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# Letter from the Editors

*Humanity has a great capacity for hope. But when faced with problems greater than ourselves, inaction and indecisiveness often overtake our idealism and contemporary global issues can appear overwhelming. Though many young people hope for a more peaceful world, they are at times discouraged by the idea that a single person cannot make a measurable difference. This hindrance was only a small obstacle for Boyd and Grace Martin, who believed in the potential that individuals have on global improvement.*

*Boyd and Grace Martin founded the Martin Institute at the University of Idaho in 1979 to study the causes of war and conditions necessary for achieving lasting peace. Their unwavering hope for a better world lives on through a variety of programs at the university. The Borah Symposium is a much anticipated annual event that introduces audiences to the most contemporary global problem solvers of our time. Both this symposium and the Martin Forums help students become more conscientious world citizens by featuring a variety of speakers on important international topics. These and other programs through the Martin Institute allow students to realize that world peace is burden we all shoulder; we are all in it together.*

*Undergraduate seniors in the Martin Institute are given the opportunity to examine a global issue and propose pragmatic, creative, and innovative solutions as part of their capstone course. Each student must challenge themselves to incorporate their entire breadth of knowledge regarding international studies in order to produce their best work in the format of a "white paper." These papers are the result of many hours of research, editing, and drafting over the course of the student's final semester. This work culminates in the realization that each one of us can be part of the solution to international conflict. The opportunity to gain this understanding is one of the University of Idaho's most valuable experiences.*

*The Martin Journal was created in 2009 to showcase the particularly impressive work of its students. Therefore, we are proud to present this year's exceptional collection of white papers especially deserving of merit in the journal's fourth annual edition. We would like to thank our published writers for their efforts and diligence in addressing these important global issues. Additionally, we would like to extend special thanks to Martin Institute Director Dr. Bill Smith who assisted in overseeing this project, and Karla Scharbach of U-Idaho's Creative Services division for the edits and publication.*

*To our readers, we hope that you will learn more about a topic you are passionate about as well as discover new and interesting issues. We hope, like Grace and Boyd Martin, that you are inspired to make a difference, no matter how small. Lastly, we hope that you enjoy reading this journal as much as we have enjoyed putting it together.*

Best,



Mary Sloniker



Erin Heuring



Bryanna Larrea

*It now becomes necessary for us to put our major global problems  
into a socially relevant global framework.  
Our world has become too complex, too interdependent,  
to answer these questions by simplistic answers.*

*These problems call for creative thinking...*

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– Boyd A. Martin, founder of the Martin Institute and namesake  
of the Martin School, at the Institute's inauguration, 1980



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## Artistry and Judge Misconduct in Artistic Olympic Sports

– Kayla C. Whiting

The Olympic sports of artistic gymnastics and figure skating recently underwent changes to their scoring systems which ensued as a result of judge misconduct; these changes led to difficult skills becoming paramount and artistry less important. Artistry has always been a defining characteristic of these sports and many are disconcerted by its devaluation. Routines that were once a form of theatre have been reduced to mere mathematical equations; they are now chock-full of dangerously difficult skills, sacrificing choreography and presentation to technical prowess, yielding less interesting performances. Though there are merits to the new systems of judgment, improvements can be made to increase the incentive to perform artistically and to reduce the chances for judge misconduct. The choice solution is to create a judging panel dedicated to evaluating the artistic score, and to instate new leadership for the promulgation of ethic standards and the enforcement of penalties for judge misconduct.

The character of Olympic artistic sports has been drastically altered because of a reaction to frequently corrupt judging. Corruption remains, but artistry is in danger of becoming a thing of the past.

The problem with Olympic artistic sports is a combination of judges not being held accountable and athletes not being given incentive to perform artistically. In recent years it became obvious that the judging of artistic sports is often biased, leading to decreased credibility. As a consequence, changes were made to the codes of points and judging systems which to some extent lessened the possibility or consequences of corrupt judging, but at the price of altering the character of the sports,<sup>1</sup> in particular figure skating<sup>2</sup> and artistic gymnastics.<sup>3</sup> These sports lost their artistic merit for the sake of objectivity, which unfortunately still does not always prevail.

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1 Danny Rosenberg, Kelly L. Lockwood. "Will the New Figure Skating Judging System Improve Fairness at the Winter Olympics?" *Olympika: The International Journal for Olympic Studies* (2005), 77.

2 Throughout this paper, "figure skating" or "skating" refers to the singles or pairs disciplines.

3 Artistic gymnastics, which may be referred to as "gymnastics" throughout this paper, is comprised of two disciplines: Women's Artistic Gymnastics (WAG) and Men's Artistic Gymnastics (MAG). *Human Kinetics*, 132.

The publicity of corrupt judging, which resulted from the judging scandal at the 2002 Winter Olympic Games,<sup>4</sup> spurred the International Skating Union (ISU) to create the New Judging System (NJS) which eliminated the '6.0', a scoring system beloved by audiences.<sup>5</sup> The NJS is similar to the Code of Points for artistic gymnastics, applying a numeric value for every skill executed during a skater's performance and awarding points even for falls. This, and the elimination of the artistic mark,<sup>6</sup> raises the incentive to attempt difficult, risky skills in spite of poor execution while lowering the incentive to perform spins and footwork, which have a lower level of difficulty. The highest and lowest scores are dropped and the remaining ones are averaged,<sup>7</sup> greatly diminishing the effect that a corrupt judgment can have; however, there is still the possibility for biased judging and, because the NJS grants anonymity to all judges, it is now nearly impossible to uncover dishonesty and hold judges accountable.<sup>8</sup>

Similarly, after the judging scandal at the 2004 Summer Olympic Games,<sup>9</sup> the International Gymnastics Federation (FIG)<sup>10</sup> revamped the gymnastics Code of Points so that the signature 'perfect 10' was replaced by an open-ended scoring system in which the goal is to amass as many points as possible. Gymnasts that earn high difficulty scores can easily win over those with high execution scores and lower levels of difficulty, but one of the oldest and most defining characteristics<sup>11</sup> of these two sports is artistry, and the ultimate goal should be to find a unique balance between

athleticism and artistry.<sup>12</sup>

Sport brings people together and the Olympics in particular promote patriotism<sup>13</sup> as well as peaceful relationships between states. Interactions among officials, judges, and athletes are important in fostering these peaceful relationships but unfortunately, skaters and gymnasts pay for corruption among judges and officials by being forced to emphasize difficulty over artistry in their routines. China and Canada have banned together to push for an alteration to the emphasis placed on dangerously difficult skills demanded at the expense of artistry.<sup>14</sup> They call for prompt action and are confident that good competition can be had while protecting athletes from injury and bringing artistry back as an essential part of competition.<sup>15</sup>

## CHANGING THE RULES OF THE GAME

### **Create a New Judging Panel**

Since the FIG and the ISU already went to the lengths of changing the rules of the game, it seems a viable option to observe what faults remain and adjust accordingly. A proposition for increasing the incentive for performing with good form and artistry is to do as is done in rhythmic gymnastics, a discipline of gymnastics renowned for its artistry. In rhythmic, there are three panels of judges, the difficulty (D) panel, the execution (E) panel, and a third dedicated to assessing artistry, i.e. the music, originality, and balance and variety of skills. The sum of the artistry panel, or A panel, and the E panel account for a total of 20 available points, while the D panel accounts for 20 points on its own.<sup>16</sup> Conversely, in artistic gymnastics there are only two panels of judges: the D panel and the E panel. The D score is determined by totaling the values from the eight most difficult elements in the

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4 See Appendix 1.

5 E.M. Swift. "Judge's E-mail Exposes Corruption of Figure Skating's Scoring System." *SI.com* (2010).

6 Archie Tse. "In New Judging System, Skaters Say So Long to 6.0" *New York Times* (2006). [So Long 6.0](#).

7 International Skating Union. "Summary of ISU Judging System" (2012), 4: Final Score. [ISU Judging System](#).

8 Hanely, 150-151.

9 See Appendix 2.

10 International Gymnastics Federation is commonly referred to as "FIG" because the official name is *Fédération Internationale de Gymnastique*.

11 Gymnastics Canada. "China and Canada want to put the 'artistry' back into gymnastics" (2011). [Put the 'Artistry' Back into Gymnastics](#).

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12 James R. Hines. *Figure Skating A History*. (University of Illinois Press, 2006), 308,309.

13 Alan Bairner. "Sport, Nationalism and Globalization: Relevance, Impact, Consequences" (*Hitshobi Journal of Arts and Sciences*, 2008), 1-2.

14 Gymnastics Canada.

15 *Ibid*.

16 "Rhythmic Gymnastics Judging 101", 1-2. [How Rhythmic Gymnastics is Judged](#).



routine, assessed by two judges who compare their individual scores to reach a consensus.<sup>17</sup> Six judges on the E panel deduct from a 10.0 for errors in technique and composition. The highest and lowest scores are dropped and the remaining four are averaged and added to the D score to determine the total score.<sup>18</sup> In figure skating, a technical panel identifies the elements performed, and a judging panel evaluates the quality of the entire routine, adding up points rather than deducting them.<sup>19</sup> In rhythmic gymnastics, more emphasis is placed on artistry as a unique component of each exercise, separate from execution. Yet, by placing a higher value on the quantitative difficulty of elements, the most valuable score still comes from objective observations, and a balance between all three elements is retained.

### **Stop Rewarding for Failed Skills**

A second way of increasing incentive to perform with good artistry is to cease awarding points for failed skills. For example, if a skater falls on a quadruple Axel, or if a gymnast falls on a back flip with a 360 degree twist on balance beam (both exceedingly difficult skills), they would not be rewarded. In a situation such as this, each of the three panels would behave differently. The D panel (assuming it remains open-ended, as it currently is in both sports) would award zero points for the attempted skill; the E panel may deduct five tenths of a point for the fall as well as appropriate deductions for lack of proper form; the A panel, which we adopted from rhythmic gymnastics, would deduct nothing. A rule like this evens the playing field, so to speak, by punishing harshly for major faults on difficult skills, while simultaneously rewarding the athlete who performs with zeal and imagination, enabling him or her to earn high A scores for performing nearly flawless routines even if they don't have high D scores. However, it would not be a rule that completely eliminates incentive for attempting difficult, daring skills because the reward for successfully completing them would remain significantly higher than successful

execution of easier skills. While the current judging systems are arguably more objective, emphasizing the accumulation of points, this option would discourage athletes from tending toward difficulty over artistry and it would make for safer and more entertaining performances.

### **Lengthen Time Limits**

An important aspect of artistry is theatrics. Two time Olympic figure skating gold medalist, Katarina Witt, commented that the NJS has taken the emotion out of the sport and that since every move performed has a quantifiable value attributed to it, there is no room left for "theatrics" in routines.<sup>20</sup> Before the demand for difficulty was so high, legendary performers such as gymnast Nadia Comaneci<sup>21</sup> and the aforementioned Witt<sup>22</sup> engaged the audience with their passion and emotion. Therefore, a third possibility for increasing incentive to bring the artistry back into routines, recreating the emotion and merger of art, personality, and sport, is to allow for more lengthy routines in ice skating and on the gymnastics events of balance beam and floor exercise. As Olympic gymnastics gold medalist Tim Daggett said while commentating at the 2011 Gymnastics World Championships, the problem with the rules is that "you have to do trick after trick after trick" and "if the rules were changed, you could see a routine that is not only difficult... but also beautiful."<sup>23</sup> Changing the time limit from 90 seconds to 120 seconds in gymnastics<sup>24</sup> and from 4 minutes to 5 minutes in figure skating<sup>25</sup> would permit the athletes to slow down and be creative instead of just packing in as many difficult skills as possible. This change, coupled with a cap

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20 Hanely, 151.

21 Nadia Comaneci was a Romanian gymnast that the legendary coach Bela Karoly praised for her artistry, and was the first ever to score a perfect 10.0 in the Olympics (1976). Amy Van Deusen. "Gymnast: Nadia Comaneci" *About.com: Gymnastics*. [Nadia Comaneci](#).

22 Two time Olympic champion (1984, 1988), German Katrina Witt was one of the most successful figure skaters of all time, known for her beauty and athleticism. Jo Ann Schneider Farris. "Katrina Witt—Two Time Olympic Figure Skating Champion" *About.com: Figure Skating*. [Katrina Witt](#)

23 National Broadcasting System. "2011 World Gymnastics Championships Team Final Part 2," 1:49-2:36. [2011 Gymnastics World Championships](#).

24 Human Kinetics, 129, 130.

25 Ibid, 107.

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17 Human Kinetics with Thomas Hanlon. *The Sports Rules Book Human Kinetics with Thomas Hanlon—3<sup>rd</sup> Edition*. (Human Kinetics, Inc., 2009), 132.

18 Ibid.

19 Ibid, 108-110.

on the amount of skills above a certain level of difficulty that are counted in a routine,<sup>26,27</sup> permits the athlete to perform easier, aesthetic elements such as holds and footwork in figure skating, and balancing and flexibility movements on the balance beam and floor exercise. This would contribute to the theatrics and art of each performance.

## JUDGE ACCOUNTABILITY

### *Define Harsher Penalties*

In lieu of changing the rules of the games, it may prove more effective to reform judge accountability and transparency, which would greatly reduce the chances for corruption or bias. In order for judges to be accountable for their actions, one crucial thing must happen: harsher penalties for 'misconduct' or any form of judge colluding. According to Sally Stapleford, ISU chairperson at the time of the 2002 pairs skating scandal, the penalty for rigged judging should be a lifetime ban rather than a mere three year ban.<sup>28</sup> Though there was much criticism for the lax penalty given to the perpetrators,<sup>29</sup> there also was not enough support to ban them for life.<sup>30</sup> Banning is one of many possible forms of judicial accountability; however, the important prerequisite to enforcing any form of accountability is being able to identify biases or 'deals' when they occur and to know who the culprit is. In order to realize this, the identities of figure skating judges must be known to all. In the sport of gymnastics this is not a current issue, but there are still no definite penalties outlined in Code of Ethics for

either sport.<sup>31, 32</sup> Furthermore, penalties must be clearly defined in writing in order for there to be any enforcement, and there must be a system of enforcement because it is not sufficient to have theoretical penalties.

### *Train IOC Judges*

Another credible option for reducing corruption among judges was presented by International Olympic Committee (IOC) member Richard Pound: "to train a staff of professional judges instead of relying on each country's federation to train and nominate judges for the international duty, leaving them open to outside influence."<sup>33</sup> Olympic judges are meant to forfeit their nationalities as representatives of fair play and olympism. Doing so would reduce the chances for country-based biases. This will be easier to accomplish the IOC trains them instead of their home countries. Establishing a training system for IOC judges would lower costs for individual federations, but it would also increase the costs for the IOC, which may prove to be problematic as the IOC is currently trying to reduce the cost of the Olympics.<sup>34</sup> However, another goal of the IOC is to make itself more transparent and to protect the athletes,<sup>35</sup> therefore, this could possibly be an avenue they're willing to pursue.

## THE CHOICE SOLUTION

Just as this problem is twofold, so too is the solution. First, there the judging panels need to be reformed; second, ethical standards for officials and judges must be enforced.

In both skating and gymnastics, artistry is simply assessed as a secondary part of all the other

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26 In women's artistic gymnastics, the eight skills with the highest levels of difficulty are counted toward the D score. Fédération Internationale de Gymnastique. "2009 Code of Points—Women's Artistic Gymnastics," 11.

27 There is no cap in figure skating. ISU, "Summary of the New Judging System."

28 Hanely, 146.

29 I modeled this judging process after ideas taken from a mix of both the figure skating NJS and the WAG Code of Points as well as the judging system for rhythmic gymnastics.

30 Hanely, 148.

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31 Fédération Internationale de Gymnastique. "Code of Ethics Fédération Internationale de Gymnastique" *Fédération Internationale de Gymnastique* (2001), 3.

32 International Skating Union. "Communication No. 1717: ISU Code of Ethics" *International Skating Union* (2012), 2-5.

33 Hanely, 150.

34 IOC. Structure of the Olympic Movement. (2002), 4.


35 Ibid.

components in a routine.<sup>36,37</sup> For artistry to be considered a valuable part of the score, there needs to be a panel that specifically judges it. Given the subjective character of judging artistry, however, certain parameters are needed and artistry must not be weighted more heavily than execution. The way in which this new A panel could maximize the incentive to perform artistically would be to allot value to each component of artistry within the routine. Athletes could earn up to five tenths of a point for the following: choreography and composition; theatrical representation or interpretation of the music; and originality, personality or outstanding unique movements.<sup>38</sup> They could also be deducted up to five tenths for each category. With a system such as this, the athlete could earn or lose up to 1.5 points for artistry, a significant amount in sports where second place is sometimes separated from first by a fraction of a point.

For this system to be transparent, ideally the judges would be trained by the IOC, independent of the influence of their individual federations.<sup>39</sup> Seven judges would occupy the panel, but only five of the scores would be randomly selected by a computer. Then the highest and lowest scores would be dropped and the remaining three would be averaged to produce the final A score. This process eliminates the effect that a single judge can have on the score of an athlete. If this was the only change made to the judging systems, it would be enough to add incentive to perform more artistically, as was the original goal of these sports.

To hold judges accountable, there need to be clear penalties for both major<sup>40</sup> and minor<sup>41</sup> misconduct that are certain to be carried out. The first step is to create term limits for presidents. Both the FIG president, Bruno Grandi, and the ISU president, Ottavio Cinquanta have been in office since 1996

because of the lack of term limits and both dealt poorly with the scandals in the past, failing to penalize judges effectively. Despite the fact that they have Codes of Ethics, the internal politics of each of these organizations are arguably not very transparent and investigations into misconduct are not completed openly.<sup>42</sup> With new leadership, a new chance would arise to emphasize the importance of good morals through enforcement of the Codes, instead of letting guilty judges off the hook based on their status within the FIG or ISU,<sup>43</sup> or for any other reason. Judges should know that misconduct will not be tolerated because the ethical standards within their organizations are so high, and there should be incentives to judge fairly and to report misconduct when one has knowledge of it. Promotion should be contingent upon a clean judging record, fiscal rewards available for those who report misconduct, and bans ranging from one year for minor misconduct to life for major misconduct should be enforced.

Reform of these sports must happen if judges are to be held accountable and artistry to be valuable—the essence of these artistic Olympic sports depends on it. 

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36 ISU, “Summary of the New Judging System,”  
2: Technical Score, 3: Presentation Score.

37 Fédération Internationale de Gymnastique. “2009 Code of Points—Women’s Artistic Gymnastics” *Fédération Internationale de Gymnastique* (2009), 8.

38 See *Rhythmic Gymnastics Judging 101*.

39 Hanely, 150.

40 See Appendix 3.

41 See Appendix 4.

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42 Ice Skating International: Online. “Ethics and Accountability in Judging” (2012). [Ethics and Accountability in Judging](#).

43 Hanely, 147.

## APPENDICES

- 1.) The president of the French figure skating federation, Didier Gailhaguet rigged the pairs competition at the 2002 Olympic Games by pressuring French judge, Marie-Reine Le Gougne, to place the Russian couple ahead of the Canadian couple. She later confessed that her federation had pressured her to make sure the Russian couple would win and Gailhaguet and Le Gougne received a three year suspension for this 'misconduct'. He is again the president of the French federation today.<sup>44</sup>
- 2.) At the 2004 Olympic Games in Athens, Paul Hamm won the gold for the all around. However, after the competition, the Korean team filed a complaint with FIG, arguing that the judges had given Yang Tae Yung a lower start value than his actual start value. FIG should not have heard the complaint because doing so was against their own rules to hear protests after the next contestant has started competing, let alone after the entire competition has played out and medals have been awarded. Bruno Grandi, the president of the FIG, later wrote Hamm a letter telling him that he believed Yung was the true all around champion and that he should do the "honorable" thing and give up his medal. The Court of Arbitration for Sport (CAS) agreed to hear the Korean's case even though they had previously stated that they only took cases concerning judge colluding and doping. The US Olympic Committee (USOC) and USA Gymnastics (USAG) planned to award a second gold medal without communicating with Hamm. In the end, Hamm did keep his gold medal, and Yung kept his silver.<sup>45</sup>
- 3.) Major misconduct shall be defined as: 1) Bribery—both offering and receiving, 2) Any form of deal making, 3) Communicating with another member of the judging panel with the intention of coordinating marks, 4) Physical intimidation or threats to coerce a placement.

The penalty shall be a lifetime ban from any activity within the organization.<sup>46</sup>

- 4.) Minor misconduct shall be defined as: 1) Failure to report an overture to engage in misconduct, 2) Failure to report knowledge of an act of misconduct, 3) Discussing the outcome of an event before it has occurred, 4) Engaging in national bias, 5) Observing an official practice session for any event at any time (which is currently permitted). The penalty shall be a one to three year ban from judging.<sup>47</sup>

## ADDITIONAL WORKS CONSULTED

- Chorba, Pete. "FIG President Calls Chinese Gymnasts 'Robots'." *Shanghaiist* (2009).
- Hines, James R. *Figure Skating: A History*. Illinois: University of Illinois Press, 2006.
- Tatlow, Peter. *The World of Gymnastics*. Nik Stuart, Meg Warren, Tony Murdock. New York City: Atheneum Publishers, 1987. Print. Strategic Development vs. Neocolonialism:

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44 Hanely, 146.

45 USA Today. "Despite Scoring Controversy, Hamm Feels Golden" (2004). [USA Today Interview with Paul Hamm](#).

46 Ice Skating International: Online.

47 Ibid.



# Strategic Development vs. Neocolonialism: Exploring China- Africa Relations

– Sarah Grigg

## ABSTRACT

The marginalization of Africa as a participant in the age of globalization ended with the formation of the Forum for China African Cooperation (FOCAC). China-Africa development and trade arrangements represent a major concern for the international community who believe China is extracting natural resources through its infrastructural improvement programs without concern for cultivating governance. To ensure long-term economic growth, environmental sustainability, and social justice, China must assume responsibility for its relations in Africa. International bodies, civil organizations and heads of state must recognize the potential threat of Chinese control over African land and resources. To minimize the cost and maximize the benefits of these agreements, adoption of a multilateral strategic plan for development provides a new perspective on China-Africa relations.

## BACKGROUND

The 21st century established a new approach to Africa's growing need for international assistance. In September 2000, heads of state and major development groups signed the UN Millennium Declaration.<sup>1</sup> This document represented a commitment to human development via established goals and methods of implementation. During the same year, China established the first Beijing Summit of the Forum on China-African Cooperation (FOCAC) fostering their "South-South" development strategy.<sup>2</sup> Since FOCAC's creation, a whirlwind of bilateral agreements established trade partnerships, humanitarian assistance, infrastructure, and political support at unprecedented rates (Chart 1). China cancelled the bilateral debt of 31 African countries, totaling some \$1.27 billion worth of debt (Chart 2).<sup>3</sup> During the first three quarters of 2011, China-Africa trade volume rose 30 percent from the previous year

1 "A/res/55/2." *Welcome to the United Nations: It's Your World*. 08 Sept. 2000. Web. 06 May 2010. <http://www.un.org/millennium/declaration/ares552e.htm>

2 "March 2012 FOCAC I" FOCAC. <http://www.focac.org/eng/lttda/dsjbzjhy/>

3 Denis M. Tull. "China's engagement in Africa: scope, significance and consequences". *J. of Modern African Studies*, 44: 3 (2006), 463.

totaling \$122.2 billion which is only a few billion shy of the 129.9 billion spent in total trade for 2010 (Chart 3).<sup>4</sup> Shen Danyang, a spokesperson for China's Ministry of Commerce, stated that, "China has become Africa's largest trading partner, with bilateral trade growing 28 percent per year from 2001-2010". Until the economic crisis in 2008, African economies reflected the success of these efforts, maintaining a 6.7 percent growth rate in 2007 (Chart 4).<sup>5</sup>

The growing influence of the People's Republic of China in the world's political and economic arenas creates a new dynamic for international development strategies. For two decades, the Chinese economy continued to grow at an average of 9 percent per year, a result of the opening of its once closed market (Chart 5).<sup>6</sup> Industrialization and a competitive economy allow the still developing nation to partake in the historically Western development burden of the twenty-first century. China enters this position from an entirely new perspective driven by its own need to expand into the new millennium's globalized political and economic structures.

China's heightened interest in Africa produces major concern - not only for the fragile governments entering into agreements with the new super power, but also for Western states whose efforts to end corruption become undermined by Chinese investments. Current Chinese development and trade policies omit stipulations or concession on governance, allowing China to become a key partner with the pariah regimes of Angola, Zimbabwe, Sudan, and Nigeria (Chart 6).<sup>7</sup> By ignoring these Western-imposed sanctions, China reaps the economic benefit of procuring resources without Western competition. To ensure long term economic growth, environmental sustainability, and social justice, China must assume responsibility for its relations in Africa. The international

community and the heads of African states must recognize both their stakes in the future of China-Afro relations and the danger of a potential neocolonial agenda. It is in the world's interest that Africa gain maximum benefits from China's investments and can minimize the potential threat to human security in an already unstable region.

## POLICY ACTIONS

### *International Community*

#### International Monetary Fund (IMF) and World Bank (WB)

As the international community's functioning bodies for the allocation of development funding and economic policy, the IMF and WB must acknowledge China's role in Africa's development. By providing loans and projects without economic conditionalities, China will become a more appealing option for states suffering from the failed IMF and WB's Structural Adjustment Programs (SAPs).<sup>8</sup> Enterprises like the Multilateral Debt Relief Initiative (MDRI) launched in 2005, which focused on canceling 100 percent of debt claims for countries struggling under an unmanageable debt burden, represent excellent efforts to provide alternatives to Chinese debt relief packages.<sup>9</sup> In addition to providing more options for African states seeking assistance, the IMF and WB should evaluate the Debt Sustainability Framework (DSF), a document designed to guide the borrowing decisions of each country taking into account individual circumstances.<sup>10</sup> This important document fell under Chinese criticism for failing to recognize public project-based development sustainability. In addition the DSF lacks a proper analysis for the determinants of growth. The IMF and WB are urged to continue their efforts to review this document.

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4 Guo Lijun (2011). *China-africa trade to hit record high in 2011*. Retrieved from <http://english.people.com.cn/90778/7654237.html>

5 Yiagadeesen Samy (2010). China's Aid Policies in Africa: Opportunities and Challenges. *Round Table*, 99(406), 75.

6 Edoho, F. M. (2011). Globalization and Marginalization of Africa: Contextualization of China--Africa Relations. *Africa Today*, 58(1), 103-124.

7 "No Questions Asked." *Economist* 378.8461 (2006), 43.

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8 HOW IMF, WORLD BANK FAILED AFRICA. (cover story). (2007). *New African*, (458), 12.

9 International Monetary Fund. *The Multilateral Debt Relief Initiative*. (pg. 1) <http://www.imf.org/external/np/exr/facts/mdri.htm>

10 International Monetary Fund. *The Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries*. (pg. 1) <http://www.imf.org/external/np/exr/facts/jdsf.htm>

### United Nations:

As an organization dedicated to promoting international peace, the UN must hold states choosing to invest in corrupt governments accountable for investing in areas which will prolong conflict. Valid international concerns for China's economic investment and developmental assistance in the unstable and violent states of Sudan, Angola, Zimbabwe and Nigeria continue to represent ineffective UN policy. Despite the institution of a UN arms embargo in 2004, China continued to supply arms to Sudan as reported by Amnesty International.<sup>11</sup> The United States' and the United Kingdom's efforts to pursue tougher sanctions were vetoed by China in the Security Council.<sup>12</sup> International bodies should not tolerate China's abuse of its influence in the UN, especially when compared to its refusal to acknowledge the socio-political implications of its involvement in Sudan. The UN should continue to direct international pressure to condemn China's involvement in conflict zones while also directing the nation's efforts into long term solutions. China upholds unique capabilities to positively use its close relations with the region to promote positive action. It demonstrated this power in May 2006 when China convinced the northern Sudanese government to accept a UN peacekeeping force of 26,000 troops which Sudan initially opposed.<sup>13</sup>

### Primary Stakeholders: United States, France, United Kingdom<sup>14</sup>

The United States, United Kingdom, and France still account for 70 percent of foreign direct investment in Africa (Chart 7).<sup>15</sup> To build stronger political ties in addition to providing alternative bilateral trade, key stakeholders in Africa should account for

China as a competitor. Economic marginalization leaves African markets with only one option for engaging in trade and successful infrastructure. While China presents an excellent development partner in most aspects, its use of export credits through "infrastructure for national resources" could easily be challenged by stakeholders.<sup>16</sup> These resource based loans are dangerous because they become securitized through the future production and the delivery of resources, which are subject to commodity prices and market fluctuations. Angola provides an example. In 2008 it suffered from a fall in oil prices - in connection with the global financial crisis - causing its fiscal spending to be unsustainable.<sup>17</sup> Many African countries, particularly those with oil wealth, engage in these risky loans to meet infrastructural needs. The U.S., U.K., and France already invest heavily in the region, yet they often overlook infrastructure investment or require weighty concessions for governance. A Kenyan government spokesperson echoed the widespread sentiment that, "You never hear the Chinese saying they will not finish a project because the government has not done enough to tackle corruption. If they are going to build a road, then it will be built".<sup>18</sup> Invested countries should not abandon standards for good governance; rather, they should find more committed and less encumbered strategic development agendas.

### The People's Republic of China

#### Sustainable Commitment:

Africa has become a key resource for both the political and economic development of the People's Republic of China. China's relations with Africa should support a symbiotic partnership that cultivates sustainable development ensuring that Africa remains a provider of key resources and an equitable market for exports in the future. Particularly China must admit that investment paid at the expense of African citizens will ultimately result in the disruption of African relations. This does not mean that China should abandon its non-interference policies, but instead that it should

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11 Sherri McFarland. "Africa in Retrospect: Russia, Iran and Chinese Arms Supplies to Sudan" *African & Asian Studies* 9:4 (2010), 463.

12 Pieter D. Wezeman. (2007). United nations arms embargoes: Their impact on arms flows and target behaviour. *Stockholm International Peace Research Institute*, 1-7.

13 McFarland, 471

14 Secondary stakeholders include former colonial powers. Examples include Portugal, Belgium, Germany and Italy.

15 Greg Pollock. "Back to the Future: Understanding China's Return to Africa and its Implications for U.S. Policy". *Journal of Public and International Affairs*. Princeton University 18:1 (2008), 55-77.

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16 Benedicte Vibe Christensen "China in Africa: A Macroeconomic Perspective". *Center for Global Development*. Working Paper 230. 2010, 10

17 Ibid, 20

18 Tull, 467

search for means of incorporating responsible assistance into its approach. It can accomplish this by investing in public expenditure management systems (PEMs) to provide education and health services to African populations. Sub-Saharan countries possess some of the weakest PEMs in the world, even including those in Asia, Latin America and transition countries.<sup>19</sup> As Oxfam's 2007 briefing paper highlights, Uganda invests some 40 percent of government spending in health and education, much of which is provided by donors.<sup>20</sup> Chinese policies designed to weigh such government initiatives as valuable in investment decisions guarantee sustainable development goals.

### Transparency:

China is not a member of the Organization for Economic Co-operation and Development (OECD), hence it does not publish comprehensive data on foreign aid.<sup>21</sup> As outlined by the Paris Declaration on Aid Effectiveness, the efficiency of aid is determined by ownership, alignment, harmonization, managing for results and mutual accountability. In addition to effectiveness, timely and accurate economic data affords donors essential information for good decision making.<sup>22</sup> China must acquiesce to opening its policies on transparency - both internally and externally - to guarantee that the funding spent on aid contributes to long term sustainable goals. As demonstrated by the complex aid structure of China (Chart 8), the government needs to support a means of increasing aid information, internally focusing on proper decision making, monitoring of implementation and measuring the effectiveness of aid operations.<sup>23</sup> Furthermore, it is in the interest of China to share more information with the recipient countries rather than imbibe the risk of entering agreements where one or more parties have not determined the specific terms of the loan. Finally, though more difficult to absorb into China's current political interests, China could value the reduction

of public speculation concerning the nature of its interest in Africa. Increased participation with international bodies like the WB or the OECD could deliver the benefits of a healthier international reputation.<sup>24</sup>

### Macroeconomic Analysis:

China's lack of macroeconomic analysis in regards to its actions in Africa demonstrates not only its lack of long term goals, but also its disregard for investment risks. China can avoid economic hazards by preventing inflation, accounting for fluctuations in commodity price, and working with individual government's macroeconomic goals. Most importantly, China should ensure that the size and allocation of its financing and operational modalities can fit the absorptive capacity of the country<sup>25</sup>. If the external financing to a country is scaled up, the currency of the recipient country might appreciate, making the tradable goods sector less competitive.<sup>26</sup> This phenomenon, referred to as Dutch Disease<sup>27</sup>, can be avoided if the use or absorption of aid is sequenced properly. Suggestions such as using aid to build foreign exchange reserves, investing in a specific import, or large short term benefits to productivity, are easily implementable into current Africa-China policy.

### Heads of African States

#### Diversify Economies:

The majority of Sub-Saharan states engaging in aid and development agreements with China are dependent on a few price-volatile primary goods as exports (Chart 9). Nigeria alone obtains 90 percent of its foreign exchange from the export of crude oil, Sierra Leone depends on diamonds for more than 60 percent of its foreign exchange income, and Zambia obtains 85 percent of its foreign exchange from the export of copper.<sup>28</sup> These resource-reliant economies have enjoyed the benefits of high prices on international markets over the last years, yet reliance on either the abundance of

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19 Christensen, 17

20 OXFAM International. *Paying for People: Financing the skilled workers needed to deliver health and education services for all.* (11-12)

21 Christensen, 23

22 OECD. *The Paris Declaration on Aid Effectiveness.* (2005), 12.

23 Christensen, 23

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24 Ibid, 23

25 Ibid, 14

26 Owen Barder. *A Policymakers' Guide to Dutch Disease.* Working Paper 91, Center for Global Development. (2006),4.

27 Christine Ebrahim-zadeh. "Back to Basics" *Finance and Development*, IMF 40:1 (2003), 1

28 Edoho, 114



resources or the consistency of commodity prices results in a gamble against the vagaries of the global market. It is recommended that African states enter into negotiations with Chinese firms that require programs to develop the capabilities to process intermediate goods.<sup>29</sup> Investment into market diversification focuses on employment opportunities and exploring new markets, thus strengthening state economies. Africa is in a position to maximize its benefits in resource allocation, and China presents an excellent partner in this endeavor because of its experience in developing its own economy over the last twenty years.

### Transparency:

African governments must end corruption in order for the people of Africa to reap the benefits of economic growth and development provided by China. China's willingness to enter into agreements with states lacking good governance cannot unravel the long-standing efforts of international and regional labors for democracy. As the mission statement of the African Union (AU) describes, transparency and accountability exemplify key values to a functional African future.<sup>30</sup> Specifically, the non-transparent nature of Chinese aid agreements paralyze the accountability efforts of organizations like the Economic Community of West African States, the New Partnership for Africa's Development (NEPAD), and the African Development Bank. While these organizations represent a new era of regional cooperation, they seldom maintain the authority to hold their members accountable to their policies. Particularly, NEPAD's Peer Review Mechanism - focusing on economic governance and corporate governance - affords the potential to fight corruption if strengthened and enforced.<sup>31</sup> Member states of these organizations uphold an obligation to acquiesce to their commitment to transparency efforts when accepting aid, insurance that the

wealth of resources is shared among the citizens of a state.

### Invest in Human Capital:

To break the cycle of dependence that plagues Africa, incentives for heads of state to invest newly acquired Chinese aid into developing human capital provide an opportunity for change. Studies based on the cultivation of human competencies reveal that the efforts to extend education flourish in opening economies.<sup>32</sup> As African markets grow more competitive due to China's trade agreements, governments ascertain that funding innovation, entrepreneurship, and productivity will produce even better economic returns. These investments present an opportunity to create new job markets and further diversify economies. In addition, China-Africa relations result in increased flows of technology and other capacity building goods to the African continent, building demand for a workforce that is able to adapt constantly to the requirements of changing technology. Rather than allowing Chinese firms to provide foreign labor for aid projects, African states could insist that wherever possible, China accommodates their own workforce with training to manage and maintain projects. Human capital remains a resource that cannot be sold or stolen as well as a clear investment choice for sustainable development.

## RECOMMENDATIONS

Clearly, Chinese and Western interests in the continent of Africa prevail despite their negative impacts. The world can expect an increase of bilateral trade and development agreements throughout the region over the years to come. Though these economic and development ties to the region's resources result in concerns about a potential neocolonial future, admittedly China benefits more from a trade partner than from a neocolonial regime. Apprehensions concerning the human security threats of this malleable era of Africa's development remain valid and require multilateral commitment to finding a solution. The most effective and immediate course of action

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29 Ibid, 119

30 African Union Commission. Strategic Plan. (EX.CL/501 (XV) 2009-2012, 2.


31 "March 2012: African Review Mechanism (APRM)". NEPAD. <http://www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about>

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32 Nancy Birdsall. "Human Capital: and the Quality of Growth". Development Outreach: World Bank Institute. (2001)

exists in an increase of the intensity and scope of the FOCAC.

Preparations for the FOCAC V in Beijing this year have been in progress since 2010, promising new commitments to address climate change, technology, agriculture, and an additional \$10 billion in preferential loans to Africa.<sup>33</sup> The mission of the FOCAC continues to be based on the two pillars of collaboration: pragmatic cooperation and equality through the establishment of mutual benefits.<sup>34</sup> The FOCAC V conference provides a unique opportunity for the international community, civil society organizations, and heads of state to address concerns about the future of Africa-China relations. Among these concerns reside multifaceted pleas for improved transparency, sustainable development, and human capacity investment.

In the past, the FOCAC functioned as a discussion between heads of state and a small representation from international and regional organizations. To increase transparency and provide a larger network for action, the upcoming summit entertains to accommodate a major mobilization of non-governmental organizations, indigenous groups, and corporations to diversify the scope of future Afro-China relations. The increased presence of civil society provides a humanistic element to the forum necessary to ensure the interests of people on the ground. Efforts between China and the heads of African states sustain an obligation to address the macroeconomic and long term sustainability issues through the above-mentioned policy options. However, these efforts ignore the underlying issues of poverty, inequality, environmental degradation, and human injustice that drive many of the social elements of Africa's development. Providing publically minded discussion as an attribute of the FOCAC V affords an opportunity for China-Afro relations to address the social needs of the continent. As former South African president and political activist Nelson Mandela once said, "Money won't create success, the freedom to make it will." 

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- U.S. Senate, Subcommittee on African Affairs, Committee on Foreign Relations. (2008) *China in Africa: Implications for U.S. Policy*. 1-61.

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33 "March 2012 FOCAC VI" FOCAC. <http://www.focac.org/eng/lttda/dsjbzjhy/>

34 Vernon Mwaanga. 10<sup>th</sup> Anniversary of the Forum on China African Cooperation (FOCAC). (2011) <http://vernonmwaanga.com/?p=21>

APPENDICES

Chart 1: Geographic Representation of Investment

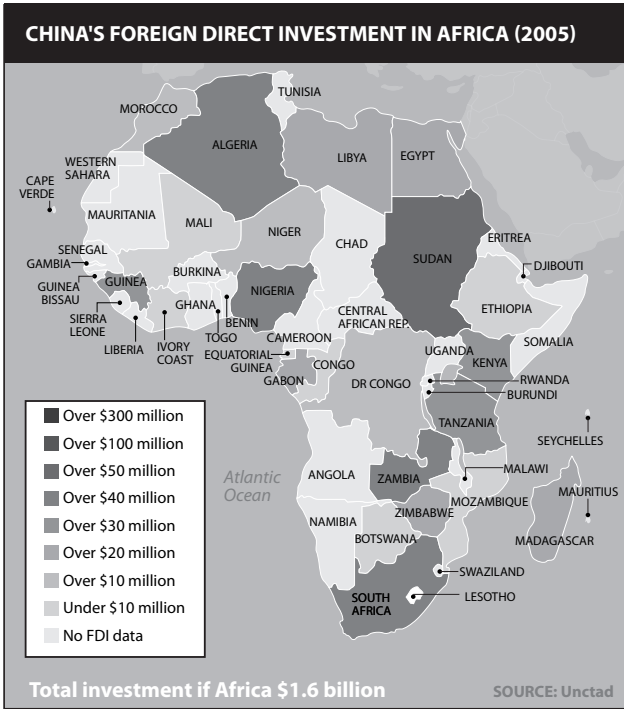
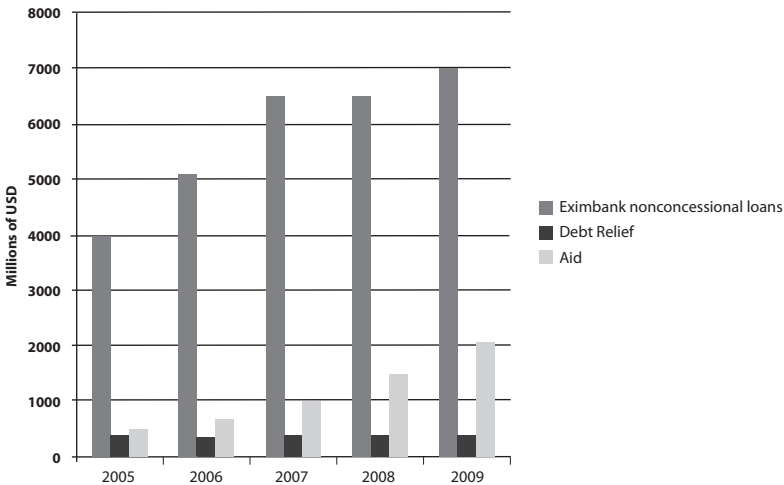


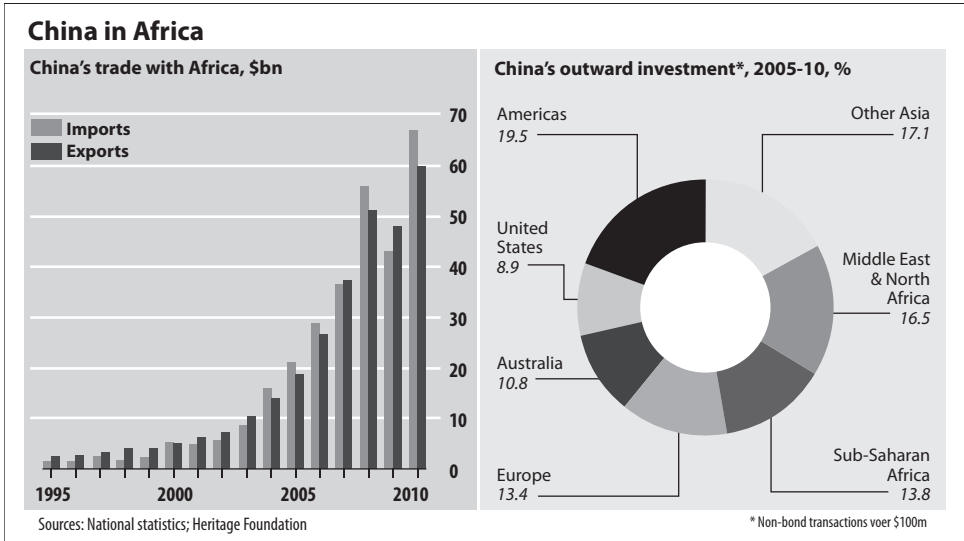
Chart 2: External Flows From China to Africa, 2005-2009



Sources: Deborah Brautigam, *The Dragon's Gift* (updated by the author); World Bank, *Building Bridges, China's Growing Role as Infrastructure Financier for Sub-Saharan Africa*, 2008.

1. The figures for Eximbank lending are on a commitment basis, while those for aid are on a disbursement basis and therefore not strictly comparable.

**Chart 3: China's Investment in Africa 2005-2010**

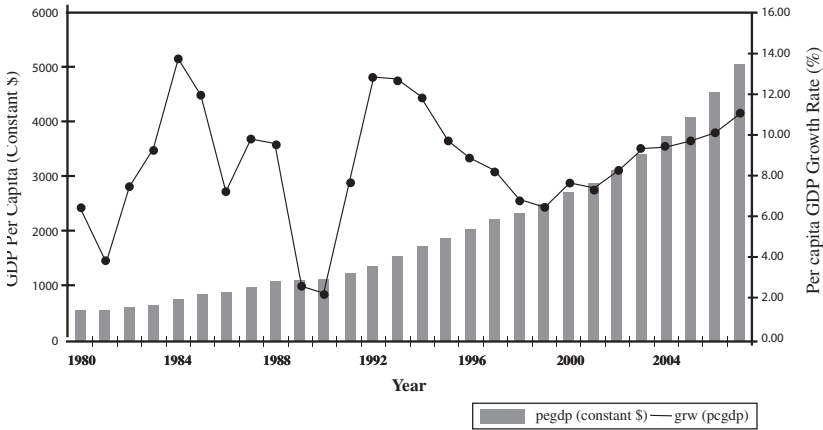


**Chart 4: African Economic Performance 1980-2007**

Country	1980-98	1990-99	2000-07
<i>GDP growth (%)</i>			
Sub-Saharan Africa	2.2	2.0	4.8
All Africa	2.6	2.5	5.6
<i>GDP per capita growth (%)</i>			
Sub-Saharan Africa	- 0.8	- 0.6	2.2
All Africa	- 0.3	0.0	2.2

**Sources: African Development Indicators, World Bank (2007); author's calculations based on World Development Indicators, World Bank.**

**Chart 5: China's Economic Performance (1980-2007)**



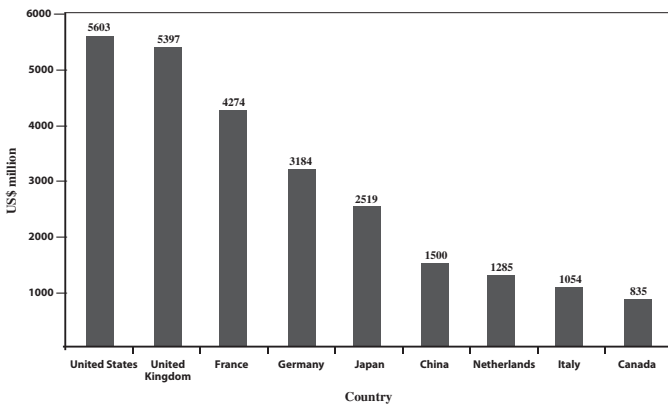
Source: Data obtained from World Development Indicators, World Bank.

**Chart 6: China's Top Traid Partners in Africa (Percentage of Exports 2009)**

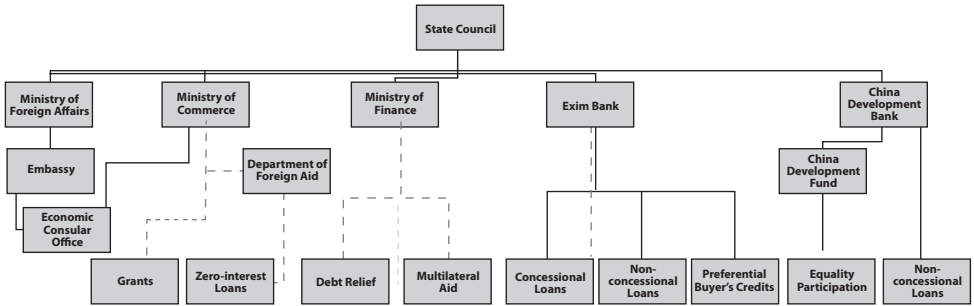
Country	Percentage
Angola	39.54
South Africa	23.42
Sudan	12.62
Congo	4.68
Zambia	3.43
Democratic Republic of Congo	3.06
Equatorial Guinea	2.84
Nigeria	2.42
Rest of Africa	7.09

Source: Morrisey 2010.

**Chart 7: Comparison of China's Aid to Africa with Major Donors (2006)**

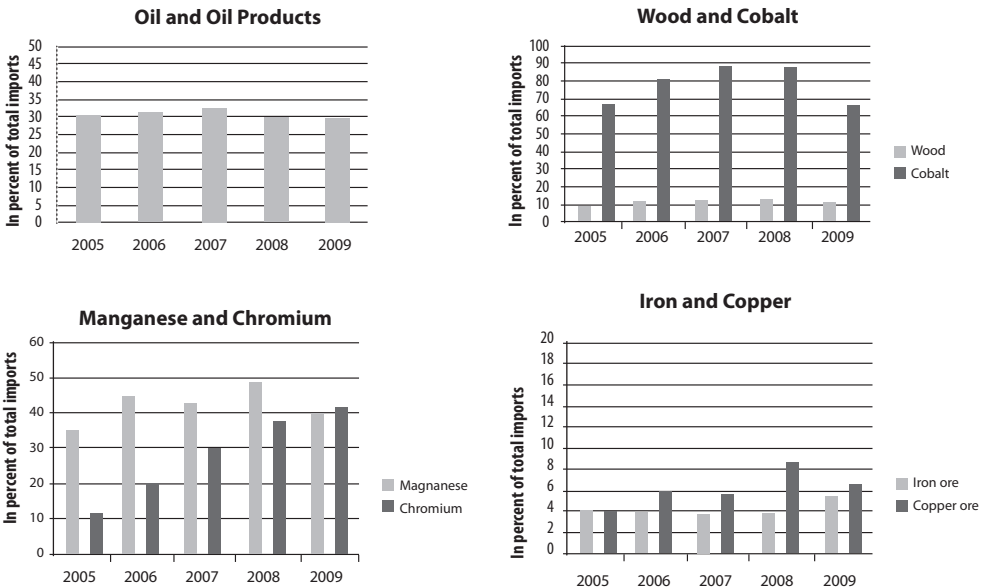


**Chart 8: Chinese Organization of Aid and Official Financing Decision Making**



1. This figure excludes the provision of humanitarian aid that is provided by several ministries

**Chart 9: China: Imports of Raw Materials from Africa, 2005-2009**



Source: UN Comtrade

1. Africa comprise Northern and sub-Saharan Africa



# Securing Corporate Social Responsibility in the Development of States: A Legal Framework of Accountability

– Angelene Little

## ABSTRACT

Corporations have gained significant power in the current era of globalization; by contributing economically to local and national development, corporations influence the manner in which these communities develop. It is an unfortunate reality that with this burgeoning economic and political influence corporations have not also seen an increase in social and environmental accountability. Corporate social responsibility concerns how corporations interact with and affect the just and stable development of the communities in which they work. Current standards of corporate social responsibility must be codified and agreed upon internationally. Corporations cannot be relied upon to monitor and apply these standards, and often, developing states lack bargaining power to uphold them; these standards must be enforced in international, binding agreements. Through a legal framework of accountability, corporate social responsibility can be enforced without compromising state sovereignty or stable development.

Foreign direct investment (FDI), in the form of both public and private funds, increasingly contributes to the world's development; the global stock of inward FDI as a percent of global GDP increased from less than 5% in 1980 to 25% in 2006. In fact, since the mid-1990s, inward FDI has become the main source of external finance for developing countries and is more than twice as large as official development aid.<sup>1</sup> Multinational enterprises (MNEs), defined as “a cluster of corporations or unincorporated bodies of diverse nationality joined together by ties of common ownership and

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<sup>1</sup> “Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy: the Impact of Foreign Direct Investment on Wages and Working Conditions.” *OECD-ILO Conference on Corporate Social Responsibility. Organization for Economic Co-operation and Development, International Labor Organization*. France, Paris. 24 June 2008. Conference Background Paper.

responsive to a common management strategy,”<sup>2</sup> comprise the primary source of this investment. More narrowly, MNE means any of these clusters headquartered in a home state and managed or operated in one or more host states.

Accused of taking unfair advantage of low wages and weak labor standards in developing countries, and of violating international human and labor rights in countries where these standards are not strictly upheld, these enterprises have developed into a source of controversy and social concern. These enterprises, through their investment and therefore political and economic power, profoundly affect the stability and development of the states in which they operate. The United Nations Conference on Trade and Development (UNCTAD) recognizes that MNEs drive globalization and increasingly influence the development of world economies.<sup>3</sup> With their increasing power on the international level, these enterprises potentially impact the corruption and tax standards of the developing states in which they work in a negative way.

Due to the increasing influence of MNEs and their history of environmental and human rights abuses, the concept of corporate social responsibility (CSR) captures the attention of governments and development organizations alike. The concept of CSR concerns how businesses relate to and impact the societies in which they work. In this paper, CSR specifically refers to voluntary corporate initiatives aimed at improving the social and environmental impacts of a company’s business activities, excluding philanthropy prior to profit.<sup>4</sup> Discussion on the social responsibility of MNEs comprises a

large component of international and multilateral efforts to develop an economically and socially stable and just global society.

The reality of implementing CSR standards on MNEs remains complicated. These “independent” enterprises caught among differing expectations from public and private sector groups, international organizations, governments, NGOs, etc. wish to maintain their corporate identity and operating procedures while adhering to this array of demands for responsibility. Various measures of accountability implemented over the course of recent decades portray this. Because FDI in Latin America alone peaked at US\$ 128.301 billion in 2008,<sup>5</sup> and because the MNEs responsible for this investment also maintain some of the worst human rights and environmental faults, the discussion of CSR accountability options is of utmost importance to the stable and just development of developing states.

## FORMAL ACCOUNTABILITY MECHANISMS

### I. Legal Duties

Legal duties, existing and proposed, introduce varying levels of successful accountability to CSR initiatives. These duties, binding and mandatory, represent Sarah Joseph’s definition of “horizontality,” wherein states must control private entities and therefore heavily enforce standards.<sup>6</sup>

#### A. Laws of Home States

The home states of MNEs, “states of incorporation,”<sup>7</sup> have the responsibility to oversee and enforce standards of CSR in their corporations operating abroad. This often proves more viable for states with pre-existing and stable justice systems where regulations can be enforced.

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2 Adapted from Sarah Joseph’s article in *Liability of Multinational Corporations Under International Law*. Her definition was adapted from Detlev Vagts, “The Multinational Enterprise: A New Challenge for Transnational Law,” 83 *Harvard Law Review* (1970): 739-740 and Richard Vernon, “Economic Sovereignty at Bay,” 47 *Foreign Affairs* (1968): p. 110-114. Joseph, Sarah. “An Overview of the Human Rights Accountability of Multinational Enterprises.” *Liability of Multinational Corporations Under International Law*. (2000): 75-93.

3 United Nations Conference on Trade and Development *The Social Responsibility of Transnational Corporations UNCTAD/ITE/IIT/Misc. 21*. i-75.

4 Jenkins, Rhys. “Globalization, Corporate Social Responsibility and Poverty.” 81,3 *International Affairs* (2005) 525-540.

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5 Alatorre, Jose, Calderon, A., Peres, W., Ludena, M.P., and Razo C. “Foreign Direct Investment in Latin America and the Caribbean.” *United Nations Economic Commission for Latin America and the Caribbean, Unit on Investment and Corporate Strategies of the ECLAC Division of Production, Productivity and Management*. 2009. Briefing Paper.

6 Joseph,

7 *Case Concerning the Barcelona Traction Light and Power Co. Ltd (Belgium v. Spain)*. International Court of Justice (1970) p 3, para. 70



## ***Alien Torts Claims Act of 1789 (ACTA), USA***

The Alien Torts Claims Act of 1789 originally operated under the auspices of the Judiciary Act of the United States. Legal recourse is based on corporate complicity in rights violations or principles in international law.<sup>8</sup> As globalization and its affects on development and business practices became more apparent, particularly in the field of human rights, this act became a tool for human rights litigation. In 1996, Burmese villagers brought Unocal, the last American corporation working in Burma, to trial under the ATCA for complicity in forced labor, rape, and murder. The plaintiffs suffered a variety of violations at the hands of Burmese army units hired by Unocal to secure the implementation of a pipeline route. The counsel for these villagers includes a variety of Western partners.<sup>9,10</sup> The case is ongoing.

The likelihood of home states imposing strict measures of accountability, even in light of recognized responsibility under international standards, is slim. These regulations impose a disadvantage on corporations compared to local businesses or MNEs operating elsewhere.

### **B. Laws of Host States**

Human rights duties imposed indirectly through host states (states in which corporations conduct business, to be distinguished from the states in which they headquarter) rely on the full functioning of state agency and justice systems. It has been noted that domestic laws in developing states concerning CSR lack strong enforcement—these states often do not possess proper incentives to rigidly enforce standards on corporations, for fear of loss of investment. In situations of corporations from developed states operating in developing states, these corporations often wield more

bargaining power, threatening to transfer business to other states in which regulation proves more lax.<sup>11</sup> Known as the “race to the bottom,” this trend is daunting to states lacking the infrastructure to enforce regulations without losing key investments from corporations. In other cases, the inaction of government has created a regulatory vacuum due to governmental corruption—governments of host states may co-opt companies against citizens and the environment. Studies by the OECD and others indicate that MNEs involved in extractive industries, such as oil, gas and diamonds, are particularly prone to such complicity with the host state.<sup>12</sup>

## ***II. Soft Law***

Non-binding codes of corporate conduct, hereby known as soft law, allow states to endorse and promote agreed-upon standards of CSR. These alternatives to legal duties do not require intergovernmental consensus on the level of detail necessary for legally enforceable regulations.

### **A. International Law**

MNEs prove difficult to regulate under the auspices of any one state. The lack of generally accepted international legal CSR standards causes MNEs to operate in multiple states under multiple definitions of responsibility. Under agreed-upon international standards and regulation, it is postulated that corporations would be effectively regulated indirectly through states.

#### ***i. United Nations Sub-Commissioner on Human Rights (UNCHR): Norms on the Responsibilities of Transnational Corporations and Other Businesses Enterprises with Regard to Human Rights***

The proposed Norms of the UNCHR constitute an authoritative guide to CSR. These norms, the first of their kind aimed largely at MNEs, hold corporations accountable to human rights standards under international law. Binding in the sense that the

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8 Monshipouri, M., Welch, C.E., and Kennedy, E. “Multinational Corporations and the Ethics of Global Responsibility.” *Human Rights in the World Community*, 3<sup>rd</sup>. ed. Philadelphia: University of Pennsylvania Press, 2006. 434-443.

9 NGO EarthRights International (ERI), Paul Hoffman, the Center for Constitutional Rights, Hadsell & Stormer, and Judith Brown Chomsky.

10 “Doe v. Unocal Case History.” EarthRights International, 2012. Web. 26 Mar 2012. <<http://www.earthrights.org/legal/doe-v-unocal-case-history>>.

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11 Winston, Morton. “NGO Strategies for Promoting Corporate Social Responsibility.” 16, 2 *Ethics & International Affairs*. (2002) 71-87.

12 Kamminga, Menno T. “Corporate Obligations Under International Law.” *Conference of the International Law Association*. 17 August 2004, Berlin. Pg. 4.

norms apply human rights law to MNEs,<sup>13</sup> the Norms represent an ambitious attempt to codify the principles that companies must respect in the field of human rights, labor law, environmental protection, consumer protection, prevention of corruption etc.<sup>14</sup>

International standards potentially eradicate problems of extraterritoriality when dealing with MNE accountability. Agreed upon by the international community (host and home states alike), these standards would become binding on enterprises if implemented in state and international legislation. These standards are intended to eliminate the “race to the bottom” in developing countries.

**ii. Organization for Economic Cooperation and Development (OECD): Guidelines for Multinational Enterprises contained in the Declaration and Decisions on International Investment and Multinational Enterprises**

Implemented in 1976, the Guidelines represent the only CSR instrument formally adopted by state governments. These Guidelines make recommendations on socially responsible business practices, addressed by governments to MNEs operating both within their borders and beyond them. A unique network of National Check Points supports the observance of these recommendations, placing responsibility of implementation and issue resolution on adhering governments.<sup>15</sup> Though these guidelines remain voluntary and therefore non-binding, membership includes all 34 OECD member states and 9 non-member states. It appears that most of the largest corporations are covered with these guidelines—the largest corporations are based in developed

countries, and the 71 largest corporations are based in only five OECD countries.<sup>16</sup>

Such a comprehensive approach to MNE guidelines on responsibility remains non-existent outside of the Guidelines. This Declaration and the recommendations outlined in it hold corporations, domestic and abroad, directly accountable for their procedures and their place in the development of stable states.

**iii. International Labor Organization (ILO): Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**

Shortly after the adoption of the OECD Guidelines, the ILO released the Tripartite Declaration in 1977. This declaration outlines guidelines for MNEs, governments, employers’ organizations, and workers’ organizations that are recommended and voluntary. Most of the guidelines deal with labor rights in employment, training, industrial relations, and conditions of work and life, paragraph eight references directly human rights.<sup>17</sup> Its provisions are reinforced by certain international labor Conventions and Recommendations which the social partners are urged to bear in mind and apply, to the greatest extent possible.<sup>18</sup>

This declaration applies the described guidelines indirectly, through sanctions imposed by state governments that adopt the declaration. The difficulty of enforcement lies in this indirect nature: there is an absence of any monitoring process and a lack of implementation mechanisms.

**B. General Standards**

One type of soft law outlines general standards of CSR, permitting an “adaptable application”

16 (France, Germany, Japan, the United Kingdom and the United States)

Letnar Cernic, Jernej. “Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises.” 3,1 *Hansel Law Review* (2008). 71-100.

17 Deva, Surya. “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” *Connecticut Journal of International Law*. 19.1 (2003): pg. 12. Print.

18 “Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration).” 4<sup>th</sup> ed. *International Labor Organization*. 2006. Web. <[http://www.ilo.org/empent/Publications/WCMS\\_094386/lang-en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang-en/index.htm)>.

13 Howard-Hassman, Rhonda. *The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization*. International Human Rights: Problems of Law, Policy, and Practice. 4<sup>th</sup> ed. New York: Aspen Publishers, 2006. 375-385.

14 Kamminga, I.

15 United Nations Organization for Economic Cooperation and Development. *Guidelines for Multinational Enterprises DAFFE/IME(2000)20*.

by MNEs, despite differences in business type or operation.<sup>19</sup>

### **UN Global Compact**

Drawing from the Universal Declaration of Human Rights, the principles and rights of the International Labor Organization, and backed by the Earth Summit agenda, the UN Global Compact (UNGC) urges businesses to adopt ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption. The UNGC boasts membership from over 8700 corporate participants, representing 130 stakeholders. This makes it the largest voluntary corporate responsibility initiative in the world. According to the Compact, corporations have a responsibility to obey the laws of host states and to contribute to the vitality of the communities in which they work through their increase in transparency and integration of CSR measures.<sup>20</sup> The UNGC incorporates a transparency and accountability policy known as the Communication on Progress (COP). The annual posting of a COP demonstrates a participant's commitment to the compact and its principles.

Voluntary initiatives like the UNGC complement legal frameworks of CSR accountability and should not be confused for legal, binding duties.

## **INFORMAL ACCOUNTABILITY MECHANISMS**

The most common accountability mechanism utilized by corporations in the last two decades, self-implemented codes of conduct have been propelled by NGO pressure and international attention. These voluntary codes require minimum standards of behavior and accountability.

### **I. Corporate Codes of Conduct**

Voluntarily written from within, corporate codes of conduct set out a corporation's ethical standards for business practices. These codes contain ethical standards relating to the treatment of workers, use of natural resources, and the extent to which a corporation is involved in and promotes the

communities in which they operate. These codes depend on their credibility: the extent to which it is taken seriously by industry, unions, consumers, and governments. Credibility, in turn, depends on monitoring, enforcement and transparency.<sup>21</sup>

The Hershey Company demonstrates a critical approach to voluntarily adopted CSR standards in their Business Code of Conduct. Hershey's states that they are committed to the global community through compliance with all global trade laws, protecting natural resources and supporting the communities where they live, work, and do business.<sup>22</sup> They achieve this through implementing CSR practices in their supply chains and outside monitoring of their codes through social auditing.

### **II. Voluntary Adoption of Industry-Wide Codes**

Initiated in 1996 by United States President Bill Clinton, the Apparel Industry Partnership Initiative (AIPI) brought together leaders of the apparel and footwear industry, labor unions, consumer groups and nongovernmental human rights organizations to ensure that products are manufactured under humane working conditions and to communicate production information to consumers.<sup>23</sup> This partnership adopted an industry-specific code of conduct outlining decent and humane working conditions and principles for monitoring the code in 1997. In 1998 the partnership initiated an external monitoring system under the not-for-profit organization Fair Labor Initiative (FLA). This initiative grew out of the increase in cheap sweatshop labor in the apparel industry and binds the industry to the code of conduct along the chain of production: from retailer to manufacturer to contractor to subcontractor to consumer to

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21 International Labor Organization. Bureau for Workers' Activities (ACTRAV). *Corporate Codes of Conduct*. Web. <<http://actrav.ilo.org/actrav-english/telearn/global/ilo/code/main.htm>>.

22 Hershey Company. Ethical Business Practices Committee. *Code of Ethical Business Conduct*. Web. <<http://www.thehersheycompany.com/investors/corporate-governance/code-of-conduct.aspx>>.

23 Bobrowsky, David. "Creating a Global Public Policy Network in the Apparel Industry: the Apparel Industry Partnership Initiative." Global Public Policy Institute, 1-72. Web Document. 26 March 2012. <[www.gppi.net/fileadmin/gppi/Bobrowsky\\_Apparel\\_Industry.pdf](http://www.gppi.net/fileadmin/gppi/Bobrowsky_Apparel_Industry.pdf)>.

19 UNCTAD, 2.

20 Howard-Hassman, 375.

government regulators and NGO overseer.<sup>24</sup> The initiative boasts success through its unique monitoring system and the voluntary nature of its code of conduct.

### **III. Independent Social Auditing and Monitoring of Voluntary Codes of Conduct**

Social auditing, a voluntary and formal review of a corporation's social responsibility, emerged at the height of CSR awareness. This method of accountability argues that corporations cannot be trusted to monitor their own voluntarily-adopted codes of conduct and need to be monitored by an outside source on a regular basis. The FLA (mentioned above) and Social Accountability International (SAI) take this approach. SAI utilizes the SA8000 to standardize social auditing of retail corporations. Developed in 1997, the SA8000 bases its CSR measures on international human rights and ILO conventions and covers eight issues of responsibility—child labor, forced labor, discrimination, discipline, health and safety, working hours, compensation, and the right to free association. When brand-name corporations become signatories they agree to require themselves and their subcontractors and suppliers to be audited against the SA8000 standards.<sup>25</sup> The public recognition of social responsibility draws corporations to social auditing and voluntary conducts.

## **POLICY RECOMMENDATION**

"We need an international legal framework that reflects ethical standards of global relevance. And we don't need to invent those ethical standards—they exist in universal human rights."<sup>26</sup>

Globalization, "the compression of the world and the intensification of consciousness of the world as a whole,"<sup>27</sup> creates an unprecedented global interdependence and consciousness, introducing new actors to the process of development. Evidence that MNEs have sprung to the forefront

of this process, contributing significantly to the development of states through direct and indirect investment, is overwhelming. However, the effects of MNE investment remain contested; FDI creates jobs, promotes the transfer of technology and may have numerous other positive side effects. However, the liberalization of world trade and the process of deregulation and privatization of state functions has greatly strengthened the comparative position of companies. This new strength enables unscrupulous companies to abuse their powers and influence. An accountability gap then occurs if host states are either unable or unwilling to hold companies to reasonable minimum standards.<sup>28</sup> Due to this accountability gap and the lack of international regulation of corporations, corporate power has increased while their responsibility to the societies in which they work has decreased. Current frameworks for CSR fall tremendously short, whether due to lack of enforcement mechanisms or of corporate acceptance.

*These shortfalls necessitate the reconceptualization of the international framework of accountability, as well as of the legal status of MNEs under international law. Domestic laws and self-regulation, along with other soft law accountability mechanisms, have proven insufficient mechanisms of CSR. Guidelines for this inclusion and the scope of responsibility need to be defined. Along with this inclusion, strong implementation mechanisms must be employed to ensure full participation of corporations. This approach is not merely an attempt to inform and improve the current system of CSR but for an entirely new mechanism that does not suffer from the inadequacies of the existing framework.*

This proposed new mechanism demands the involvement of the World Trade Organization (WTO) and the World Bank (WB) in partnership with the UN in all levels of human rights accountability: formulation of trade policies, formulation of development strategies, resolution of disputes, and

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<sup>24</sup> Ibid, 2

<sup>25</sup> Winston, 79.

<sup>26</sup> Khan, Irene. Speech on behalf of Amnesty International delivered at "Public Eye on Davos" 24 January 2003.

<sup>27</sup> Robertson

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<sup>28</sup> Kamminga, Menno T. "Corporate Obligations under International Law." 71<sup>st</sup> conference of the International Law Association. 17 August 2004: Berlin. Pg. 3. Print.

enforcement of decisions.<sup>29</sup> These organizations are three of the most powerful democratic international institutions to date, all with panels to deliberate and settle member disputes, which can be utilized to enforce CSR. This partnership would extend WTO responsibilities from strictly trade to trade-related issues, including the promotion and protection of human rights and the environment, as well as extend WB responsibilities from only state development to corporate development. This partnership, the central concern of which is ensuring CSR accountability, depends on the cooperation wherever necessary of the ILO, the OECD, and numerous NGOs.

Though it remains unclear whether the WTO and the WB have contributed to the lax standards of CSR, it remains clear that their involvement is crucial to implementing strong measures of CSR to ensure sustainable and fair development. The UNCHR Norms provide a clear and thorough declaration of CSR measures to be upheld and must be adopted by this new partnership. The recognition of these Norms by the General Assembly secures their acclaim, but only their legal application in international law makes them binding rather than voluntary. By adopting these Norms as the regulatory framework of international CSR, the proposed WTO-WB-UN partnership upholds the highest measure of CSR in international development.

This new framework, while revolutionary, is not unattainable. The intention of the drafters of the Norms obviously was that obligations of companies would supplement and not replace the obligations of states, just as individual responsibility under international law has not replaced but coexists with state responsibility for the same offences.<sup>30</sup> The drafters of the Norms anticipated the reaction of the critics and included a clause in Principle I of the Norms according to which states continue to have primary responsibility to ensure respect for human rights. The same Principle provides that companies only have responsibilities 'within their respective

spheres of activity and influence.<sup>31</sup> In addition, free and liberal trade and development would not be at risk, as even free trade is not absolutely free; freedom to trade and develop is subject to rules, and a claim can be made that CSR forms a part of these rules. If the WTO and WB enforces CSR obligations on corporations, they would only be ensuring that trade and development are pursued within the rules that MNEs are prone to violate.<sup>32</sup>

Under this new framework, corporations contribute to the sustainable, just, and stable development of states, rather than detracting from it. The proposed partnership eliminates the CSR vacuum between states and corporations by holding corporations directly responsible for their violations of human rights and against the environment, as outlined in the UNCHR Norms. 

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29 Deva, 27.

30 Nollkaemper, Andre/ 'Concurrence Between Individual Responsibility and State Responsibility in International Law', 52 ICLQ (2003) 615-640.

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31 Kamminga, 5.

32 Ibid, 33.

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# Biopiracy: IPR Solutions for Developing Nations and their Indigenous Groups

– Andrea Scanlan

## ABSTRACT

Biopiracy, or the theft of biological resources or traditional knowledge, poses a serious threat to the livelihoods and survival of many communities in developing areas. Since current intellectual property laws have a distinctly western bias, they are difficult to apply to indigenous botanical knowledge and biological property rights. In this paper, I explore a number of potential solutions that minimize the detrimental economic and cultural effects that biopiracy can have on affected populations. Ultimately the most compelling course of action is a two-pronged approach that begins with improving negotiation skills on the national level while simultaneously working on an international system of sui generis intellectual property laws.

## I. BACKGROUND AND HISTORY OF BIOPIRACY AND INDIGENOUS INTELLECTUAL PROPERTY RIGHTS

The ethnobotanical and traditional knowledge of indigenous cultures holds great potential for economic profit and social benefit. Occasionally the pursuit of this economic benefit leads to exploitation or unfair distribution of the benefits of biodiversity and traditional knowledge. The term biopiracy originated from a small group of NGO's, especially the Rural Advancement Foundation International, who were concerned about the economic consequences of outside use of both biodiversity found in indigenous regions and the unapproved use of their traditional knowledge on the subject.<sup>1</sup>

Biopiracy is an offshoot of bioprospecting, a practice that, in itself, should not hold any specific threats to indigenous intellectual property rights (IPR). Bioprospecting refers to the "set of practices which seek to identify, conserve, capitalize upon and share the benefits of the genetic resources

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<sup>1</sup> Aoki, Keith. "Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection." *Indiana Journal of Global Legal Studies* 6.11 (1999): Print. P. 14

(and the traditional knowledge of their use.)”<sup>2</sup> However, when the process goes wrong, it can lead to biopiracy and unlawful or unfair extraction of resources. Biopiracy “brings together in one term the ambivalent promises that emerge at the intersection of science, nature and intellectual property rights.”<sup>3</sup>

Acts of biopiracy often fall into gray areas of the law and legal conventions. Biopiracy definitions vary depending on the source, but most include the basic acknowledgement that outside entities have appropriated the intellectual or biological property of a region without the owners’ prior informed consent.<sup>4</sup>

Biopiracy first occurs at the level of resource and biodiversity theft. The next level includes the use of cultural and traditional knowledge without permission from the originator. Finally economic biopiracy occurs when “domestic and international markets are usurped through the use of trade names and IPRs, thereby destroying local economies and national economies where the innovation took place, thereby wiping out the livelihoods and economic survival of millions.”<sup>5</sup>

Critics claim that the euro-american slant of current IPR laws prevents them from taking into account the nuances of indigenous traditional knowledge and the rights that they ought to have. Current laws and resolutions on biopiracy and its regulations are mainly contained in the Trade Related Aspects of Intellectual Property Agreement (TRIPS), World Intellectual Property Organization (WIPO) writings, the Convention on Biodiversity (CBD), World Trade Organization agreements (WTO) and any national laws or institutions like the US Patent office.<sup>6</sup>

Biopiracy of indigenous knowledge and biodiversity carries with it a number of moral and ethical dilemmas.<sup>7</sup> Additionally, even with attempts to mitigate these dilemmas, the benefits are often impossible to allocate fairly or not shared at all.<sup>8</sup> Most measurably, biopiracy can affect traditional users by bidding up the price of resources. It is a severe infringement on property rights when traditional users not only lack the economic profit from their traditional knowledge, but also are prevented from using it themselves.<sup>9 10</sup>

## II. POSSIBLE SOLUTIONS:

### *Sui Generis Systems*

Sui generis systems are those that are specifically tailored to changing circumstances that are unforeseeable when the law is drafted. More of a genre of law, sui generis is a way of writing law that acknowledges the impossibility of foreseeing all future developments and problems. Thus, they have flexibility to adapt to changes built into their legal terms. The current system of IPR laws exist in a vacuum that fails to take into account changing categories or classifications of intellectual property. By adopting a sui generis system, IPR could be more adaptable to fit changing and nuanced systems. “Unlike ‘mainstream’ intellectual property law—which historically has been associated with the advancement of commercial concerns—this new movement favoring recognition and protection of more general forms of knowledge has its roots in

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2 Hamilton, Chris. “‘Biopiracy’ as a Challenge to Intellectual Property Rights Systems.” *Development* 49.4 (2006). Print. P. 95

3 Hamilton “‘Biopiracy’ as a Challenge” P. 94

4 Shiva, Vandana. *Protect or Plunder?: Understanding Intellectual Property Rights*. London: Zed, 2001. Print. P. 66

5 Shiva P. 62

6 Mathur, Ajeet. “Who Owns Traditional Knowledge?” *Economic and Political Weekly* 38.42 (2003): 4471-481. Print. P. 4471

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7 Visser, Coenraad J. “Making Intellectual Property Laws Work For Traditional Knowledge.” *Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries*. By J. M. Finger and Philip Schuler. [Washington, D.C.]: Copublication of the World Bank and Oxford UP, 2004. 207-40. Print. P. 217.

8 Schuler, Philip. “Biopiracy and Commercialization of Ethnobotanical Knowledge.” *Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries*. By J. M. Finger. [Washington, D.C.]: Copublication of the World Bank and Oxford UP, 2004. Print. P. 160

9 Schuler P. 165

10 N.B. While it could be preferable for some indigenous groups to prevent biopiracy altogether, for the purposes of this paper it is assumed that resources will be appropriated regardless. Thus, the focus is on regulation of this appropriation and fair sharing of benefits.



human rights, labor and environmental law.”<sup>11</sup>This system has the potential to solve some of IPR laws’ problems with unbalanced allocation of rights to developed countries. However most of the current legal structures in place (especially internationally) are not well suited to change to sui generis systems. This necessitates the promotion of national laws that can interact with current property law systems.<sup>12</sup> Without any IPR protection, biological resources were considered the common heritage of mankind but many countries did not reap any economic benefit. Ajeet Mathur emphasizes that “new biodiversity laws in developing countries make ‘prior informed consent’ of the government a precondition to the export of biological resources.”<sup>13</sup> International systems have neither capability nor the authority to create such laws and to adapt in a timely manner to changing circumstances.

### **Eliminate patentability of plants**

Traditional knowledge, which according to WIPO can refer to any knowledge that pertains to “science, technology, agriculture, the environment, medicine, environmental biodiversity, expressions of folklore, and so on,”<sup>14</sup> is considered to be the common heritage of mankind. It receives this definition from WIPO and the Convention on Biological Diversity. Many critics assert that since the incalculable wealth of traditional knowledge, and the plants it pertains to, goes back thousands of years and was developed by communities around the globe, it “is and has always been a collective an public wealth, managed by local communities for the benefit of humanity.”<sup>15</sup> Revoking patents on life could reduce the misappropriation of benefits and the exploitation of traditional knowledge and biological resources by developed countries.<sup>16</sup> If no one is able to patent biological resources, all

those who have developed them or encounter them can share the benefits. Often, “for many campaigning against biopiracy, it is not who owns [patents on life] but that [they] are owned at all that matters.”<sup>17</sup> Patents are supposed to protect individual knowledge so that it may be used for the public good. Patenting traditional knowledge does the opposite—taking information out of the public domain so that individuals can benefit from it. This can also be applied to chemicals and genes that are isolated and separated from their original source. Despite the process involved in isolating them, “materially, the traits and properties for which the patent has been claimed already exist in nature... [and] cannot be claimed as creation.”<sup>18</sup>

### **Reforms for IPRs in Developed Nations**

As the system currently operates in many developed countries, patents are far too quick to be granted. They have moved away from extensive examination of patents before approval toward an adversarial process to dispute patents after they are already granted.<sup>19</sup> Patent law must consider the novelty and prior use of a product or technology before it is approved. As Dr. Vandana Shiva makes clear, “If a patent system fails to honestly apply criteria of novelty and non-obviousness in the granting of patents related to indigenous knowledge, then the system is flawed and needs to change.”<sup>20</sup> It should be a concern not only because of the blatant disregard for the facts shown by the USPTO and other large, developed-country patent offices, but also because the process of contesting patents is arduous and expensive and therefore not one easily undertaken by developing countries. Patent offices need to take initiative ensure that the investigation of patents is done before granting patents instead of granting them quickly and leaving any heavy research to post-award litigators.<sup>21</sup> While there may be complaints of slow moving patent processes, if the patent office cannot be trusted to distribute property rights in a fair and equitable manner, they are not serving their purpose. Patent offices effectively shirk any

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11 Halewood, Michael. “Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection.” *McGill Law Journal* 44.953 (1999). Print. P. 955

12 Halewood P. 957

13 Mathur P. 4476

14 Bodeker, Gerard. “Traditional Medical Knowledge, Intellectual Property Rights and Benefit Sharing.” *Cardozo Journal of International and Comparative Law* 11.2 (2003). Web.

15 Hamilton, “Biodiversity, Biopiracy and Benefits” P. 172

16 Schuler P. 177

17 Hamilton, “Biodiversity, Biopiracy and Benefits” P. 172

18 Shiva P. 50

19 Schuler P. 176

20 Shiva P. 62

21 Schuler P. 176

responsibility to create conditions for fairness and transparency in the patent process. Reforms need to be made to ensure that every possible effort is made to ascertain the origin and originator of potential patents before they enter into law.

### **Create knowledge-sharing contracts**

Knowledge sharing contracts have the potential to balance the needs of two parties involved in the biopiracy and traditional knowledge debate. The landmark initiative by Merck and the Costa Rican National Biodiversity Institute (INBio) which agreed to share biological samples and information that had the potential for pharmaceutical development in exchange for staff training at Merck facilities, one million US dollars in compensation over a two year period, \$130,000 of laboratory equipment for use at the University of Costa Rica and royalties on any pharmaceuticals developed as a result of the partnership. The Merck/INBio agreement can serve as a model to other countries of a program that addresses several problems and is a collaborative effort, not just a bilateral business undertaking.<sup>22</sup> Several aspects of the agreement should be highlighted as a guide for other countries. Firstly, the testing and research of samples is all done in Costa Rica. This creates local awareness and involvement for future developments.<sup>23</sup> Knowledge sharing contracts such as this one have advantages over treaties like the CBD in that they have a spirit of cooperation that is generally absent in negotiations over the CBD. These sorts of arrangements better represent each party's opinion than treaties, "whose negotiations commonly, if not exclusively, involve a great deal of posturing for the benefit of political constituencies. Specifically, parties in real life may be willing to make concessions which, from an abstract perspective, seem intolerable."<sup>24</sup> Additionally, Costa Ricans retain rights to all

samples collected and databases compiled, giving them power in future negotiations.<sup>25</sup>

### **Empower communities to negotiate within national and international frameworks**

There is general agreement that IPRs have failed to protect peripheral groups from exploitation. One solution is to sensitize, without encouraging or discouraging adoption of the global North's system, these populations to the realities of the current IPR system in dominance internationally.<sup>26</sup> Fostering greater understanding of IPR frameworks and procedures is the best way to encourage greater indigenous participation in global and domestic policy making. Just as it is vital that the developed world understand the differences in indigenous conception of IPRs, indigenous groups will benefit greatly from a more complete understanding of the North's conception of traditional knowledge, culture and property. Once this is in place, they will be able to better identify the needs of their populations with regards to international policies.<sup>27</sup> Currently many poorer countries and marginalized groups within them are unaware of what needs to be patented, how to go about it, and misunderstand the implications of allowing other parties to claim IPRs within their borders. By sending the right people to the negotiating table, developing countries can be better equipped to deal with the legal battles that inevitably take place in international negotiations.<sup>28</sup> Empowerment for negotiation starts with sensitization to the issues through education and its effects would be threefold: it would give populations the information necessary to make informed decisions on resource access, strengthen development by clarifying the role of IPRs in protecting and compensating resource owners, and give target populations a voice in international negotiations.<sup>29</sup>

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25 Ragavan P. 518

26 Staral, Johanna M., and Jean M. Sekerak. "Fighting Biopiracy at the Source: Sensitizing Indigenous Communities to Westernized Intellectual Property Rights and the Threat of Biopiracy." *Case Western Reserve University School of Law*. Web. 2012.

27 Staral

28 Lawrence, S., and J. Skordis. "Practical Strategies to Combat Biopiracy." *The Lancet* 363.9403 (2004): 166. Print.

29 Staral

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22 Zebich-Knos, M. "Preserving Biodiversity in Costa Rica: The Case of the Merck-INBio Agreement." *The Journal of Environment & Development* 6.2 (1997): 180-86. Print.

23 Ragavan, Srividhya. "New Paradigms for Protection of Biodiversity." *Journal of Intellectual Property Rights* 13 (2008): 514-22. Print. P. 517

24 Coughlin, Michael D. "Using the Merck-INBio Agreement to Clarify the Convention on Biological Diversity." *Journal of Transnational Law* 31.2 (1993): 337-75. Web.

### **Improve benefit sharing**

Benefit sharing is a primary component of the CBD and with improvements could reduce the damaging effects of biopiracy. The CBD addresses benefit-sharing generally by emphasizing the need for "fair and equitable sharing of benefits" in Article 1. It then becomes more specific in Article 16 by promoting technology transfer as a form of benefit sharing and in Article 19 by explaining the fair handling of benefits of biotechnology research between developed and developing countries.<sup>30</sup> Overall, benefit-sharing arguments focus on the need for prior informed consent (PIC) and mutually agreed terms (MAT).<sup>31</sup> However, beyond these vague terms, interpretations vary on how they should be implemented anywhere from royalties, upfront payments, milestone payments, and/or rewards to transfer of biotechnology.<sup>32</sup> Ultimately, if biopiracy's greatest harm lies in misallocation of benefits from biodiversity resources, then creating frameworks for equitable allocation of resources and their benefits will solve its biggest problems. This could be achieved by requiring those applying for patents to prove very clearly where the knowledge they use originated from and demonstrate the prior informed consent of the originator while proving the negotiation of benefit sharing proposals.<sup>33</sup> While the practical implications of creating functional benefit-sharing frameworks are daunting, the solution does address many of the most damaging social and economic effects of biopiracy. Improvements in the implementation of benefit-sharing agreements show a great deal of promise in compensating all parties involved in bioprospecting and biotechnology enterprises.

### **Traditional Resource Rights**

For many indigenous groups, IPRs present a danger to their way of life, cultural expression and the biodiversity on which they often depend. Traditional resource rights (TRR) are a part of "an integrated rights concept that recognizes the

inextricable link between cultural and biological diversity and sees no contradiction between the human rights of indigenous and local communities, including the right to development and environmental conservation."<sup>34</sup> Many proponents of the development of TRRs assert that IPRs are not an effective mechanism to achieve indigenous empowerment. As an alternative to the usual top-down development structure, supporters of TRRs assert that they more appropriately address the issue at hand instead of trying to fit the complex politics and nuances of indigenous property into the framework of established IPRs.<sup>35</sup> International law does not really exist in this area, and what does address it only touches on the issues at hand. TRRs would prevent the privatization and commoditization of communally shared concepts and property. The use of IPR and patents in these areas is not only incomprehensible for the originators of knowledge but also impossible in many cases since their traditional knowledge dates back generations.

### **Knowledge databases to prove prior use**

Much of the contention that comes with biopiracy allegations and patent litigation stems from a lack of documentation of the original owner or innovator of indigenous traditional knowledge or biodiversity. Knowledge databases are one tool that can help minimize the uncertainty of ownership of traditional knowledge and biodiversity. Knowledge databases are developed for a number of reasons, sometimes by libraries, archives or anthropologists and sometimes by indigenous groups themselves to prevent their knowledge from being used without acknowledgement. Recording knowledge so it exists as documentation allows for the possibility of crosschecking claims

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30 United Nations Environment Programme. *Convention on Biological Diversity*. 1993.

31 Sampath, Padmashree Gehl. *Regulating Bioprospecting: Institutions for Drug Research, Access, and Benefit-sharing*. Tokyo: United Nations UP, 2005. Print. P. 39

32 Sampath, P. 177

33 Hamilton, "Biodiversity, Biopiracy and Benefits" P. 169

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34 Posey, Darrell Addison, and Graham Dutfield. *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*. Ottawa: International Development Research Centre, 1996. Web.

35 Posey, Darrell Addison. "Indigenous Peoples and Traditional Resource Rights: A Basis for Equitable Relationships." Reading. Workshop on Indigenous Peoples and Traditional Resource Rights. Green College Centre for Environmental Policy and Understanding. University of Oxford. 28 June 1995. Web.

and proving prior existence.<sup>36</sup> Reasons in support of knowledge databases are numerous, including the potential to preserve indigenous knowledge and property and protect against its loss. Ensuring IPR protections of indigenous knowledge can do this. Enhancing recognition of indigenous knowledge by sharing it with outsiders has the potential to benefit humanity greatly while still preserving indigenous culture.<sup>37</sup> An example of a fairly successful registration system is India's Traditional Knowledge Digital Library, which holds over 36,000 formulations from Ayurvedic medicinal practice and features categories to facilitate the links between traditional formulations and proposed patents. Creating knowledge databases as a defensive intellectual property strategy will prove to be an integral step to prove prior existence<sup>38</sup> and prevent misappropriation of indigenous intellectual property.<sup>39</sup> However, it will be vital that these databases address who owns the database and the information in it and whether these owners are different entities.

### III. RECOMMENDED COURSE OF ACTION:

#### ***Start with negotiation at the national and move towards sui generis in IPR laws internationally***

Given the unyielding nature of current IPR laws and the cultural and representational differences that prevent real change for indigenous populations, the short-term solution would be to promote indigenous negotiation training and education so that they can assert their rights within the already established framework. Since the "current global framework is entrenched...it might be more effective to make the system work for the disadvantaged while civil society takes on the

larger task of reforming the system altogether."<sup>40</sup> If indigenous groups and developing countries, the main parties negatively affected by biopiracy and intellectual property rights failures, were to send the right people to the negotiating table, they would be "better equipped to navigate the legal minefield."<sup>41</sup>

We see this functioning well in several instances, including a set of trade talks in Cancun, Mexico in September of 2003. Negotiators were trained in the skills necessary to participate and assert their rights in negotiations and the level of preparedness surprised many.<sup>42</sup>

Sensitizing target populations to the nuances of negotiation not only assists them in their efforts in international organization but it could help create an atmosphere of change in national legal systems, bringing about the possibility of much needed reforms to IPR laws.<sup>43</sup> If affected groups are empowered to negotiate within the national framework, their needs are more likely to be given a place in the national agenda. As more attention is paid at the national level, the international level could follow.

Thus, the long-term solution must first begin with short-term assertion of rights on the part of the marginalized groups that are in need. The process towards a sui generis system of laws to regulate intellectual property and prevent misappropriation of resources must begin with national systems of rights and obligations. Once these systems are put into place, it would be more likely that they could be reflected in international law.

The final step in the process from national negotiation to international law would be the eventual harmonization of the current international policies and guidelines currently in place. Once national frameworks have been established, it stands to reason that international laws should be tailored to mirror states' needs. TRIPS, the CBD and WIPO policies will need to be reevaluated and move toward a sui generis structure as well.

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36 Anderson, Jane. *Indigenous/Traditional Knowledge & Intellectual Property*. Duke University School of Law, 2010. Durham, NC: Center for the Study of the Public Domain, 2010. Web.

37 Tagle, Yovana Reyes. "The Protection of Indigenous Knowledge Related to Biodiversity: The Role of Databases." *SYLFF* (2007): 131-45. Web.

38 Anderson

39 Tagle

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40 Lawrence and Skordis P. 166

41 Ibid.

42 Ibid.

43 Staral

Since international policy is slow to react to changing circumstances, the built-in flexibility and adaptability of sui generis would prove to have greater longevity and functionality in the long run.<sup>44</sup>


The development of sui generis law system could “establish a bridge between [the] indigenous/local community and national and international legal systems, in order to secure the effective recognition and protection of rights which derive from customary law and practice.”<sup>45</sup> If indigenous groups and developing countries can move towards a system in which they do not have to continually attempt to translate their needs for intellectual property rights into an inappropriate system, issues of biopiracy and other related problems will become manageable.

## APPENDIX I. NOTABLE BIOPIRACY CASES

**Turmeric:** Turmeric root has a long history of use. In Ayurvedic medicine, it is used to treat “anemia, asthma, burns, conjunctivitis, dental problems, diabetes, diarrhea, pain and many other ailments.”<sup>46</sup> There are over 350 scientific studies listed using turmeric. Two Indian scientists at a US university received a patent from the USPTO for turmeric-derived wound treatment. However, their patent was overturned in 1997 and is considered the first case of successful reversal of a biopiracy patent.<sup>47</sup> Before the reversal, Indian scientist N.R. Subbaram pointed out, “Under the US law, a new medicinal property of a known compound could be patented, but not the known property. To secure patent protection even for the new property, the applicant has to submit substantial medical evidence which is not very easy.”<sup>48</sup>

**Phyllanthus niruri:** The Fox Chase Cancer Centre of Philadelphia applied to the European Patent office

for a patent to use phyllanthus niruri for use in treating viral hepatitis B. It sources its information back to Dr. KM Nadkarni’s Indian Materia Medica, which notes that the plant had traditionally been used for treatment of jaundice (which presents itself in all forms of hepatitis.) The Fox Chase Centre isolated the use of the plant for Hepatitis B and claimed novelty based on the targeted application to a particular strain of the virus.<sup>49</sup>

**Neem:** The neem tree, or *azadirachta indica*, is a member of the mahogany family that is indigenous to India. Long used for human and animal medicine, toiletries and cosmetics, it is also an effective insect repellent and fungicide in nature. The chemical firm WR Grace: European held patents on substances derived from a neem seed extract.<sup>50</sup> The substances used in the patents had been used traditionally for generations. The inventors list a number of solvents that can be used to extract the neem chemicals; the processes of using these solvents are their grounds for novelty. After a well-publicized protest over the patents surfaced, the patents were revoked based on public prior use. However, the detrimental effects of the patent are still being felt. The price of neem seed has exceeded the budgets of ordinary people and manufacturers of pesticides purchase almost all of the neem seed now collected.<sup>51</sup> 

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44 Sampath P. 4480

45 Anderson P. 34

46 Schuler 166

47 Schuler 167

48 Kalshian, Rakesh. “Turmeric Biopiracy”. *Outlook India*. 31 July 1996. Web. 10 May 2012. <<http://www.outlookindia.com/article.aspx?201841>>.

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49 Shiva P. 54

50 Schuler P.162

51 Shiva P.59

## APPENDIX II. TREATIES AND ORGANIZATIONS:

**World Trade Organization (WTO):** The WTO is a forum for governments to negotiate trade agreements and a place to settle trade disputes. Its origins lie in the General Agreement on Tariffs and Trade (GATT). As of May 10, 2012, it has 155 member countries.<sup>52</sup>

**Agreement on the Trade Related Aspects of Intellectual Property (TRIPS):** Negotiated in the Uruguay round in 1986, the TRIPS agreement introduced intellectual property rules into the multilateral trading system. It creates intellectual property rights in the common international rules. All members of the WTO are automatically included in the agreement.<sup>53</sup>

**World Intellectual Property Organization (WIPO):** The World Intellectual Property Organization dedicated to the use of intellectual property as a means of stimulating innovation and creativity through services, legal framework and infrastructure. WIPO was established in 1967 and has 185 member states.<sup>54</sup>

**Convention on Biological Diversity (CBD):** The Convention on Biological diversity was inspired by the world community's growing commitment to sustainable development and emphasizes the conservation of biological diversity, sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.<sup>55</sup> The CBD has 193 parties and 168 signatories.<sup>56</sup>

## ADDITIONAL WORKS CONSULTED:

"Bioprospecting and Biopiracy in the Americas | North American Congress on Latin America." *North American Congress on Latin America*. Web. 01 Apr. 2012. <<http://nacla.org/news/bioprospecting-and-biopiracy-americas>>.

Börlmann, Catherine. "M. A. Bengwayan, Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia." *International Journal on Minority and Group Rights* 11.3 (2004): 327-28. Print.

Brown, Michael F. *Who Owns Native Culture?* Cambridge, MA: Harvard UP, 2003. Print.

Clapp, R. A., and C. Crook. "Drowning in the Magic Well: Shaman Pharmaceuticals and the Elusive Value of Traditional Knowledge." *The Journal of Environment & Development* 11.1 (2002): 79-102. Print.

Garrity, G., and J. Huntercevera. "Bioprospecting in the Developing World." *Current Opinion in Microbiology* 2.3 (1999): 236-40. Print.

Maskus, Keith E. *Intellectual Property Rights in the Global Economy*. Washington, D.C.: Institute for International Economics, 2000. Print.

Simeone, Tonina. "Indigenous Traditional Knowledge and Intellectual Property Rights." *Indigenous Traditional Knowledge and Intellectual Property Rights (PRB 03-38E)*. Parliament of Canada. Web. 01 Apr. 2012. <<http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0338-e.htm>>.

Tupper, Kenneth W. "Ayahuasca Healing beyond the Amazon: The Globalization of a Traditional Indigenous Entheogenic Practice." *Global Networks* 9.1 (2009): 117-36. Print.

Wang, Yali, Yuchun Wang, Brian McNeil, and Linda M. Harvey. "Maca: An Andean Crop with Multi-pharmacological Functions." *Food Research International* 40.7 (2007): 783-92. Print.

Wu, Haoliang, and Bingbin Lu. "Prior Consents: Preventing Offensive Genetic Engineering Patents Against Indigenous People's Rights." *Global Jurist Frontiers* 5.1 (2005). Print.

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52 "Who We Are." *WTO*. Web. 10 May 2012. <[http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm)>.

53 "Intellectual Property: protection and enforcement" *WTO*. Web. 10 May 2012. [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)

54 "What Is WIPO?" *What Is WIPO?* World Intellectual Property Organization. Web. 10 May 2012. <<http://www.wipo.int/about-wipo/en/>>.

55 "History of the Convention." *www.cbd.int*. Convention on Biological Diversity. Web. 10 May 2012. <<http://www.cbd.int/history>>.

56 "List of Parties." *www.cbd.int*. Convention on Biological Diversity. Web. 10 May 2012. <<http://www.cbd.int/convention/parties/list/>>.



# Cultural Heritage and European Policy

– A. Tayler Marshall

## ABSTRACT

This paper deals with the transnational issue of Cultural Heritage. Cultural Heritage has become increasingly significant in the past 80 years as the economic benefits and transnational cooperation have surpassed expectations. Additionally, the legislation and program initiatives have been adopted by governments and non-governmental organizations to increase cultural awareness and protection of artifacts across state borders. However, these efforts have proven to have their failings regarding preservation. Many of these legislative pieces lack universal support and consideration amongst other shortcomings. The economic benefits that have been gained due to increased efforts focused at Cultural Heritage have exceeded expectations and developed local/state economies. Therefore, the recommended solution to the preservation of Cultural Heritage incorporates supranational cooperation, targeted legislation and the continuation of current programs and practices.

## BACKGROUND

The conservation of Cultural Heritage (CH) artifacts and sites creates incentives for European states to monitor significant cultural and natural heritage. The impacts of preservation vary from local and state economic benefits to greater understanding of a preceding culture. Cultural Heritage, also known as World Heritage, has two fundamental sectors: intangible and tangible. Intangible Cultural Heritage is the larger focus of United Nations Education, Scientific and Cultural Organization (UNESCO) and entails the "practices, representations, expressions, knowledge, skills... that communities, groups, and in some cases individuals recognize as part of their cultural heritage."<sup>1</sup> Inversely, Tangible Cultural Heritage includes "buildings and historic places, monuments, artifacts, etc., which are considered worthy of preservation for the future."<sup>2</sup> UNESCO, as

1 "Text of the Convention for the Safeguarding of Intangible Cultural Heritage." *UNESCO Culture Sector*. UNESCO. Web. 17 Mar 2012. <<http://www.unesco.org/culture/ich/index.php?lg=en&pg=00022>>.

2 "Tangible Cultural Heritage." *UNESCO Office in Cairo*. UNESCO. Web. 25 Mar 2012. <<http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/>>.

the largest force in preserving CH proposes regular international legislation to preserve heritage pieces while funding restoration projects.

Internationally, 142 countries (16 European)<sup>3</sup> ratified the Convention for Safeguarding of Intangible Cultural Heritage (2003) indicating a strong interest in the preservation of CH. However, the movement towards preservation began in 1931 with the Athens Charter. The seven points outlined in the manifesto developed the CH movement and includes mandates to fund projects, establish guidelines and promote national legislation to work in conjunction with supranational efforts. The original efforts of the Athens Charter were followed with a more focused and goal oriented Venice Charter. This transnational effort coordinated seventeen nations,<sup>4</sup> a vast majority of which were European, to create guidelines for preserving monument sites as if they were a moveable piece of art.

The pressing need for cultural heritage efforts is present in the European Union (EU) via economic incentives. The EU has seen growth in local/state economies as well as decreased unemployment by expanding the knowledge of its citizens and visitors about culturally significant artifacts and sites. In Røros, Norway, the Research Council of Norway observed a 7 per cent overall growth in employment and income due to the preservation of a local heritage site.<sup>5</sup> Additionally, the Norwegian government is seeing unprecedented return rates on its investment in cultural heritage finding that "for each krone public investment in maintenance and rehabilitation of culturally valuable buildings, society receives 10 kroner in return... each workplace directly attached to the cultural heritage sector creates on average 26.7 associated jobs."<sup>6</sup>

## RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (HAGUE CONVENTION)

European States have been intertwined with armed conflict throughout history. The Hague Convention of 1954 secured protection for cultural heritage artifacts and sites during times of armed conflict. European States account for 30 signatories<sup>7</sup> of the First Protocol which recognized that armed conflict was an international method of resolution to conflict; however, the conflicts that prompted the original publication of the convention damaged cultural heritage artifacts beyond repair. An additional Protocol to the Convention, added in 1999, enhanced the enforcement efforts of external bodies while supplementing the punishments of perpetrators whose efforts intentionally damage a cultural heritage site or artifact.

Arguably, post-conflict restitution efforts are greatly affected by cultural heritage and as history has shown, various restitutions depend upon the successful return of items of cultural significance to the nation of origin. Ratification by international bodies benefits from "mutual commitment of more than 115 States with a view to sparing cultural heritage from consequences of possible armed conflicts."<sup>8</sup> The commitment to preserve cultural heritage, even in times of conflict, can only be effective if pursued by all countries in the world. The remaining non-signatory nations have no obligation to consider cultural artifacts thereby undermining the ability to protect CH internationally. Despite the disadvantageous gap between signatories and non-signatories, "the scope of protection has been greatly widened."<sup>8</sup>

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3 See Appendix 1

4 See Appendix 2

5 Bowitz, Einar and Karen Ibenholt. "Economic Impacts of Cultural Heritage – Research and Perspectives." *Journal of Cultural Heritage* 10.1 (2009): 1-8. *Academic Search Premier*. Web. 28 Mar 2012.

6 White Paper, 2004. "Living with Cultural Heritage. Government White Paper to the Norwegian Parliament no. 16 (2004-2005)" pg. 46. (Leve med kulturminner. St. melding nr. 16. (2004-2005) s 46).

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7 See Appendix 3

8 Hastings, L.J. 1078 (1975-1976). *International Law and the Protection of Cultural Property in Armed Conflicts*: Nahlik, Stanislaw E.



## INTERNATIONAL REGISTER OF CULTURAL PROPERTY UNDER SPECIAL PROTECTION

In connection with the Hague Convention of 1954, the International Register of Cultural Property under Special Protection identifies items deemed worthy of special protection during armed conflict as well as during peaceful times. The International Register advises that nations follow procedures to ensure items of grave importance are protected by submitting documentation verifying location and "adequate distance"<sup>9</sup> from any vulnerability; adequate distance is not defined by UNESCO, however, except on a case-by-case basis.

Submitting the necessary requirements for protection under the International Register of Cultural Property under Special Protection, however, does not guarantee that items of cultural significance protection in the case of conflict. Rather, the International Register compiles a list of significant artifacts whose location is deemed an acceptable distance from any military danger.<sup>10</sup> The International Register installed a limit of the number of items that are listed in an effort to prioritize them by greatest cultural importance. Many CH preservation groups have compiled lists in an attempt to make nations aware of the importance and location of CH items to avoid during conflict, but require the International Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 to instill any repercussions. These registrars are of vital importance for governments to declare what is culturally significant to them and has allowed for international communities to acknowledge these items as well.

## 2003 UNESCO CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE

The 2003 UNESCO Convention focused on the preservation of intangible CH, which until 2003 was largely overlooked. The Convention, preceded by 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, previously was UNESCO's sole instrument regarding intangible CH. The 2003 Convention defines intangible CH to include dance, language and other culturally significant and traditional practices. Intangible CH, however, is not just any form of human activity; rather, it must include some form of symbolism and shared cultural significance. The Convention includes the "mutual respect" clause. Within this clause, communities impose cooperation and respect, forcibly, upon one another other; however many traditions and cultures have developed out of resistance to another group. Thus, "including the 'mutual respect' standard can however disqualify much of the world's traditional culture from coverage by the Convention."<sup>11</sup> The 2003 UNESCO Convention addresses the flaws with the 1989 Recommendation in that it included more regulatory measures while the 1989 Recommendation was simply based on "soft law." The 2003 Convention focuses the efforts of previous documents and gives the documents legitimate force upon which to act. This Convention has become the basis for many of the expansions within the field of CH.

## LIST OF INTANGIBLE CULTURAL HERITAGE IN NEED OF URGENT SAFEGUARDING

The List of Intangible Cultural Heritage in Need of Urgent Safeguarding was established as a result of the 2003 Convention to preserve elements in grave danger of elimination. The intangible nature of performing arts, rituals, festivals, crafts and oral traditions/folklores makes them eligible for protection under this list. The process, from

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<sup>9</sup> "Convention for the Protection of Cultural Property in the Event of Armed Conflict; the Hague Convention, 1954." *International Register of Cultural Property under Special Protection*. (1997): 1-4. Web. 25 Mar. 2012. <<http://unesdoc.unesco.org/images/0011/001134/113431Eo.pdf>>.

<sup>10</sup> "Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954." *UNESCO Legal Instruments*. UNESCO, n.d. Web. 6 May 2012. <[http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html)>.

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<sup>11</sup> Kurin, Richard. "Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal." *Museum International* 56.1/2 (2004): 66-77. *Academic Search Premier*. Web. 28 Mar. 2012.

submission to listing an intangible item, takes two years before UNESCO intervenes to assist; this listing type deals with urgency rather than the scale of a threat against it in a more defensive procedure.

As of December 2011, 142 nations have approved the List of Intangible Cultural Heritage in Need of Urgent Safeguarding<sup>12</sup>. European countries account for 64<sup>13</sup> intangible CH elements inscribed onto the list since 2008. This list, as one of three major record keeping efforts, tracks the most urgently threatened CH elements in the world in terms of possible extinction. Preserving these rituals, dances, etc. means these elements can gain higher esteem and given great consideration and funding internally.

## EXPANSION OF THE WOMEN, INTANGIBLE HERITAGE AND DEVELOPMENT PROGRAM (WIHDP)

One of UNESCO's current projects includes the WIHDP. The Islamic Republic of Iran in 1999 proposed that the role of women in intangible CH be studied and presented to UNESCO via the International Symposium on the role of Women in the Transmission of Cultural Heritage in Tehran.<sup>13</sup> The symposium found that "an integral part of continuing programmatic efforts by UNESCO to refine our understanding of intangible cultural heritage and to promote women's priorities, perspectives and contributions to rethinking of development."<sup>14</sup> The regions selected to participate in the program include Africa, Arab States, Latin America, and Asia. Women have played significant roles in these regions and have a large contribution to make to intangible CH; from rituals involving birth, marriage and death to handicrafts and medicine.

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12 "Cultural Protection has no borders." *Coalition por la diversitie culturelle*. (2012): Web. 28 Mar. 2012. <<http://www.cdc-ccd.org/Cultural-protection-has-no-borders?lang=fr>>.

13 See Appendix 4

14 UNESCO. Intangible Cultural Heritage Sector. *SYNTHESIS REPORT ACTIVITIES IN THE DOMAIN OF WOMEN AND INTANGIBLE HERITAGE: International editorial meeting and future activities in the domain Iran National Commission for UNESCO Tehran June 2001*. Tehran: UNESCO, 2001. Web. <<http://www.unesco.org/culture/ich/doc/src/00160-EN.pdf>>.

Europe's interests, regarding the WIHDP, are to support the programs and expand the knowledge of these regions thereby facilitating greater relations in addition to gender relations. Europe stands to benefit from the development of women's roles in these societies and through their contribution to the social context of the world. Interestingly, the WIHDP views CH differently than most of UNESCO's programs in that it looks to a specific characteristic of the population to identify intangible elements of CH. Furthermore, the aims of the program included supporting full participation of women in local government and society by inspiring their contributions to CH; each region developed specific goals for successful implementation.

## CONTRIBUTIONS TO THE WORLD HERITAGE FUND (WHF)

The WHF is a controversial financing mechanism which developed out of the 2003 Convention to identify, assist and finance CH. The debate surrounding the Convention is concerning voluntary versus compulsory contributions to the fund. Initially, compulsory funds of 1% of the state's subvention to the regular budget were to be required of every state<sup>15</sup>. After three meetings of the state parties, it was identified that the WHF could be funded through the UNESCO general budget but that compulsory contributions could provide stability and overall success of the entire 2003 Convention. Finally, the General Convention of UNESCO became the funding source for the WHF which had already been functioning prior to the Convention. Annually, the WHF provides \$4 million<sup>16</sup> to state parties in need of international assistance. The Convention allows for additional voluntary contributions from state parties, other non-governmental organizations and benefactors to contribute to the fund. Alternately, if the project has a specific goal or objective, the WHF provides

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15 Blake, Janet. *Commentary on the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage*. 1st. Leicester: Institute of Art and Law, 2006. 105-107. Print.

16 "Funding." *UNESCO World Heritage Convention*. UNESCO Cultural Sector, 2011. Web. 18 Mar 2012. <<http://whc.unesco.org/en/funding>>.

contributions in the form of Funds-In-Trust as well as assistance in Rapid Response situations<sup>15</sup>.

The WHF is a successful measure to ensure that projects receive necessary funding; its original debate surrounding how the fund should function financially has not dampened its abilities to provide for the CH projects of pressing concern and goal-orientation. However, greater compulsory funding could only benefit its ability to promote CH in the international community and succeed for an additional thirty years.

### **SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE AT THE NATIONAL LEVEL**

UNESCO's battle to preserve CH has, at times, been stifled by state sovereignty. Cultural boundaries that are inconsistent with geographical boundaries have found this to be particularly difficult to overcome. The goals of member states are directly correlated to the success of policy and the approach taken by initiatives. The relationship between "sovereignty of State has historically been given priority over the recognition of cultural rights, the relationship of the State to UNESCO's cultural rights approach deserves special attention."<sup>17</sup> Given the dependence of UNESCO on Member States, forcibly pursuing policy would not benefit CH in anyway. However, in the 2003 Convention, UNESCO calls upon Member States to pursue its own policies of preservation instead of waiting for policy to be forced upon them.

In addition to the economic benefit, European nations stand to gain from internal regulation. The European Commission notes that European Countries benefit from stronger cultural programs and the EU will pursue "the promotion of evidence-based policy making, in particular through the development of comparable quality statistics on culture across the EU<sup>18</sup>" to improve cultural

diversity and dialogue and well as the EU's international relations. The EU has pursued more CH preservation by creating programs like the Cultural Capital of Europe (CCE).<sup>19</sup> Since 1985, two cities have been chosen by the European people to represent them as the CCE and be the living proof to the world of Europe's cultural diversity.<sup>20</sup>

### **EDUCATION, AWARENESS-RAISING AND CAPACITY-BUILDING (EARCB)**

The 2003 Convention called for educational programs aimed at young people through non-formal means of transmission. The origin of the EARCB article, within the Convention, aims to educate youth and create more awareness and dedication to preservation.<sup>21</sup> UNESCO has since created articles, books, pamphlets and other informative literature on the comprehension levels of youth which include graphics, images of traditions and examples of intangible items. Specifically, UNESCO produced books to create awareness about current projects like the book "Tell me about... Living Heritage."<sup>22</sup> This book, a short 48 pages of text which includes pictures, a glossary of terms and well over fifty tangible and intangible preservation projects is one such education effort targeting Europe's youth.

Educating fellow Europeans about the initiatives of UNESCO has enhanced appreciation and commitment to projects. Additionally, the education objectives of UNESCO increase knowledge of the international objectives, preservation options and assistance of international organizations. Supplementing the European Union's (EU) goals of increasing knowledge of CH has numerous and long lasting benefits.

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19 Cultural Capital of Europe: [cities chosen] ... provide living proof of the richness and diversity of European cultures.

20 Appendix 5

21 Blake, Janet. *Commentary on the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage*. 1st. Leicester: Institute of Art and Law, 2006. 118. Print.

22 *Tell me about... Living Heritage*. Paris: UNESCO, 2008. 1-48. Print.

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17 Blake, Janet. *Commentary on the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage*. 1st. Leicester: Institute of Art and Law, 2006. 118. Print.

18 European Commission. Culture and Education. *European Agenda for Culture*. 2012. Web. <[http://ec.europa.eu/culture/our-policy-development/european-agenda\\_en.htm](http://ec.europa.eu/culture/our-policy-development/european-agenda_en.htm)>.

## TOWN PLANNING

The idea of town planning presents an interesting adaptation to policy that does not exist in other facets of CH protection: prevention. By taking preventative measures when building modern buildings near historic infrastructure, the protections taken enable preservation and CH protection. One effort to preemptively preserve towns and structures states that "...with a view to delineating a zone where new construction should be prohibited and proposing regulations to govern urbanization in the surrounding area."<sup>23</sup> To protect tangible CH, during the planning process, cities can enforce thoughtful consideration efforts and regulate zoning around culturally significant or traditional sites. In Great Britain, town planning went from preventative to legislative with the 1967 Civic Amenities Act.<sup>20</sup> It stipulates that local planning authorities and agencies must designate sections of urban areas as conservation areas. This legislation allows for seizure of buildings/sites that are not being safeguarded according to legislative standards. This legislation created incentives for restoring old buildings by creating a fund where owners were given 50% of the costs of restoration.<sup>24</sup> Similar legislation enacted in many countries throughout Europe conserve the traditional feel of cities before the sites were deemed unsalvageable.

Europe has made the most advanced and notable steps towards preservation of buildings through town planning efforts. These efforts can finance the preservation of buildings, but it does not directly assist with more significant heritage sites. The benefits extend to keeping the traditional styles of European towns and give more cultural significance throughout Europe.

## POLICY RECOMMENDATION

An adaptive approach to CH should include preventative initiatives and reactive legislation to preserve both tangible and intangible CH. By combining a number of solutions, European nations

can continually lead the preservation of regional heritage and world heritage.

Europe has the ability, through the EU and UNESCO, to combine efforts to protect CH.

The European Commission's production of the Culture Plan every five years encourages further development of individual country legislation and through the supranational EU. However, even with internal initiatives, there are still a number of sites placed on the List of Intangible Cultural Heritage in Urgent Need of Safeguarding annually. The EU emphasized promotion and maintenance of tangible CH, acknowledging that focus needs to shift to intangible CH.

Protection of CH does not have one solution. Tangible CH has benefitted tremendously from the Hague Convention, which in a Utopian society, would be ratified by all members of the international system. Given that universal ratification is unlikely, efforts to expand the number of signatories would only contribute to the growing success of conservation and protection. Secondly, the efforts to consider tangible heritage sites prior to erecting any modern structures will also provide preventative consideration to sites. The efforts made by individual European countries to consider CH prior to building modern structures benefit the landscape and culture of the nations. The financial benefits of tangible CH have proven to outweigh costs associated and benefitted a number of local economies.

Intangible CH has proven to be the more difficult solution. Adoption of the 2003 Convention and all its subparts pertaining to intangible CH could dramatically alter the current direction of CH. Through UNESCO, European states have many options for facilitating protection of intangible CH. However, each state may find that the solution for intangible CH depends upon their internal needs. Education about intangible CH seems to be an overarching objective that can benefit any of Europe's states. The depth and complexity of intangible CH will prove a challenge to any nation. The Convention's creation of the List of Intangible Cultural Heritage in Need of Urgent Safeguarding provided much needed assistance for intangible CH elements. Member states have to begin the process

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23 Sorlin, Francois. *Europe: The Comprehensive Effort*. Paris: UNESCO, 1975. 66-80. Print.

24 Shankland, Graeme. *Why Trouble with Historic Towns?*. Paris: UNESCO, 1975. 24-42. Print.

of listing items on the international registers and continue to contribute to the WHF.

Individual nations have a responsibility to be reactive and recognize the policy changes and in turn act upon them. The protection of tangible CH begins with proactive policy via town planning and concludes with additional signatories of the Hague Convention. Intangible CH continues to grow with the use of the many registrars and lists available for countries and continuation of the WHF programs. The benefits of CH have proven extensive and Europe has continually embraced the opportunity to explore additional methods to preservation.

## APPENDIX 1

Signatories to the Convention for Safeguarding of Intangible Cultural Heritage

"The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)."*UNESCO Culture Sector*. UNESCO, 28 12 2011. Web. 25 Mar 2012.

(Group I)\* Austria, Belgium, Cyprus, Denmark, France, Greece, Iceland, Italy, Luxembourg, Monaco, Norway, Portugal, Spain, Sweden, Switzerland, Turkey

(Group II)\* Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Montenegro, Poland, Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, Tajikistan, The former Yugoslav Republic of Macedonia, Ukraine, Uzbekistan

(Group III) Argentina, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, Venezuela

(Group IV) Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Democratic People's Republic of Korea, Fiji, India, Indonesia, Iran, Japan, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Mongolia, Nepal, Pakistan, Palau, Papua New Guinea, Philippines, Republic of Korea, Sri Lanka, Tonga, Turkmenistan, Vanuatu, Viet Nam,

(Group V [a]) Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Sao Tome and Principe, Senegal, Seychelles, Togo, Uganda, United Republic of Tanzania, Zambia, Zimbabwe

(Group V [b]) Algeria, Egypt, Iraq, Jordan, Lebanon, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, Yemen.

\*European Signatories

## APPENDIX 2

### Signatories (Representatives) of the Venice Charter

"The Venice Charter, 1964." *ICOMOS*. UNESCO-ICOMOS, 06 Jul 2005. Web. 28 Mar 2012. <<http://www.international.icomos.org/venicecharter2004/index.html>>.

Piero Gazzola (Italy), Chairman

Raymond Lemaire (Belgium), Reporter

Jose Bassegoda-Nonell (Spain)

Luis Benavente (Portugal)

Djurdje Boskovic (Yugoslavia)

Hiroshi Daifuku (UNESCO)

P.L de Vrieze (Netherlands)

Harald Langberg (Denmark)

Mario Matteucci (Italy)

Jean Merlet (France)

Carlos Flores Marini (Mexico)

Roberto Pane (Italy)

S.C.J. Pavel (Czechoslovakia)

Paul Philippot (ICCRUM)

Victor Pimentel (Peru)

Harold Plenderleith (ICCRUM)

Deoclecio Redig de Campos (Vatican)

Jean Sonnier (France)

Francois Sorlin (France)

Eustathios Stikas (Greece)

Mrs. Gertrud Tripp (Austria)

Jan Zachwatowicz (Poland)

Mustafa S. Zbiss (Tunisia)

## APPENDIX 3

### Signatories of the Hague Convention

"Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954." *UNESCO Conventions*. UNESCO, n.d. Web. 25 Mar 2012. <<http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E&order=chrono>>.

In order of date of deposit of instrument:

Egypt, San Marino\*, Myanmar, Mexico, Poland\*, Hungary\*, Russian Federation, Ukraine\*, Belarus\*, France\*, Jordan, Libya, Cuba, Monaco, Holy See\*, Syrian Arab Republic, Romania\*, Israel, Thailand, Italy\*, India, Brazil, Bulgaria\*, Netherlands\*, Pakistan, Iran, Nicaragua, Liechtenstein\*, Lebanon, Ghana, Belgium\*, Malaysia, Albania, Ecuador, Democratic Republic of the Congo, Mali, Nigeria, Norway, Luxembourg, Cameroon, Madagascar, Gabon, Guinea, Cambodia, Switzerland\*, Austria\*, Cyprus\*, Turkey, Indonesia, Germany\*, Iraq, Morocco, Yemen, Kuwait, Niger, Tunisia, Greece\*, Sweden\*, Burkina Faso, Senegal, Peru, Spain\*, Croatia\*, Tajikistan, Georgia, Slovenia\*, Czech Republic\*, Slovakia\*, Bosnia and Herzegovina\*, Armenia, Azerbaijan, Guatemala, Finland\*, Kazakhstan, the former Yugoslav Republic of Macedonia, Costa Rica, Colombia, Lithuania\*, Uruguay, Republic of Moldova, China, Panama, Serbia, Dominican Republic, El Salvador, Honduras, Denmark\*, Latvia\*, Paraguay, Estonia\*, Portugal\*, Canada, Bangladesh, Montenegro, Argentina, Japan, Saudi Arabia, Bahrain, Chile, Barbados.

\**European Signatories*

## APPENDIX 4

European List of Intangible Cultural Heritage  
in Need of Urgent Safeguarding

Processional Giants and Dragons (Belgium France)

The Patum de Berga (Spain)

Opera dei Pupi, Sicilian Puppet Theatre (Italy)

The Mystery Play of Elche

The Mevlevi Sema Ceremony (Turkey)

The Kihnu Cultural Space (Estonia)

Georgian Polyphonic Singing (Georgia)

The Carnival of Binche (Belgium)

The Bistritsa Babi – Archaic Polyphony, Dances and Rituals from the Shoplounk Region (Bulgaria)

The Calus Ritual (Romania)

The Canto a tenore, Sardinian Pastoral Songs (Italy)

The Baltic Song and Dance Celebrations  
(Estonia/Latvia/Lithuania)

The Arts of Meddah, Public Story Tellers (Turkey)

The Azerbaijan Mugham (Azerbaijan)

Albanian Folk Iso-polyphony (Albania)

The Canti in paghjella: A secular and liturgical oral tradition of Corsica (France)

Asikik (minstrelsy) tradition (Turkey)

Aubusson tapestry (France)

Buso festivities at Mochas: masked end-of-winter carnival custom (Hungary)

Doina (Romania)

The festivity of Saint Blaise, the patron of Dubrovnik (Croatia)

Irrigators' tribunals of the Spanish Mediterranean Coast (Spain)

Karagoz (Turkey)

Lace making in Croatia (Croatia)

Lefkara laces of Lefkaritika (Cyprus)

Maloya (France)

Nestinarstvo, messages from the past: the Panagy of Saint Constantine and Helena (Bulgaria)

Procession of the Holy Blood in Bruges (Belgium)

Procession Za Krizen on the Island of Hvar (Croatia)

The scribing tradition in French timber framing (France)

Seto Leelo, Seto polyphonic singing tradition (Estonia)

Spring procession of Ljelje/Kraljice (Croatia)

Traditional manufacturing of children's wooden toys in Hrvatsko Zagorje (Croatia)

Two-part singing and playing in the Istrian scale (Croatia)

Whistled language of the Islands of La Gomera (Spain)

Traditional Sohbet meetings (Turkey)

Semah, Alevi-Bekatsi ritual (Turkey)

Shrovetide door-to-door procession and masks in the Hilineck area (Czech Republic)

The sinjska Alka, a knights' tournament in Sini (Croatia)

Surtines, Lithuanian multipart songs (Lithuania)

The traditional art of Azerbaijan carpet weaving (Azerbaijan)

The Mediterranean Diet (Spain/Greece/Italy/Morocco)

Kirkpinar oil wrestling festival (Turkey)

Krakelingen and Tonnekensbrand, end-of-winter bread and fire feast (Belgium)

Human Towers (Spain)

The hopping procession of Echternach (Luxembourg)

Houtem Jaarmarkt, annual winter fair and livestock market (Belgium)

The gastronomic meal of the French (France)

Gingerbread Craft from Northern Croatia (Croatia)

Falconry (Belgium/France/Czech Republic/Spain)

Flamenco (Spain)

Compagnonnage network for on-the-job transmission of knowledge and identities (France)

The craftsmanship of Alençon needle lace-making (France)

The chant of the Sybil on Majorca (Spain)

Aalst carnival (Belgium)

Tsiattista poetic dueling (Cyprus)

Ride of the Kings in the South-east Czech Republic (Czech Republic)

Nijemo Kolo, silent circle dance of the Dalmatian hinterland (Croatia)

Leuven age set ritual repertoire (Belgium)

Equitation in the French Tradition (France)

Fado, urban popular song of Portugal (Portugal)

Festivity of 'la Mare de Deu de la Salut of Algemesi (Spain)

Becarac singing and playing from Eastern Croatia (Croatia)

Ceremonial Keskek tradition (Turkey)

## APPENDIX 5

### Cultural Capitals of Europe

"Past European Capitals of Culture." *European Commission Culture*. European Commission, 28 Apr 2011. Web. 6 May 2012. <[http://ec.europa.eu/culture/our-programmes-and-actions/doc2485\\_en.htm](http://ec.europa.eu/culture/our-programmes-and-actions/doc2485_en.htm)>.

1985: Athens

1986: Florence

1987: Amsterdam

1988: Berlin

1989: Paris

1990: Glasgow

1991: Dublin

1992: Madrid

1993: Antwerp

1994: Lisbon

1995: Luxembourg

1996: Copenhagen

1997: Thessaloniki

1998: Stockholm

1999: Weimar

2000: Avignon, Bergen, Brussels, Helsinki, Krakow, Reykjavik, Prague, Santiago de Compostela

2001: Porto and Rotterdam

2002: Bruges and Salamanca

2003: Graz

2004: Genoa and Lille

2005: Cork

2006: Patras

2007: Luxembourg and Sibiu

2008: Liverpool and Stavanger

2009: Linz and Vilnius

2010: Essen for the Ruhr, Pécs and Istanbul

2011: Tallinn and Turku

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# Communication, Integration, and Identification — An Effective Language Policy for the European Union

– Emily Kay Brookhart

## ABSTRACT

The official language policy of the European Union states that all official languages of EU Member States are automatically official languages of the EU, a policy introduced when the organization only consisted of six states with four official languages. The European Union has since grown to include 27 Member States with 23 official languages, and its language policy is no longer adequate. Language plays a key role in political, economic, and social institutions by determining how individuals access and participate with those institutions. The constant language conflict in the EU prevents real integration of Member States, progression of a European identity, and development of the Union as a whole. The European Union can solve this conflict by adopting an asymmetrical language policy, encouraging its citizens to learn two languages in addition to their mother tongues, and nationalizing any necessary translations.

## BACKGROUND

The official language policy of the European Union states that all official languages of EU Member States are automatically official languages of the EU and must be used in all official EU communications.<sup>1</sup> This policy began in 1958 with a declaration by the Council of Ministers of the European Communities, an organization that consisted of only six states and four official languages at the time.<sup>2</sup> The European Union now consists of 27 Member States whose 500 million inhabitants speak 23 official languages.<sup>3</sup>

Language plays a key role in political, economic, and social institutions by determining which individuals have the power to engage in democracy, employment, licensing, and social society. As a result, language is “an instrument of

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1 [European Council. “Council Regulation No. 1 Determining the Languages to be Used in the European Economic Communities.”](#) 2

2 Caviedes, Alexander. “The Role of Nation-Building Within The European Union.” *Dialectical Anthropology* 27 (2003), 253.

3 [European Commission. \*Speaking for Europe: Languages in the European Union.\* \(2008\), 7](#)

participation, access, or deprivation.”<sup>4</sup> As such, the European Union’s language policy seeks to ensure equality among its people and fulfill the ideals of “democracy, transparency, and the right to know.”<sup>5</sup>

To achieve these goals, the EU translates all of its communications into all languages and promotes lifelong language learning among its citizens. The European Union employs 1,650 full time translators, not including oral interpreters, volunteers, or freelance linguists,<sup>6</sup> and it devotes over 1.045 billion Euros to translation services yearly.<sup>7</sup> The Union has introduced new tools into the translation process, including computerized SMART translation software<sup>8</sup> and a virtual “Translator’s Workbench” that suggests translations of phrases based on previous translations of similar material.<sup>9</sup> To aid translation further, The European Parliament requires its Members (MEPs) to keep all communications under 15 pages in length and encourages them to use simple sentences and avoid slang and jokes.<sup>10</sup> The Union also sponsors education and exchange programs that promote language learning for all EU citizens throughout their lives.<sup>11</sup> All education programs have an ultimate goal of a population fluent in at least three languages.<sup>12</sup>

However, despite its worthwhile goals and the resources devoted to achieving them, the EU’s language policy is not adequate for such a large and globalizing Union. Common complaints focus

on “translation and interpretation errors, delays caused by the translation of documents, delays caused by interpretation of oral communication and its paralyzing effects on discussions, and the opacity of resulting documents.”<sup>13</sup> Perhaps more problematic are the language barriers that exist within the European populace. Although citizens have the right to work freely in any EU state, language barriers limit EU labor movement.<sup>14</sup> The constant language conflict in the EU prevents real integration of Member States, progression of a European identity, and development of the Union as a whole.<sup>15</sup>

The European Union needs to shed its outdated language policy in favor of one more suited to its growth and the globalizing world in which it exists. An effective policy would maintain democratic principles while still encouraging cultural identity, social integration, and the ideals of Europe’s knowledge-based economy.<sup>16</sup>

## POSSIBLE SOLUTIONS

### ***Controlled Multilingualism***

As EU citizens cannot be expected to follow laws that they cannot understand, the EU must provide legislation in all EU languages.<sup>17</sup> The European Parliament completes this task with a limited version of a controlled multilingualism policy.<sup>18</sup> In this model, all translations are conducted through the use of pivot languages: usually English, French, and German. Documents and speeches are first translated into one of those three languages and then into the other 22, reducing the need for translators with the ability to work directly

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4 Caviades, 252

5 European Commission, *Speaking*, 13

6 Grindheim, Jan Erik, and Terje Lohndal. “Lost in Translation? European Integration and Language Diversity.” *Perspectives on European Politics and Society* 9:4 (2008), 460.

7 Fidrmuc, Jan, and Victor Ginsburgh. “Languages in the European Union: The Quest for Equality and its Cost.” *European Economic Review* 51 (2007), 1352.

8 Cordis. “EU Project Seeks to Remove Language Barriers.” *Community Research and Development Information Service*, 2007.

9 Owen, James. “With 20 Official Languages, Is EU Lost in Translation?” *The European Union: Opposing Viewpoints*. Ed. Noël Merino. (Farmington Hills, MI. Gale Cengage Learning, 2008), 164.

10 Fidrmuc & Ginsburgh, “Languages in the European Union,” 1353

11 European Commission, *Speaking*, 10

12 Ibid, 12

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13 Mamadouh, Virginie. “Dealing with Multilingualism in the European Union: Cultural Theory Rationalities and Language Policies.” *Journal of Comparative Policy Analysis: Research and Practice* 5 (2002), 330.

14 CIVITAS. “Irish Emigration, a Lesson in Language Barriers in the EU.” *The Institute for the Study of Civil Society*, 2010.

15 Yim, Jonathan. “Feasibility of the Language Policy of the European Union.” *International Law* 41 (2007), 134.

16 European Commission. “EU Languages and Language Policy.”

17 Yim, 130

18 Gazzola, Michele. “Making Multilingualism in the European Union: Language Policy Evaluation for the European Parliament.” *Language Policy* 5 (2006), 410.

between lesser-known languages.<sup>19</sup> Full controlled multilingualism also includes conducting smaller meetings in only one language, with fewer translation services, and then translating any final documents into all 23 official languages.<sup>20</sup>

Controlled multilingualism ensures that all communications are available to all EU citizens and that no EU official is prevented from serving because of his or her language ability.<sup>21</sup> It also decreases the need for specialized translators with the ability to translate directly, for example, from Estonian to Maltese.<sup>22</sup> However, controlled multilingualism nearly doubles the number of required translations by adding a relay step to most translations, thereby increasing translation delays and making language services an even more labored process. In addition, all translation-related miscommunications still exist and frequently increase, similar to playing a game of telephone with multiple languages.<sup>23</sup>

### **Reduced Multilingualism: English, French, & German**

The European Commission, though officially working in 23 languages, conducts nearly all of its business only English, French, and German. When Commission members finish their final drafts, translators then convert the final copies into all official languages.<sup>24</sup> Working only in these three languages is a productive move for the Commission, reducing the need to translate working copies at each stage of production, only to translate them again later.

The use of English, French, and German has more potential than the EC currently gives it, however. All EU institutions could adopt these languages as their sole working languages. German is the most widely spoken mother tongue in the Union, with over 90 million native speakers, while English and French are roughly tied with 65 million native speakers

each.<sup>25</sup> With the addition of foreign language speakers, English is the most widely spoken language in the Union, with just over half of the EU population conversant.<sup>26</sup> Altogether, 81% of the EU population has a working knowledge of at least one of these three languages, a higher percentage than any other three-language combination.<sup>27</sup>

An English, French, and German reduced multilingualism policy succeeds in communicating with a large majority of EU citizens but still alienates at least 19% of European people. The system would not fully uphold European equality ideals and would marginalize several smaller language communities.

### **Monolingualism**

The success of any national identity depends on a language that its people can speak, read, and write.<sup>28</sup> While Member State identity takes precedence in the European Union, the 2009 Eurobarometer reports that a European identity is growing among inhabitants and ties primarily to the euro and democratic principles.<sup>29</sup> The absence of a public sphere with a common language, however, creates a "considerable obstacle for such an identity to [more fully] develop."<sup>30</sup>

According to the 2006 Eurobarometer, 70% of EU citizens agree with the statement that everyone in the Union should be able to speak a common language,<sup>31</sup> for reasons of both economics and European identity. Smaller language communities especially tend to support the concept of a single EU language, primarily because there is little

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19 European Commission, *Speaking*, 3

20 Ibid, 14

21 Fidrmuc & Ginsburgh, "Languages in the European Union," 1367

22 European Commission, *Speaking*, 13

23 Fidrmuc, Jan, Victor Ginsburgh, and Shlomo Weber. "Voting on the choice of core languages in the European Union." *European Journal of Political Economy* 25 (2009), 58.

24 European Commission, *Speaking*, 13

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25 Fidrmuc & Ginsburgh, "Languages in the European Union," 1364

26 European Commission, *Speaking*, 5

27 Fidrmuc & Ginsburgh, "Languages in the European Union," 1358

28 Caviedes, 250

29 Eurobarometer. *Special Eurobarometer 303: The 2009 European Elections Report*. European Parliament and European Commission, 2009, 34.

30 Grindheim & Lohndal, 452

31 Eurobarometer. *Special Eurobarometer 243: Europeans and Their Languages*. European Commission, (2006), 53

chance that their languages would ever be used as an EU working language.<sup>32</sup>

However, larger language communities tend to be opposed to single language usage, for their own languages would likely be compromised and lose function.<sup>33</sup> In addition, with current language distribution, sole use of any single language would alienate at least 50% of the EU population.<sup>34</sup>

### ***Lingua franca options are discussed below.***

#### **Monolingualism: Esperanto**

While a pre-existing European language could cause an increase in language-based power for native speakers of that language, planned languages such as Esperanto provide non-political monolingual solutions. Esperanto is an artificial language developed in 1887 by L.L. Zamenhof of Poland with a simple grammatical structure and a logical vocabulary, making it relatively easy to learn.<sup>35</sup> Because of its logical nature, the teaching of Esperanto also supports future language learning and increases the chances of students becoming fluent in those other languages.<sup>36</sup>

Because Esperanto is simple and politically neutral, it has the potential to increase European communication while preserving national linguistic sovereignty.<sup>37</sup> However, actual speakers of the language are too few to be successful. The Universal Esperanto Association has fewer than 20,000 members, and there are only an estimated 150,000 total speakers worldwide.<sup>38</sup> Despite its political

potential, Esperanto lacks the necessary popularity to be effective as a European Union *lingua franca*.

#### **Monolingualism: French**

French is the oldest working language in the EU, having been the official language of three of the European Communities' original six members. It is now the sole working language of the European Court of Justice.<sup>39</sup> Maurice Druon, a proponent of the language, states that the ECJ uses French because the language is precise and has "fewer syntactical ambiguities" than other major European languages, giving it potential to be used as the primary language in all EU institutions.<sup>40</sup>

Despite its historical and linguistic significance, however, the language has lost the influence it once had. With the 2004 expansion of the EU into Eastern Europe, only 34% of the EU population speaks French.<sup>41</sup>

#### **Monolingualism: English**

English is a practical choice for a monolingual Europe simply because of the extent of its usage. Although spoken natively by fewer people than German, English acts as the first foreign language for 38% of EU citizens, making it the most widely spoken language in the Union.<sup>42</sup>

Primary concerns with English state that it is a "language killer," decreasing the value of the other languages that it slowly replaces.<sup>43</sup> Though language "death" is highly unlikely, loss of function is a legitimate fear for large, non-English languages.<sup>44</sup> In addition, English may be a poor choice for an EU *lingua franca* simply because it is a linguistically unstable tongue. It contains "idiosyncrasies, vague grammar, fragile phonetics, [and an] unwieldy vocabulary."<sup>45</sup> Of all of the

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32 Ammon, Ulrich. "Language Conflicts in the European Union: On Finding a Politically Acceptable and Practicable Solution for EU Institutions that Satisfies Diverging Interests." *International Journal of Applied Linguistics* 16:3 (2006), 323.

33 Ibid

34 Fidrmuc, et al, "Voting," 58

35 Katzner, Kenneth. *The Languages of the World, New Edition*. (London. Routledge, 1995), 36-37.

36 Christiansen, Pia. "Language Policy in the European Union: European/English/Elite/Equal/Esperanto Union?" *Language Problems & Language Planning* 30:1 (2006), 37.

37 Maurais, Jacques. "Towards a New Linguistic World Order." *Languages in a Globalising World*. Ed. Jacques Maurais and Michael A. Morris. (Cambridge. Cambridge University Press, 2003), 31.

38 Fettes, Mark. "The Geostrategies of Interlingualism." *Languages in a Globalising World*. Ed. Jacques Maurais and Michael A. Morris. (Cambridge. Cambridge University Press, 2003), 43.

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39 Bilefsky, Dan. "Linguistic Don Quixote Comes to Brussels." *The European Union: Opposing Viewpoints*. Ed. Noël Merino. (Farmington Hills, MI. Gale Cengage Learning, 2008), 175.

40 Ibid

41 Fidrmuc & Ginsburgh, "Languages in the European Union," 1357

42 European Commission, *Speaking*, 5

43 Mamadouh, 330

44 Ammon, 323

45 Maurais, 30-31

European languages, English is among the worst choices to facilitate European communication.<sup>46</sup>

Despite its flaws, though, English has become a universal language, with more people using it as a foreign language than native, both in Europe and worldwide.<sup>47</sup> English has a “pluricentric character,” giving it “a de-ethnicized and culturally-unbounded quality that allows speakers to use it without automatically identifying with one nation.”<sup>48</sup> In addition, usage of English continues to grow throughout Europe, particularly among youth (see Appendix 2). It is the only language in Europe for which fluency rates are significantly higher among younger generations than older.<sup>49</sup>

## NATIONALIZED TRANSLATION

Translation of all documents could be streamlined by nationalizing the translation process: putting Member States in charge of their own translation needs. If states were to bear the costs of translation themselves, many would opt for considerably different linguistic regimes than are currently in place.<sup>50</sup>

This system seemingly places an unfair disadvantage on smaller states, which all but rely on translation subsidization from larger states.<sup>51</sup> Those larger states are far more likely to receive documents initially produced in their native languages, and therefore will require less translation work. The smaller states, meanwhile, have only a very small chance that their languages will be used, and thus must translate all documents.

However, it is often those smaller states that require the least translation services due to increased multilingual capability. For example, given that only 370,000 people speak Maltese, translators for

the language are extremely difficult to procure,<sup>52</sup> currently costing the EU nearly 10 times more per person than more common languages.<sup>53</sup> However, the vast majority of people in Malta speak fluent English.<sup>54</sup> Translation, then, may not be necessary for many documents.

This trend continues in other countries with small language communities. Over 90% of people in Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovakia, Slovenia, and Sweden speak another language.<sup>55</sup> Luxembourg has the highest concentration of second language speakers, with 99% of its citizens fluent in a foreign language.<sup>56</sup>

## MOTHER TONGUE PLUS TWO

In 2002, the European Council passed a resolution encouraging all EU citizens to learn at least two languages in addition to their native tongues.<sup>57</sup> All EU language education programs since have revolved around this goal but have been only marginally successful. The 2006 Eurobarometer states that only 28% of Europeans speak at least two foreign languages, while 44% speak no foreign language at all.<sup>58</sup>

An effective use of the Mother Tongue Plus Two policy would put greater emphasis on the education of its citizens by expanding programs already in place, such as the Comenius, Erasmus, Grundtvig, and Leonardo da Vinci programs directed toward primary and secondary students, university students, adults, and vocational education, respectively.<sup>59</sup> It would also dictate a planned lingua franca for all citizens' first foreign language, and encourage students to choose a second language based on regional location or economic viability.

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52 Owen, 163

53 Fidrmuc & Ginsburgh, “Languages in the European Union,” 1364

54 Owen, 164

55 European Commission, *Speaking*, 5

56 *Special Eurobarometer 243*, 8

57 [European Council. “Council Resolution of 21 November 2008 on a European Strategy for Multilingualism \(32008G1216\(01\)\).”](#) 1.

58 *Special Eurobarometer 243*, 8

59 European Commission, *Speaking*, 10

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46 Ibid, 30

47 Modiano, Marko. “Inclusive/Exclusive? English as a Lingua Franca in the European Union.” *World Englishes* 28:2 (2009), 208.

48 Cavedies, 254

49 Fidrmuc, et al, “Voting,” 58

50 Fidrmuc & Ginsburgh, “Languages in the European Union,” 1368

51 Ibid, 1357

An increased Mother Tongue Plus Two policy would decrease language barriers while still managing to sustain a secure ethnic and cultural identity for all citizens.<sup>60</sup> It would also contribute to a stronger economic market with better labor mobility, allowing citizens to take advantage of their freedom to work or study in other EU states.<sup>61</sup>

## ASYMMETRICAL LANGUAGE POLICY

An asymmetrical language policy is one in which all participants are invited to use their own languages to communicate with the EU, but the Union only produces documents and communicates outwardly in one language.<sup>62</sup> The central idea is based on a "Speak/Write 23, Listen/Read 1" system.

Such a policy reduces the barriers to incoming communication introduced by monolingual practices. Speakers fluent in foreign languages may still prefer to speak primarily in their own languages<sup>63</sup> and are able to do so using an asymmetrical policy. The system is well adapted for a Parliamentary setting as well. Because EU citizens elect their Parliamentarians directly, no EU policy should prevent an MEP from serving on the basis of language ability.<sup>64</sup> Also, "if the Parliament does not recognize their language, it is less likely that citizens will recognize it as being their parliament."<sup>65</sup> The asymmetrical language policy corrects for both of these concerns, allowing all citizens to communicate with the EU in their own tongues while still greatly reducing translation needs.

Although correcting for barriers to approach, the asymmetrical policy does adopt several of the other problems of monolingualism. Because EU institutions would provide outgoing

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60 Christiansen, 21

61 [European Commission. "Communication From the Commission To The European Parliament and the Council: The European Indicator of Language Competence."](#) 3.

62 Gazzola, 402

63 Fidrmuc & Ginsburgh, "Languages in the European Union," 1363

64 Owen, 163

65 Ginsburgh, Victor, and Shlomo Weber. "Language Disenfranchisement in the European Union." *JCMS* 43:2 (2005), 284.

communication in only one language, the policy would potentially alienate all non-speakers of that language.

## POLICY RECOMMENDATION

In order to facilitate communication, integration, identity, and labor mobility among its institutions and the citizens of its Member States, the European Union should take a three-tier combination approach toward its language policy. First, for its own workings, the EU should adopt an asymmetrical language policy with English as a lingua franca, allowing all participants to speak their own native language, but working and producing documents only in English.

The choice of English as a planned language stems from the fact that most citizens, when choosing a foreign language, will opt for the language that will "increase the communication potential...of their repertoire more than any other language would."<sup>66</sup> English is quickly becoming that universal language with the highest communication potential. The popularity of English in Europe is still growing, particularly among younger generations. Though spoken by only 50% of the entire EU population, 66% of 15-24 year olds spoke English fluently in 2004.<sup>67</sup> It is the only practical option for a common European language.

The second leg of a reformed language policy must revolve around education, for any planned common language would require that language to adopt a key role in basic education across the Union.<sup>68</sup> The Mother Tongue Plus Two policy should remain in place but require English as the first foreign language learned. In addition, translation funds no longer required in Commission and Parliament proceedings should be redirected toward language education to expand current offerings to reach all EU citizens.

Because a complete English education for all EU citizens will take many years, if not decades, to complete, some translation of EU proceedings must


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66 Mamadouh, 333

67 [European Commission. \*Many Tongues, One Family: Languages in the European Union.\* \(2004\), 5.](#)

68 Mamadouh, 332

still occur to prevent alienation of marginalized citizens. Therefore, the third leg of a reformed language policy should include the nationalizing of translation. The EU would produce documents only in English, and Member States would then be responsible for any necessary translations. This translation approach would reduce the specialization and overall number of translators required by allowing each translator to only work between English and one other language. It would also give each state the tailored translation needed for its particular language.

Citizens would still be encouraged to use their native tongues in their own lands and to acquire, as their second foreign languages, the tongues of other countries in which they would live. This would maintain the strength and national identity of each state and language. Meanwhile, a common European language would encourage the development of a European identity, by "enhancing regional mobility and...a common public sphere, especially through the media."<sup>69</sup> Costs would be reduced, communication would be enhanced, and the Union would become more closely integrated despite its growing size. 

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Europa.eu. "Living in the EU." European Union, 2012.

<sup>69</sup> Ammon, 322

## APPENDICES

### *Appendix 1: Official Languages of the European Union*

Bulgarian	Finnish	Italian	Romanian
Czech	French	Latvian	Slovak
Danish	German	Lithuanian	Slovene
Dutch	Greek	Maltese	Spanish
English	Hungarian	Polish	Swedish
Estonian	Irish	Portuguese	

*European Commission. "Languages." 2012.*

### *Appendix 2: Percentage of pupils in upper secondary level general education who are learning English, German, or French as a foreign language. (2007)*

Country	E	G	F	Country	E	G	F
Belgium	94.4	28.4	48.1	Luxembourg	97.0	--	--
Bulgaria	86.1	40.3	15.3	Hungary	73.3	49.9	6.2
Czech Republic	100.0	72.2	25.0	Malta	63.5	1.7	7.9
Denmark	99.9	71.9	22.6	Netherlands	100.0	86.2	70.1
Germany	94.3	--	28.7	Austria	96.9	--	54.1
Estonia	92.6	44.1	6.1	Poland	90.0	64.0	10.0
Ireland	--	18.2	60.5	Portugal	50.7	1.6	15.1
Greece	94.0	2.9	8.6	Romania	94.8	11.6	83.6
Spain	94.6	1.1	27.1	Slovenia	98.9	77.0	10.2
France	99.4	22.8	--	Slovakia	97.7	72.6	16.0
Italy	86.9	7.7	21.4	Finland	99.5	35.4	19.7
Cyprus	88.1	2.4	38.3	Sweden	99.9	32.4	22.4
Latvia	94.9	35.1	4.1	United Kingdom	--	2.6	6.0
Lithuania	82.3	27.2	5.4				

Europa.eu. "Living in the EU." European Union, 2012.





# The Ambiguity of Cyber Warfare: Regulating Cyber War for the 21st Century

– Stephen A. Weeks

## ABSTRACT

The recent cyber attacks in 2008, during the Ossetia War between Georgia and Russia, provide a current case in point fueling concerns that cyber warfare is the new battleground of the 21st century. Despite this growing concern, the international community has not yet established cyber warfare rules that recognize internationally accepted norms, mitigate damage to critical government and private sector resources, avoid harm to citizens and hold government actors accountable. Addressing this issue will be an international effort, involving already established norms and future treaty work. The international community must work together to mitigate cyber warfare.

## CYBERWARFARE: THE NEW BATTLEGROUND

In 2008 during the war between Georgia on one side and Russia and South Ossetia on the other, cyber attacks shut down informational news websites in South Ossetia only a few days before Georgia's military invaded South Ossetia. During the conflict, Georgia's parliamentary and foreign affair web sites were hacked. Both countries denied any involvement in the computer attacks and attributed them to individuals. These events highlight the difficulty states face in distinguishing between cyber war and already recognized acts of cyber terrorism and crime.<sup>1</sup> The potential responses to such acts vary depending upon the perceptions concerning the cyber act.

As disruption to computers and network systems increase, countries have focused on whether cyber attacks on computer and network systems constitute a risk to national security and whether cyber attacks are a new form of warfare or terrorism. For some, such as U.S. Air Force General Robert Kehler, it is clear that such attacks are a form of warfare, and "there needs to be a full conversation about doctrine and there needs to be

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1 "Marching off to cyberwar: The internet: Attack launched over the internet on Estonia and Georgia highlights the difficulty of defining and dealing with 'cyberwar'," *The Economist* December 4<sup>th</sup>, 2008 (<http://www.economist.com/node/12673385>).

a full conversation about rules of engagement.”<sup>2</sup> For others, such as Thomas Rid, computer hacking is merely a code for acts that actually are espionage, sabotage, and subversion, but fall far short of war.<sup>3</sup> These differing views emphasize the need to define what constitutes an act of aggression in cyber warfare and the need to develop rules for responding to such acts.

Governments have been caught off guard by the rapid advancement of cyber attacks, and doctrine and rules of engagement do not currently exist for responding to them.<sup>4</sup> However, since 2011 the U.S. has made it clear that any cyber attack on the U.S. by a state actor or otherwise will be responded to by the use of traditional military force.<sup>5</sup> This leads the issue down a path of cyber war moving from debate to a real time issue. Yet, there is no general agreement on what an act of cyber aggression looks like.

Currently, there is no widely accepted definition of cyber warfare. Before an effective doctrine for responding to cyber war can be discussed, it must first be defined. Both Susan Brenner and General Charles Dunlap provide a clear combined proposal of what acts constitute cyber warfare. Cyber warfare is the conduct of military state operations by virtual means,<sup>6</sup> which causes death or injury to persons or damage to or destruction of property and other tangible objects, by Law of Armed Conflict (LOAC) standards, through armed force.<sup>7</sup>

As nations begin to focus their energies on developing doctrines and weapons for conducting and responding to cyber warfare operations, it is essential that the debate encompass more than recognition that cyberspace is a new battleground. Governments must recognize the need to reach agreement regarding what rules regulate this new battlefield. A code of conduct governing cyber warfare must be established and understood so governments are capable of easily navigating and dealing with cyber war as it occurs.

## INTERNATIONAL HUMANITARIAN LAW: SOLUTION 1

Some experts propound solving the cyber warfare conundrum by utilizing constructs that are already in place. Michael Schmitt believes that International Humanitarian Law (IHL), namely Geneva and its later Protocols, are applicable to governing cyber war so long as some key sets of understanding are applied to cyber techniques.<sup>8</sup> According to Schmitt, the clear caveat is that the solution must fit within the LOAC ideals of war.<sup>9</sup>

Schmitt is not alone in his assessment of the need for humanitarian law interpretations. In a series of meetings on the importance of cyber war, the International Council of Red Cross (ICRC) concluded that the use of IHL to deal with cyber attacks and cyber war was the best available course of action in regulating the issue.<sup>10</sup> ICRC reinforced this point by bringing in experts to address cyber war and argue the applicable uses of IHL<sup>11</sup> and concluded IHL should be applied to cyber warfare given its

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2 Kendra Srivastava, *U.S. to Define Cyber-Warfare “Rules of Engagement”*, Mobilmedia, March 12, 2012, (<http://www.mobiledia.com/news/112902.html>).

3 Thomas Rid, “Cyber War Will Not Take Place,” *The Journal of Strategic Studies* 35 (February 2012): 6 (<http://www.tandfonline.com/doi/pdf/10.1080/01402390.2011.608939>).

4 Kevin Coleman, *Cyber Attacks & Warfare, Rules of Engagement*, DEFENSETECH.org November 28, 2008 ([http://www.defensetech.org/archives/cat\\_cyberwarfare.html](http://www.defensetech.org/archives/cat_cyberwarfare.html))

5 National Security Council, “The Comprehensive National Cybersecurity Initiative,” 2011 (<http://www.whitehouse.gov/cybersecurity/comprehensive-national-cybersecurity-initiative>).

6 Susan Brenner, “At Light Speed: Attribution and Response to Cybercrime/Terrorism/Warfare,” *Northwestern University* 97 (2007), 401 (<http://www.jstor.org/stable/40042831>).

7 Charles Dunlap, “Perspectives for Cyber Strategists on Law for Cyberwar,” *Strategic Studies Quarterly* (2011), 86 (<http://www.au.af.mil/au/ssq/2011/spring/dunlap.pdf>).

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8 Michael Schmitt, “Wired warfare: Computer network attack and jus in bello,” *IRRC* 84 (2002), 368. ([http://www.icrc.org/eng/assets/files/other/365\\_400\\_schmitt.pdf](http://www.icrc.org/eng/assets/files/other/365_400_schmitt.pdf)).

9 Schmitt, 373.

10 ICRC, *Round Table on New Weapon Technologies – Conclusion*, ICRC Sep. 13, 2011 (<http://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-13.htm>).

11 Cordula Droegge, *No Legal Vacuum in Cyber Space*, ICRC, Aug. 16, 2011 (<http://www.icrc.org/eng/resources/documents/interview/2011/cyber-warfare-interview-2011-08-16.htm>).

demonstrated flexibility and capabilities.<sup>12</sup> Further, Brazil in the 65th General Assembly of the United Nations (UN) advocated a serious discussion on mechanisms to deal with cyber war, modeling the UN as the leader in the discussion while also keying in on paying attention to IHL standards already in place.<sup>13</sup> Although the UN typically plays a prominent role in any major international agreement or regulation, it is clear from varying sources of evidence that IHL provides a framework for avoiding potential humanitarian impact from serious consequences of cyber operations and responses.

## LOAC : SOLUTION 2

Charles Dunlap urges future cyber warfare policy makers look at “the role of LOAC in cyberwar.”<sup>14</sup> Dunlap proposes that policy be analyzed closely to format a law of norms, keying in on what justifiably fits into the ruling contexts of cyber war and cyber crime, and more specifically the regulation of the former.<sup>15</sup> CCDCOE (Appendix 2) agrees with Dunlap’s analysis, presenting LOAC as the appropriate mechanism to regulate cyber war using its “criteria of an ‘armed attack’.”<sup>16</sup>

The idea of using LOAC as a regulatory framework is the favored approach of military officers within the U.S. Colonel James Cook adheres to Dunlap’s view, claiming that LOAC as a war doctrine is much more flexible than IHL in application and provides a mixture of solid treaty law and years of agreed upon

military norms.<sup>17</sup> This flexibility in doctrine explains LOAC’s mass indoctrination in military conduct,<sup>18</sup> and the military’s comprehensive understanding of it. LOAC also provides an established set of norms, something governments such as China and Russia view as important. In fact, in a document presented by China and Russia to the UN on cyber security, a set of international standardized norms was given primary importance.<sup>19</sup>

Even the UN advocates the importance of LOAC’s flexible normative procedures. In a report from the UNIDIR (the UN’s armament committee), the LOAC was recognized as providing limited means to regulate cyber war.<sup>20</sup> Like IHL, LOAC presents a common goal of regulation.

## MASS ARMAMENT CONTROL: SOLUTION 3

Another approach to addressing cyber war currently under construct in the UN is creating a treaty that bans cyber weaponry.<sup>21</sup> To accomplish this goal, experts like Scott Shackelford draw upon familiar reference sources on the banishment of nuclear weapons. As Shackelford sees it “conversation... [and] case law on nuclear warfare are relevant to controlling the scope and tools of IW.”<sup>22</sup>

Ideas of mass banishment of cyber technology as

12 Jakob Kellenberger, *International Humanitarian Law and New Weapon Technologies*, ICRC, Aug. 09, 2011 (<http://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-08.htm>).

13 65<sup>th</sup> General Assembly First Committee, “Fortifying Regional Disarmament and Security, Countering Potential Cyberwarfare, Misuse of Dual-Purpose Technologies, Focus of Debate in First Committee,” UN/Department of Public Information, Oct. 21, 2010 (<http://www.un.org/News/Press/docs/2010/gadis3419.doc.htm>).

14 Dunlap, 82.

15 Dunlap, 81-84.

16 CCDCOE, *Cyber Attacks Against Georgia: Legal Lessons Identified* (NATO Unclassified). (pg. 20) (<http://www.carlisle.army.mil/DIME/documents/Georgia%201%200.pdf>).

17 Colonel James Cook, “‘Cyberation’ and Just War Doctrine: A Response to Randall Dipert,” *Journal of Military Ethics* 9:4 (2010), 413-418.

18 ICRC, “The Law of Armed Conflict: Basic Knowledge,” ICRC June 2002, 2-1 – 14-1 ([http://www.icrc.org/eng/assets/files/other/law1\\_final.pdf](http://www.icrc.org/eng/assets/files/other/law1_final.pdf)).

19 Ministry of Foreign Affairs of the People’s Republic of China, “China, Russia and Other Countries Submit Document of International Code for Information Security to the United Nations,” Ministry of Foreign Affairs of the People’s Republic of China Sept. 09, 2011 (<http://www.fmprc.gov.cn/eng/wjdt/wshd/t858978.htm>).

20 Nils Melzer, *Cyberwarfare and International Law*, UNIDIR RESOURCES 2011, 21-36 (<http://www.unidir.org/pdf/ouvrages/pdf-1-92-9045-011-L-en.pdf>).

21 Tim Maurer, *Cyber Norm Emergences at the United Nations: An Analysis of the Activities at the UN Regarding Cyber Security*, Belfer Center for Science and International Affairs Sept. 2011, 20-34 (<http://www.un.org/en/ecosoc/cybersecurity/maurer-cyber-norm-dp-2011-11.pdf>).

22 Scott Shackelford, “From Nuclear War to Net War: Analogizing Cyber Attacks in International Law,” *Berkeley Journal of International Law* (2009), 218.

it relates to war capability are currently the leading action within the international sphere, highlighted by Russia's multiple attempts since 1996 to banish cyber weapons through the UN.<sup>23,24</sup> The CCDCOE is currently drafting a report for publication in 2012 to guide the debate for cyber banishment of dangerous technologies as compared to LOAC regulation of cyber war.<sup>25</sup> Further, reporter Kenneth Geers with the CCDCOE draws similarities to Chemical Weapon Conventions (CWC) and cyber weapons technology, contending the CWC is a perfect path for banishment of hostile cyber capabilities.<sup>26</sup> Mass banishment of hostile cyber technologies has reached as far as the International Telecommunication Union (ITU), a civil branch of the UN, which is now advocating the importance of utilizing an international banishment treaty framework.<sup>27</sup> The idea of banishment has gained enough momentum and support that ex-State Department official on cyber security Richard A. Clarke, a previous voice against banishment, has joined the bandwagon<sup>28</sup> along with UN official James Lewis.<sup>29</sup>

## WAIT AND SEE: SOLUTION 4

An important debate, as Forbes illustrates,<sup>30</sup> leans towards determining the certainty of cyber war before seeking a solution. If warfare must fit a kinetic definition, empirical analysis indicates a lack of its existence. With no cyber war, there exists no need to develop a solution to deal with cyber attacks. According to Thomas Rid, cyber attacks do not fit Clausewitz's definition of war. Such attacks lack the usual aspects of violence, instrumentality, and political nature.<sup>31</sup> Rid asserts that all the scenarios laid out on potential cyber attacks lack relevance because they have never transpired.<sup>32</sup> Thus, the solution proposed by Rid is to wait and see if there truly ever is a cyber attack which meets Clausewitz's definition of war before determining what action to take and what solutions to seek.

## RECOMMENDATIONS

With the U.S. declaration of kinetic attack in response to cyber attacks,<sup>33</sup> cyber war has gone from a theoretical debate to an actual issue. As evidenced by the current efforts within the U.N.,<sup>34</sup> interest in cyber warfare in the international community has catapulted to new heights within the international sphere.<sup>35</sup> Waiting to see if cyber warfare results in damage or casualties is not a viable option. It is vital that internationally accepted rules governing cyber warfare are established to clarify accepted norms.

Moving forward, the international community should institute a long range plan and a short range plan for addressing the issue. The short range plan should stopgap the current flood of cyber attacks. This plan requires regulatory measures be implemented now. Such measures must be something easily agreed upon internationally to

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23 50<sup>th</sup> General Assembly First Committee, "A/RES/50/70 D: Resolutions Adopted by the General Assembly," UN Jan. 15, 1996 (<http://www.un.org/depts/ddar/Register/Resolutions/5070.htm>).

24 61<sup>st</sup> General Assembly First Committee, "Agenda Item 85: Developments in the Field of Information and Telecommunications in the Context of International Security," UN Oct. 11, 2006 ([http://disarmament2.un.org/vote.nsf/511260f3bf6ae9c005256705006e0a5b/27d66ab2098a42618525720b005f1de0/\\$FILE/L.35.pdf](http://disarmament2.un.org/vote.nsf/511260f3bf6ae9c005256705006e0a5b/27d66ab2098a42618525720b005f1de0/$FILE/L.35.pdf)).

25 CCDCOE, "Timeline, Contents and Publication," NATO, 2009- Present (<http://www.ccdcoe.org/253.html>).

26 Kenneth Geers, *Cyber Weapons Convention*, NCIS/CCDCOE 2009 ([http://www.ccdcoe.org/articles/2010/Geers\\_CyberWeaponsConvention.pdf](http://www.ccdcoe.org/articles/2010/Geers_CyberWeaponsConvention.pdf)).

27 Dr. Hamadoun I. Toure, *The Quest for Cyber Peace*, ITU Jan. 2011, 91-100 ([http://www.itu.int/dms\\_pub/itu-s/opb/gen/S-GEN-WFS.01-1-2011-PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/opb/gen/S-GEN-WFS.01-1-2011-PDF-E.pdf)).

28 Richard A. Clarke, Robert K. Knake, *Cyber War*, (New York, New York: Harper-Collins Publishers, 2010), 218-241.

29 James Andrew Lewis, *Cyberwarfare and its Impact on International Security*, UNODA June 19, 2010, 13-16 (<http://www.un.org/disarmament/HomePage/ODAPublications/OccasionalPapers/PDF/OP19.pdf>).

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30 Sean Lawson, "Cyber War and the Expanding Definition of War," *Forbes*, Oct. 26, 2001.

31 Rid, 7-10.

32 Rid, 9-10.

33 NSC, "The Comprehensive National Cybersecurity Initiative."

34 Tim Maurer, 23-27.

35 Tim Maurer, 23-27.


allow states and government bodies the time to formulate an end goal of prevention.

While IHL has established treaty law that could be used for the short term, its lack of flexibility leaves too many grey areas that would allow too much ambiguity. While ambiguity will be a serious issue during the band-aid regulatory stage, it is important that the stopgap measures be as concise as possible.

LOAC presents the best format for regulation because of the vast wealth of knowledge military forces have regarding its requirements.<sup>36</sup> This flexibility and the established military norms will allow states to combine both existing treaty laws with common norms of war. While this stopgap measure might not prevent threats, it can curb the venom within the threats.

LOAC is not meant to be a long-term solution. It is important the international community continue to engage in treaty talks with the goal of eventually banishing the use of dangerous cyber technologies. This ultimate goal of preventative measures will control the weapons that cause cyber attacks and cyber war in the same manner treaties have controlled chemical weapons. Such treaties will prevent states from engaging in cyber war, and will normalize the response if the treaties are violated. However, it is clear that such talks must be viewed as a long range goal given the debates within Non-Governmental Organizations like the ICRC<sup>37</sup> on regulatory measures, which demonstrate that the process of full prevention is still years away. Continuing pressure and discussion through the UN of an eventual treaty similar to CWCs must be encouraged, building on the joint resolution agenda established 2006.<sup>38</sup>

Treaties would also distinguish cyber terrorism and cyber crimes, and avoid an inappropriate response if a malicious cyber act fell outside the norms of cyber warfare. Without this preventative measure

progressing to an ultimate implementation worldwide, the potential for inappropriate uses and responses to cyber war will continue its dangerous growth. 

## APPENDIX

CCDCOE= Cooperative Cyber Defense Center of Excellence.

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<sup>36</sup> ICRC, 2-1 – 14-1.

<sup>37</sup> Jakob Kellenberger, *International Humanitarian Law and New Weapon Technologies*.

<sup>38</sup> 61<sup>st</sup> General Assembly First Committee, "Agenda Item 85: Developments in the Field of Information and telecommunications in the Context of International Security."





# Improving U.S.- Russia Intercountry Adoption and Cooperation: Ensuring the Wellbeing of Orphans across Borders

– Elizabeth Rose Hardman

***“For children who remain in Russian orphanages because of the difficulties of international adoption, this has been a calamity—it is a crime committed by us all.”***

— Boris L. Altschuler  
Director of Children’s Rights

## ABSTRACT

Intercountry adoption (ICA) between the United States and Russia presents a unique case of severe maltreatment of newly adopted Russian children on behalf of their American parents, consequentially negatively affecting all parties involved. Russia’s temporary regional suspensions of ICA following a series of nineteen deaths since 1991 voices international concern and calls into question the effectiveness of current ICA methodology, regulation, and laws. A substantial number of Russian children demonstrate serious mental and physical symptoms of previous abuse and/or neglect by biological parents or institutionalization pre-adoption. Adoptees remain generally uninformed or misinformed about pre-existing medical conditions by adoption agencies. Taking into consideration the multiple parties and situational factors that may prompt unfavorable ICA outcomes, this paper examines varying plausible solutions that ultimately aim to strengthen U.S.-Russia relations and cooperation through safeguarding the well-being of Russian children, without limiting their right to fulfillment of an improved life across borders.

## BACKGROUND

The fall of the “Iron Curtain” and the subsequent dissolution of the Soviet Union concluding in 1991 marked the opening of Russia’s borders to intercountry adoption (ICA) and the beginning of an exponential surge of new intercountry adoptions by prospective parents residing in the United States.<sup>1</sup> The economic and social devastation following the

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1 Selman Peter. “The Rise and Fall of Intercountry Adoption in the 21st Century”. *International Social Work* 52:5 (Sep 2009), 590.

Soviet collapse continues affecting the domestic lives of Russian children in the form of pre- and perinatal syndromes, abuse, and/or abandonment from parents who largely suffer from alcohol and drug addictions and/or who may be imprisoned or deemed incapable of providing proper care<sup>2</sup>.

A considerable majority of the estimated 50,000 Russian orphans<sup>31</sup> adopted into the U.S. since 1993<sup>4</sup> greatly benefit from ICA's "global gift"<sup>5</sup>. Unfortunately, some merely escape tremendously poor conditions in Russian homes and institutions to find themselves further subject to mistreatment, abuse, death - or as Russian Foreign Minister states, "an incessant string of crimes" - at the hands of their new parent/s in the United States<sup>6</sup>. Claims among new parents regarding adopted children's excessive psychological instability evidence extreme Russian institutional neglect as well as failure of disclosure of known medical issues on behalf of adoption agencies who have raked in an estimated \$1.29 billion since 1991 from ICA<sup>7</sup>. Russia's previous and ongoing calls for and/or actual full and/or regional suspension of ICA in 2007<sup>8</sup>, 2010<sup>9</sup>, and since of

February of this year<sup>10 11</sup> voice Russia's legitimate concern for prospective adoptions following the reported abuse of at least 3,000 children and murder (or neglect to the point of death) of at least nineteen children since 1992<sup>12</sup> and prove that U.S.-Russia relations also suffer consequently.

Contrary to the belief of many prospective parents, the ICA process faces particular complexity due to the necessity to abide by the laws of three different jurisdictions: the federal law of Russia, the federal law of the U.S., and the state law pertaining to the prospective parent's/s' residency within the U.S.<sup>13 14</sup> Russian and U.S. governments as well as the orphans and the prospective parents indubitably encounter and struggle to bridge the immense cultural gap between Western and Eastern European environment and ideology. Currently, Russia and the United States base their ICA guidelines loosely around the common ideals and mutual acceptance of the 1948 UN Universal Declaration of Human Rights (UDHR)<sup>15</sup> and the 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and

2 Alaska International Adoption Agency, Ltd. "Please Be Advised That" <http://www.akadoptions.com/index.html>

3 U.S. Citizenship and Immigration Services. "Orphan" [http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=0bff13\\_6d2035f010VgnVCM1000000ced190aRCRD&vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD](http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=0bff13_6d2035f010VgnVCM1000000ced190aRCRD&vgnnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD)

4 Alan Greenblatt. "Fewer Babies Available For Adoption By U.S. Parents" *NPR* (17 Nov 2011) <http://www.npr.org/2011/11/17/142344354/fewer-babies-available-for-adoption-by-u-s-parents>

5 Juffer and M.H. van IJzendoorn. "International Adoption Comes of Age: Development of International Adoptees from a Longitudinal and Meta-analytical Perspective" *International Advances in Adoption Research*. (2009), 169-92.

6 "Russia Foreign Ministry: U.S. Adoptions Should Be Suspended" *Huffington Post* (11 Feb 2012) [http://www.huffingtonpost.com/2012/02/11/russia-us-adoptions\\_n\\_1270704.html](http://www.huffingtonpost.com/2012/02/11/russia-us-adoptions_n_1270704.html)

7 Thomas D. Morton. "Lost in America" *Child Welfare Institute* (Aug 2005) <http://goecwi.vayazol.com/data/site250783/files/2005ideasaugust.pdf>

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12 Irina Titova. "Russia Moves to Limit Foreign Adoptions" *TOL* (18 Apr 2012) <http://www.tol.org/client/article/23103-russia-moves-to-limit-foreign-adoptions.html>

13 Jordana P. Simov. "The Effects of Intercountry Adoptions on Biological Parents' Rights" *Loyola of Los Angeles International and Comparative Law Review* 22:251 (1999), 251.

14 Michael Schwartz. "Pact on Adoptions Ends a U.S.-Russia Dispute" *New York Times*. (14 July 2011:12) <http://web.ebscohost.com/ehost/detail?sid=41fd4f43-7669-4483-a0c9-4585fe5d26a6%40sessionmgr14&vid=2&hid=18&bdata=JnNpdGU9ZWVhvc3QtbGl2ZQ%3d%3d#db=aph&AN=62609035>

15 United Nations. *Universal Declaration of Human Rights*. <http://www.un.org/rights/HRToday/declar.htm>



Adoption, Nationally and Internationally<sup>162</sup> - neither of which provide international legally binding instruments. A bilateral agreement, signed by U.S. Secretary of State Hillary Clinton and Russian Foreign Minister Sergei V. Lavrov in July 2011 aims to alleviate concerns by augmenting ICA safeguards and transparency, but awaits ratification by the Russian Federation<sup>17</sup>. ICA policy approaches suggest varying solutions as follows:

## MAINTAIN THE STATUS QUO

The maintenance of the status quo consists of inconsistency and unpredictability in the adoption process due to the recurrence of temporary regional halting of ICA, as Russia experiences currently. Ensuing consequences illustrate mainly undesirable outcomes for both Russia, where an overabundance of orphans lamentably couples with a shortage of capable parents, adoptees and caretakers, and the U.S., who receives considerable criticism and blame for misbehavior on behalf of adoptee citizens, in addition to the legal system's sometimes inadequate and unjust punishment<sup>18</sup>. Legitimate adoptees seeking adoption abroad encounter indefinite waiting periods. Most importantly, many orphans suffer from the elimination of opportunity for and right to an improved life by a loving American family and remain subject to the assuredness of unnecessary increased crowding, neglect, and malnutrition in many institutions that jeopardize the orphans' "physical, psychological, emotional, and spiritual well-being," as Romania's ongoing ban on ICA since

2001 exemplifies<sup>19</sup>. Essentially, this proposition disregards the very principles of "devotion to the best interests of the child, the right to life, survival and development," "protection from harmful influences" within the 1989 Convention on the Rights of the Child (CRC), to which Russia is party<sup>20</sup>, and would signify a failure on behalf of the U.S. and Russia to reach international cooperation, agreement, and implementation regarding the development and advancement of ICA safeguards.

## ENSURE PROPER COMMUNICATION BETWEEN THE U.S. AND RUSSIA

Russia's frustration with the U.S. does not solely stem from the violent outbursts committed against their children, but also from the failure to disclose some cases of abuse and death in a timely fashion. Commitment from the U.S. officials to properly inform an already concerned home country must be confirmed and acted upon, as current delays of communication, lasting up to six years in one case and described as "inexcusable" by the Children's Rights Commissioner for the President of the Russian Federation, Astakov,<sup>21</sup> exacerbates hostile relations. These steps would signal respect and ultimately improve relations between the U.S. and Russia through joint formal and international recognition of the concerns and efforts of one another, working toward an ICA solution.

## RATIFY EXISTING LEGALLY BINDING INTERNATIONAL CONVENTIONS

However widely accepted the 1989 CRC and the 1993 UN Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (HCIA) appear, neither of the legally-binding multilateral treaties holds efficacy so long as one of the two parties participating in ICA relations

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16 "December 3, 1986: Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (A/RES/41/85) General Assembly. <http://www.un.org/documents/ga/res/41/a41r085.htm>

17 U.S. Department of State. *Notice: Intercountry Adoption Notice: Secretary Clinton and Russian Foreign Minister Lavrov Sign Adoption Agreement* (13 July 2011) [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=russia\\_2](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=russia_2)

18 David M. Herszenhorn. "Russia Attacks Sentence of Adoptee's Parents" *The New York Times* (19 Nov 2011) [http://www.nytimes.com/2011/11/20/world/europe/russia-angry-at-penalty-against-dead-adopted-boys-parents.html?\\_r=2&adxnml=1&adxnmlx=1336755706-7G5vX0u2UQj1E717o5xo6g](http://www.nytimes.com/2011/11/20/world/europe/russia-angry-at-penalty-against-dead-adopted-boys-parents.html?_r=2&adxnml=1&adxnmlx=1336755706-7G5vX0u2UQj1E717o5xo6g)

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19 "September 14, 2005: In the best interest of the children?: Romania's ban on inter-country adoption" Hearing before the Commission on Security and Cooperation in Europe, One Hundred Ninth Congress, first session. Washington: U.S. G.P.O. (pg. 4).

20 United Nations International Children's Emergency Fund. *Convention on the Rights of the Child*. [http://www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html)

21 Rankin.

does not ratify<sup>22</sup>. This is the case for both Russia and the United States. The main disparity between the CRC and the HCIA lies within the hierarchical order of preferred methods of care for orphans; whereas Russia supports the CRC and favors all domestic options before ICA, including institutionalization, the U.S. defends the HCIA and advances ICA as superior to domestic institutionalization, but inferior to domestic adoption<sup>23</sup>. The HCIA centers mostly around the prevention of child abduction, sale, and trafficking<sup>24</sup>, although some aspects also advantage legal ICA, such as the selection of a country by adoptees as a prerequisite to the home study<sup>25</sup> as well as adoptee obligation to at least ten hours of ICA education<sup>26</sup>, and the future creation of an instrument for examining and acting upon criticism of the malfunctioning of adoption agencies<sup>27</sup>. While the HCIA lacks specificity as to the determination of children's human rights and "the best interests of the child"<sup>28</sup>, the CRC successfully clarifies through the standardization of children's health, educational, legal, civil, and social services<sup>29</sup>. The UN Committee on the Rights of the Child embodies the most impressive feature that complements the CRC and provides exhaustive review and feedback to member-states' five-year reports as to the plausible options to achieve proper and full implementation of the ideals of the CRC<sup>30</sup>.

## IMPROVE CONDITIONS IN RUSSIAN INSTITUTIONS

Augmentation in food supply to malnourished orphans, environmental enrichment, as well as social enrichment within Russian in "baby houses" and "children's homes"<sup>31,32</sup> would decrease preventable medical complications of the orphans, the number of "blind" adoptions by prospective parents, and consequential stress and frustration thereof. Institutionalization in unsanitary, generally overcrowded and understaffed "closed zones"<sup>32</sup> frequently fosters the spread of physical disease and illness such as parasitic infection or scabies<sup>33</sup> as well as developmental delays affecting children including ADHD, head banging, hypo- or hypersensitivity, lack of communication skills, and "rocking"<sup>34</sup>.

The good news: young children able to pursue a healthy diet and mental stimulation "seem to recover" from the effects from malnutrition,<sup>35</sup> heavily interrelated with cognitive dysfunction issues<sup>36</sup>. Environmental and social stimulation prompted by games, puzzles, outside play time, and increased staff-to-child ratio or increased caregiver-child interaction surely would improve the orphans' chances of normal development and brain growth<sup>37,38</sup>.

This proposition, however, requires significant funds for implementation and UNICEF acknowledges that children's services in Russia remain highly underfunded<sup>39</sup>; in the worst-case scenario, revocation or reframing of Russian

22 Martha Osborne. "Adoptive Parents Ask: What Does The Hague Convention Mean to Me?" *Rainbow Kids: The Voice of Adoption* (1 Mar 2008) <http://www.rainbowkids.com/ArticleDetails.aspx?id=575>

23 Elizabeth Bartholet. "International Adoption" chapter in *Children and Youth in Adoption, Orphanages, and Foster Care*. (Westport, Greenwood Publishing Group Inc., 2005), 113.

24 Karen Rotabi and Judith Gibbons. "Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?" *Journal of Child & Family Studies* 21:1 (Feb 2012), 108.

25 Child Welfare Information Gateway. "Intercountry Adoption from Hague Convention and Non-Hague Convention Countries" <http://www.childwelfare.gov/pubs/factsheets/hague.cfm>

26 Adopt Abroad. "Russian Adoptions" <http://adopt-abroad.com/russia.htm>

27 Osborne.

28 Rotabi and Gibbons.

29 United Nations International Children's Emergency Fund.

30 United Nations High Commissioner for Refugees. "UN Committee on the Rights of the Child" <http://www.unhcr.org/refworld/publisher.CRC,.LKA,.0.html>

31 A Helping Hand Adoption Agency. "Adopt from Russia" <http://worldadoptions.org/adopt/adoptrussia.php>

32 Russian NGOs' Alternative Report, 22.

33 A Helping Hand Adoption Agency.

34 Laurie Miller, Wilma Chan, Linda Tirella and Ellen Perrin. "Outcomes of Children Adopted From Eastern Europe" *International Journal of Behavioral Development* 33:4 (July 2009), 296.

35 Sharon Lesar Judge. "Eastern European Adoptions: Current Status and Implications for Intervention" *Topics In Early Childhood Special Education* 19:4 (1999), 246.

36 Miller, Chan, Tirella and Perrin, 296.

37 Ibid.

38 Judge, 21.

39 Greenblatt.

Federal Law 122<sup>40</sup>, which transferred responsibility of the Russian orphans to 89 subjects, or enhanced collaboration between the subjects of the newly decentralized state, would at least counter regional monetary disparities and allow for more uniform payments to social services<sup>41 42</sup>.

## **SAFEGUARD THE PRE-ADOPTION PROCESS: PROMPTLY IDENTIFY HEALTH CONDITIONS & DETER CORRUPTION WITHIN ORPHANAGES AND ADOPTION AGENCIES**

With prospective parents paying average costs between \$25,000 - \$30,000 per child<sup>43</sup>, the incentive to withhold critical and pertinent medical history from prospective parents is obvious<sup>44</sup>. Adoption agencies thrive in this lucrative business due to inability to determine by law which children in reality possess medical history reports and background information from those who do not and as a result the adoptees as well as the children may suffer. Similar to the newly created federal database of orphaned children in Russia, orphanages should keep a database in which caregivers write monthly reports regarding the physical and mental status of each child. Documentation should especially take into consideration measurements of physical growth, such as height, weight, and head circumference, which may provide the most concrete evidence of an omitted medical problem<sup>45</sup><sup>46</sup>. Since the adoption process with Russia takes at least eight months<sup>47</sup>, this would give fairly sufficient

time to monitor and record a child's general health. Children lacking medical history documents will have at least a minimal amount of documentation to ensure to the best possible extent the full disclosure of known behavior. This framework allows for easier tracking of misinformation.

Further measures to identify any previously unforeseeable health issues includes the mandatory distribution of photographs and/or video recordings of orphans to prospective parents - as some orphanages already require - to then be reviewed with a physician in the U.S. for educated advice.<sup>48 49</sup> The U.S. may heavily encourage or require consultation with a physician prior to the prospective parent's/s' orphanage visit, during which time the parties build a list of relevant questions and concerns that should be addressed at the orphanage. Early preparation grants adoptees the opportunity to send information back to the physician for analysis prior to signing an adoption agreement.<sup>50</sup> Russia may take action to ensure that orphanages cannot restrict adoptees from bringing physicians into their premises to observe and evaluate the prospective child, since only specific regions allow this activity currently<sup>51</sup>. Orphans may alternatively undergo a substantial medical exam in a Russian clinic prior to finalization of the adoptions, just as some regions mandate necessary of prospective parents<sup>52</sup>.

## **SAFEGUARD THE POST-ADOPTION PROCESS: PROMPTLY IDENTIFY HEALTH CONDITIONS & DETER CORRUPTION WITHIN ORPHANAGES AND ADOPTION AGENCIES**

Post-adoption, the U.S. may heavily suggest or require full and standard physical and

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40 Russian NGOs' Alternative Report, 3.

41 UN Committee on the Rights of the Child (CRC). UN Committee on the Rights of the Child: Concluding Observations, Russian Federation, 23 November 2005 (CRC/C/RUS/CO/3). (pg. 3,5,13).

42 Russian NGOs' Alternative Report, 7-17.

43 Children's Hope International. "Russia Adoption - Adopting from Russia" <http://adopt.childrenshope.net/programs/russia/index.php>

44 Morton.

45 Emmanuel Walter and Dennis Clements. "Internationally Adopted Children: What to consider when adopting a child from a foreign country" *News for Parents* [http://www.newsforparents.org/expert\\_internationally\\_adopted\\_children.html](http://www.newsforparents.org/expert_internationally_adopted_children.html)

46 Miller, Chan, Tirella and Perrin, 291-292.

47 A Helping Hand Adoption Agency.

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48 Mark Alden Branch. "Bringing Home Baby" *Yale Alumni Magazine* (May 1999) [http://www.yalealumnimagazine.com/issues/99\\_05/adoption.html](http://www.yalealumnimagazine.com/issues/99_05/adoption.html)

49 Walter and Clements.

50 Christian World Adoption. "Russia Adoption" <http://www.cwa.org/russia-adoption.htm>

51 International Adoption Help. "Adoption Process for Russia" [http://www.internationaladoptionhelp.com/international\\_adoption/international\\_adoption\\_russia\\_process.html](http://www.internationaladoptionhelp.com/international_adoption/international_adoption_russia_process.html)

52 Christian World Adoption.

developmental exams and/or psycho-evaluations of the adopted children<sup>53</sup> to be paid for by prospective parents upon arrival to the U.S. Under the circumstances that there are clear implications and formal diagnoses of at least one severe non-disclosed medical condition within a given time period as to the likelihood that the child undoubtedly would have been showing symptoms prior to arrival in the U.S., then (a) the parents should have the option to relinquish the adoption, and (b) the orphanage and/or adoption agency shall be held accountable on a case-by-case basis, whether that involves a three-strike rule to revoke accreditation or some other option.

This may promote honesty as orphanages would be frustrated to receive any possibly returned child, decreasing frequency of first-time "blind" adoptions as well as providing documentation for the child if returned to Russia, eliminating the possibility of second-time "blind" adoptions. Should the parent(s) choose to keep the child after diagnosis, then he/she leaves enlightened and aware of his/her child's specific necessities. On the other hand, results may translate into fairly traumatic experiences for children upon rejection as well as fewer placement of special needs children altogether, as many-to-most prospective parents desire to adopt healthy children. If the parent(s) should choose to keep the child after diagnosis, then he/she leaves enlightened and aware of his/her child's specific necessities.

## TIGHTEN ADOPTEE PSYCHOLOGICAL QUALIFICATIONS

The evaluation of medical history - a gauge for psychological preparedness<sup>54</sup> - already constitutes part of background check in the dossier presented to Russian court upon formal adoption<sup>55</sup>. The U.S. and Russia's proposed 2011 bilateral agreement, aims to heighten the level of psychological readiness

past this point, although information regarding the content and target of said evaluations has yet to be provided.<sup>56</sup>

Demonstrating the possible inefficiency of proposed methodology for psycho-analysis, one study among eighty-six American mothers adopting nationally adduces an association between "significant" and "relatively common" post-adoption depression (a mental state for which Russia sometimes deems unstable for children<sup>57</sup>) and "stress and adjustment difficulties," yet non-association to "personal or family psychiatric history."<sup>58</sup> Since the subject body undergoing analysis - American mothers - remains unchanged, the repetition of a similar study in regard to ICA would also not assign significance of post-adoption depression to mothers with "psychiatric history." Therefore, while the psychological state of adoptees holds high and legitimate concern for the safety of the children, tightening safeguards too heavily in this respect without appropriate knowledge as to how to effectively approach the situation may anticipate perfectly functional adoptees from adopting. In order to promote indicative ICA research to ultimately achieve proper methodology for addressing parental aggression toward adopted Russian children, the state may conduct through adoption agencies post-adoption evaluations and surveys across a certain percentage of adoptees chosen at random.

## CREATE ADOPTEE INFORMATIONAL AND EDUCATIONAL REQUIREMENTS: IMPROVE ADOPTEE PRE-ADOPTION AWARENESS AND EDUCATION

The pre-adoption process does not include any concrete or universal mandatory courses to cater to the very particular situation of prospective

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53 Miller, Chan, Tirella and Perrin, 296.

54 Laurie C. Miller, Wilma Chan, Robert A. Reece, Linda Grey Tirella and Adam Pertman. "Child Abuse Fatalities Among Internationally Adopted Children" *Child Maltreatment* 12:4 (Nov 2007), 378.

55 The Adoption Hub Adoption Resource. "International Adoption Process" [http://www.theadoptionhub.org/?page\\_id=63](http://www.theadoptionhub.org/?page_id=63)

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56 Andrea Poe. "Russia and U.S. Sign New Adoption Agreement" *The Washington Times* (20 July 2011) <http://communities.washingtontimes.com/neighborhood/red-thread-adoptive-family-forum/2011/jul/20/russia-and-us-sign-new-adoption-agreement/>

57 CITE

58 Jennifer L. Payne, Eve S. Fields, Jennifer M. Meuchel, Chiara J. Jaffe and Manish Jha. "Post Adoption Depression" *Archives of Women's Mental Health* 13:2 (Apr 2010), 147.

parents from the U.S. adopting Russian orphans. Many prospective parents hold unrealistic expectations for ICA - that the process is easier and "safer - more predictable and more likely to end in success" than domestic adoption, where biological parents likely reside in the same country<sup>59</sup>. Proper increased awareness and educational courses serve the purpose of weeding out prospective parents with misguided ideas regarding ICA, while creating a sense of understanding between remaining adoptees and child. Both outcomes lessen the likelihood of abuse possibly triggered by the feeling of parental confusion, helplessness, frustration, or simple lack of parenting knowledge<sup>60</sup>. Possible mandatory courses may cover the following topics: (1) common ICA misconceptions, (2) background/history, environment and culture experienced by Russian orphans both inside and outside of institutions, (3) common medical conditions among orphans - whether onset by institutionalization or culture shock - their causes and characteristics, and (4) guidelines to proper parenting - especially in regard to (3).

A complementary comprehensive "pass-fail-pass" test system permits that adoptees take the test as many times as necessary to warrant a "pass" - a design meant to guarantee that all prospective parents learn the appropriate material before adoption, while also not restricting the possibility of adoption. On the other hand, the more rigorous process may deter possible adoptees and lack support from adoption agencies due to increased waiting time and expenses.

## IMPROVE POST-ADOPTION TRANSPARENCY AND MONITORING

Strategic restructuring of post-adoption reports and home visits for new families, based upon time and age of the child, presents a viable and obvious option to improve transparency and effectiveness of monitoring within the adoption process. Twelve-to-thirteen of the sixteen murders or suspected murders of ICA Russian children materialized

within less than one year upon arrival to the U.S and seven-to-eight within six months (see Appendix A).<sup>61 62 63 64 65 66 67</sup>

The previously mentioned study of eighty-six national adoptee mothers reported "significant" post-adoption depression and associated stress within this same time frame - 27.9% women within the first month, 25.6% between the first and third months, and 12.8% between the third month and first year<sup>68</sup>. Post-adoption rules currently require four reports filed at 6, 12, 24, and 36 months, but reform instead considers clustering more reports and home inspections within the first 6 months and first year to then taper off accordingly - 2, 4, 6, 9, 12, 18, for example.

Age represents another factor to consider as eleven of the sixteen were three years or younger at the time of death, with nine-to-ten of those eleven deaths manifesting within one year. Another study of fifty children adopted from Eastern Europe and the former Soviet Union supports this relationship between age and likelihood of parental aggression, reporting that "age at adoption is inversely associated with parental stress"<sup>69</sup>. Families

61 Russell Working. "Adoptee Deaths Rare, Experts Say" *Chicago Tribune* (21 May 2004) [http://articles.chicagotribune.com/2004-05-21/news/0405210350\\_1\\_adoptive-families-adam-pertman-emotional-disorders](http://articles.chicagotribune.com/2004-05-21/news/0405210350_1_adoptive-families-adam-pertman-emotional-disorders)

62 Igor Parfenenko. "American Family Starves 8-year-old Boy Adopted in Russia to Death" *Pravda* (8 Aug 2005) <http://english.pravda.ru/society/stories/08-08-2005/8707-child-0/>

63 Theresa Vargas. "Mother Sentenced to 25 Years" *Washington Post* (26 May 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052501022.html>

64 Alina Chernovanova. "Inquiry Opened into Adopted Russian's Death" *Gazeta* (12 June 2011) [http://en.gazeta.ru/news/2011/12/06/a\\_3860726.shtml](http://en.gazeta.ru/news/2011/12/06/a_3860726.shtml)

65 Channel 2 abc. "Iowa City Murder Suspect Found Not Guilty" (3 Nov 2011) <http://www.kcrg.com/news/crime/iowa-city-murder-suspect-found-not-guilty-133162088.html?m=y&smobile=y>

66 Combined Reports. "Murder Charge for Adoptive U.S. Mom" *The St. Petersburg Times* (18 Mar 2008) [http://www.sptimesrusssia.com/index.php?story\\_id=25351&action\\_id=2](http://www.sptimesrusssia.com/index.php?story_id=25351&action_id=2)

67 Svetlana Osadchuk. "2 Adoption Agencies Barred After Boy's Death" *The Moscow Times* (15 July 2008) <http://www.themoscowtimes.com/news/article/2-adoption-agencies-barred-after-boys-death/368946.html>

68 Payne, Fields, Meuchel, Jaffe and Jha, 147.

69 Miller, Chan, Tirella and Perrin, 290, 295.

59 E. J. Graff. "The Lie We Love" *Foreign Policy* (1 Nov 2008), 1. [http://www.foreignpolicy.com/articles/2008/10/15/the\\_lie\\_we\\_love?page=0.0](http://www.foreignpolicy.com/articles/2008/10/15/the_lie_we_love?page=0.0)

60 Miller, Chan, Tirella and Perrin, 296.

adopting children at a younger age therefore warrant closer attention and security inspection.

## FURTHER PROMOTE DOMESTIC ADOPTION AND FOSTER HOMES

Russia's recent attempts to minimize the chance of harm to orphans abroad by maximizing domestic forms of accommodation certify successful, noting that the foreign-to-domestic adoption ratio shifted from 7852:7331 in 2003<sup>70</sup> to about 3400:7800 in 2011<sup>71</sup>. Approaches for promotion of domestic adoption and placement into foster homes must heed caution as to not prompt wrongful motivation; current government subsidies, for example, may invite opportunity for abuse of the system<sup>72</sup>. Eliminating "daunting" and "unfriendly" bureaucratic hurdles required of domestic adoptees - such as obligatory special assistance from a limited number of underpaid and overworked "specialists of guardianship and trusteeship bodies" rather than from local adoption agencies<sup>73</sup> - would present domestic adoption a more attractive option to Russians<sup>74</sup>.

The increase of placement of orphans into either domestic adoption families or foster homes consequently supplies orphans with greater food supply, heightened care, human interaction, and environmental stimulation, thus reducing the severity and/or possibility of behavioral and psychological dysfunction. Foster homes, appropriately attracting less attention from the U.S. and Russia as an option for care, create less stable environments than domestic adoptions and ICA, as children may move multiple times throughout their childhood, which may prompt psychological issues; however, the utilization of orphanages will favorably decrease.

## POLICY RECOMMENDATION

Due to the ongoing threat of suspension since February of 2012 even after numerous multilateral attempts to refine ICA exchanges, the message is clear: there is still room for improvement. The status quo cannot and will not suffice should the United States and Russia desire to achieve good political relations and cooperation with one another. Continuance of regional suspensions of ICA would not only conflict with "the best interests of the child" by restricting their opportunity and right to a prosperous life elsewhere, but would also aggravate all Russian orphans' chances of a better life, including proper physical and mental development, in orphanages, foster homes, or domestic families within Russia.

The increase in quantity of caregivers and/or the increase in quality of care given to orphans within institutions, the introduction of environmental enrichment, as well as increased food supply proves effective from past studies and any amount of improvement would undoubtedly alleviate the mal-effects on the child. Noting that lack of funding presents a particularly difficult issue to tackle, Russia should at least reconsider the removal or reconstruction of Russian Federal Law 122 to allow for more uniform dispersal of funds to orphanages.

Russia should take appropriate measures to allow prospective parents to visit their prospective child in orphanages with a physician specialist, if they so choose. Mandatory complete reports and documentation regarding childrens' health monitoring, including video recordings, should be conducted while in institutional care for the eight-plus months prior to adoption abroad. Pre-determined questions for orphanage managers in Russia and health checks upon arrival to the United States should be heavily suggested. These together would not only decrease the number of "blind adoptions" that occur due to actual lack of child documentation, but also those due to simple misinformation produced by orphanages and adoption agencies, as the database creates accountability measures. Prospective parents will be more aware and able to cater to their child's unique needs.

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70 Russian NGOs' Alternative Report, 21.

71 Children's Rights Commissioner for the President of the Russian Federation.

72 Arutunyan.

73 Russian NGOs' Alternative Report, 9.

74 Arutunyan.

Furthermore, the restructuring or addition of new mandatory and relevant pre-adoption courses should be implemented in order to raise awareness as well as to filter out prospective parents with unrealistic expectations of ICA, specifically between Russia and the United States. The pass-fail-pass test provides a solid approach which ensures that prospective parents know at least the minimal amount of information regarding their ICA process and child prior to adoption without eliminating the opportunity to adopt. Lastly, the post-adoption home monitoring would perhaps benefit from requiring more home reports earlier in the post-adoption process and/or more home reports depending upon the age of the child upon adoption. 

## (ENDNOTES)

1. Orphan: "A child may be considered an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents. The child of an unwed mother or surviving parent may be considered an orphan if that parent is unable to care for the child properly and has, in writing, irrevocably released the child for emigration and adoption. The child of an unwed mother may be considered an orphan, as long as the mother does not marry (which would result in the child's having a stepfather) and as long as the child's biological father has not legitimated the child. If the father legitimates the child or the mother marries, the mother is no longer considered a sole parent. The child of a surviving parent may also be an orphan if the surviving parent has not married since the death of the other parent (which would result in the child's having a stepfather or stepmother)," as defined by the USCIS and the Immigration and Nationality Act.
2. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally: considers a child's cultural and religious background of utmost importance and places ICA as the absolute last resort for child care
3. Baby houses and Children's homes: Russian orphanages with ages ranging from a few months to three or four years old in the former, and four to sixteen years in the latter; may further separate the latter based on pre-school age, ranging from four to seven, and school age, from seven to sixteen
4. Russian Federal Law 122 (1 Jan 2005): proclaims transfer of the responsibility of the protection of the rights of the children from the Russian Federation "to the discretion of authorities of every of 89 Russian region" without creating federal standards







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