan13462.htm>.

¹⁴⁵ For background on the Mission, see U.N. Mission in Sudan, Mission Background, www.unmis.org/english/background.htm (last visited Feb. 17, 2009). Specifically, U.N. Security Council Resolution 1590 of March 24, 2005 established the U.N. Mission in Sudan. S.C. Res 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005).

¹⁴⁶ S.C. Res. 1679, ¶ 3, U.N. Doc. S/RES/1679 (May 16, 2006).

¹⁴⁷ *Sudan: Hybrid Peacekeeping Force for Darfur Must Comply With U.N. Requirements*, REFUGEES INT'L, Nov. 22, 2006, <http://www.refugeesinternational.org/content/article/detail/9673> (last visited Feb. 17, 2009) ("Khartoum is forcing the U.N. to water down its Darfur effort to a level acceptable to Sudan."); *Efforts To Help Darfur Again Reach Dead End*, SUDAN TRIB., Dec. 5, 2006, available at www.sudantribune.com/spip.php?article19080. Naming any excuse he could, Sudanese President Omar al-Bashir later told reporters that "[i]nternational troops are a colonization of Sudan." *Id.* Colin Thomas-Jensen of the International Crisis Group, a U.S. think tank said that Al-Bashir's excuses and arrogance are "entirely coherent with (Sudan's) pattern of behavior over the last 17 years," since al-Bashir came to power in a 1989 Islamist and military coup. *Id.*

¹⁴⁸ Colum Lynch, *U.N. Envoy Urges Sudan To Let Peacekeepers In*, WASH. POST, Sept. 2, 2004, available at www.washingtonpost.com/ac2/wp-dyn/A52261-2004Sep1?language=printer.

The U.N. report calls on Sudan to accept a U.N. proposal to allow about 4,000 African Union peacekeepers and police officers to help monitor a cease-fire between the government and the rebels. Sudan has allowed a contingent of about 300 Rwanda and Nigerian peacekeepers and observers in Darfur, but it refused requests from the African Union to expand the mission and provide them with the authority to protect civilians in Darfur. *Id.*

¹⁴⁹ S.C. Res. 1769, pmb., ¶¶ 1-2, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1706, ¶ 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006); Simon Apiku, *Sudan Bowed to Pressure on Darfur Force—Opposition*, REUTERS, June 19, 2007, <http://www.reuters.com/article/worldNews/idUSL1973884020070619> [hereinafter Apiku 2].

¹⁵⁰ *Security Council Approves Peacekeeping Force In Darfur*, CBC NEWS, July 31, 2007, <http://www.cbc.ca/world/story/2007/07/31/darfur-force.html>.

¹⁵¹ Apiku 2, *supra* note 149.

¹⁵² *Id.*

The International Community Responds To Darfur

2. *The International Commission of Inquiry*

On September 18, 2004, the U.N. Security Council adopted resolution 1564 requesting that the Secretary-General “rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties.”¹⁵³ Resolution 1564 required the Commission to determine whether acts of genocide were committed and also to identify the perpetrators “with a view to ensuring that those responsible are held accountable.”¹⁵⁴ The U.N. adopted this resolution just nine days after then-U.S. Secretary of State Colin Powell reported that the U.S. State Department had concluded that Sudan was committing genocide in Darfur.¹⁵⁵

In October 2004, then Secretary-General Kofi Annan created the International Commission of Inquiry (“ICOI” or “Commission”) on violations of international humanitarian law and human rights law in Darfur and ordered a full report in three months.¹⁵⁶

a. *The Commission’s Findings.*

On January 25, 2005, the Commission issued a 176-page report.¹⁵⁷ The Commission investigated the crisis in Darfur and conducted a thorough analysis of the information gathered from its investigations.¹⁵⁸ The Commission found that Sudan’s government and the Janjaweed Arab militias were responsible for “serious violations of international human rights and humanitarian law amounting to crimes under international law.”¹⁵⁹ The Commission found that Sudanese government armed forces and the Janjaweed militias indiscriminately attacked civilians throughout Darfur.¹⁶⁰

During these jointly planned and implemented attacks, Sudanese government forces and militia raped, tortured, and killed civilians.¹⁶¹ The armed forces and militias pillaged and destroyed villages, and forcefully displaced and caused the disappearance of Darfur civilians.¹⁶² The Commission further found that the

¹⁵³ ICOI Report, *supra* note 23, at 2.

¹⁵⁴ *Id.* By seeking the ultimate goal of holding “those responsible accountable,” the Security Council apparently showed where it lies in the debate between criminal prosecution and the argument of “amnesty for the sake of peace.” The authors agree with the Security Council. Amnesty fosters impunity more than peace. In the words of Pope Paul VI, “if you want peace, work for justice.”

¹⁵⁵ Ted Dagne, Cong. Research Serv., CRS Issue Brief for Congress, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*, at 4 (Nov. 29, 2005), available at <http://www.fas.org/sgp/crs/row/IB98043.pdf>.

¹⁵⁶ ICOI Report, *supra* note 23, at 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* In addition to rape, the forces and militia committed “other forms of sexual violence” against African women and girls. *Id.*

¹⁶² *Id.*

The International Community Responds To Darfur

Government forces and Janjaweed militias deliberately directed most of their attacks against innocent civilians (non-combatants).¹⁶³ Supporting the appearance of genocidal intent, the Commission found that the vast majority of the victims belonged to specific African tribes: the Fur, Zaghawa, Massalit, Jebel, and Aranga.¹⁶⁴

b. The Commission's Conclusions

The Commission concluded that the Government forces and Janjaweed militias' actions could be considered crimes against humanity because they were committed on a widespread and systematic basis.¹⁶⁵ The Commission, however, concluded that they did not have enough evidence to show that the Sudanese government "pursued a policy of genocide," even though "in some instances individuals, including Government officials, may commit acts with genocidal intent."¹⁶⁶ The Commission seemed eager to emphasize that this conclusion should not detract "from the gravity of the crimes perpetrated" in Darfur, including crimes against humanity and war crimes.¹⁶⁷

3. The Security Council Referred Darfur to the ICC

Two months after the Commission of Inquiry sent its report to the Security Council, the Council adopted Resolution 1593 referring the situation in Darfur to the ICC Prosecutor in accordance with article 13(b) of the Rome Statute.¹⁶⁸ Then U.N. Secretary-General Kofi Annan praised the Council for using its power pursuant to the Rome Statute to create a suitable way to "lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked."¹⁶⁹

On March 31, 2005, Secretary-General Annan called on the Sudanese Government, all parties to the Darfur conflict, and all other States and regional and

¹⁶³ *Id.* at 3-4.

¹⁶⁴ *Id.* at 3. Neither Arab tribes nor non-African tribes were attacked. *Id.*

¹⁶⁵ *Id.* at 3.

¹⁶⁶ The Commission concluded that "the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned." *Id.* at 4. *But see* Human Rights Watch, Presentation of The Smallest Witnesses: The Crisis in Darfur Through Children's Eyes (Human Rights Watch, 2005) (traveling museum presentation of victimized children's drawings in which one 13-year old child described the scene of his drawing, "I am looking at the sheep in the wadi [dry riverbed]. I see Janjaweed coming—quickly, on horses and camels, with Kalashnikovs—shooting and yelling, '**kill the slaves . . .**'" (emphasis added)).

¹⁶⁷ These crimes are "no less serious and heinous than genocide." ICOI Report, *supra* note 23, at 4.

¹⁶⁸ S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court., U.N. Doc. SC/8351 (Mar. 31, 2005). The vote was eleven in favor, none against, and four abstentions (Algeria, Brazil, China, United States). *Id.* While this action was certainly significant, some argue that the Security Council actually did "the minimum necessary" in response to mounting pressure after the Commission's report. *See* Jerry Fowler, Conference on International Justice, *supra* note 9 (arguing that the Security Council's resolution was its way of "kicking the can down the road").

¹⁶⁹ Secretary-General Welcomes Referral To ICC, *supra* note 135.

The International Community Responds To Darfur

international bodies to fully cooperate with, and provide assistance to, the ICC and the Office of the Prosecutor (OTP).¹⁷⁰

B. The ICC Response

The ICC's response includes the Prosecutor's investigation, the Pretrial Chamber's findings of "reasonable grounds," and the Chamber's issuance of arrest warrants for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb").¹⁷¹ And most recently, the ICC continued its courageous response to the genocide in Darfur by indicting the sitting head of state of Sudan, Omar Al-Bashir.¹⁷²

1. The ICC Investigation

On April 5, 2005, the ICOI sent its conclusions to the ICC Chief Prosecutor, Luis Moreno-Ocampo.¹⁷³ The Prosecutor acknowledged that the Commission reported "mass killings of innocent civilians, systematic rape of girls and women, and the burning of family homes."¹⁷⁴ Upon receiving the IOCI documents, Prosecutor Ocampo stated that "[w]e all have a common task: to protect life in Darfur, ending the culture of impunity."¹⁷⁵ On June 1, 2005, Prosecutor Ocampo decided to open an independent and impartial investigation¹⁷⁶ into the situation in Darfur.¹⁷⁷

Prosecutor Ocampo conducted a twenty month investigation into the crimes allegedly committed in Darfur.¹⁷⁸ The investigation included interviews of vic-

¹⁷⁰ *Id.*

¹⁷¹ See *infra* Part B.1-3 (discussing the ICC's response to Darfur). The ICC issued its first warrants in 2005 against Joseph Kony, the leader of the Lord's Resistance Army in Uganda, as well as four of his subordinates. The ICC has also issued warrants against Thomas Lubanga Dyilo of the Union of Congolese Patriots, Germain Katanga of the Forces of Patriotic Resistance, and Mathieu Ngujolo Chui of the National Integrationist Front in the Democratic Republic of Congo.

¹⁷² See generally, *Arrest of Sudanese President Could Have World-Wide Effects*, AUSTL. BROAD. CORP., Feb. 13, 2009, <http://www.abc.net.au/news/stories/2009/02/13/2491424.htm>.

¹⁷³ Press Release, ICC, Prosecutor Receives List Prepared by Commission of Inquiry on Darfur (Apr. 5, 2005), available at <http://www2.icc-cpi.int/NR/exeres/3EA00FC5-8337-485B-BB19-54D3CDCDA8D8.htm> [hereinafter ICOI To Prosecutor].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The Prosecutor's comments are encouraging in an age where good people suffer from compassion fatigue and donor fatigue. "The people of Africa and the people of the world [however] have impunity fatigue." Gayle Smith, Senior Fellow at the Center for American Progress and Co-Chair of the ENOUGH Project, Conference on International Justice, *supra* note 9.

¹⁷⁶ Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), available at <http://www2.icc-cpi.int/NR/exeres/6840C44E-153F-43F2-9B21-B60F4C756907.htm> [hereinafter Prosecutor Opens Investigation] ("The investigation will be impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur.").

¹⁷⁷ See *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman (Prosecutor v. Harun)*, Case No. ICC-02/05-01/07, Pretrial Chamber I, ¶ 3 (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279809.PDF>.

¹⁷⁸ ICC, Fact Sheet: The Situation In Darfur, the Sudan, 1, available at <http://www.adh-geneva.ch/RULAC/news/ICC-OTP-Fact-Sheet-Darfur-20070227-en.pdf> [hereinafter Darfur Fact Sheet].

The International Community Responds To Darfur

tims and witnesses from Darfur¹⁷⁹ and a total of five missions by the OTP to Sudan from November 2005 to January/February 2007.¹⁸⁰ During the missions to Sudan, the OTP interviewed and gathered information directly from Sudanese Government officials.¹⁸¹

In addition to the five missions to Sudan, the OTP also collected evidence and statements during a total of seventy missions in seventeen countries.¹⁸² The Prosecutor also delivered four reports to the Security Council as required by Resolution 1593.¹⁸³ On February 27, 2007, the Prosecution filed an application under article 58(7) requesting that summonses to appear or arrest warrants be issued by the Chamber for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb).¹⁸⁴

2. *The Pretrial Chamber Findings.*

a. *ICC Jurisdiction*

The Chamber began its discussion by noting how it had jurisdiction over the Sudanese nationals. Although Sudan is not a State Party to the Rome Statute, Article 12(2) does not apply where the Security Council refers a situation to the Court pursuant to the U.N. Charter Chapter VII and Article 13(b) of the Rome Statute.¹⁸⁵ The Court could, therefore, exercise jurisdiction over crimes committed in the territory of, or by nationals of, a State that is not Party to the Rome Statute.¹⁸⁶

The Prosecution informed the Court that according to the Judicial Investigations Committee (JIC), Ali Kushayb was arrested on November 28, 2006 by Sudan authorities due to an arrest warrant issued against him by Sudan in April 2005.¹⁸⁷ The JIC indicated that Ali Kushayb was under investigation in relation to five separate incidents from South and West Darfur.¹⁸⁸ The Prosecution argued that the Sudanese authorities' investigation did not encompass the conduct that was the subject of the application before the ICC.¹⁸⁹ In the end, the Pretrial Chamber easily agreed with Prosecutor Ocampo.¹⁹⁰

¹⁷⁹ *Id.* at 2. The OTP took over 100 formal witness statements, many from victims. *Id.* Darfur victims "were interviewed in other countries because of the ongoing insecurity in Darfur." *Id.* at 4.

¹⁸⁰ *Id.* at 6.

¹⁸¹ *Id.* at 2.

¹⁸² *Id.*

¹⁸³ *Id.* at 6.

¹⁸⁴ Prosecutor's Application Under Art. 58(7), ICC-02/05-55-US-Exp (Feb. 27, 2007); Prosecutor's Application Under Art. 58(7), ICC-02/05-56.

¹⁸⁵ Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶ 16.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* ¶ 20.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 21.

¹⁹⁰ *Id.* ¶¶ 24-25.

The International Community Responds To Darfur

The Court then discussed whether it had jurisdiction over the alleged crimes. Article 8(2)(c) & (e) of the Rome Statute deals with acts committed in the course of a conflict not of an international character.¹⁹¹ The Chamber discussed the various actors in the conflict and several of their specific attacks on each other.¹⁹² The Chamber then easily found reasonable grounds to believe that the conflict in Darfur was not of an international character.¹⁹³

b. Reasonable Grounds

The ICC Pretrial Chamber found reasonable grounds¹⁹⁴ to believe that Ali Kushayb was one of the most senior tribal leaders in the Wadi Salih Locality (WSL).¹⁹⁵ Kushayb was the “Aqid al Oqada,” or “colonel of colonels” in the WSL.¹⁹⁶ In August 2003, Ali Kushayb was officially “appointed to a position” in the Sudanese Armed Forces (SAF) and was part of the Sudanese Popular Defense Forces’ (SPD) structure within the SAF.¹⁹⁷ In his positions, Ali Kushayb personally led and commanded thousands of the Janjaweed militia in their internationally criminal attacks against Darfur civilians and villages from August 2003 until March 2004.¹⁹⁸ Kushayb also mobilized, recruited, armed, and fully equipped the Janjaweed militias he commanded.¹⁹⁹

The Chamber further found reasonable grounds to believe that Ali Kushayb fully implemented the counter-insurgency strategy that was fundamentally grounded on the commission of crimes against humanity and war crimes in the forms of rape, torture, persecution, killing of civilians, and hundreds of attacks on Darfur villages and towns.²⁰⁰ Darfur witnesses reported that they saw Ali Kushayb and Ahmad Harun physically together in Darfur during the attacks and

¹⁹¹ *Id.* ¶ 3. The Court quotes Article 8(2)(f) of the Rome Statute: “Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

¹⁹² *Id.* ¶¶ 35-42.

¹⁹³ *Id.* ¶¶ 17, 35-42. The Chamber found that the conflict was between the Janjaweed and the Sudanese Government, specifically the Sudan People’s Armed Forces and the Popular Defence Forces, on one side, and the two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), on the other side. *Id.* ¶ 36.

¹⁹⁴ Based on Article 21(3) of the Rome Statute, in interpreting and applying the standard of “reasonable grounds to believe,” the Chamber followed the “reasonable suspicion” standard of the European Convention on Human Rights Article 5(1)(c) and the Inter-American Court of Human Rights’ jurisprudence on the fundamental right to personal liberty of the American Convention on Human Rights Article 7. *Id.* ¶ 28.

¹⁹⁵ *Id.* ¶ 95.

¹⁹⁶ Darfur Fact Sheet, *supra* note 178, at 4.

¹⁹⁷ Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶ 95.

¹⁹⁸ *Id.* ¶ 96.

¹⁹⁹ *Id.* ¶ 105.

²⁰⁰ *Id.* ¶¶ 97-102. “This strategy became the justification for the mass murder, summary execution, mass rape, and other grave crimes against civilians who were known not to be participants in any armed conflict.” Darfur Fact Sheet, *supra* note 178, at 3.

The International Community Responds To Darfur

violence.²⁰¹ And the Chamber certainly found that Harun, as well as Kushayb, were intimately involved in the organized and systematic destruction of Darfur villages and the killing, raping, and persecuting of Darfur civilians.²⁰²

As to Ahmad Harun, the Chamber found reasonable grounds to believe that from April 2003 until September 2005, Harun served as Minister of State for the Interior of the Sudanese Government.²⁰³ He was in charge of the management of the “Darfur Security desk” and coordinated the Government bodies involved in the counter-insurgency in Darfur, including the SAF, the Police, the National Security and Intelligence Service and the Janjaweed militias.²⁰⁴

The Chamber also found reasonable grounds to believe that Ahmed Harun coordinated and personally participated in essential functions of the Security Committees, including recruiting, arming, and funding the Janjaweed militias in Darfur.²⁰⁵ Ahmad Harun, therefore, intentionally contributed to the commission of crimes against humanity and war crimes against Darfur civilians.²⁰⁶ Harun knew that his actions would further the shared plan of the SAF and the Janjaweed militias, which consisted of attacking the civilian populations in Darfur.²⁰⁷

Harun, by virtue of his position, knew all about the international crimes committed against the Darfur civilian population.²⁰⁸ And Harun specifically knew about the Janjaweed’s methods.²⁰⁹ Specifically, Harun’s public speeches proved that he had personal knowledge that the Janjaweed were attacking civilians and pillaging towns and villages.²¹⁰ In his public speeches, Harun actually personally encouraged the commission of these internationally criminal acts against civilians; apparently his status as a senior Sudanese Government official did not in any way prevent him from overtly and publicly encouraging these vicious crimes.²¹¹

In a move that singularly exemplifies Sudan’s arrogant and indignant stance towards the international community’s response to the genocide in Darfur, in 2006, the Sudanese Government actually promoted Ahmad Harun to Minister of State of Humanitarian Affairs.²¹² Shockingly, Harun also sits on the committee

²⁰¹ Darfur Fact Sheet, *supra* note 178, at 4.

²⁰² Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶¶ 94-99.

²⁰³ *Id.* ¶ 80.

²⁰⁴ *Id.* ¶¶ 81-82.

²⁰⁵ *Id.* ¶¶ 82-83.

²⁰⁶ *Id.* ¶ 88.

²⁰⁷ *Id.* “When describing Harun, witnesses immediately identified him as the official from Khartoum responsible for mobilising, funding, and/or arming the ‘Janjaweed’ or ‘Fursan.’ Witnesses also often stated that they saw Ahmad Harun meeting with or addressing leaders of the Militia/Janjaweed, including Ali Kushayb.” Darfur Fact Sheet, *supra* note 178, at 4.

²⁰⁸ Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶¶ 92-93.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* ¶ 93.

²¹² ICC Prosecutor Moreno-Ocampo testified before the Security Council that “[m]aintaining Harun in his position as Minister of State for Humanitarian Affairs was a direct threat to millions of victims and to the humanitarian workers and peacekeepers seeking to protect them.” *Sudan Has Failed to Cooperate*

The International Community Responds To Darfur

responsible for overseeing the deployment of the UNAMID peacekeeping force.²¹³ Harun's current positions no doubt show that Sudan's Government is wholly complicit in, and approves of, the genocide in Darfur. It represents Sudan's defiance of and disrespect for the international community, including the U.N. and the ICC.

3. *The Pretrial Chamber Issued Arrest Warrants for Harun and Kushayb.*

On May 2, 2007, the ICC Pretrial Chamber issued arrest warrants for Ahmad Harun²¹⁴ and Ali Kushayb²¹⁵ for their alleged individual criminal responsibility for crimes against humanity and war crimes under article 25(3)(a)(b) and (3)(d) of the Rome Statute. The arrest warrant for Ahmad Harun lists forty-two counts,²¹⁶ while the arrest warrant for Ali Kushayb lists fifty counts.²¹⁷ Harun and Kushayb are charged with a combined fifty-one counts of war crimes and crimes against humanity, including murder, rape, torture, and persecution.²¹⁸

with *International Criminal Court, Prosecutor Says*, U.N. NEWS CENTRE, Dec. 5, 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=24933&Cr=sudan&Cr1=> [hereinafter *Sudan Not Cooperating*].

²¹³ Luis Moreno-Ocampo, ICC Chief Prosecutor, Conference on International Justice, *supra* note 9 (“He is controlling the fate of his victims.”).

²¹⁴ Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-2, Warrant of Arrest For Ahmed Harun (Apr. 27, 2007) [hereinafter Harun Warrant, Case No. ICC-02/05-01/07-2].

²¹⁵ Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-3, Warrant Of Arrest For Ali Kushayb (Apr. 27, 2007) [hereinafter Kushayb Warrant, Case No. ICC-02/05-01/07-3]. See also, *Sudan Not Cooperating*, *supra* note 212 (Ali Kushayb, “against whom the Government had previously indicated that there was an investigation” was released on September 30, 2007 for alleged lack of evidence).

²¹⁶ See Harun Warrant, Case No. ICC-02/05-01/07-2. Twenty counts of crimes against humanity (murder – articles 7(1)(a) and 25(3)(d); persecution – articles 7(1)(h) and 25(3)(d); forcible transfer of population – articles 7(1)(d) and 25(3)(d); rape – articles 7(1)(g) and 25(3)(d); inhumane acts – articles 7(1)(k) and 25(3)(d)); imprisonment or severe deprivation of liberty – articles 7(1)(e) and 25(3)(d); and torture – articles 7(1)(f) and 25(3)(d)); and twenty-two counts of war crimes (murder – articles 8(2)(c)(i) and 25(3)(d); attacks against the civilian population – articles 8(2)(e)(i) and 25(3)(d); destruction of property – articles 8(2)(e)(xii) and 25(3)(d); rape – articles 8(2)(e)(vi) and 25(3)(d); pillaging (articles 8(2)(e)(v) and 25(3)(d); and outrage upon personal dignity – articles 8(2)(c)(ii) and 25(3)(d)).

²¹⁷ See Kushayb Warrant, Case No: ICC-02/05-01/07-3. Twenty-two counts of crimes against humanity (murder - article 7(1)(a); deportation or forcible transfer of population - article 7(1)(d); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law - article 7(1)(e); tortures - article 7(1)(f); persecution - article 7(1)(h); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and twenty-eight counts of war crimes (violence to life and person - article 8(2)(c)(i); outrage upon personal dignity in particular humiliating and degrading treatment - article 8(2)(c)(ii); intentionally directing an attack against a civilian population - article 8(2)(e)(i); pillaging - article 8(2)(e)(v); rape - article 8(2)(e)(vi); destroying or seizing the property – article 8(2)(e)(xii)).

²¹⁸ See generally, Amitis Khojasteh, The American Non-Governmental Organizations Coalition For The International Criminal Court [AMICC], *Questions & Answers On The ICC Arrest Warrants In The Darfur Investigation 1* (June 6, 2007) available at http://www.amicc.org/usinfo/advocacy_materials.html [hereinafter AMICC Q & A].

The International Community Responds To Darfur

The Chamber issued these arrest warrants because it found reasonable grounds to believe that Harun and Kushayb would not voluntarily turn themselves in to the Court.²¹⁹

4. *ICC Indicts and Issues and Arrest Warrant for Sudan President Omar Al-Bashir.*

On July 14, 2008, the ICC Chief Prosecutor requested an arrest warrant from the ICC Pre-trial Chamber for Sudanese President Omar Hassan Ahmad Al-Bashir for ten counts of crimes of genocide, crimes against humanity, and war crimes in Darfur.²²⁰ The ICC Prosecutor explained that Al Bashir's "motives were largely political. His alibi was a 'counterinsurgency.' His intent was genocide." ²²¹ "In the [refugee] camps Al Bashir's forces kill the men and rape the women. He wants to end the history of the Fur, Masalit and Zaghawa people."²²² Prosecutor Moreno left no doubt as to the extent of Bashir's involvement by explaining that "[Bashir] used the whole state apparatus, he used the army, he enrolled the Militia/Janjaweed. They all report to him, they all obey him. His control is absolute."²²³

And on March 4, 2009, the ICC's Pre-trial Chamber issued a historic arrest warrant for Sudan's sitting President, Omar Al-Bashir for five counts of crimes against humanity and two counts of war crimes for his "essential role" in the murder, torture, rape, and displacement of millions of civilians in Darfur.²²⁴ The Chamber found reasonable grounds to believe that in his position as the *de jure* and *de facto* President of Sudan and Commander-in-Chief of the Sudanese Armed Forces, Al-Bashir "played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation" of systematic and violent attacks against Darfur civilians.²²⁵ Al-Bashir was in "full control of all branches of the 'apparatus' of the State of Sudan," including the Sudanese Armed Forces and their allied Janjaweed Militia.²²⁶ Al-Bashir used this control to ensure implementation of the attacks in Darfur and is there-

²¹⁹ Press Release, ICC, Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed, ICC-OTP-20070502-214 (May 2, 2007), available at http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/warrants%20of%20arrest%20for%20the%20minister%20of%20state%20for%20humanitarian%20affairs%20of%20sudan_%20and%20a%20leader%20of%20the.

²²⁰ Press Release, ICC, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, For Genocide, Crimes Against Humanity and War Crimes in Darfur, ICC-OTP-20080714-PR341-ENG (July 14, 2008), available at [http://www2.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/a](http://www2.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/a).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Bashir Warrant, Case No. ICC-02/05-01/09.

²²⁵ *Id.* at 7.

²²⁶ *Id.*

The International Community Responds To Darfur

fore criminally responsible as an indirect perpetrator or as an indirect co-perpetrator for war crimes and crimes against humanity.²²⁷

The government of Sudan and its allies certainly attempted to block the issuance of this arrest warrant against Al-Bashir by attempting to convince key African states on the Security Council to request a delay at the ICC.²²⁸ The Security Council recently renewed the mandate for Darfur peacekeepers and refused to delay the ICC legal proceedings against Omar Al-Bashir.²²⁹ This decision by the Security Council came in the face of attempts by Libya and South Africa to include language that would have prevented ICC judges from considering an arrest warrant against Bashir.²³⁰ Richard Dicker, the director of the International Justice Program at Human Rights Watch called the “attempt to halt the ICC’s work . . . blatant political interference with an independent court.”²³¹ Not only did Sudan attempt to curtail the ICC’s legal processes, but it has also continued its deliberate attacks on Darfur civilians.²³²

While the Prosecutor’s decision to indict Al-Bashir fueled controversy with many, including the Arab League and Africa analysts, claiming the indictment would hamper the peace process and others hailing it as a step in the direction of international justice and the end to impunity, it apparently has had not direct consequences on the people of Darfur or the peace process as of yet.²³³ Other critics opined that a Bashir arrest warrant would hurt the deliver of essential humanitarian aid and the much awaited deployment of the full 20,000 U.N. peacekeeping force in Darfur.²³⁴ Both of these critical endeavors, however, are already bogged down by Sudanese obstruction and delay.²³⁵ The Prosecutor’s indictment will affect the ongoing conflict in Darfur. The Prosecutor’s decision to bring the indictment when he had what he believed to be sufficient evidence is a sign that this Prosecutor is not swayed by “politics,” but rather, by his mandate to prosecute international crimes.²³⁶ And the ICC’s subsequent issuance of a

²²⁷ *Id.*

²²⁸ UN: *Renewed Peacekeeper Mandate for Darfur: US Abstains in Support of ICC Case Against Sudan’s President*, HUMAN RIGHTS WATCH, July 31, 2008, <http://www.hrw.org/english/docs/2008/07/31/sudan19525.htm>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* (“[E]ver since the prosecutor requested the warrant two weeks ago, there have been reports of at least two attacks, on villages by government forces.”).

²³³ See, e.g., R. Green *Controversy in the Arab World Over ICC Indictment of Sudan President Al-Bashir*, MIDDLE E. MEDIA RES. INST., July 24, 2008, <http://www.sudan.net/news/posted/16146.html>; accord Louis Charbonneau, *Sudan’s Bashir Could Escape War Crimes Indictment*, REUTERS, July 16, 2008, available at <http://www.reuters.com/article/worldNews/idUSN1639809920080716?feedType=RSS&feedName=WorldNews>.

²³⁴ Richard Goldstone, *Catching a War Criminal in the Act*, N.Y. TIMES, July 15, 2008, available at http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=1&scp=1&sq=ICC%20al-Bashir&st=cse&oref=slogin (Richard Goldstone is the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda).

²³⁵ *Id.*

²³⁶ *Id.*

The International Community Responds To Darfur

warrant shows that it too can transcend politics in a pursuit for international justice.

The enduring hope is that Ocampo's courage and integrity and the ICC's permanency can help change the international culture of impunity that is so offensive to the most fundamental notions of justice. Maybe the indictment and arrest warrant for Bashir can help produce long-term systemic change and the fruit of "peace"—if not today, then in the future.²³⁷ This change, however, will not come easily as governments confronted with their own failures and intentional crimes will resist accountability at every turn.

5. *Sudan Has Refused to Execute Any of the Warrants*

Sudan has continually rejected the ICC's jurisdiction over the Darfur situation since the Security Council adopted Resolution 1593.²³⁸ Almost one year after the ICC issued the two arrest warrants, testimony by ICC Prosecutor Moreno-Ocampo before the Security Council revealed that Sudan's Government continued to refuse to arrest or prosecute either Harun or Kushayb indicted by the ICC for war crimes and crimes against humanity Sudan,²³⁹ although it has all the power to do so.²⁴⁰ Sudan has, instead, responded to the ICC's arrest warrants by suspending its cooperation with the ICC Prosecutor and by saying that it will not surrender the indictees to the ICC.²⁴¹

²³⁷ It is also worth considering what the ramifications might be if the ICC prosecutor decided not to bring charges against Bashir just because Bashir threatened more "bloodshed" or because it was controversial. Every dictator and violent head of state and every terrorist leader or criminal could always threaten "more bloodshed" and scare off public prosecutions. What kind of a precedent does that set for international justice or any justice for that matter? Would it make the people of Africa safer if Bashir and his cronies are assuaged? No. Rather, it would make those most in need of international intervention increasingly more unsafe and insecure because they know that the international community (the ICC, the U.N., and others) will not intervene if their perpetrator threatens more violence.

²³⁸ AMICC Q & A, *supra* note 218, at 2.

²³⁹ *Sudan Not Cooperating*, *supra* note 212; see also Save Darfur Pushes Sudan Sanctions, ICC Actions With The Security Council: Coalition 'The Security Council Is Abdicating Its Responsibility To Ensure Security In The World,' available at www.savedarfur.org/newsroom/releases/save_darfur_pushes_sudan_sanctions_icc_action_with_security_council/ ("I report today to the Security Council that the Government of the Sudan has not complied with its legal obligations. The Government of the Sudan has not complied with Resolution 1593. The Government of the Sudan is not cooperating with my Office, or the Court.").

²⁴⁰ Press Release, Security Council, International Criminal Court Prosecutor Tells Security Council Sudan's Government 'Not Cooperating' in Darfur Investigation, Massive Crimes Continue, U.N. Doc. SC/9186 (Dec. 5, 2007) [hereinafter Security Council, 'Not Cooperating' in Darfur Investigation]. ICC Prosecutor Moreno-Ocampo testified before the Security Council that "[t]he Government of the Sudan is not cooperating with my Office, or the Court." *Id.* See also Darfur Fact Sheet, *supra* note 178, at 5 (noting that the "Sudanese Government, as the territorial State, has both the legal responsibility" and ability to facilitate the appearance of the individuals).

²⁴¹ AMICC Q & A, *supra* note 218, at 2. The African Union recently passed a resolution indicating that it will not assist in the arrest of Bashir, although it is unclear whether all 30 African state signatories to the Rome Treaty will abide by this resolution and thereby ignore their responsibilities under international law. *African Move On Bashir Dismissed*, BBC News, July 5, 2009 (noting that Botswana's refusal to abide by the resolution). Bashir and Sudan's continued defiance to the ICC arrest warrants is clearly and deliberately contrasted by the voluntary surrender of rebel leader Badr Idriss Abu Garda. In response to an ICC court summons, the United Resistance Front leader turned himself into the Hague to face war crimes charges for his alleged involvement in the 2007 killing of 12 AU peacekeepers. A member of the

The International Community Responds To Darfur

Instead of cooperating with the ICC, Sudan's armed forces targeted civilians in air and ground attacks on villages in Darfur in the winter of 2008, according to a report issued in Geneva by the office of the U.N. High Commissioner for Human Rights, and the joint mission in Darfur, UNAMID.²⁴² Sudanese officials have also purposefully restricted and impeded access to humanitarian groups trying to provide relief to the civilian population,²⁴³ and even attacked them.²⁴⁴ And in a blatant move of disrespect and scoff at UNAMID, the Sudanese Government on November 18, 2007 announced on its official website that Ahmad Harun was appointed to the UNAMID national monitoring mechanism group and was overseeing that force's deployment.²⁴⁵

There were also reports that Sudan painted their army aircrafts with U.N. and AU colors and then used them on attacks in Darfur.²⁴⁶ This action may have led to the murder of eight AU peacekeepers in Sudan by rebel forces.²⁴⁷

Sudan's government has similarly responded with defiance to the ICC's arrest warrant for Bashir. Addressing a government-organized rally in Khartoum, Bashir raised his arms with a big smile in complete defiance of the ICC's reasoned decision.²⁴⁸ Instead of responding to the accusations in court, Bashir ac-

Darfurian delegation traveling with Abu Garda, Tadjadine Niam, said "We want to set an example to the Sudanese leadership and others accused in Sudan. We believe the court is independent and impartial. Let the others also come to the court." Marlise Simons, *Darfurian Rebel Commander to Face War Crimes Charges*, N.Y. TIMES, May 17, 2009.

²⁴² Robert Evans, *U.N. Says Sudan Targeted Civilians In Darfur*, REUTERS, Mar. 21, 2008, <http://www.reuters.com/article/latestCrisis/idUSL20508924>. Attacks were on the village of Saraf Jidad in January, and the villages of Sirba, Sileia and Abu Surouj on February 8. *Id.* These attacks came "during a major military push by the Sudanese government against rebels in the area." *Id.* In February 2008, U.N. Secretary General Ban Ki-moon condemned the bombing of a displaced person's camp in by Sudanese government aircrafts in Jebel Moun. *See also, Fighting Traps Darfur Refugees*, BBC NEWS, Feb. 21, 2008, <http://news.bbc.co.uk/2/hi/africa/7255750.stm>. Eyewitnesses and rebels said Sudanese army helicopters, Antonov aircrafts, and state-backed militias "carried out a three-pronged offensive."

²⁴³ Jerry Fowler noted that in 2003 and 2004 Sudan had an active effort to impede humanitarian NGOs from delivering aid to Darfur's displaced and hungry population. At one point, there were 1 million displaced civilians and only 100 humanitarian aid workers. Simply put, the "people can not survive without outside humanitarian aid." He reports that humanitarian access has decreased over the last six months from November 2007 to April 2008. Apparently, Sudan is determined to commit genocide against the people of Darfur in every way practically and legally possible. The Rome Statute 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; (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.

Rome Statute, *supra* note 9, art. 6.

²⁴⁴ Oxfam's Sudan representative, Alun MacDonald, reported in December 2007, that Oxfam "staff are being targeted on a daily basis. They are being shot, robbed, beaten and abducted." Mike Thomson, *Wave of Violence Threatens Darfur Camps*, BBC NEWS, Dec. 4, 2007, <http://news.bbc.co.uk/2/hi/africa/7125209.stm>.

²⁴⁵ *Sudan Not Cooperating*, *supra* note 212.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Neil Macfarquhar & Marlise Simons, *Bashir Defies War Crime Order*, N.Y. TIMES, Mar. 5, 2009, <http://www.nytimes.com/2009/03/06/world/africa/06sudan.html>.

The International Community Responds To Darfur

cused the ICC of colonialism and attempting to steal Sudan's oil resources.²⁴⁹ Almost immediately after the warrant was issued, Bashir expelled thirteen international aid organizations that were a life-line for the people in Darfur.²⁵⁰ The European Commission has called on Sudan to immediately reverse the expulsion orders, with EC spokesman for humanitarian aid John Clancy saying that "the lives of hundreds of thousands of people are at stake."²⁵¹ U.S. Secretary of State Hillary Clinton made clear that President Bashir and the government in Khartoum "will be held responsible for every single death that occurs" because of these expulsions.²⁵²

The United States has also sought to persuade entities with influence over Sudan, such as the Arab League, the African Union, and China, to pressure Bashir to reverse his expulsion of these critically needed humanitarian agencies. In a March meeting with Chinese Foreign Minister Yang Jiechi, President Barack Obama expressed his "deep concern" about the current humanitarian crisis in Darfur and asked Beijing to pressure Sudan's government.²⁵³ Whether these U.S. efforts will actually bear tangible results in time to prevent an even greater humanitarian crisis is yet to be seen.

With respect to the outstanding warrants, it remains unclear how can they will be executed when the ICC lacks its own police force or marshal service. The answer is simply but complex: the Court relies on States' cooperation in securing the custody of wanted individuals.²⁵⁴

C. The United States Response

In 1997, long before the conflict in Darfur escalated to its current state, the United States classified Sudan as a state sponsor of terrorism based on the prevalence of human rights violations, including slavery and severe restrictions on religious freedom in Sudan.²⁵⁵ The United States also took some military action in 1998 when it launched missiles on a Sudanese site suspected of produced

²⁴⁹ *Id.*

²⁵⁰ Xan Rice, *Sudan Aid Purge Puts Thousands At Risk*, Mar. 5, 2009, <http://www.guardian.co.uk/world/2009/mar/05/sudan-aid-purge-darfur-khartoum>.

²⁵¹ *Id.*

²⁵² *U.S. Increases Pressure On Sudan After Expulsions*, Mar. 17, 2009, REUTERS, http://www.savedarfur.org/newsroom/clips/us_increases_pressure_on_sudan_after_expulsions/.

²⁵³ *Id.* See Jim Wallis & John Prendergast, *Obama Can Make A Difference In Darfur: Solving The Crisis Will Require U.S. Leadership*, WALL ST. J., Apr. 12, 2009 (laying out concrete action President Obama and Special Envoy Gen. Gration should take to end the genocide). Thus far, Obama and Gration have had some success as Sudan allowed four of the thirteen expelled humanitarian agencies back into Darfur just one week after Gration met with Sudanese officials to press them on the crisis. Peter Baker, *Obama Urges Sudan to Allow Aid Groups Back Into the Country*, N.Y. TIMES, Mar. 30, 2009; *Sudan 'Allows Aid Agencies Back'*, BBC NEWS, June 12, 2009.

²⁵⁴ Court Issues Bashir Arrest Warrant, Mar. 5, 2009, ALJAZEERA.NET, <http://english.aljazeera.net/news/africa/2009/03/20093412473776936.html> (quoting Stuart Alford of the War Crimes Committee at the International Bar Association as saying that "the court doesn't have a police force and therefore relies on those countries who have signed up to the court . . . to use their power and their police forces to make the arrest").

²⁵⁵ International Emergency Economic Powers Act, 50 U.S.C §1701.

The International Community Responds To Darfur

chemical weapons.²⁵⁶ Two years before the conflict began, Nina Shea, commissioner of the U.S. Commission on International Religious Freedom, expressed the Commission's view that "the government of Sudan is the world's most violent abuser of the right to freedom of religion and belief."²⁵⁷

Shortly after the start of the Darfur conflict, the United States issued statements reflecting their concern about the situation. In early 2004, the United States warned that it saw warning signs of genocide.²⁵⁸ On September 9, 2004, former U.S. Secretary of State Colin Powell, speaking to the Senate Foreign Relations Committee, said that the Government of Sudan and the government-sponsored Arab Janjaweed Militias was committing genocide and "bear responsibility" for rapes, killings and other abuses that have displaced 1.2 million Black Africans.²⁵⁹ Colin Powell was the first to call the Darfur violence "genocide," and he did so when both the African Union and Arab League denied that genocide was occurring.²⁶⁰ Moreover, this was the first time any government had accused another of committing genocide.²⁶¹ Powell's bold statement, however, ultimately returned void and the U.S. State Department argued that the finding of genocide did not impose any obligation on the United States to stop the killing.²⁶²

In addition to Powell's statements, the U.S. State Department released a report that found a "consistent and widespread pattern of atrocities committed against non-Arab villagers."²⁶³ This report, based on 1,136 interviews with refugees during the summer of 2004, found that "sixty-one percent had witnessed the killing of a family member and sixteen percent had been raped or had heard about a rape victim."²⁶⁴ Later that year, the U.S. Congress urged President George Bush to "seriously" consider "unilateral intervention to stop [the] genocide in Darfur, Sudan should the United Nations Security Council fail to act."²⁶⁵ At the same time, the U.S. House of Representatives unanimously passed a resolution calling the situation in Sudan genocide.²⁶⁶

²⁵⁶ *Timeline: Sudan*, *supra* note 41.

²⁵⁷ AMBASSADOR SHIRIN TAHIR-KHELI, HEAD OF THE U.S. DELEGATION, Item 9: Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Mar. 30, 2001, <http://geneva.usmission.gov/humanrights/2002/statements/0330item9.html>.

²⁵⁸ *The crisis in Darfur, a timeline*, *supra* note 74.

²⁵⁹ Gleen Kessler & Colum Lynch, *US Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html> [hereinafter Kessler & Lynch] ("We concluded — I concluded — that genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility — and genocide may still be occurring.").

²⁶⁰ *Id.* (writing that at that time the European Union said it had insufficient evidence to conclude a genocide was being committed).

²⁶¹ Prendergast & Thomas-Jensen, *supra* note 16, at 150.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Kessler & Lynch, *supra* note 259.

²⁶⁵ H.R. Con. Res. 467, 108th Cong. ¶ 10 (2004).

²⁶⁶ U.S. Congress Terms Situation in Darfur "Genocide," U.S. Department of State, <http://usinfo.state.gov/is/Archive/2004/Jul/26-233176.html> (last visited Apr. 20, 2008).

The International Community Responds To Darfur

Three years after the House of Representatives passed its resolution, the United States provided over four billion dollars in “assistance to the people of Sudan and Eastern Chad.”²⁶⁷ Currently, the United States provides a quarter of the cost of up-keep for the U.N./AU hybrid force.²⁶⁸ In addition, the United States constructed and still maintains thirty-four bases for AU peacekeepers.²⁶⁹ The United States also contributes the largest amount of food aid by donating 40,000 metric tons of food a month.²⁷⁰ President Bush, dissatisfied with the Sudanese government’s total failure to end the violence, imposed sanctions on thirty one companies owned or operated by the Sudanese government, along with three individuals.²⁷¹ Today, the United States is almost the only nation taking this type of action.²⁷² China, along with several other countries, criticized the United States.²⁷³ Britain, though it considered supporting U.S. sanctions and imposing their own, chose not to and refused to impose any sanctions.²⁷⁴

In addition to the U.S. federal government taking action, many U.S. states have joined the divestment movement. In 2005, Governor Blagojevich of Illinois approved a bill from the Senate prohibiting the state from investing in the government of Sudan or with any companies with business ties to Sudan.²⁷⁵ Governor Blagojevich urged other states to follow their example and divest in a similar fashion.²⁷⁶ As of the spring of 2008, twenty-two U.S. states and over fifty universities have adopted Sudan divestment policies.²⁷⁷ And many U.S. and international corporations have also divested from Sudan.²⁷⁸

²⁶⁷ The United States Response to the Darfur Crisis, U.S. Department of State, <http://www.state.gov/r/pa/scp/92492.htm> (last visited Apr. 20, 2008).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*; See also U.S. Imposes New Sanctions Against Sudan, CNN NEWS, May 29, 2007, <http://www.cnn.com/2007/POLITICS/05/29/bush.sudan/index.html> (last visited April 20, 2008).

²⁷² The crisis in Darfur, a timeline, *supra* note 74.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Lucien J. Dhooge. *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C. J. INT’L L. & COM. REG. 391, 391 (2007).

²⁷⁶ *Id.* at 392.

²⁷⁷ Sudan Divestment Task Force, <http://www.sudandivestment.org/home.asp> (last visited Apr. 20, 2008).

²⁷⁸ “Nine major foreign companies—CHC Helicopter, ABB, Siemens, Rolls Royce, ICSA of India, Schlumberger, Weatherford International, Weir Group and La Mancha Resources—have ceased problematic operations in Sudan or significantly changed their behavior in the country since the proliferation of the Sudan divestment movement.” *Cooley and the Genocide Intervention Network Mark Passage of Sudan Accountability and Divestment Act*, REUTERS, Jan. 11, 2008, <http://www.reuters.com/article/pressRelease/idUS135165+11-Jan-2008+MW20080111>. In July 2005, the European Parliament unanimously adopted a resolution calling on European Union members to support targeted Sudan divestment efforts. Press Release, Sudan Divestment Task Force, Senate Banking Committee Sends Messages to Sudan 2 (Oct. 17, 2007), http://sudandivestment.org/docs/SADA_Passes_Senate_Committee_on_Banking_PR_10-17-07.pdf. In addition, many NGOs have taken the initiative to start divestment campaigns in several countries, to convince companies and governments that they should divest. See Sudan Divestment Task Force, Divestment Statistics, <http://www.sudandivestment.org/statistics.asp> (last visited Apr. 20, 2008); Darfur Divestment Worldwide, <http://www.darfurdivestment.org/> (last visited Apr. 20, 2008).

The International Community Responds To Darfur

Most recently, on March 18, 2009, President Barack Obama and Secretary of State Hillary Clinton named Major General J. Scott Gration as the special envoy for Sudan.²⁷⁹ Obama called the appointment “a strong signal of my Administration’s commitment to support the people of Sudan while seeking a lasting settlement to the violence that has claimed so many innocent lives.”²⁸⁰ Obama called Sudan a priority for his Administration that “cries out for peace and for justice.”²⁸¹

V. Proposal

A. The International Community Should Enforce All Three Outstanding ICC Warrants

Under the Rome Statute, State Parties agree to use their respective national authorities to arrest suspected perpetrators and transfer them to the Court.²⁸² Although Sudan is not a State Party to the Rome Statute, U.N. Security Council Resolution 1593, which referred the situation in Darfur to the ICC, requires all parties to the Darfur conflict, including the Sudanese Government, to fully cooperate with Court.²⁸³ So, in theory, Sudan could be pressured to comply with Resolution 1593 and enforce the ICC warrants.²⁸⁴

U.N. Resolution 1593 was adopted under U.N. Charter chapter VII which authorizes the Security Council to make recommendations or decisions to maintain and restore international peace and security.²⁸⁵ Chapter VII resolutions, such as Resolution 1593, are binding on all U.N. members.²⁸⁶ Additionally, when the Security Council refers cases to the Court, the Council has the power to require U.N. Member States, whether States Parties or non-States Parties to the ICC, to cooperate with the Court in specific situations. The Council specifically did so in Resolution 1593.

However, one year after the issuance of the arrest warrants, U.N. Member States, and the five permanent members of the Security Council—China, Russia, United States, Britain, and France—have failed to affect the arrest of the

²⁷⁹ White House, Office of the Press Secretary, Announcement of Special Envoy for Sudan: Sudan Is a Priority for Obama Administration, Mar. 18, 2009, <http://www.america.gov/st/texttrans-english/2009/March/20090318171308xjsnommis0.326687.html&distid=ucs>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Rome Statute, *supra* note 9.

²⁸³ S.C. Res. 1593, *supra* note 168.

²⁸⁴ Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240 (ICC Prosecuting stating that Sudan must “remember . . . that this issue is a part of their duties now that we have these global legal standards” enshrined in the ICC. . . “[t]he responsibility to execute the warrant is for the Government of Sudan.”).

²⁸⁵ U.N. Charter, art. 39, para. 1.

²⁸⁶ *Id.* art. 43, para. 1.

The International Community Responds To Darfur

criminals.²⁸⁷ Opportunities remain, however, for all these nations and others to make the human rights of the people of Darfur of utmost priority.²⁸⁸

There are several ways that members of the international community can and should help enforce the ICC warrants.²⁸⁹ We propose that every international actor pursue all legal means available to enforce the ICC warrants and to bring Harun and Kushayb to the ICC to face their charges, and hopefully, be held accountable.

The international community should take additional steps to exert pressure on Sudan's Government to effectuate the Court's arrest warrants.²⁹⁰ The ICC should also report Sudan's failure to cooperate to the U.N. Security Council and the Council should take measures such as sanctions against Sudan.²⁹¹ Individual States should also introduce non-humanitarian-aid related sanctions targeted at the Sudanese Government and military to demand compliance.²⁹²

Neighboring African countries should also exert diplomatic pressure on Sudan in order to persuade the Government to cooperate with the ICC.²⁹³ It is in the best interest of all African countries that the perpetrators of Darfur's genocide be held accountable for their crimes and brought to justice. Surely, this will produce some deterrent effect on future would-be international criminals in war-torn Africa.

Finally, AU and U.N. peacekeeping forces in Sudan should be authorized to execute the arrest warrants if the Sudanese Government continues to fail to do

²⁸⁷ The United States did issue a strong statement following the ICC Prosecutor's December 2007 report to the Security Council, stating:

The United States is particularly troubled by the Prosecutor's report that the Government of Sudan is still not cooperating and has taken no steps to arrest and surrender the two individuals that are subject to ICC arrest warrants: current Minister of State for Humanitarian Affairs Ahmad Muhammad Harun and the Janjaweed leader known as Ali Kushayb. We call on the Sudanese Government to cooperate fully with the ICC as required by resolution 1593.

Press Release, United States Mission to the United Nations, Statement by Jeffrey DeLaurentis, U.S. Advisor, on the report of the ICC prosecutor Mr. Luis Moreno-Ocampo on Sudan, Dec. 5, 2007, *available at* http://www.usunnewyork.usmission.gov/press_releases/20071205_353.html.

²⁸⁸ "[In December 2007] Britain introduced a toughly worded Presidential Statement at the U.N. Security Council, demanding that Khartoum's National Islamic Front regime turn over two génocidaires [Ahmed Haroun and Ali Kushayb] to the International Criminal Court. The Presidential Statement should've easily passed: The evidence against both men is strong, and because of U.N. Security Council Resolution 1593, the ICC has jurisdiction over the matter. What ended up happening, though, was hardly a surprise to anyone who has watched Darfur closely over the last five years. China threatened to veto the non-binding declaration unless its language was essentially gutted, and rather than force the issue, Britain, France, and the U.S.—as well as the other Security Council members—quietly decided to drop the matter. As a result, not only will Haroun and Kushayb remain free, but the government in Khartoum will feel as if it can block the extradition of those subsequently accused by the Court. The ICC just lost its teeth. This under-reported development provides yet another example of China's enabling role in the Darfur genocide." Eric Reeves, *Partners in Genocide*, THE NEW REPUBLIC, Dec. 18, 2007, <http://www.tnr.com/politics/story.html?id=1f4269dd-9d4f-4911-891f-57ae85d66b70>.

²⁸⁹ AMICC Q & A, *supra* note 218, at 2.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

The International Community Responds To Darfur

so.²⁹⁴ No legal instrument in place prevents the U.N. from authorizing AU and U.N. peacekeepers to arrest people named in an ICC arrest warrant.

Testifying before the Council, ICC Prosecutor Moreno-Ocampo asked: “When will be a better time to arrest Harun? How many more women and girls have to be raped? How many persons have to be killed?”²⁹⁵ The answers to Ocampo’s questions are simple: “Immediately” has always been, and continues to be, the best time to arrest Harun and Kushayb. We do not need another rape or murder to be committed to act on these warrants.

What purpose would arresting Harun and Kushayb serve? First, it would help realize the ICC’s potential to be an international legal institution that punishes severe international crimes.²⁹⁶ In the words of the ICC Prosecutor Ocampo directed to the ears and hearts and minds of the U.N. Security Council members: “It would send a signal to the perpetrators of crimes in Darfur that the international community was not only watching, but would hold them accountable for their actions.”²⁹⁷ As such, it could deter future criminals.

But Prosecutor Ocampo points to another reason; one even more immediate and pressing: “What is at stake is, simply, **the life or death of 2.5 million people.**”²⁹⁸ He states that “arresting Harun today will help peace, the political process, and the deployment of peacekeepers.”²⁹⁹

It is clear that, although the international community succeeded in ending the North-South civil war, it utterly failed to hold any of its perpetrators accountable. That is exactly the kind of impunity that fueled Sudan’s boldness to start the genocide in Darfur even before the North-South conflict was over. And unless Harun, Al-Kushayb, and Al-Bashir are brought to account, Khartoum’s regime and Arab militias will be emboldened to stoke the flames of suffering in the South as the South seeks to secede in 2010 from the genocidal regime called Khartoum.

History still waits patiently for someone to write this chapter; the chapter that ends with two key perpetrators of the horrendous atrocities in Darfur being brought to justice in a permanent international tribunal named the International Criminal Court; the chapter that says that 2.5 million displaced Darfuris were saved from ultimate death.

B. Make R2P A Binding International Norm

In 2000, in his Millennium Report to the General Assembly, U.N. Secretary-General Kofi Annan confronted a key criticism of humanitarian intervention with these words: “[I]f humanitarian intervention is, indeed, an unacceptable assault

²⁹⁴ *Id.*

²⁹⁵ Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240.

²⁹⁶ Fanton, *supra* note 19.

²⁹⁷ Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240 (telling Security Council members that “[y]ou can make a difference, you can break the criminal system”).

²⁹⁸ *Id.* (emphasis added).

²⁹⁹ ICC Chief Prosecutor, Luis Moreno-Ocampo, Conference on International Justice, *supra* note 9.

The International Community Responds To Darfur

on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”³⁰⁰ In response to this challenge by Secretary-General Annan,³⁰¹ the Canadian government created the International Commission on Intervention and State Sovereignty (ICISS).³⁰² The ICISS completed its report, *Responsibility to Protect* (R2P), in September of 2001.³⁰³

The 108-page R2P report is very detailed and comprehensive. The R2P Report lays out the responsibilities to prevent, to react, and to rebuild.³⁰⁴ The Report emphasizes the need to prevent international crimes from happening in the first place.³⁰⁵ States also have a responsibility to react if crimes against humanity or large scale atrocities are being committed.³⁰⁶ Finally, the international community must rebuild communities broken by war through reconciliation and reconstruction efforts.³⁰⁷

With regard to intervention, the R2P Report, importantly, calls for military intervention as a remedy of last resort.³⁰⁸ The only just cause for military intervention is to prevent or stop “large scale loss of life” or “large scale ‘ethnic cleansing.’”³⁰⁹ The intervention’s main purpose must be to prevent or stop human suffering.³¹⁰ The military intervention must be only that which is necessary for the humanitarian purpose, and actions taken must be proportional to the end goal.³¹¹ The intervention requires Security Council authorization.³¹²

Based in large part on the R2P report by the ICISS, the R2P principle was formally endorsed by the U.N. General Assembly at the 2005 World Summit:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

³⁰⁰ The Millennium Assembly of the United Nations, *Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 217, U.N. Doc. A/54/2000* (Mar. 27, 2000).

³⁰¹ U.N. GAOR, 54th Sess., 1st plen. mtg. (Sept. 20, 1999) (statements by Secretary-General Kofi Annan, <http://www.un.org/News/Press/docs/1999/19990919.sgsm19990920.stmt.doc.htm>). Annan also challenged the international community to “find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.” *Id.*

³⁰² ICISS Report, *supra* note 21, at vii. The ICISS was co-chaired by International Crisis Group’s President Gareth Evans and Algerian diplomat Mohamed Sahnoun.

³⁰³ *Id.* at ix.

³⁰⁴ *Id.* at xi.

³⁰⁵ *Id.* (noting also the need for an “early warning system”).

³⁰⁶ *Id.* at 29-37.

³⁰⁷ *Id.* at 39-45.

³⁰⁸ ICISS Report, *supra* note 21, at 36-37.

³⁰⁹ *Id.* at xii, 32.

³¹⁰ *Id.* at xii, 35.

³¹¹ *Id.* at xii, 37.

³¹² *Id.* at xii, 50. Should the Council reject a proposal or take an unreasonably long time to respond, the “Uniting for Peace” procedure permits the General Assembly in Emergency Special Session to consider the case, and regional organizations could also act after receiving Security Council authorization. *Id.* at 53-54.

The International Community Responds To Darfur

This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.³¹³

Before this declaration, several other integral members of the international community embraced R2P, including the AU, EU, former U.N. Secretary-General Kofi Annan,³¹⁴ and the U.N. High-Level Panel on Threats, Challenges and Change.³¹⁵ The U.N. Security Council also recently reaffirmed the R2P principles in a 2006 resolution.³¹⁶ Current Secretary-General Ban Ki-moon strongly supports the concept of the responsibility to protect, especially in situations like Darfur.³¹⁷ And even Pope Benedict XVI, in a recent speech to the U.N., explicitly affirmed the R2P principle by saying that while “every state has the primary duty to protect its own population from grave and sustained violations of human rights. . . [i]f states are unable to guarantee such protection, the international community must intervene with the juridical means provided in the United Nations charter and in other international instruments.”³¹⁸

We call on the U.N. to continue to affirm and implement the principle of R2P. We call on every U.N. Member State and every State Party to the Rome Statute, to do likewise. No longer should the notion of “sovereignty” tie the hands of the international community while vulnerable girls and women are systematically raped, and gang raped; while families and ethnic groups are destroyed; while those with power callously and fearlessly crush the lives of the oppressed.³¹⁹

³¹³ G.A. Res. 60/1, ¶¶ 138, 139, U.N. Doc. A/60/L.1 (Sept. 14-16, 2005).

³¹⁴ General Assembly, Report of the Secretary-General, In Larger Freedom: Towards Development, Security And Human Rights For All, ¶¶ 132, 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

³¹⁵ The Secretary-General, Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶¶ 201-203, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter A More Secure World]; *but see* Michael Clough, Darfur: Whose Responsibility To Protect?, HUMAN RIGHTS WATCH, <http://hrw.org/wr2k5/darfur/1.htm> (last visited May 1, 2009). In December 2004, the High Level Panel on Threats “acknowledged the failure of the U.N. to prevent atrocities against civilians and recommended reforms to enhance the U.N.’s capacity to carry out its collective security mandate. The High Level Panel also strongly endorsed the emerging norm that there is an international responsibility to protect civilians in situations where governments are powerless or unwilling to do so. So far, however, these initiatives have afforded no protection to the people of Darfur.” *Id.*

³¹⁶ S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

³¹⁷ Warran Hoge & Ian Fisher, In Speech, Pope Urges Promotion of Human Rights, N.Y. TIMES, Apr. 18, 2008, *available at* http://www.nytimes.com/2008/04/18/us/nationalspecial2/18cnd-pope.html?_r=1&hp&oref=slogin.

³¹⁸ *Id.*

³¹⁹ For some, the new interventions herald a new world in which human rights trumps state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights. ICISS Report, *supra* note 21, at 2. Pope Benedict also noted that international intervention to stop human rights abuses “should never be interpreted as an unwarranted imposition or a limitation of sovereignty” but rather “[o]n the contrary, it is indifference or failure to intervene that do [sic] the real damage.” UN Has Duty to Protect, But Should

The International Community Responds To Darfur

The international community has a moral and legal responsibility to protect civilians from crimes against humanity, genocide, and war crimes when their governments refuse to; this universal truth should become a binding rule of international law.

VI. Conclusion

There is hope that the ICC and international community will respond to genocide and crimes against humanity by holding those most responsible accountable for their crimes, and, by doing so, end the epidemic of impunity. There is hope that the notion of a responsibility to protect will become a binding rule of international law.

What the international community needs now is less talk, less resolutions, less declarations, and more action, more intervention, more protection; and more justice. Today, we need national and international leaders of integrity and courage to rise up, speak out, and *act* to execute the ICC arrest warrants for Ahmad Harun, Ali Kushayb, and Al-Bashir. These historic acts constitute the next chapter in the enforcement and advancement of international law and international justice. The chapter is still being written.

Not Violate Sovereignty, Says Pope, CATHOLIC NEWS AGENCY, Apr. 18, 2008, <http://www.ewtn.com/vnews/getstory.asp?number=87737>.

RIGHT TO WORK? A COMPARATIVE LOOK AT CHINA AND JAPAN'S LABOR RIGHTS FOR DISABLED PERSONS

Cerise Fritsch[†]

Introduction

The international community recognizes the universal principles of dignity and justice for all persons.¹ It is the duty of all States, regardless of their underlying legal, economic, and cultural systems to protect and promote the inalienable rights and fundamental liberties of all. One such fundamental right recognized in the international community is the right to employment.² Employment not only offers an individual a means to support one's livelihood, but also provides an opportunity for social interaction, advancement, and feelings of self-accomplishment.

Yet employers and government actors deny persons with disabilities the fundamental right to work each day. Approximately 650 million individuals, or ten percent of the world's population, live with a disability.³ Eighty percent of these individuals live in countries stricken by poverty, where the majority of individuals of legal working age are unemployed.⁴ The lack of equal opportunity to earn gainful employment and discrimination in the workforce results in the continuing marginalization, poverty, and social exclusion of persons with disabilities.

Discrimination in the labor market is an issue most prevalent in the Asian Pacific region, which has the largest number of persons with a disability in the world.⁵ Recognizing the need to address the rights of people with disabilities in this region, the United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP") launched the Decade of Disabled Persons ("Decade"), which lasted from 1993 to 2002.⁶ The Agenda for Action of the Decade, adopted in 1993, focused on the issue of training and employment of persons with disabilities. Due to a marked disparity in implementation of the Decade's Agenda, the original Decade was extended for a second decade from 2003 to 2012.⁷ The

[†] J.D., Loyola University Chicago, expected May 2010.

¹ United Nations Enable, International Day of Persons with Disabilities – 3 December, <http://www.un.org/disabilities/default.asp?id=109> (last visited May 1, 2009).

² Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities* (Int'l Labour Org., Working Paper, 2003).

³ Int'l Labour Org. Facts on Disability in the World of Work (2007), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Factsheets/lang—en/docName—WCMS_087707/index.htm.

⁴ International Day of Persons with Disabilities, *supra* note 1. In fact, 80 to 90 percent of disabled persons in developing countries are unemployed, and 50 to 70 percent in industrialized nations are unemployed.

⁵ O'Reilly, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

Right to Work?

second Decade carries forward the goal of “full participation and equality of persons with disabilities” in Asian society, calling for training and employment opportunities for persons with a disability to be addressed.⁸

At the beginning of this second Asian and Pacific Decade of Disabled Persons, advocates in the international community underwent a fundamental shift in thinking with respect to the rights of disabled persons. The adoption of the Convention on the Rights of Persons with Disabilities (“CRPD”) and its Optional Protocol exemplifies this philosophical change in looking at the rights of persons with disabilities. The adoption of the CPRD marked a new era in the international efforts to promote and safeguard the “civil, political, social, economic and cultural rights of persons with disabilities, and to promote disability-inclusive development and international cooperation.”⁹ The Biwako Millennium Framework and the CRPD both strive to achieve a barrier-free, rights-based society for persons with disabilities.¹⁰

As State Parties to the CRPD, China and Japan should incorporate its provisions into their national law and guarantee all the rights enumerated in the CPRD for persons with disabilities.¹¹ As such, domestic legislation enacted pursuant to the CRPD should include either a reference to provisions of the CRPD or the specific text of the provisions. Further, the United Nations (“U.N.”) requires countries to implement public policies and programs to ensure that the provisions of the CRPD are put into practice and impact the lives of persons with disabilities in a meaningful way.¹² This includes the adoption of Article 27 of the CRPD, which specifically addresses the employment rights of persons with disabilities.¹³ Whereas China is formally bound to the CRPD as a ratified party, Japan has signed, but has not ratified the treaty, indicating the government’s agreement with the principles of the CRPD, but its unwillingness to face repercussions should it choose not to fully provide the protections afforded to persons with disabilities as outlined in the CPRD.¹⁴ Nonetheless, as a signatory party, Japan should refrain from actions that defeat the purpose of the CPRD.

To this end, China and Japan address the issue of the rights of persons with disabilities in their domestic laws. China and Japan approach the issue of discrimination against persons with disabilities in a similar manner, by focusing on

⁸ United Nations, Econ. & Soc. Comm’n for Asia & the Pacific [ESCAP], Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific, E/ESCAP/APDDP/4/Rev.1 (Jan. 24, 2003) [hereinafter BMF for Action]. The 2003-2012 Asian and Pacific Decade of Disabled Persons commenced a number of initiatives to ensure the goal of the previous Decade is met and that equal employment rights are extended to all persons with a disability in the region. One such initiative is the Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ International Day of Persons with Disabilities, *supra* note 1.

¹² *Id.*

¹³ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 27, U.N. Doc. A/Res/61/106 (Dec. 13, 2006) [hereinafter CRPD].

¹⁴ *Id.*

Right to Work?

the special considerations owed to such individuals and on the need for state assistance, rather than by outlawing employment discrimination per se in order to guarantee equal opportunity for minority persons.¹⁵ Thus, although their domestic laws grant protections for disabled persons' right to work, the countries do not recognize the equal treatment of persons with disabilities as a civil rights issue.¹⁶ This approach is in stark contrast to Article 27 of the CRPD and maintains the pre-CRPD view of disabled persons as objects.¹⁷

This article will examine whether the Chinese and Japanese legal systems adequately protect the rights of disabled persons in the work environment, including the right to equal opportunity in hiring and treatment in the workforce. The laws and policies in China and Japan will be measured against international legal standards, particularly the CRPD. Although the Chinese and Japanese legal systems generally provide for the protection of the right of persons with disabilities to work, including equal opportunity and treatment in the workplace, a disparity exists in the full implementation and recognition of the rights of persons with disabilities. In light of international legal standards, this article contends that the domestic legal framework in China and Japan inherently discriminates against persons with disabilities, necessitating a civil-rights based approach to ensure the full enjoyment of the fundamental right to employment for persons with disabilities.

Part I of this article outlines the international legal standards related to persons with disabilities and the right to employment and discusses the definition of the term "disability." Part II provides an overview of the domestic legal framework of disability law in China and Japan, offering comparisons of the two systems. Additionally, it examines the extent to which the domestic laws and policies in China and Japan have complied with international legal standards, illuminating areas of major concern due to inadequate protections. Lastly, this article evaluates the disability law with respect to employment in each country and offers recommendations for future compliance with international legal standards and the full protection of persons with disabilities.

I. International Legal Standards and the Employment of Disabled Persons

The right to work transcends the right to mere employment, and extends to the right to have a meaningful and gainful occupation, whereby a person with a disability has the opportunity to freely choose an occupation based on his or her capabilities. In order to exercise this right, it is necessary to have access to the same education, vocational training, and development opportunities as are available to those without a disability. This is a fundamental human right recognized

¹⁵ This is the approach taken by the United States under the 1990 Americans with Disabilities Act, as well as the approach taken in disability legislation in Australia, New Zealand, Canada, and Great Britain. See Robert Burgdorf, *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

¹⁶ *Id.*

¹⁷ *Id.*; CRPD, *supra* note 13.

Right to Work?

by the U.N. and the international community. The deprivation of the right to work for persons with disabilities, perhaps more so than for any other group in society, results in complete exclusion from society, and greatly contributes to the poverty of a country. Thus, the full participation of persons with disabilities in all aspects of society will result in “their enhanced sense of belonging and in significant advances in . . . human, social and economic development . . . and the eradication of poverty,” demonstrating the necessity of ensuring that this fundamental right is granted to all persons.¹⁸

International legal standards provide a framework for rights of disabled persons and recognize the promotion of human rights and fundamental freedoms for persons with disabilities. The rights of persons with disabilities have historically been protected under the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and the International Covenant on Civil and Political Rights, which together comprise the International Bill of Human Rights. Additionally, the International Labour Organization (“ILO”) has promulgated several conventions governing the issue of workers with disabilities. Most notably, however, Article 27 of the CRPD calls for comprehensive labor rights and legal protections to workers with disabilities.¹⁹

A. International Covenant on Economic, Social, and Cultural Rights and Universal Declaration of Human Rights

As previously stated, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the ICESCR provide a framework for an International Bill of Human Rights.²⁰ Specifically, the ICESCR was the first international covenant providing comprehensive provisions on the right to employment and equal opportunity in hiring and treatment in the workforce.²¹ Although none of the provisions within the ICESCR directly address the right of disabled persons in the work environment, including equal opportunity in hiring and treatment in the workforce, Article 6 and Article 7 of the ICESCR generally provide for the right to work and the full enjoyment of this right.²²

Under Article 6, the ICESCR provides that State Parties shall recognize the right to work, which extends to all persons and includes the opportunity to earn a living by work that one freely chooses or accepts.²³ This Article also calls for State Parties to take active steps towards the “full realization of this right” by providing for vocational training, programs and policies to ensure economic, so-

¹⁸ CRPD, *supra* note 13, pmb1.

¹⁹ *Id.* art. 27.

²⁰ U.N. High Commissioner for Hum. Rts., *Human Rights: A Compilation of International Instruments*, Vol. II U.N. Doc. ST/HR/1/Rev.6 (Vol. I/Part 2) (2002).

²¹ *See generally* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/2200 (Dec. 16, 1966).

²² *Id.* arts. 6-7.

²³ *Id.*

Right to Work?

cial, and cultural development, and employment conditions that safeguard the freedoms of all individuals.²⁴

Article 7 of the ICESCR further requires that State Parties recognize the right of all persons to enjoy just and favorable working conditions. The ICESCR provides that, at a minimum, State Parties should have fair wages with equal pay for equal work, employment opportunities that will ensure a decent living for workers and their families, “safe and healthy working conditions,” equal opportunity in employment promotions, and adequate working hours to provide for rest, leisure, and holidays.²⁵

Although not specifically addressed within the ICESCR provisions, the Committee on Economic, Social, and Cultural Rights emphasizes the importance of protecting and providing rights for persons with disabilities in the labor market.²⁶ The Committee in its General Comment No. 5 discusses the prominent and persistent discrimination against persons with disabilities with respect to employment.²⁷ As such, the Committee calls for State Parties to the ICESCR to take several additional measures to protect and ensure the full enjoyment of employment rights for workers with disabilities, including but not limited to: removal of barriers to employment; mainstreaming employment rather than excluding persons with disabilities in “sheltered facilities”; modes of accessible transportation; and adoption of the ILO’s Convention No. 159 related to vocational training and rehabilitation.²⁸

The Universal Declaration of Human Rights also recognizes the right to employment.²⁹ Specifically, Article 23 explicates the right to work, the freedom of employment, the protection against unemployment, the right to equal pay for equal work, the right to adequate and just working conditions, and the right to human dignity by those employed and their families.³⁰ However, similar to the ICESCR, the Universal Declaration of Human Rights does not specifically address the rights of workers with disabilities.

B. U.N. Standard Rules on Equalization of Opportunities for Persons with Disabilities

In 1993, the U.N. adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.³¹ Although these Rules did not have an obligatory effect on States, they implied that States should take action for the

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 5: Persons with Disabilities*, ¶ 20, U.N. Doc. E/1995/22 (Dec. 9, 1994).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 23, U.N. Doc. A/Res/217/A (Dec. 10, 1948).

³⁰ *Id.*

³¹ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/96 (Dec. 20, 1993).

Right to Work?

“equalization of opportunities” for persons with disabilities by providing a basis for cooperation among States and acting as a policy-making tool.³²

The Standard Rules discuss the issue of employment in Rule 7, which states that parties:

[S]hould recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labor market.³³

The Standard Rules further call for non-discrimination laws and regulations and the integration of workers with disabilities in the open labor market. This can occur through measures such as:

Vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities.³⁴

As previously mentioned, the Rules did not have binding authority on States that a convention such as the CRPD would have. Nonetheless, the Rules were influential in making policies concerning persons with disabilities in many areas of the world on the issues of medical care, rehabilitation, support services, and personal training.³⁵

C. International Labour Organization Conventions

The ILO is the U.N. agency charged with promoting “decent work throughout the world” and bringing together governments, employers, and workers of member States.³⁶ Specifically, the ILO has a Disability Program that promotes decent work for persons with disabilities and provides a means for breaking down the barriers that prevent disabled persons’ access to full participation and enjoyment of their rights in the labor market.³⁷

To this end, the ILO has promulgated conventions and international norms related to the employment rights of persons with disabilities. The most noteworthy convention with respect to persons with disabilities is the Vocational Rehabilitation and Employment Convention of 1983 (No. 159) and its accompanying

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; see World Health Organization, The U.N. Standard Rules on the Equalizations of Opportunities for Persons with Disabilities: Government Responses to the Implementation of the Rules on Medical Care, Rehabilitation, Support Services and personal training, WHO Doc. WHO/DAR/01.4 (2001), available at http://whqlibdoc.who.int/hq/2001/WHO_DAR_01.4.pdf.

³⁶ Int’l Labour Org, <http://www.ilo.org/global/lang—en/index.htm> (last visited Dec. 2, 2008).

³⁷ *Id.*

Right to Work?

Recommendation (No. 168).³⁸ Two other conventions also address the rights of disabled persons – the 1958 Discrimination Convention (No. 111) and the 1964 Employment, Policy Convention.³⁹

1. 1983 ILO Vocational Rehabilitation and Employment Convention (No. 159)

The 1983 ILO Vocational Rehabilitation and Employment Convention (“IVREC”) defines the term “disabled person” as an “individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recogni[z]ed physical or mental impairment.”⁴⁰ The IVREC focuses on vocational rehabilitation and calls on each Member State to “consider the purpose of vocational rehabilitation” in allowing disabled persons to secure, maintain and advance in suitable employment, which would result in the integration and acceptance of persons with disabilities in society.⁴¹ Thus, the IVREC recognizes the importance of the fundamental right to work for disabled persons, who can thereby gain a sense of self-fulfillment from employment, and further have a means to escape oppression, discrimination, and marginalization from society. These are positive obligations on State Parties, and both China and Japan have ratified the IVREC.⁴²

Furthermore, the IVREC calls for Members to take measures to ensure that the right to work is afforded to persons with disabilities. It states that Members should “formulate, implement and periodically review a national policy on vocational rehabilitation and employment” of disabled persons.⁴³ The Convention requires that these policies be based on the equal opportunity of disabled workers and that special “positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.”⁴⁴ This provision implies that under international standards, measures such as a quota system, mandating that a percentage of persons with disabilities be employed, are a lawful and effective means of ensuring employment rights for persons with a disability.

2. 1958 Discrimination Convention (No. 111)

The 1958 ILO Discrimination Convention (“IDC”) discusses the discrimination of persons in the workplace, stating that discrimination involves “any dis-

³⁸ Int’l Labour Org. Vocational Rehabilitation and Employment Convention of 1983 (No. 159) [hereinafter 1983 Convention].

³⁹ Int’l Labour Org. 1958 Discrimination Convention; 1964 Employment, Policy Convention (No. 122).

⁴⁰ 1983 Convention, *supra* note 38, art. 1.

⁴¹ *Id.*

⁴² See Pacific Islands Treaty Series, Status Report C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C159> (last visited May 1, 2009).

⁴³ 1983 Convention, *supra* note 38, art. 2.

⁴⁴ *Id.* art. 4

Right to Work?

tion, exclusion or preference made on any grounds” within the Convention or by the State, “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁴⁵

Specifically, Article 5 of the IDC provides that affirmative action and similar measures, such as the quota system employed by Japan, may not be considered to be discrimination.⁴⁶ Article 5 also states that special measures of protection or assistance adopted by the ILO are not a form of discrimination.⁴⁷ This provision has the effect of permitting a quota system if applied to the employment of persons with disabilities, which may nevertheless fail to properly promote and protect the labor rights of persons with disabilities, as discussed in Part II of this article under the Japanese domestic legal framework.

Despite these measures calling for non-discrimination practices and equal opportunity and treatment in employment, neither the IDC nor the accompanying Recommendation (No. 111) specifically preclude discrimination on grounds of disability.⁴⁸ Similarly, the 1964 Employment Policy Convention (No. 122) fails to mention disability. Rather, the 1964 Convention (No. 122) limits its application to freedom of choice and equal opportunity in employment on the basis of a person’s “race, color, sex, religion, political opinion, national extraction or social origin.”⁴⁹

D. Convention on the Rights of Persons with Disabilities

The U.N. General Assembly adopted the CRPD and the Optional Protocol on December 13, 2006.⁵⁰ On the day the CPRD was opened for signatures, March 30, 2007, it received eighty-two signatories. Additionally, forty-four countries signed the Optional Protocol, and one country ratified the CPRD.⁵¹ To date, there are 142 signatories to the CPRD, including Japan, eighty-five signatories to the Optional Protocol, sixty-two ratifications, including China, and forty ratifications to the Optional Protocol.⁵² As discussed above, parties who have signed the treaty have expressed their intent to ratify the CRPD in the future, but are neither currently legally bound by the provisions of the CRPD nor required to ratify the treaty. On the other hand, ratifying parties must take an active role in implementing the treaty and are bound by its provisions.

The CRPD is the first binding international treaty that specifically addresses the rights of persons with disabilities and is the first comprehensive human rights

⁴⁵ 1958 Discrimination Convention, *supra* note 39, art. 1.

⁴⁶ *Id.* art. 5.

⁴⁷ *Id.*

⁴⁸ O’Reilly, *supra* note 2, at 13.

⁴⁹ Employment Policy Convention (No. 122) art. 1(2)(c), July 8, 1965, 569 U.N.T.S. 65.

⁵⁰ CRPD, *supra* note 13.

⁵¹ This is the highest number of signatories to a U.N. Convention on opening day. United Nations Enable. Convention and Optional Protocol Signatures and Ratifications, <http://www.un.org/disabilities/countries.asp?id=166> (last visited May 1, 2009).

⁵² *Id.*

Right to Work?

treaty of this century.⁵³ Recognizing the need for a shift in attitudes and approaches to addressing persons with disabilities, the CRPD makes a paradigm shift in the world's view of persons with disabilities.⁵⁴ Instead of treating persons with disabilities as "objects," the CRPD treats them as "subjects" with rights and capabilities, including decision-making capabilities and active participation in society.⁵⁵ The human rights model that the CRPD adopts serves to eradicate barriers erected by societies to exclude and stigmatize persons with disabilities, barriers which are often more disabling than the mental or physical disabilities themselves.⁵⁶

The CRPD directly addresses the issue of disability-related discrimination in employment in Article 27.⁵⁷ Article 27 illustrates the importance of the issue of inadequate employment opportunities for persons with disabilities and the negative effects on society when persons with disabilities are not afforded the right to enjoy equal opportunity in gaining employment and indiscriminate treatment in the workforce.⁵⁸ This Article protects the right to employment of persons with disabilities to a far greater extent than the previously existing international standards and norms.

Specifically, Article 27 of the CRPD provides that:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a [labor] market and work environment that is open, inclusive and accessible to persons with disabilities.

States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and [favorable] conditions of work, including equal oppor-

⁵³ International Day of Persons with Disabilities, *supra* note 1.

⁵⁴ The Biwako Millennium Framework also emphasizes this "paradigm shift" from a charity-based approach to a rights-based approach. BMF for Action, *supra* note 8.

⁵⁵ CRPD, *supra* note 13.

⁵⁶ Article 1 of the CRPD most notably recognizes this paradigm shift to a human rights model. The provision states: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." *Id.* art. 1.

⁵⁷ The CRPD entered into force on May 3, 2008. *Id.*

⁵⁸ *Id.*

Right to Work?

tunities and equal remuneration for work of equal value, safe and healthy grievances;

(c) Ensure that persons with disabilities are able to exercise their [labor] and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance [programs], placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the [labor] market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action [programs], incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open [labor] market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work [programs] for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory [labor].⁵⁹

The U.N. General Assembly distinguishes Article 27 of the CRPD from the ICESCR. Article 27 protects the rights of persons with disabilities in the employment sector under a single article, whereas the ICESCR deals with the right to work in its Article 6 and then addresses the right to favorable and just working conditions under its Article 7.⁶⁰ On the other hand, Article 27 of the CRPD requires that State parties address the issue of discrimination by prohibiting it *per se* and further includes specific obligations for State parties, requiring them to take actions to promote the enjoyment of the right to work and employment of persons with disabilities.⁶¹

⁵⁹ *Id.* art. 27.

⁶⁰ *Id.*; ICESCR, *supra* note 21, arts. 6-7.

⁶¹ CRPD, *supra* note 13, art. 27; ICESCR, *supra* note 21, arts. 6-7.

II. Domestic Legal Framework in China and Japan

A. China

China, the largest developing country in the world, has approximately eighty-three million persons with disabilities, comprising 6.3 percent of the population.⁶² Under Chinese domestic laws, the rights of persons with disabilities are protected in the Constitution, the Labor Law, and the Law on the Protection of Disabled Persons (“LPDP”). These laws and other measures taken by the Chinese government provide a legal framework for the full enjoyment of employment rights and opportunities for persons with disabilities.

China has also taken part in international legal measures to protect the rights of persons with disabilities. China is a State Party to over twenty international human rights treaties, including the CRPD. Furthermore, China took part in the Asian and Pacific Decades of Disabled Persons and the Biwako Millennium Framework.⁶³ China became a signatory to IVREC, and has ratified other ILO conventions, including the IDC.⁶⁴

Under Chinese law, a disabled person is defined as “one who suffers from abnormalities of loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal.”⁶⁵ Furthermore, the term “disabled persons” specifically includes “those with visual, hearing, speech or physical disabilities, intellectual disabilities, psychiatric disabilities, multiple disabilities and/or other disabilities.”⁶⁶ The definition of a person with a disability under Chinese law encompasses not only physical handicaps but mental handicaps. This definition positively impacts the rights of persons with mental illnesses who in some countries are stigmatized and excluded in society with no legal basis for overcoming barriers to the full realization of employment rights.

1. Chinese Constitution

The Constitution of China includes provisions on the right to work and guarantees the equality of all citizens in China. Specifically, Article 33 states that “all

⁶² International Day of Persons with Disabilities, *supra* note 1.

⁶³ See U.N. Econ. & Soc. Comm. For Asia and the Pacific, High-level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons, 2003-2012 (Sept. 19-21, 2007), available at <http://www.worldenable.net/bmf5/finalreport.htm> (naming China as one of the attendees).

⁶⁴ See Int’l Labour Org., ILOLEX Database of International Labour Standards, Convention No. C111, <http://www.ilo.org/ilolex/english/convdisp1> [follow “C111” hyperlink; then follow “See the ratifications for this Convention”] (last visited Dec. 1, 2008).

⁶⁵ Law on the Protection of Disabled Persons (adopted at the 17th mtg. of the 7th Standing Comm. of the 7th Nat’l People’s Cong. on Dec. 28, 1990, and revised at the 2d mtg. of the 11th Standing Com. Nat’l People’s Cong April 24, 2008) (P.R.C.) [hereinafter Law on Protection of Disabled Persons (P.R.C.)], available at http://www.cdpf.org.cn/english/law/content/2008-04/10/content_84949.htm.

⁶⁶ *Id.*

Right to Work?

citizens of the People's Republic of China are equal before the law."⁶⁷ The Constitution also protects the right to employment for all persons. Article 42 states that "citizens of the People's Republic of China have the right as well as the duty to work." Article 43 further provides that "working people in the People's Republic of China have the right to rest."⁶⁸

In relation to persons with disabilities, Article 45 of the Constitution provides that:

Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or *disabled*. The state develops the social insurance, social relief and medical and health services that are required to enable citizens to enjoy this right. The state and society ensure the *livelihood of disabled members* of the armed forces, provide pensions to the families of martyrs and give preferential treatment to the families of military personnel. The state and society help make arrangements for the *work*, livelihood and education of the blind, deaf-mute and other handicapped citizens.⁶⁹

2. Labor Law - Article 12

China's Labor Law establishes equality and non-discrimination practices in the employment of individuals generally. Article 12 of the Labor Law calls for anti-discrimination measures on the basis of "nationality, race, sex, or religious beliefs."⁷⁰ Although this Article does not address persons with disabilities specifically, it provides that "special stipulations in laws and regulations concerning the employment of the disabled" apply.⁷¹

If an employee becomes injured and disabled as a result of a work-related incident or illness, the individual is eligible to receive the full enjoyment of social insurance benefits. The Labor Law states that "workers shall enjoy social insurance treatment according to law in one of the following cases: (1) retirement; (2) falling ill or suffering job injuries; (3) disabled by job injuries or occupational diseases; or (4) unemployment."⁷²

3. Law on the Protection of Disabled Persons

The rights of disabled persons in China are further protected by the LPDP, enacted in 1991.⁷³ In April 2008, the National People's Congress revised the

⁶⁷ XIAN FA art. 33 (1982) (P.R.C.), available at <http://english.peopledaily.com.cn/constitution/constitution.html>.

⁶⁸ *Id.* arts. 42-43.

⁶⁹ *Id.* (emphasis added).

⁷⁰ Labor Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 12 (P.R.C.).

⁷¹ *Id.*

⁷² *Id.* art. 73.

⁷³ Law on the Protection of Disabled Persons *supra* note 65.

Right to Work?

LPDP. The purpose of this statute is to protect the rights and interests of persons with disabilities by “promoting the work on disability, ensuring the equal and full participation of persons with disabilities in social life and their share of the material and cultural wealth of society.”⁷⁴

Chapter 4 of the LPDP guarantees protections for disabled persons as related to employment.⁷⁵ Generally, the law prohibits discrimination practices against persons with disabilities “in recruitment, employment, obtainment of permanent status, promotion, determining technical or professional titles, payment, welfare, holidays and vacations, social insurance or in other aspects.”⁷⁶ The law also prohibits organizations and individuals from forcing persons with disabilities to work in conditions of “violence, threat or illegal restriction of personal freedom.”⁷⁷

The government of China supports welfare enterprises, self-employment initiatives, and a quota scheme under the LPDP. First, under Article 32 of LPDP, the establishment of welfare enterprises provides for “concentrative” employment opportunities for persons with disabilities.⁷⁸ Essentially, the government and the Chinese people will establish specific businesses, solely for the purpose of employing persons with disabilities. For example, such welfare enterprises could include “blind massage institutions.”⁷⁹ Next, the LPDP supports the self-employment of persons with disabilities. In Article 34, the LPDP “encourages and supports the efforts of persons with disabilities to find their own jobs or set up their own businesses.” Lastly, the statute establishes a quota scheme for the hiring of individuals with disabilities. Article 33 of LPDP mandates the implementation of a quota scheme to “provide jobs for persons with disabilities.” Article 33 provides that:

Government agencies, social organizations, enterprises, public institutions, and private-run non-enterprise entities shall, in accordance with the quota stipulated in relevant regulations, arrange job opportunities for persons with disabilities, and offer them appropriate work and positions. Those who cannot reach the quota as prescribed in relevant regulations shall fulfill their obligation to guarantee job opportunities for persons with disabilities in accordance with relevant state regulations. The State encourages employers to over fulfill their obligation to employ more persons with disabilities.

The concrete measures on the employment of persons with disabilities shall be formulated by the State Council.⁸⁰

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* art. 38.

⁷⁷ *Id.* art. 40.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Right to Work?

4. *Implications of Chinese Domestic Laws on the Rights of Workers with Disabilities*

In theory, China's domestic laws serve to protect the rights of workers with disabilities. The latest statistics in 2003 reflect that 83.9 percent of persons with disabilities in China were employed, and the quota scheme reached maximum implementation across the country in 2005.⁸¹ Despite these improvements, there is still a significant population of persons with disabilities in China who are not employed in the open labor market, and the development of employment opportunities has remained limited in recent years. Furthermore, prejudice against persons with disabilities is ingrained in Chinese society, which results in continued unfair treatment in the workforce.⁸² Additionally, the laws have not adequately provided for the training of persons with disabilities, thereby resulting in a lack of competitive skills.⁸³ Although the quota scheme has been established across the country, employers still often prefer to pay the fine rather than to hire workers with disabilities, even if the government sanctions the companies under the LPDP.⁸⁴

B. Japan

Japan is a developed and thriving nation with one of the largest economies in the world. Approximately five percent of Japan's population has a disability.⁸⁵ As persons age, they are increasingly likely to develop a disability. In Japan, where the average life expectancy exceeds the age of seventy, persons spend approximately eight years (11.5 percent of their lives) living with a disability.⁸⁶ The percent of physically disabled persons employed in Japan in 2005 was sixty-six percent, with approximately fifty-eight percent employed who were intellectually disabled, and seventy-eight percent of non-disabled persons employed.⁸⁷

The rights of persons with disabilities are protected under Japanese domestic laws and policies within the Constitution, Basic Law for Persons with Disabilities (amended and renamed in 2004 as the Law for Employment Promotion of the Physically Disabled), and the Basic Programme for Persons with Disabilities. These laws and other measures taken by the Japanese government provide a legal framework for the employment rights of persons with disabilities.

Japanese law defines a disabled person as a person "whose daily life or life in society is substantially limited over the long term due to a physical disability,

⁸¹ INFO. OFFICE OF THE STATE COUNCIL, CHINA'S EMPLOYMENT SITUATION AND POLICIES (April 2004), available at <http://www.china.org.cn/e-white/20040426/index.htm>.

⁸² Zhang Qi, *Employment and Social Security for the Disabled in China* (2004).

⁸³ *Id.*

⁸⁴ Zou Yuchun, *How to Make Employment Security System Workable and Efficient for Disabled Persons in Urban Areas*, in *STUDIES ON SOCIAL SECURITY OF DISABLED PERSONS* 268-69 (2004).

⁸⁵ Approximately 7.24 million have a disability. ESCAP, *Disability at a Glance: A Profile of 28 Countries and Areas in Asia and the Pacific* at 18, U.N. DOC. ST/ESCAP/2421, U.N. Sales No. E.06II.F.24 (2006), available at http://www.unescap.org/ESID/publications/disability_at_a_glance.pdf.

⁸⁶ *Editorial: Uphold Disabled People's Rights*, JAPAN TIMES, June 22, 2008.

⁸⁷ *Id.*

Right to Work?

mental retardation, or mental disability.”⁸⁸ As such, similar to Chinese law, this definition of a person with a disability encompasses not only physical but mental handicaps, positively impacting the rights of persons with mental illnesses.

1. *Japanese Constitution*

Under Japan’s Constitution, promulgated in 1946, the fundamental human rights of every individual are protected under Article 11. Articles 13 and 14 address the respect for individuals and equality under the law.⁸⁹ Article 13 calls for the “right to life, liberty, and the pursuit of happiness” to be the “supreme consideration in legislation and in other governmental affairs” so long as it “does not interfere with the public welfare.”⁹⁰ Under Article 14, all people “are equal under the law,” therefore prohibiting “discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁹¹ Again, similar to Chinese law, the Japanese Constitution calls for equality under the law but does not single out disability as a basis of discrimination.

Article 25 of the Japanese Constitution states that “all people shall have the right to maintain the minimum standards of wholesome and cultured living,” and the “State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.”⁹² Lastly, Article 27 of the Constitution specifically addresses the rights and obligations to work, guaranteeing “standards for wages, hours, rest and other working conditions . . . to be fixed by law.”⁹³

2. *Law for Employment Promotion of the Physically Disabled*

As previously noted, Japan protects the rights of persons with disabilities within its society by focusing on the special considerations owed these individuals and the need for State assistance. In this respect, Japan enacted the Law for Employment Promotion of the Physically Disabled, which establishes a quota system whereby employers are required to hire a specified number of employees with disabilities or face sanctions.⁹⁴

Under this law, general employers, including the government and municipal offices, are “obligated to employ workers with disabilities in excess of the [following] quotas:”⁹⁵

Governmental bodies: 2.1%

⁸⁸ SHOUGAISHA KIHONHOU [Disabled Peoples’ Fundamental Law] art. 1(2) (1993).

⁸⁹ KENPO, arts. 13-14.

⁹⁰ *Id.* art. 13.

⁹¹ *Id.* art. 14.

⁹² *Id.* art. 25.

⁹³ *Id.* art. 27.

⁹⁴ Shintai shougaisha koyou sokushinhous [Law for Employment Promotion, etc. of the Disabled Persons], Law No. 123 of 1960.

⁹⁵ JAPANESE SOC’Y FOR REHABILITATION OF PERSONS WITH DISABILITIES, THE 38 SELECTED JAPANESE LAWS RELATED TO PERSONS WITH DISABILITIES ch. 6 (Oct. 29, 2004) [hereinafter 38 SELECTED JAPANESE LAWS].

Right to Work?

Private companies: 1.8% (Specialized juridical persons: 2.1%)
Boards of Education in prefectures: 2.0%

The quota system does not address persons with psychiatric or mental disabilities.⁹⁶ The quota system obligates employers to report annually the number of persons with disabilities they employ.⁹⁷ The employment rate of disabled persons in the private sector in 2006 was 1.52 percent, and in the public sector it reached 2.2 percent.⁹⁸ Under the quota scheme, a company must hire at least the number of disabled employees required by law. The legally required amount of employees at a given company is calculated by multiplying the total number of full-time employees by the employment quota rate.⁹⁹

3. Implications of Japanese Domestic Laws on the Rights of Workers with Disabilities

Japan's domestic laws, specifically the Law for Employment Promotion of the Physically Disabled, provide state assistance to disabled persons and establish a quota system to further this goal. Despite the implementation of a quota system, there is a significant gap in the number of persons with disabilities employed, demonstrating the ineffectiveness of the law. In 2003, there were approximately 3.48 million physically disabled persons in Japan and only 369,000 were employed, which was a decrease of 6.8 percent since 1998.¹⁰⁰ The number of persons with intellectual disabilities over the age of eighteen in 2005 was 410,000.¹⁰¹ In 2003, approximately 114,000 persons with intellectual disabilities were regularly employed.¹⁰² Nonetheless, there has been an increase in recent years in employment applications by persons with disabilities. In 2007, the number of persons successful in finding employment increased 3.6 percent from 2006.¹⁰³ As in China, the Japanese quota system lacks adequate enforcement and effective implementation by authorities. The goal of the quota system is to ensure that a percentage of persons with disabilities are employed in the open labor market, but the government in many cases fails to impose the sanctions for non-compliance, and, as in China, employers often prefer to pay the fine instead of hiring workers with disabilities.

⁹⁶ However, these persons who are employed and granted a Health and Welfare Identification Booklet for Persons with Mental Disabilities can be added to the number of persons employed in the respective enterprise and used when calculating the employment rate. Ministry of Health, Labour and Welfare & Japan Org. for Emp. of the Elderly and Persons with Disabilities, *Supporting the Employment of Persons with Disabilities*, at 11 (2008) [hereinafter Ministry of HLW & JEED].

⁹⁷ 38 SELECTED JAPANESE LAWS, *supra* note 95, ch. 6.

⁹⁸ Hiroshi Ueno, *Work and Employment of Persons with Disabilities in Japan* (Oct. 15, 2007), <http://www.google.com/url?sa=t&source=web&ct=res&cd=2&url=http%3A%2F%2Fwww.jicafriends.jp%2Fleaders%2Fpdf%2F12007lecture1015.pdf&ei=D5p1SoTvBM-StgfF1NGWCQ&usg=AFQjCNHdQxtShT9Yk3WlwSYRer4VADyW4Q&sig2=HC0K8BkzO0R81B0VH3eq7A>.

⁹⁹ Ministry of HLW & JEED, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

II. Recommendations and Conclusion

Under international norms, the fundamental right to gainful employment extends to persons with a disability. Historically, this right was protected for all persons under the treaties that make up the International Bill of Human Rights. The U.N.'s recent adoption of the CRPD protects the right to employment, specifically for persons with a disability, and is the first comprehensive international treaty to highlight equal opportunity in employment, fair treatment in the workforce, and anti-discrimination policies on the basis of disability.

As State Parties to the CRPD, China is bound by the Convention and Japan has expressed its intent to comply with the standards in the Convention. The Chinese and Japanese governments have addressed the issue of employment rights for persons with disabilities in a similar manner by providing protections and quota systems, but have failed to outlaw discrimination *per se* or to recognize employment for persons with disabilities as a civil-rights based issue.

Although the Chinese and Japanese governments have initiated reforms under their respective legal systems to comply with the CRPD and to protect the right to work for persons with disabilities, critical issues remain regarding the implementation of these laws and the basis of the policies. For example, the integration of persons with disabilities in the economic mainstream remains a concern. Despite Japan's signing and China's ratification of the CRPD and their implementation of domestic laws requiring measures to protect the rights of persons with disabilities, the lack of adequate implementation of policies and practices results in the continued disproportionate number of unemployed, untrained, and impoverished persons with disabilities.¹⁰⁴

In making statements before the General Assembly on the CPRD, the Japanese government stated that the Convention is only a stepping stone in ensuring the full realization of the rights of persons with disabilities.¹⁰⁵ Although the Japanese delegation further expressed the government's intent to sign and ratify the Convention, the government has to date neither ratified the CRPD nor adopted a human rights approach to looking at the employment rights of persons with disabilities. Although the domestic laws of China reflect a protection of rights for persons with disabilities, evaluation and full implementation of these laws must occur. China as a communist country has an international reputation for a lack of extending and protecting human rights to its people. The rights of persons with disabilities may be no different, necessitating domestic systems to review and ensure the full implementation of the laws.

Other critical issues as outlined in the Biwako Millennium Framework Action Plan are a lack of trained and competent staff to work with persons with disabilities and capacity issues concerning the implementation, evaluation, and dissemination of effective policies and programs. Open employment for persons with disabilities should effectuate model standards in equal opportunity and advance-

¹⁰⁴ BMF for Action, *supra* note 8.

¹⁰⁵ Statement of Yasushi Takase, Permanent Mission of Japan to the United Nations, Statements Made on the Adoption of the Convention on the Rights of Persons with Disabilities, <http://www.un.org/esa/socdev/enable/convstatementgov.htm#jp> (last visited May 1, 2009).

Right to Work?

ment of persons with disabilities in government positions. China and Japan should also call for mainstream employment for workers with disabilities to allow for an inclusive and barrier-free society for these workers. In order to comply with the CRPD, legislation and policies should prohibit discrimination in “recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.”¹⁰⁶ Lastly, promotion of public awareness of the issue in both countries would limit prejudice and empower people with disabilities, leading to equal opportunity in employment and treatment in the workforce.

Implementation of these recommendations would result in full compliance with the CRPD and international standards related to the employment rights of persons with disabilities in China and Japan. Anti-discrimination laws may be the most effective way of protecting the rights of workers with disabilities in equal treatment and equal opportunity in the workforce, necessitating consideration of a civil-rights’ based approach to the right to work for disabled persons in China and Japan. Most importantly, persons with disabilities must be involved in and have a voice in the process of promulgating policies and practices to ensure that their labor rights are fully protected.

¹⁰⁶ CRPD, *supra* note 13, art. 27.

THE RAPE EPIDEMIC IN THE CONGO:
WHY IMPUNITY IN THE CONGO CAN BE SOLVED BY
INTERNATIONAL INTERVENTION

Jeanine Oury[†]

I. Introduction

On November 25, 2008, United Nations (hereinafter “U.N.”) Secretary General Ban Ki-moon issued a report to the Security Council proposing that the largest group of U.N. peacekeepers in the world should continue its mission in the Congo until 2009.¹ The same report suggested that war crimes and crimes against humanity have occurred and continue to occur in this ravaged, central African nation.² Ki-moon’s report accused the Congolese and foreign armed forces of “serious crimes against humanity including mass killings, rapes, torture, and sexual slavery.”³

This article will focus on why rape in the Congo is the worst in the world, and argue that it deserves international attention. However, foreign interveners must be careful when meddling in this warring country due to its history of exploitation by outsiders. International intervention to protect women at this point is necessary because there seems to be no end to the fighting despite attempts at ceasefires, and thus no end to the wartime rape tactics. Moreover, the Congo’s rape epidemic can be attributed to the culture of impunity that exists due to a lack of a centralized government and long-standing social beliefs. Therefore, not only does the International Criminal Court (hereinafter “ICC”) need to prosecute individuals to emphasize that rape in the Congo is a crime against humanity, but a system must also be instituted to repair the damage to victims, perpetrators, and the society as a whole. This approach to solving the rape epidemic in the Congo is both wide-scale and individualistic, and will require the cooperation of the international community and the Congo itself.

II. The Congo: A History of Foreign Intervention

The Congo’s history in the past century leading up to “Africa’s First World War” has been long, tumultuous, and strongly affected by foreign interveners.⁴ Part of its tumult is a direct cause of its wealth of natural resources, such as

[†] J.D., Loyola University Chicago, expected May 2010.

¹ John Heilprin, *U.N. Investigates Possible War Crimes in Eastern Congo*, THE OREGONIAN, NOV. 30, 2008.

² *Id.*

³ *Id.*

⁴ STUART NOTHOLT, *FIELDS OF FIRE - AN ATLAS OF ETHNIC CONFLICT* § 2.28 (Troubadour Publishing Ltd. ed. 2008).

The Rape Epidemic in the Congo

cobalt, copper, tantalum, and diamonds.⁵ Throughout its history, other nations, corporations, and individuals have continuously pillaged the Congo's minerals and other resources for their own profit.⁶ As a result, although the Congo is rich in resources, millions of its citizens die from starvation or other causes related to poverty.⁷

Congo began as "Congo free state," possessed by Leopold, King of the Belgians, but was eventually appropriated to Belgium as a nation in 1908.⁸ In 1960, the Congo became an independent state despite Belgian objection.⁹ In the wake of its newfound independence, the Congo and its more than 250 different ethnic groups found it extremely difficult to unify.¹⁰ With help from the Belgians, the southern Congo Katanga province broke away from the Congo in July 1960.¹¹ When the elected Prime Minister Patrice Émery Lumumba asked the U.N. to send peacekeeping troops, the U.N. instead placed Lumumba under house arrest.¹² Without adequate help from the international community, the secession left the Congo a chaotic, disjointed nation until around 1975.¹³

In November 1996, the Congo (then known as Zaire) mandated that all Tutsis, the victims of the Rwandan genocide, must leave the country or be subject to death.¹⁴ The Tutsis rebelled and in May 1997, captured the capital, Kinshasa and replaced the government with one led by Laurent Kabila.¹⁵ As a result of the Tutsi overtaking, Hutu extremists, the perpetrators of the Rwandan genocide, moved into the Congo, attacking the Tutsis in forceful combat.¹⁶ The U.N. reacted to this humanitarian crisis by sending a "temporary multinational force" to ensure humanitarian aid was able to reach those who needed it.¹⁷ Unfortunately, the U.N.'s intentions failed to address the true causes of the deadly battles -the conflicts arising in the aftermath of the Rwandan genocide.¹⁸ In 1998, with the support of other nations in the region, rebel groups ambushed Kabila's govern-

⁵ Owei Lakemfa, *Congo- Africa's Bleeding Heart*, Oct. 17, 2008, <http://allafrica.com/stories/200810170422.html>.

⁶ NOTHOLT, *supra* note 4, § 2.28.

⁷ Lakemfa, *supra* note 5.

⁸ NOTHOLT, *supra* note 4, § 2.28.

⁹ Lakemfa, *supra* note 5.

¹⁰ NOTHOLT, *supra* note 4, § 2.28.

¹¹ GEORGE NZONGOLA-NTALAJA, *THE CONGO FROM LEOPOLD TO KABILA* 99 (Zed Books ed. 2002).

¹² *Id.*

¹³ NOTHOLT, *supra* note 4, § 2.28.

¹⁴ *Id.* § 2.29. As a group, Tutsis are often the victims of racism, scorned for their "clannishness, entrepreneurial success, and alleged snobbery." *Id.*

¹⁵ *Id.*

¹⁶ Laurence Juma, *The War in Congo: Transnational Conflict Networks and the Failure of Internationalism*, 10 *GONZ. J. INT'L L.* 97, 136 (2006-2007).

¹⁷ *Id.*

¹⁸ *Id.*

The Rape Epidemic in the Congo

ment.¹⁹ Thus, the Congo's civil war was an internal conflict supported by external forces.²⁰

Terrified of his government's obliteration, Kabila appealed to Namibia, Zimbabwe, Angola, and Chad to send troops.²¹ These troops, along with Hutu Interahanwe, fought for Kabila's government.²² On January 18, 1999, Uganda, Rwanda, Angola, Namibia and Zimbabwe signed the Lusaka cease-fire agreement, causing the nations to remove most of their troops from the conflict.²³ However, a cease-fire never occurred because rebel groups remained, and fighting continued in the region.²⁴

In January 2001, Kabila was assassinated and replaced by his son, Joseph.²⁵ After the U.N. assigned the Congo trusteeship in 2001, the Mission de l'Organisation des Nations-Unies au Congo (hereinafter, "MUNOC") began.²⁶ This became the largest UN undertaking in the world with 17,000 peacekeeping troops sent to the region.²⁷ Attempts at agreements and cease-fires were made several times over the years, but still the fighting continued.²⁸

In 2003, peace was temporarily reached in the country, but when warlords and other nations realized that this might limit their access to the natural resources in the eastern part of the Congo, the fighting reappeared in full force.²⁹ This area, with its more than twenty-three warring groups and abundant natural resources, has always suffered from instability and brutality.³⁰ In late 2007, Rwanda and the Congo tried to disarm the Hutus together.³¹ Afterward, Nkunda and the Congo agreed to a cease-fire in January 2008.³² However, the fighting resur-

¹⁹ Lakemfa, *supra* note 5. Uganda and Rwanda each supported the Mouvement pour la liberation du Congo and Rwanda supported the Rassemblement congolaise pour la democratie. NOTHOLT, *supra* note 4, § 2.29.

²⁰ Lakemfa, *supra* note 5.

²¹ *Id.* Namibia sent troops under Sam Nujoma, Zimbabwe under Robert Mugabe, Angola under Jose Eduardo, and Chad under Idris Deby. *Id.*

²² *Id.*

²³ *Id.*

²⁴ NOTHOLT, *supra* note 4, § 2.289; Lakemfa, *supra* note 5.

²⁵ NOTHOLT, *supra* note 4, § 2.29.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Juma, *supra* note 16, at 153-56 (highlighting the April 2002 Sun City Agreement, the July 2002 Pretoria Accord, and the December 2002 Gbadolite Agreement).

²⁹ Stephanie Nolen, *Rape Again Rampant in Congo*, VDAY, Oct. 18, 2008, <http://newsite.vday.org/node/1204>; Stephanie Nolen, *Not Women Anymore...*, Ms. MAG., Spring 2005, <http://www.ms magazine.com/spring2005/congo.asp> (last visited Jan. 9, 2009).

³⁰ *Id.*

³¹ Joe Bavier, *Congo Agrees With Rwanda to Disarm the Hutus*, REUTERS, Nov. 11, 2007, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KKAA-78V2Y2?OpenDocument&Click=>.

³² Todd Pittman, *Analysis: Hutu Militias Key to Congo Conflict*, USA TODAY, Nov. 2, 2008, http://www.usatoday.com/news/world/2008-11-02-1120858431_x.htm.

The Rape Epidemic in the Congo

rected in the fall of 2008, evidence that the peace process in the Congo is certainly not over.³³

The Congo has a long history of international intervention gone awry. Rebels and neighboring nations alike have regularly exploited the country's resources and caused years of fighting and death. It is clear that the conflict has its roots in foreign intervening. For this reason, the international community needs to meddle carefully, establishing a self-sustaining independent punishment system in the Congo while also prosecuting criminals in an international criminal tribunal so that it can achieve full independence from those that regularly exploited it in the past.

III. Congo: Rape Capital of the World

The war in the Congo is said to be the "deadliest war since World War II."³⁴ Approximately 5 million people have died due to this war, a large portion of them because of disease and malnutrition.³⁵ Half of them children, they die at a rate of 45,000 per month.³⁶ Between 2000 and 2006, 1,250 people died per day in the Congo as a direct result of the war.³⁷

One of the most disturbing aspects of the civil war is the scale of sexual abuses, assaults, and rapes the Congo sees every day. Some label the Congo as the "rape capital of the world."³⁸ Andre Bourque, a Canadian consultant, remarked that "sexual violence in Congo reaches a level never reached anywhere else."³⁹ In October 2008, there were up to 50 rapes committed daily.⁴⁰ South Kivu is the most affected region, with 4,066 reported cases of rape and sexual violence occurred in the first three months of 2008.⁴¹ In the Shabunda district of South Kivu, an estimated 70 percent of females have been victimized by rape.⁴² U.N. officials claim that rapes are occurring less and less frequently, however

³³ *Rapes in Congo Increase, Aid Group Says*, CNN.COM, Nov. 25, 2008, <http://www.cnn.com/2008/WORLD/africa/11/25/congo.rape/index.html>.

³⁴ REBECCA FEELEY & COLIN THOMAS-JENSEN, GETTING SERIOUS ABOUT ENDING CONFLICT AND SEXUAL VIOLENCE IN CONGO, ENOUGH STRATEGY PAPER #15, 2 (Mar. 20, 2008), http://www.americanprogress.org/issues/2008/03/pdf/enough_congo.pdf; see also Simon Robinson, *The Deadliest War in the World*, TIME, May 28, 2006, <http://www.time.com/time/magazine/article/0,9171,1198921,00.html>.

³⁵ Edmund Sanders, *Uganda's Conflict Spreads to Congo, Where LRA Rebels Massacre Villagers*, LATIMES.COM, Jan. 11, 2009, <http://www.latimes.com/news/nationworld/world/la-fg-congo-massacre11-2009jan11,0,2035198,print.story>.

³⁶ FEELEY & THOMAS-JENSEN, *supra* note 34, at 2.

³⁷ See Robinson, *supra* note 34.

³⁸ Ben Borland, *McConnell's mission. . .to bring peace to the world's 'rape capital'*, UK EXPRESS, Oct. 12, 2008.

³⁹ Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, <http://www.nytimes.com/2007/10/07/world/africa/07congo.html> (quoting André Bourque, a Canadian consultant who works with aid groups in eastern Congo).

⁴⁰ Borland, *supra* note 38.

⁴¹ *Id.*

⁴² *Id.*

The Rape Epidemic in the Congo

recent spikes in fighting might jeopardize this trend.⁴³ Therefore, due to the seemingly endless nature of the rebel fighting in the Congo, it is necessary to address the rape problem specifically and not wait for the fighting to stop for the rape to end also.

Rape in the Congo is a “part of the spoils of war . . . a policy, a casual encounter . . . and a weapon of terror.”⁴⁴ The rape is systematic, planned, ordered, and a collective public rape.⁴⁵ Each warring group in the Congo has a unique tactic: some rape women with guns, shooting them afterwards; some rape both men and women; and some engage in group rape.⁴⁶ It is not uncommon to hear stories like the one told by Honorato Kizende: “They kicked me roughly to the ground, and they ripped off all my clothes, and between the two of them, they held my feet. . . they proceeded to rape me. Then all five of them raped me.”⁴⁷

Towns fall under the control of rebel groups, making their female citizens easy targets of sexual violence. For instance, Interahamwe, the militia group who initiated the genocide in Rwanda, seized control over Kaniola, a Congolese town on the outskirts of a large national park.⁴⁸ They invaded Kaniola regularly, abducting women and turning them into sexual slaves afterwards.⁴⁹ At the Interahamwe’s camp, the women were violently raped, occasionally being branded on their buttocks to the enjoyment of the rebels.⁵⁰ This is just one example of the brutality and organization of the systematic rape taking place in the Congo.

It is estimated that a fifth of survivors of rape sustain injuries to their internal organs, and many contract HIV or AIDS.⁵¹ These injuries are severe because of the methods used to rape: offenders insert guns, branches, or and other foreign objects inside women, sometimes obliterating their internal organs and leaving them barren.⁵² Afterwards, the women suffer for years, and often, there is a lack of medical treatment.⁵³ “There is one hospital in the region in the capital Bukavu which can deal with severe sexual injuries . . . women . . . often have to walk for days to receive medical attention,” says a spokesman from the Scottish Catholic International Aid Fund.⁵⁴

The conditions in the Congo are highly supportive of a culture of rape and impunity. It is difficult to catch offenders, because they are typically bandits

⁴³ Jeffrey Gettleman, *Congo Rape Victims Tell Stories*, SEATTLE TIMES, Oct. 18, 2008, http://seattletimes.nwsource.com/html/nationworld/2008281517_congo18.html.

⁴⁴ Lakemfa, *supra* note 5.

⁴⁵ Nolen, *Rape Again Rampant in Congo*, *supra* note 29.

⁴⁶ *Id.*

⁴⁷ Gettleman, *supra* note 43.

⁴⁸ Nolen, *supra* note 29.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Borland, *supra* note 38.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The Rape Epidemic in the Congo

attacking villages at night and then disappearing into the thick forest.⁵⁵ There are only two hospitals in the eastern Congo that are able to treat rape injuries, and victims get trapped deep in the bush due to the lack of roads, transport, money and the endless fighting.⁵⁶

The status of women in the Congo makes them more vulnerable to sexual attacks, and makes rape a more accepted practice. In the Congo, it is common for women to be physically abused even without a war.⁵⁷ Female rape victims are instructed not to speak of their rapes because it is embarrassing to their families.⁵⁸ Rape victims are often exiled from their villages.⁵⁹ Society within the Congo has created an environment where women are more vulnerable than in other places, an important reason why rape in the Congo is the worst in the world. The international community needs to interrupt this perpetual cycle of sexual violence because the problem seems to only be getting worse.

IV. Impunity in the Congo

Impunity to perpetrators of sexual violence is the primary cause of the mass rape epidemic in the Congo. Impunity is “exempting someone from facing the due penalty and the consequence of his or her breach of a norm or principle, which holds society together; and protects it against disorder and collapse.”⁶⁰

Impunity during the war is the force driving the prevalence of rape in the Congo. Army officials turn their heads and at times even encourage their soldiers’ immoral sexual activity and violence.⁶¹ In their view, soldiers are immune from punishment for their behavior during wartime, and that it is the woman’s fault that she was raped.⁶² One army official commented in Goma at a 2008 educational event that “women should know not to go out in places where there are armed men.”⁶³ A national army that is “more a predator than a protector” causes citizens to depend on armed militias to protect them.⁶⁴ However, the armed militia are more likely to guard their stake in the Congo’s mineral resources than to adequately protect civilians.⁶⁵

In 2006, the Congolese government enacted new laws and penalties to address the rampant sexual violence.⁶⁶ Law No. 06/018, amending a 60 year penal code

⁵⁵ Gettleman, *supra* note 43.

⁵⁶ Nolen, *Rape Again Rampant in Congo*, *supra* note 29.

⁵⁷ Gettleman, *supra* note 43.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Patrice Vahard, *The Duty to Protect, an Attribute of Masculinity in Modern Africa*, SYMP. ON ENDING IMPUNITY FOR VIOLENCE AGAINST WOMEN 1 (Mar. 12, 2007), available at <http://www.uneca.org/acgd/new/Presentation-MenImpunity-Patrice.doc>.

⁶¹ FEELEY & THOMAS-JENSEN, *supra* note 34.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

The Rape Epidemic in the Congo

decree, defined what constitutes sexual violence as “indecent assaults on minors without violence . . . indecent assaults on minors with violence . . . rape”.⁶⁷ Despite these changes, the Congo still exists with very little state-instituted framework to ensure punishment.⁶⁸ The penal code is still lacking in many ways. The 2006 amendment does not include language regarding being raped by a gun or weapon or when the perpetrator shoots a women in the vagina.⁶⁹ Prosecutions are often slow, there is little to no action if a man escapes from prison, there is no witness protection program in place, and prisoners can often pay their way out of jail.⁷⁰ There are even cases of victims being re-raped for reporting their attacker where their mouths are cut off so they “won’t tell again.”⁷¹ Impunity in the Congo is the most influential reason for the scope of rape the country has seen.

V. Defining Rape in an International Framework

Rape during war is not a new concept to the world. In fact, war rapes have been reported since the rape of the Sabine women in ancient Rome.⁷² The twentieth century brought many opportunities for sexual violence against women such as in Japan in World War II, Bangladesh in 1971, and Uganda in the early 1980s.⁷³ Sexual violence during war gives power and control to the perpetrators.⁷⁴ The purpose of raping a woman is both to disgrace her and to instill defeat in the men of the community, showing their failure to defend their women.⁷⁵ During war, rape becomes a weapon.

The international community views rape as an infringement of the laws and practices of warfare.⁷⁶ The Nuremburg Charter, enacted during the International Military Tribunal to try Nazi officials, first defined crimes against humanity under Article 6 as “murder, extermination . . . and other inhumane acts,” but failed to specifically name rape as one.⁷⁷ In 1949, Article Four of the Geneva Convention stated that “women shall be especially protected against any attack on their honour, in particular against rape.”⁷⁸ Later, in 1993, the World Conference on Human Rights in Vienna declared that systematic rape and sexual slav-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Nolen, *Rape Again Rampant in Congo*, *supra* note 29.

⁷⁰ FEELEY & THOMAS-JENSEN, *supra* note 34.

⁷¹ *Id.*

⁷² Eileen Meier, *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress*, 10 INT’L LEGAL THEORY 83, 84 (Fall 2004).

⁷³ *Id.* at 85.

⁷⁴ *Id.* at 87

⁷⁵ *Id.*

⁷⁶ *Id.* at 90.

⁷⁷ *Id.* at 91.

⁷⁸ Stephanie K.Wood, *A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 282-83 (2004). Protocols I and II of the Fourth Geneva Convention generally state that all women shall be protected against any attack on their honor such as in rape. Meier, *supra* note 72, at 91-92.

The Rape Epidemic in the Congo

ery especially deserve an operative remedy, although none was specifically constructed.⁷⁹ Up to that point, rape had never been prosecuted as a war crime.⁸⁰ Additionally, the Convention on the Elimination of Violence Against Women defined gender crimes as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm of suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty.”⁸¹ The Trial Chamber of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) and the International Criminal Tribunal for Yugoslavia (hereinafter “ICTY”) both placed rape under the umbrella of genocidal acts.⁸² Furthermore, the Rome Statute of the ICC states that rape is one of the “crimes against humanity” when a large group of people are victimized.⁸³

VI. An International Criminal Tribunal for the Congo

If it is clear under international law that rape is a form of genocide, then it is unclear why the mass scale rape occurring in the Congo is going unpunished by the international community. U.N. Secretary General Ban Ki-Moon’s report to the Security Council proves that an international tribunal similar to the ones in Rwanda and Yugoslavia is a sincere possibility for the Congo.⁸⁴ The ICC already issued warrants in the Congo for such officials as Bosco Ntaganda, who is wanted for recruiting child soldiers, in April of 2008.⁸⁵ In fact, the U.N.’s peacekeeping mission, MONUC began inquiring about alleged massacres and extra-judicial executions long before the November 2008 report.⁸⁶

On November 20, 2008, the Security Council agreed to send 3,100 more peacekeeping troops to the Congo, even though rebel troops recently agreed to withdraw.⁸⁷ Although this might have been a positive step for international intervention, peacekeeping troops are often ineffective. This is partially because the U.N. mission in the Congo rarely use its Chapter 7 mandate from the Security Council, which allows it to use whatever method needed to safeguard civilians.⁸⁸ Marie-Jeanne Rwankuba, head of a Kaniola Catholic parish, says “We have a

⁷⁹ Meier, *supra* note 72, at 92-93.

⁸⁰ *Id.* at 93.

⁸¹ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 93, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (Dec. 18, 1979). “Recognizing the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings.”

⁸² Meier, *supra* note 72, at 94-95.

⁸³ Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 217, 240 (Apr. 2005).

⁸⁴ Heilprin, *supra* note 1.

⁸⁵ Heilprin, *supra* note 1. For example, the UN initiated investigations into a massacre in Kiwandi where dozens of people were killed while defending themselves against the pro-government Mai-Mai. *Id.*

⁸⁶ *Id.*

⁸⁷ Borland, *supra* note 38.

⁸⁸ Nolen, *Rape Again Rampant in Congo*, *supra* note 29.

The Rape Epidemic in the Congo

MUNOC base [a half-hour's drive from Kaniola] but we can't turn to them. When we have a problem they say, 'we are here for observation only.'"⁸⁹

Because peacekeeping troops prove ineffective, it is necessary for the ICC to intervene. Article 5 of the ICTY enabling statute states that "[t]he International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: . . . (g) rape."⁹⁰ Furthermore, the ICC must establish jurisdiction over the crimes.⁹¹ By signing and ratifying the Rome Statute in 2000 and 2002, respectively, the Congo agreed to be under the ICC's jurisdiction.⁹² Additionally, the Congo's judiciary must demonstrate a failure to independently try and punish perpetrators before the ICC can intervene.⁹³ Even though the Congolese Penal Code forbids rape and indecent assault, little has been done to enforce this code and prevent this conduct from occurring.⁹⁴ Moreover, corruption and bribery in the legal system has prevented Congolese courts from adequately providing retribution for victims and punishment to criminals.⁹⁵ Because the legal system in the Congo insufficiently safeguards against violence towards women, the ICC needs to independently investigate and convict perpetrators committing rape as a war crime.⁹⁶

VII. International Intervention is needed

The rape epidemic alone in the Congo is severe enough to warrant further international intervention. Customary international law mandates that states must intervene in a nation's affairs when there is proof of genocide.⁹⁷ Under the current definition of rape, as a crime against humanity and not as genocide, states do not have a duty to intervene.⁹⁸ States were hesitant to intervene due to the lack of a genocidal label in the early weeks of the Rwandan genocide.⁹⁹ Alison Des Forges, in her report for Human Rights Watch, observed that international leaders avoided labeling the situation as genocide so they would not have a duty to intervene under international law.¹⁰⁰ By not classifying the acts in Rwanda as

⁸⁹ *Id.*

⁹⁰ U.N., Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5 (Feb. 2008), available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf> (compiling United Nations Resolutions regarding the ICTY).

⁹¹ Tina R. Karkera, The International Criminal Court's Protection of Women: The Hands of Justice at Work, 12 *Am. U. J. Gender Soc. Pol'y & L.* 197, 210 (2004).

⁹² *Id.* at 212.

⁹³ *Id.* at 211.

⁹⁴ *Id.* at 212.

⁹⁵ *Id.*

⁹⁶ *Id.* at 217.

⁹⁷ Alexandra A. Miller, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 *PENN ST. L. REV.* 349, 362 (Summer 2003).

⁹⁸ *Id.*

⁹⁹ Miller, *supra* note 97.

¹⁰⁰ *Id.*

The Rape Epidemic in the Congo

genocide, nations who were parties to the Genocide Convention were not compelled to act.¹⁰¹ If rape were a form of genocide, the international community would be required to intervene when mass atrocities of rape occurred.¹⁰² This will deter the practice and use of rape in internal armed conflicts.¹⁰³ Rape alone is enough to require an international intervention because it is a form of genocide.

VIII. Establishing a Penal System in the Congo

International criminal tribunals cannot be the only form of punishment in the Congo because they do not necessarily deter future crimes.¹⁰⁴ The tribunals' purpose is to hold wrongdoers responsible for their illegal actions.¹⁰⁵ The tribunals do not provide victims with what they need after the attacks, such as therapy, medical attention, and a means to live their life without fear.¹⁰⁶ As a result of the efforts in 2008 by many world organizations, more rapists are apprehended, prosecuted, and incarcerated for their crimes than ever before.¹⁰⁷ For instance, in Bunia, rape prosecutions increased 600 percent since 2002.¹⁰⁸ In instances of sexual violence, both restorative and criminal justice approaches must be used to handle such a complex issue.¹⁰⁹

Aside from establishing a penal system, a system of returning victims and offenders to society is necessary. Efforts by non-governmental organizations have proven to be most effective in achieving this goal. The restorative approach to the Congo's impunity problem emphasizes the change societal habits and norms instead of simply finding a criminal guilty or allowing them to return to their life without punishment.¹¹⁰ The purpose of restorative justice is to bring victims and perpetrators together so the victim receives reparations, the offender takes responsibility, and the community is involved in the healing process.¹¹¹ An example of a means of restorative justice is a truth and reconciliation commission, where witnesses report violence and the commission assembles a report.¹¹² This allows for the synthesis of information rather than the conducting of trials, but its success depends greatly on how the government of the Congo digests the reports.¹¹³

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Cahn, *supra* note 83, at 241.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 241-42.

¹⁰⁷ Gettleman, *supra* note 43.

¹⁰⁸ *Id.*

¹⁰⁹ Cahn *supra* note 83, at 247.

¹¹⁰ *Id.* at 242

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.*

The Rape Epidemic in the Congo

One such method of increasing accountability is led by European aid agencies that are spending tens of millions of dollars constructing courthouses and prisons in the eastern Congo.¹¹⁴ Additionally, there are mobile courts conducting rape trials in villages in the heart of the forest.¹¹⁵ In January 2008, the American Bar Association opened a legal clinic to encourage rape victims to file their cases in court.¹¹⁶ As of October 2008, there have been eight convictions since the clinic's establishment.¹¹⁷ The Scottish Catholic International Aid Fund is working with local lawyers to establish strong criminal cases against rapists.¹¹⁸ In addition, Congolese investigators are learning forensic techniques in Europe.¹¹⁹ U.N. officials report positive results with more arrests than the past, but the recent spikes in combat threaten these advances.¹²⁰ One woman who was raped in 2006 says, "It's safer today than it was, but it's still not safe."¹²¹

Some organizations are trying to change the way the Congolese think of rape and women by encouraging women to speak out about their rape in open forums.¹²² One such organization attempting to give victims some sort of peace is V-Day, an organization led by *Vagina Monologues* creator Eve Ensler.¹²³ Partnering with the United Nations Children's Fund (hereinafter "UNICEF"), this group arranges truth-telling sessions in ninety villages.¹²⁴ At the sessions, women stand in front of their peers to speak about what happened to them, forcing officials and other men to acknowledge the rapes.¹²⁵ Additionally, V-Day organizes street demonstrations and is developing a list of pleas for women's safety.¹²⁶ Women at an event in Bukavu in September 2008 wore T-shirts reading in Kiswahili: "I refuse to be raped. What about you?"¹²⁷ This is just one example of how organizations are trying to give a voice to rape victims to change society's view of the crime.

There also needs to be an appeal to the Congolese government to acknowledge and deal with rape reports. One women's rights organization, Enough!, argues international donors and the U.N. can help the Congo eradicate impunity by working with the Congolese government in enhancing its ability to investigate, arrest, and try criminals.¹²⁸ They also support the ICC's investigation into the

¹¹⁴ Gettleman, *supra* note 43.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Lakemfa, *supra* note 5.

¹¹⁹ Gettleman, *supra* note 43.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Nolen, *Rape Again Rampant in Congo*, *supra* note 29.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Gettleman, *supra* note 43.

¹²⁸ FEELEY & THOMAS-JENSEN, *supra* note 34.

The Rape Epidemic in the Congo

use of rape as a war crime in the eastern Congo.¹²⁹ Efforts by these international organizations are commendable, however, it is difficult for them to make an impact without wide-scale prosecution of war criminals. Doing so will cause a trickle-down effect, so that fewer and fewer small scale perpetrators commit crimes that their high-ranking officials are encouraging.

IX. Conclusion

The rape epidemic in the Congo requires international intervention to prosecute criminals guilty of large-scale sexual violence, as well as implement a system of punishment within the Congolese legal system. An International Criminal Tribunal for the mass-scale rape occurring in the Congo will establish accountability and show the rest of the world that such violence will not be tolerated by shining a light on the atrocities. However, there must be a two-way approach to solving the rape epidemic in the Congo. First, the ICC must prosecute high-ranking individuals for their encouragement of rape as a war crime. Second, international organizations need to continue their victim-centered approach to reconciliation, both returning perpetrators to society and giving closure to the victim. Neither of these approaches alone will cure the rape epidemic in the Congo, but working together they can destroy the culture of impunity that is fueling it.

¹²⁹ *Id.*