

COLUMBIA UNDERGRADUATE
LAW  REVIEW

VOLUME VI ISSUE 2 • SPRING 2012

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THE COLUMBIA UNDERGRADUATE LAW REVIEW

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Dear Reader,

On behalf of the Executive Board, Editorial Board, and Business Board of the Columbia Undergraduate Law Review, it is my pleasure to introduce the Spring 2012 issue of the CULR.

After reading through submissions from students around the globe, the Editorial Assistants, Executive Board, and I have selected four submissions to publish.

We begin this volume with Kaitlyn Tongalson's "Dismantling the Powder Keg? Penal Moderation and the 2011 Realignment Process in California," which examines criminal justice legislation in California and analyzes whether a movement away from incarceration and harsh criminal justice policies is becoming increasingly influential in the United States.

In "Beyond the Veil: Shari'a Justification of France's 'Burqa Ban,'" Hannah Ridge analyzes French and Islamic law as well as French perceptions of Islam, nationalism, and international accords. Ridge looks at France as a sovereign nation as well as France as a member of the international community to comment on the relationship between Shari'a and the French "burqa ban."

In "Judgment at Tokyo: Crimes Against Humanity in the Tokyo War Crimes Tribunal," Joan Martinez offers a historically grounded analysis of international law. Martinez examines how the aim of the prosecution to prove a "pattern" of recurring atrocities during the Tokyo Trial had significant implications for future war crimes trials and the growing body of international humanitarian law after World War II.

The Spring 2012 CULR concludes with "International Competition Policy: An Overview." Continuing our internationally focused legal scholarship trend, Nikita Appaswami and Kaustav Kundu argue that an international competition framework must become a central WTO agenda item to ensure the health of the global economy.

The Columbia Undergraduate Law Review is excited to provide this unique forum for intellectual debate, scholarly research, and a collaborative exploration of the social, political, and economic questions shaping our society. We are proud to publish the result of this semester's editing efforts and we hope that you enjoy reading the submissions.

Sincerely,

Ana Baric
Editor-in-Chief

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Dismantling the Powder Keg? Penal Moderation and the 2011 Realignment Process in California

Kaitlyn Tongalson
Barnard College

Abstract

*I explore whether penal moderation – a movement away from incarceration and harsh criminal justice policies – is becoming increasingly influential in the United States. Using the state as the unit of analysis, I examine whether California is moving towards penal moderation or if conversely the state is becoming more punitive. California is admittedly a special case because of the Supreme Court’s recent intervention in the state’s criminal justice system, which has forced the adoption of penal moderation. Additionally, scholars have deigned California “the retributive state,” because California’s institutional structures are especially susceptible to the influence of punitive, populist policies. However, for this reason, California is an ideal case study for examining how political actors and the public will react to criminal justice legislation that aims to decrease state reliance on incarceration. Specifically, I examine the ruling of the Supreme Court *Brown v Plata* Case and the goals of AB 109, the California government’s response to the Court’s mandated decarceration and the most revolutionary criminal justice reform the state has witnessed over the past ten years. I call attention to supporters and opponents of the Realignment Process initiated by AB 109, which shifts significant numbers of prisoners from state prison facilities to county jails. This thesis proposes that California appears to be moving away from the retributive penal regime that has dominated for the last thirty years. My analysis suggests that the state is embracing a more rational and pragmatic approach to criminal justice policies that is typical of the managerialist approach used by other states, such as New York. However, this examination also posits that increasingly influential county actors will be responsible for determining the future of the state’s penal regime and will determine if California continues to embrace more moderate criminal justice reform.*

Introduction

The United States is addicted to incarceration, or so it seems. While the nation has less than five percent of the world’s population, the country’s prisons hold almost a quarter of the world’s inmates¹. There are currently over 2.3 million Americans in prison, including a disproportionate number of African Americans and Hispanics and thousands of nonviolent offenders.² China, which is four times more populous than the United States has 1.6 million people in prison – almost a million fewer prisoners than the “land of the free.”³ The renowned criminologist Durkheim posited that a nation’s embrace of high-levels of punishment was aberrational, characteristic only of severely disruptive periods of war and recession.⁴ The United States, however, has proven to be the exception. National imprisonment rates have increased five hundred percent in the last thirty years.⁵

Scholars describe the United States’ reliance on harsh, punitive measures as a distinctive American approach to crime control.⁶ Yet, an emerging group of scholars from the penal moderation school challenge the notion that the US populations’ appetite for incarceration is insatiable. Recently, the US Supreme Court legally mandated penal moderation in California, a state that in many ways is the archetype for “retributive” and “harsh” criminal justice policies.⁷ In the 2011 *Brown v Plata* Case, the Court upheld a lower

court injunction that required that California decrease its state prison population by 46,000 inmates or to 137.5 percent of its design capacity over the course of the next two years. Criminal justice experts have highlighted the importance of this case and assert that this is the first decision to move beyond evaluating prison conditions, to “place mass incarceration itself on trial”.⁸

The importance of tempering the United States’ “carceral bulimia” is becoming increasingly necessary because of shrinking state budgets and escalating correctional costs.⁹ CNBC recently released a documentary entitled “Billions behind Bars,” which points out that the United States spends over \$60 billion on corrections per year at the local, state and federal levels, a considerable increase from the \$9 billion spent on corrections in the 1990s.¹⁰

In this paper, I treat California as a case study to examine whether penal moderation – a movement away from incarceration and harsh criminal justice policies – is becoming increasingly influential in the United States. Specifically, I analyze the rhetoric of political actors and the sentiment of the public towards recent criminal justice legislation in California that is a direct consequence of the *Brown v Plata* decision. California is admittedly a special case because of the Supreme Court’s intervention in the state’s criminal justice system, which has forced the adoption of penal moderation. However, for this reason, California is an ideal case study for examining how political actors and the public will react to criminal justice legislation that aims to decrease state reliance on incarceration. My predominant question of interest is whether California is moving towards penal moderation or if, conversely, the state is becoming more punitive.

I begin my examination by exploring the rationality behind societal use of incarceration. I additionally call attention to the philosophies of two schools of thoughts that aim to explain the prevalence or disavowal of incarceration as a predominant criminal justice policy: penal populism and penal moderation. *What is Penal Populism?*

Anthony Bottoms introduced the concept of “populist punitiveness” in 1995 to describe the increasingly potent influence of the public on contemporary criminal justice systems. Reflecting on the politicization of sentencing, especially with respect to violent, sexual, and drug-related offenses. Bottoms described populist punitiveness as “politicians tapping into, and using for their own purposes, what they believe to be the public’s generally punitive stance.”¹¹ The public in this regard is viewed as inherently punitive.

Later penal populist scholars, including Pratt and Roberts et al., built on this analysis but changed its name to “penal populism.”¹² Roberts et al. define penal populist actors as those who allow the electoral advantage of a policy to take precedence over its penal effectiveness.¹³ Penal populist policies are those advanced to win votes without much regard to their effects and without the objective of reducing crime rates or promoting justice. These policies are in sharp contrast to penal policies that are grounded in principles of justice and which draw on a corpus of sentencing research. Instead, penal populist policies depend upon the exploitation of a misinformed public. Penal populist authors argue that an informed public would oppose policies that had limited social utility.¹⁴

A Movement Towards Penal Moderation?

Having laid out a brief overview of the penal populist literature that has sought to explain the exponential growth of the use of incarceration in the United States since the 1970s, I call attention to an emerging school of thought: penal moderation. While there is a wealth of literature and theories about the causes of increased incarceration, there is a dearth of literature concerning how to decarcerate and move away from penal populist criminal justice policies.

Specifically, penal moderation scholars assert that the penal populist scholars treat the presence of penal populism as inevitable. This, they argue, locks criminological inquiry

into a “dystopic” vision of state control impervious to, or ignorant of, the range and vitality of counter initiatives that have sprung up, or perhaps always have existed, challenging such punitiveness such as community justice initiatives.¹⁵ The risk is that scholars’ critical commentaries – however accurate – can have the ironic, unanticipated consequences of reinforcing the hegemony of penal populism.

Penal moderation scholars challenge this frame of mind by calling attention to the institutional arrangements and practices that enable harsh punishment. In seeking alternatives to state structures that promote harsh punishments practices, adherents to the penal moderation school advocate state adoption of the principle of penal parsimony, a philosophy that prioritizes the “least restrictive (punitive) sanction necessary to maintain public safety.”¹⁶ Governments that embrace the principle of penal parsimony implement minimalist criminal justice legislation that exhorts courts to strive for no more punishment than is needed to deter or prevent crime

An analysis of the criminal justice landscape in the United States reveals that national actors are indeed adopting more moderate rhetoric towards criminal justice policies and advocating policies emphasized by penal moderates. For instance, Newt Gingrich and Pat Nolan, two influential conservatives recently brought national attention to penal moderation in a Washington Post editorial. They urged conservative legislators to lead the way in addressing an issue often considered off-limits to reform: prisons.¹⁷ While appearing tough on crime has been a pillar of many conservatives, this change in the national dialogue signals an important shift in the U.S.’s criminal justice policies. In the present analysis, I examine criminal justice reform on the state level, because a movement towards decarceration – a preeminent goal of penal moderates – requires legislative changes emerging from local leaders.

California Case Study

In seeking to explore whether penal moderation is becoming increasingly influential in the United States, I select the state as the unit of analysis, focusing specifically on California. It may seem unusual that the state in focus is California, a state with a unique political structure. California is one of a few states in which direct democracy measures, including the initiative, referendum, and recall enable citizens to create legally binding decision through voting. While analysis of criminal justice reform in California is complicated due to the state’s complex political landscape, the state is fitting for examining a movement towards moderation, because Barker identifies California as the “retributive state.”¹⁸ She asserts that an emotive, passionate and punitive approach to crime control has dominated in California since the late 1960s, when Governor Ronald Reagan introduced a more victim-oriented approach that emphasized the pain and suffering experienced by victims. Barker also calls attention to ballot initiatives that have led to particularly punitive policies, including the 1995 “Three Strikes and You’re Out” initiative, which mandated and lengthened prison terms for repeat offenders.

While Barker employs California as a case study for the definition of the “retributive penal regime” in the United States, she also provides a counterargument to her claim, which is that recent reforms are challenging California’s dominant penal regime and its associated high imprisonment rates.¹⁹ She calls attention to the rhetoric of politicians such as the recent Republican governor Schwarzenegger and argues that a “more compromising, expert-driven, activist mode of governance concerned with general welfare, may be resurfacing” although she is skeptical that this reform will challenge what she considers the state’s predominant regime of retribution.²⁰

This paper seeks to incorporate recent legislative developments that suggest that her side-claim that a new mode of governance may be resurfacing in California is one that is

becoming increasingly relevant. The California case is also of interest to this study, because the state's problems are representative of major issues the criminal justice system in the U.S. faces on a national level, including the following:

1) *Super-Sized incarceration rates*: The U.S. incarcerates twenty-five percent of the world's prisoners, and if California were a country, it would have the third largest imprisonment rate in the world.²¹ One in seven state prisoners in the United States is incarcerated in California, and its prison population has increased sevenfold since 1975. In 1980, California had twelve prisons and 27,912 prisoners, while currently there are thirty-three prisons and 170,475 prisoners.²² The state's prisons have operated at around 200 percent of design capacity for at least eleven years (App. A, Chart 1). It is of interest to note that this increase in incarceration rates is not a response to a growth in crime; in California the crime rate has gone down or remained stable since the 1990s (App. A Chart 2), and this follows in line with decreasing national crime rates.

2) *High recidivism rates*: Despite high incarceration rates, recidivism is a continued national problem, especially due to state policies that send hundreds and thousands of prisoners back to prisons and jail for technical parole violations. California's sixty-percent recidivism rate is the nation's highest, providing support for opponents of penal populist policies, who argue that more incarceration does not necessarily increase public safety.²³ As Jeffery Travis noted, the golden rule of prison is that "they all come back," and instead of sending prisoners who are less likely to commit crime back into society, over sixty-percent return to jails and prisons.²⁴

3) *Budgetary Crisis*: California exemplifies the budgetary stresses caused by excessive spending on incarceration. In the United States corrections is the second fastest growing government spending category after health care.²⁵ California follows this trend and has spent \$5 billion dollars expanding prisons in the last twenty years and the annual bill for prisons and jail is \$31 billion dollars.²⁶ The California government spends an average of about \$47,000 per year to incarcerate an inmate in prison in California – the nation's highest cost per inmate.²⁷ Additionally, spending on corrections is increasingly surpassing funding for education (App. A Chart 3).

The Supreme Court Case *Brown v Plata*

Although often overlooked in analyzing criminal justice policies, the Supreme Court wields the important ability to affect criminal justice policy creation through its power to interpret the law. Franklin Zimring, an expert on criminal law in California, argues that in "theory federal courts can intervene to restrain the enforcement of state laws that violate rights guaranteed by the Federal Constitution."²⁸ However, courts rarely exercise this power because the standard for finding constitutional violations is quite high, and almost any prison sentence that states wish to invoke is upheld if any rationality is found in its classifications and claims. For this reason, the Court traditionally has not challenged penal populist measures implemented by states.

An example of the Supreme Court's upholding of state imposed penal populist measures is the case of *Ewing v California* (2003). The plaintiff of the case, Gary Ewing, argued that the twenty-five-years-to-life sentence that he was given, as a repeat felon whose third strike involved robbing a retail golf store, was grossly disproportionate to his crime.²⁹ The Court ruled against Ewing, and the author of the majority opinion, Justice Sandra O'Connor, argued that the conditions in question (the twenty-five-year sentence), did not meet the high standard required to invalidate state-approved terms of imprisonment.³⁰ Justice O'Connor called attention to the penal populist sentiment that prevailed during the approval of the "Three Strikes Initiative," asserting that it "responded to widespread public concerns about crime" and it was a "deliberate policy choice" on the part of the California

legislature.³¹ She argued that it was not within the Court's purview to sit as a "super legislature to second-guess" the policy choices made by particular states and that the three strikes law should be upheld.³²

Most recently, the Supreme Court took a new direction and challenged the effects of penal populist legislation through its controversial decision in the 2011 *Brown v Plata* Case. The Court's five to four divided opinion shows the contentious nature of the decision. In less than a decade, the Court went from upholding penal populist policies to directly affecting the development and implementation of criminal justice reform in California. The Court's ruling is somewhat surprising, as highlighted by the political scientist Peabody, who notes:

While our current Supreme Court has a mixed record with respect to recognizing various rights of those accused of crimes, it has generally declined to give extensive constitutional protections to those already behind bars... In recognizing that California prison overcrowding violates the Constitution, the Court has gone against the wishes of eighteen states who asked for more deference on the issue, and it has extended rights to a group—prisoners—who have historically not received much judicial protection... Of course, the conditions in California appear to be fairly extreme, and the Court's decision was closely divided (Peabody 2011, 4).

In order to understand the rationale behind the Supreme Court's decision, I provide a brief overview of the history of the interaction between the courts and the executive and legislative branches in California. In many ways, the history illuminates the enduring tension between the state's penal populist policies and pragmatic criminal justice reform emphasized by the courts. *Brief History:*

Brown v Plata is a case that combined two class action cases, the 1991 *Coleman* Case and the 2001 *Plata* Case. The *Coleman* Case was a class action lawsuit that revolved around the mental-health care system in California state prisons. The defense argued that the abysmal nature of the system violated the Eighth Amendment rights of mentally ill inmates.³³ In 1995, a lower court found the mental-health care system inadequate regarding access to necessary mental health care, screening for mental illnesses, administration of medication, maintenance of medical records, staffing in mental health care services, and prevention of suicide. Notably, the case was locked in the appeals process for almost two decades. In 2002, the *Coleman* case was joined with the 2001 *Plata Case*, in which plaintiffs claimed that the state's failure to provide proper medical care for prisoners caused, "widespread harm, including severe and unnecessary pain, injury and death".³⁴ Prison overcrowding – a symptom of penal populist policies – was credited as the predominant reason for the lack of adequate medical care in both of these cases. In the rulings in both the *Coleman* and *Plata* cases, lower courts called attention to the issues wrought by penal populist policies. The courts attributed the cause of the dramatic growth in the prison population to the state's passage of harsh mandatory sentencing and three-strikes laws, the shift to determinate sentencing, and the acceptance of a counterproductive parole system.³⁵

After a court settlement, the state of California agreed to provide "the minimum level of medical care" to inmates, but the state failed to uphold this compromise and plaintiffs from the *Coleman* and *Plata* cases filed motions to convene a three-judge court to limit the prison population.³⁶ This fueled a legal battle between Governor Schwarzenegger and the courts that continued throughout his term. Although it is unfair to lay full culpability on the failure of the state to comply with the court's order to reduce its prison population on the recently departed Governor Schwarzenegger, it is revealing to look at the evolution of his criminal justice policies. While Governor Schwarzenegger initially challenged populist

policies, his support for penal moderation quickly floundered. Ultimately, Schwarzenegger's criminal justice policies were incoherent and enabled penal populism to continue to prevail.

When Governor Schwarzenegger first entered office, criminal justice reform advocates were enthusiastic and believed that he would lead positive reform. In many ways, Schwarzenegger was seen as the perfect man for reform, because no opponent would get very far accusing him of being soft on crime given his personified toughness on the movie screen. If the Terminator could not bring reform, then who else could?³⁷ Unlike his predecessor Governor Davis, Schwarzenegger refused to accept donations from the politically powerful California Correctional Peace Officers Association (CCPOA), the prison guards' union.³⁸ Additionally, in 2004 the Governor promised to construct no new prisons and raised optimism by insisting that in 2005 the Department of Corrections be renamed to include Rehabilitation in its title.

However, a review of criminal justice policies during his governorship shows that this positive rhetoric was short-lived and that he continued penal populist policies of the past by focusing on constructing new prisons and challenging initiatives aimed at ending California's Three Strikes Law. Petersilia calls attention to the shift throughout Schwarzenegger's governorship noting:

In the first two years you have reform appointments made, you have moderation in rhetoric and you have some notion of trying to reintroduce reform. Everyone was waiting for the reform agenda to get specific, and it didn't. The governor's political capital never got invested in that reform...In terms of controlling corrections costs, imposing a moratorium on new prison construction, or expanding rehabilitation programs, Gov. Schwarzenegger's administration failed. Of course, the Governor does not and cannot act alone in governing the state, but he did vow to do more on his watch than simply incapacitate prisoners—and there is no evidence that this happened (Petersilia 2010, 150).

After lower court rulings, Schwarzenegger declared a state of emergency in California, asserting that California's beleaguered prison system was a "powder keg waiting to explode".³⁹ However, in May 2007, he signed the Public Safety and Offender Rehabilitation Services Act of 2007 (AB 900), which provided \$7.7 billion to add 53,000 state prison and county jail beds – the single largest prison construction program in California's history.⁴⁰ Schwarzenegger's focus on increased incarceration further fueled the on-going battle with the courts, which required that the Governor submit a plan to ease overcrowding. The court rejected the plan submitted by the Governor because it required five years to limit the state prison population instead of the stipulated two years. Schwarzenegger became increasingly frustrated by the court's interventions in the realm of criminal justice policy, leading to the state's appeal of the decision of a three-judge court mandating a decrease in California's prison population. The Supreme Court *Brown v Plata* Case addressed the state's appeal. The ruling in *Brown v Plata*, one of the largest prison release orders in history, held that 1) a lower court did not err in concluding that overcrowding in California prisons was the primary cause of the continuing violations of prisoners constitutional rights to adequate health care and 2) evidence supported the conclusion of a prior three-judge panel that a population limit was necessary to remedy the overcrowding problem.⁴¹ Although courts have capped the population of local jails and prisons in other states, no federal panel has ordered a population reduction over a state's objections under a 1996 federal law that made it harder for such actions to take place.⁴²

The Majority Opinion

Kennedy, a justice who has gained importance since the retirement of Justice O'Connor, often provides the Court's pivotal swing vote. In this highly contentious case, Kennedy swung to the left, joining four other liberal oriented justice including Justices Sotomayor, Kagan, Ginsberg, and Breyer. In the majority opinion, Kennedy pointed out the radical nature of the Court's injunction noting that the prison population reduction is of "unprecedented sweep and extent".⁴³ However, he justified this injunction by declaring that the heinous consequences of penal populist policies in California required this action. He stated, "This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected."⁴⁴ He upheld the lower court's claim that California's prisons are so overcrowded that they, "violate the standard of decency required by the Constitution's ban on cruel and unusual punishment."⁴⁵ He argued that penal populist policies were no longer sustainable because these policies led to the creation of prisons "that deprive prisoners of basic sustenance, including adequate health care" and that are "incompatible with the concept of human dignity and have no place in the civilized world."⁴⁶ Significantly, he called attention to the abhorrent human rights conditions, which included state corrections officers holding suicidal inmates in telephone-booth sized cages without toilets (Appendix A, Image 1). One inmate had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. California's retributive justice system of mass incarceration depends deeply and irretrievably on a simple condition, the denial of the humanity of prisoners and the majority opinion in this case, challenged that denial. Justice Kennedy's dissent also highlighted that California only had one option – to move towards penal moderation in order to comply with the Court's ruling. "After a year of litigation it has become apparent that a remedy for constitutional violations would not be effective absent a reduction in the prison system population," Kennedy declared.⁴⁷ Kennedy also embraced a pragmatic and managerial approach to criminal justice reform by calling attention to the state's budget concerns. He declared that "any remedy to reduce the current crisis" that requires significant additional spending by the state would be "chimerical."⁴⁸ While liberals in California and elsewhere have hailed the *Brown v Plata* ruling as a vindication of the notion that corrections system in the United States must conform to basic standards of human rights, the dissents of Justices Scalia and Alito suggest that important actors continue to embrace emotive penal populist rhetoric.

Their dissents demonstrate that these justices appealed to the same exaggerated but durable fear of crime—and the same intuitive but inaccurate reliance on incarceration as a solution— that brought California before the Supreme Court in the first place. I analyze two common themes that emerged in both of these dissents that demonstrate that these Justices' called upon and promoted penal populist ideas.

The Dissents and Penal Populist Rhetoric:

A) *Victims' Rights*:

Justice Alito, whose dissent was described as "fear mongering from the bench," embraced an emotive penal populist discourse focused on the consequences of the ruling on victims.⁴⁹ He asserted that that he feared that the "decision, like prior prisoner release orders will lead to a grim roster of victims" and in Scalia's dissent he declared that, "terrible things are sure to happen as a consequence of this outrageous order."⁵⁰ Together, Justices Alito and Scalia repeated nine times that "forty-six thousand convicted criminals" – or "the equivalent of three Army divisions" – would be released, creating a fear-laden atmosphere.⁵¹ Scalia sarcastically faulted the order for its kindness to inmates, noting that: "the vast majority of inmates most generously rewarded by the release order... will not be prisoners with medical

conditions or severe mental illness...many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”⁵²

At the conclusion of the trial, legal experts feared that the penal populist rhetoric promoted by these justices would prevail. However, they noted that “it remains to be seen, in a nation beset by unprecedented mass incarceration and all the accompanying human and financial costs, which one (in reference to the Justices’ opinions) will win the day.”⁵³

In order to illuminate the direction of penal populist sentiment in California after the Supreme Court’s decision, I explore the Realignment process in California, a process which is a direct consequence of the Supreme Court’s ruling, the product of which is a shift of prisoners from state prisons to local jails. According to Zimring, penal policy reform usually occurs in the following sequence: 1) media and public concerns 2) legislative proposals 3) new laws 4) changes in the level and content of punishment.⁵⁴ California has a unique macro-environment that is favorable towards reforming the criminal justice system because the Supreme Court inserted itself in this process. However, the manner in which political actors react to favorable macro-environment is not predetermined. In order to better understand how state actors and the public have responded to the Supreme Court’s decision, I look at the Realignment process that the governor and legislature implemented in response to the ruling.

The 2011 Realignment Process in California

On April 8, 2011 Governor Edmund G. Brown Jr. signed Assembly Bill (AB) 109 into effect, a historic piece of legislation that aims to help ameliorate the damage wrought by California’s supersized prison system.⁵⁵ It is also a direct response to the *Brown v Plata* decision and is described by the governor as “the cornerstone of California’s solution for reducing the number of inmates in the state’s thirty- three prisons to 137.5 percent design capacity by May 24, 2013, as ordered by the highest Court of the land.”⁵⁶ This bill required many changes to California’s penal law and most significantly called for the implementation of the 2011 Realignment Process. I assert that the Realignment process demonstrates that the state is embracing a more pragmatic and rational-based approach to criminal justice reform. Although AB 109 brought about a multiplicity of changes, there are two to which I call attention, as they are directly related to Realignment:

A) Change in Sentencing Laws:

AB 109 radically changed sentencing laws in California by redefining the punishments available for felonies in states. Traditionally, following the common law, California law defined as a general matter, death or state prison, as the authorized punishments for all felonies (unless otherwise prescribed by the specific offense terms) with a limited option for county jail for a period not to exceed one year.⁵⁷ AB 109 stipulates that starting on October 1, 2011 a realignment process would occur that requires non-violent, non-serious, non-sexual felony offenders, commonly identified as the “N3,” be sent to county jails instead of state prisons.⁵⁸

While opponents of this change believe that the approach is a cyclical shell game, transferring prisoners from one facility to the next, the rationality behind this diversion of non-violent offenders to local jails instead of state facilities is multifold. Government officials have noted that counties have a far greater stake than the state does in trying to rehabilitate as many of these offenders as possible, because they have to live with them. Additionally, jails are closer to communities that California’s prisoners come from, permitting family ties to be sustained and opening access to educational and rehabilitative resources that are far more available, at least in the urban counties from which the vast majority of prisoners come.⁵⁹ Perhaps most importantly, AB 109 also grants broad new authority to counties to assign low risk inmates in county jail to home arrest and electronic monitoring and hence provides alternatives to incarceration.⁶⁰

B) The Changing Nature of the Probation/ Parole Relationship:

Realignment keeps California's three years of post-release supervision for inmates, but moves responsibility for that supervision to county probation agencies. Parolees under county supervision will no longer be subject to return to state prison for technical parole violations by the authority of the Board of Parole Hearings.⁶¹ Now county courts, the same authorities that sentence offenders charged with crimes, will have to decide on the appropriate sanctions. County probation, while subject to resource constraints, has sustained an institutional culture more oriented toward rehabilitation and reentry than state parole, which was assimilated into the custody oriented approach of the prison system decades ago. Instead of relying primarily on one sanction – return to prison – to punish parole violations, counties can use a range of options, including: home detention with GPS monitoring, restorative justice programs emphasizing victim restitution, work and education programs, drug treatment, and community-based residential programs, among others.⁶² The approach is also rational from an economic perspective, as the shifting of state prisoners to counties is projected to save the state \$1.4 billion dollars a year by 2015. The government proposes to pay counties \$25,000 per full-time prisoner per year and an additional \$2,275 per prisoner for “treatment, alternative custody, and/or other programming”. Since it now costs the state about \$50,000 per prisoner year, this is a substantial markdown. One reason for this reduction is that costs for incarcerating lower level offenders at the county level are lower than the costs of imprisoning offenders in higher security arrangements. The governor initially proposed that funding for Realignment come from an extension of the vehicle license fee and sales tax surcharges enacted in 2009. However, a source of concern that must be addressed for the success of the program is the funding flow, as county officials are worrisome regarding the state's ability to secure funding for the program going forwards.⁶³ Given these changes to California's penal law, I analyze whether these changes suggest that the predominantly retributive penal regime of California is becoming more moderate.

Penal Populism, Penal Moderation, or Something in Between?

These two significant changes demonstrate that the Realignment process strives to bring less punitive criminal justice reform into effect. However, analysis of the rationale behind this reform suggests that the goal behind this change is indeed not a change in the institutional climate towards penal moderation. Instead, an examination of recent criminal justice reform suggests that the Supreme Court has induced California to pursue a more managerial approach to crime, one focused on rationalizing and containing the threat of crime and adopted by politicians such as New York's Governor Pataki. In fact, AB 109 can be viewed as a prime exemplification of a state aiming to “regulate and minimize collective risk,” because the alternative to the realignment process was “releasing thousands of prisoners onto the streets” – an alternative that even the most avid penal moderates would likely question.⁶⁴ Indeed, the rhetoric of supporters of the Realignment process demonstrates their rational, non-emotive and pragmatic mindset – a significant change from the emotive penal populist rhetoric of the past. Even “Realignment,” the title of the process of shifting inmates, is neutral in tone when compared to the emotion-laden penal populist, “Three Strikes and You're Out” initiative. In order to support the contention that California is moving towards more moderate criminal justice reform, I evaluate California Governor Jerry Brown and the California public's assessment of Realignment.

Third time California Governor Jerry Brown, is an advocate of the Realignment process, which he describes as a necessary response to the Supreme Court's decision. In promoting the Realignment process, Brown pointed out that the state was left with no choice but to implement the ruling of the Supreme Court. This time there would be no further

appeal, because the highest Court of the land had spoken. He expressed the necessity of Realignment's success declaring:

For too long, the state's prison system has been a revolving door for lower-level offenders and parole violators who are released within months—often before they are even transferred out of a reception center. Cycling these offenders through prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision." (Brown 2011)

Brown's focus on the rehabilitation of offenders and on economic efficiency is especially telling of how attitudes towards criminal justice policy in California are changing because during Brown's first term as California's governor in 1976 he approved many harsh crime bills. In her analysis of the development of the "retribution landscape" in California, Barker calls attention to the 1976 the Determinate Sentencing Act, which Governor Brown signed and that shifted California's criminal justice policy towards a retributive philosophy by ending indeterminate sentencing, fixing criminal penalties, and most importantly prioritizing punishment over retribution. A little over three decades later, is it quite ironic that the same political actor is the governor but that he is now emphasizing a more moderate criminal justice philosophy, seeking to prioritize rehabilitation over imprisonment. When questioned about the merits of the Realignment process, Brown emphasized his dedication to "fixing" the broken system stating: "Look... people have been failing at this job for a long time. I said I'm going to fix it. I'm going to fix it".⁶⁵ While it is difficult to pinpoint the exact reason for Brown's change of policy, it can be argued that his shift in attitude has been influenced by the failure of penal populist policies over the past thirty years.

An analysis of public opinion polls since the Supreme Court's ruling shows that Californians are overwhelming in support of Brown's Realignment plan and suggests that public opinion may be becoming more moderate. A July 2011 Los Angeles Times poll found that 80 percent of voters support Realignment, though they were less clear about approving taxes to support it.⁶⁶ These opinion polls challenge the penal populist assertion that the public strives for the most retributive social justice policies.

Conclusion

While the Realignment process in California has not garnered as much national media attention as recent prisoner hunger strikes at California state prisons, it has initiated a grand criminal justice experiment in the state of California.⁶⁷ This criminal justice reform should be newsworthy for those interested in the dynamics of the constantly evolving, and often contradictory criminal justice policies in the United States.

I intended to determine whether penal moderation was gaining influence in the United States by using California as a case study and by examining various factors influencing the state's penal regime. My analysis of AB 109 and the state's response to the 2011 Realignment process suggests that California's regime is becoming more moderate due to the intervention of external actors, namely the Supreme Court, which led Governor Brown and the California legislature to embrace a more pragmatic approach to criminal justice policies. In regards to the force of penal populism, examination of the goals of Realignment and of shifting public opinion showed a movement away from the punitive policies that are characteristic of California's retributive regime.

However, this paper also cautions against making long-term assumptions about the future of California's penal regime and about penal moderation in the United States. For instance, some scholars argue that penal moderation is not as "moderate" as it purports to be and that new, moderate institutions are becoming quietly embedded in the organizational

structures and normative tenets of the American state.⁶⁸ Additionally, for the case of California, it is very possible that a high-profile media criminal case connected to the Realignment process could lead to the resurgent force of a victims' rights based-public. Because the unique institutional structure of California is privy to populist policies, it is also a possibility that the public will introduce new initiatives to mollify the Court's rulings and the state's response. For instance, citizens may choose to vote against the constitutional amendment that Governor Brown hopes to put to vote in order to guarantee continued funding for Realignment. While it remains unpredictable how external factors such as an increase in California's crime rate or a changing economic climate will affect the direction of criminal justice policies in the state, it seems that more than ever county officials will be responsible for determining the direction of California's penal regime. Over the next few years, counties will decide to use their Realignment funding to construct more jails or to focus on rehabilitation and less incarceration. Penal moderates in their quest to promote decarceration should call further attention to how local actors can shape penal regimes; a topic that has thus far been underexplored and that will become increasingly relevant over the next five years in California and in the United States, if other retributive states pursue reform similar to the Realignment process in California. Whether local officials will promote penal populist policies or will be leaders of more moderate criminal justice reform remains an object of inquiry. As Justice Alito declared, "In a few years, we will see."⁶⁹

Endnotes

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- ⁸ Simon, Jonathan. "Brown v. Plata: Dignity Is Coming to the USA." Prison Law Blog. Accessed December 4, 2011. <http://prisonlaw.wordpress.com/2011/05/> p 1.
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- ²⁰ *ibid*.
- ²¹ Zimring 2005, 333
- ²² *ibid*.
- ²³ Pew 2011, 2
- ²⁴ Travis, 2005,4
- ²⁵ Pew 2008, 12
- ²⁶ *ibid*.
- ²⁷ California Legislative Analyst Office 2008, 1
- ²⁸ Zimring 2005, 328
- ²⁹ Frase 2005, 584
- ³⁰ *ibid*.
- ³¹ Willkie 2003
- ³² *ibid*
- ³³ Lopez 2010, 101
- ³⁴ *ibid*, 103

- ³⁵ 99
³⁶ 100
³⁷ Petersilia 2010, 148
³⁸ Petersilia 2010, 150
³⁹ Walters 2007
⁴⁰ Petersilia 2010, 149
⁴¹ Scotus 2011, 1
⁴² Lopez 2010, 130
⁴³ Kennedy 2011, 3
⁴⁴ *ibid*, 1
⁴⁵ *ibid* 48
⁴⁶ *ibid* 13
⁴⁷ *ibid* 1
⁴⁸ *ibid* 30
⁴⁹ Young 2011
⁵⁰ Alito 2011, 17; Scalia 2011, 14
⁵¹ *ibid* 2
⁵² Scalia 2011, 5
⁵³ Young 2011, 3
⁵⁴ Zimring 2005, 323
⁵⁵ CDCR¹ Factsheet 2011
⁵⁶ IBID
⁵⁷ Simon 2011,1
⁵⁸ CDCR Factsheet 2011
⁵⁹ Simon 2011, 2
⁶⁰ Misczynski 2011, 5
⁶¹ Simon 2011, 1
⁶² Misczynski 2011, 10
⁶³ Blankstein 2011
⁶⁴ Barker 2011 127
⁶⁵ Walters 2011
⁶⁶ Dolan 2011
⁶⁷ California prisoners at Pelican Bay State Prison gained national attention by going on a hunger strike during the summer of 2011. For more see: Lovett, Ian. "California Prison Hunger Strike Resumes as Sides Dig In." *The New York Times*, October 7, 2011
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⁶⁹ Alito 2011, 17

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Appendix A:

Table 1:

Table 1. Criminal Justice Responsibility by Level of Government

	Prisons*	Jails*	Police**
Federal	7%	1%	8%
State	93%	--	15%
Local	--	99%	77%

*Number of inmates by level of government

**Officers by level of government

While both states and the national government have created penal codes

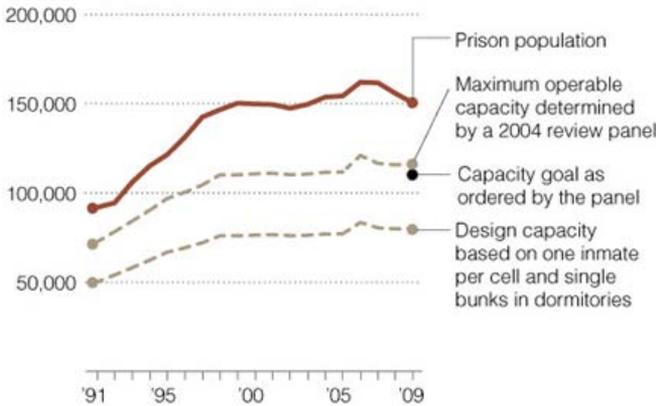
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Chart 1:

Fixing Overcrowded Prisons

A three-judge panel has ordered California officials to reduce the state's prison population by about 40,000 inmates over two years.



Sources: California Department of Corrections and Rehabilitation; United States District Court, Northern District of California

THE NEW YORK TIMES

Chart 2:

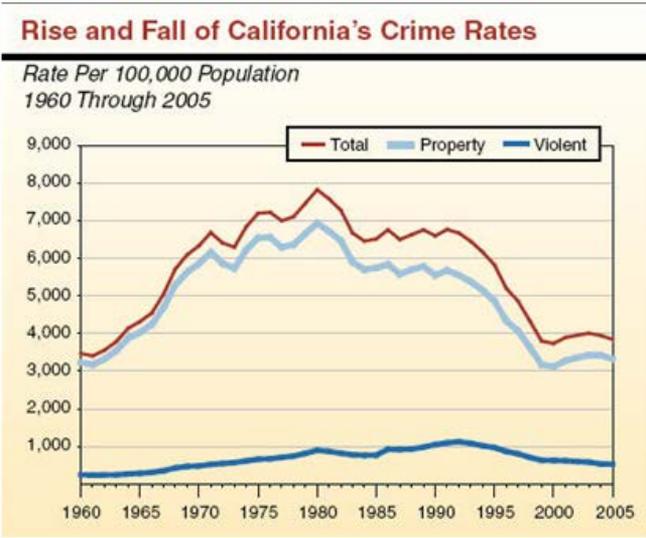
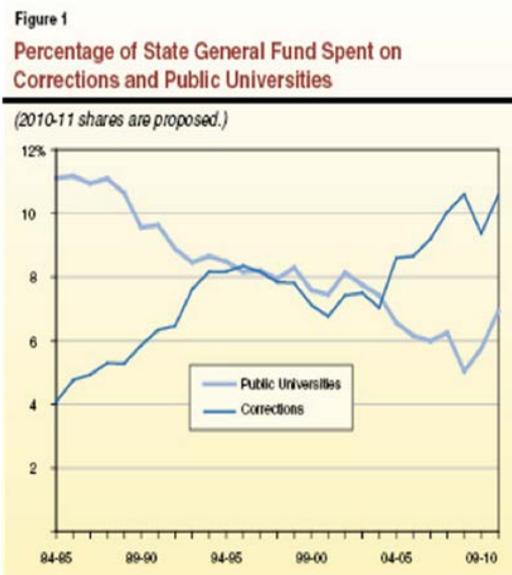


Chart 3:



Charts 1, 2, 3 Retrieved from: Gideon, Lior. "California's Attitudes Towards Inmates in an Era of Scarcity and Early Releases." Lecture, ASC Annual Meeting, California, San Francisco, November 20, 2010.

Pictures of California's Prisons as Included in the Opinion of Chief Justice Kennedy



Image 1: Salinas Valley State Prison July 29, 2008 Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed)



Image 2: California Institution for Men Aug. 7, 2006

Retrieved from: *Brown v. Plata*, No. 09–1233 (May 23, 2011) (Lexis Nexis).

Beyond the Veil: Shari'a Justification of France's "Burqa Ban"

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Abstract

This paper analyses the legitimacy of the recent French law, which banned public covering of the face, colloquially referred to as the "burqa ban." It considers the implications of French law, Islamic law, and international law. Ultimately, it concludes that the face-covering law is consistent with French law and Shari'a, as it is written. However, its conflicts with non-binding international accords may cause conflict to some degree with Shari'a. Translations from French to English were done by the author, with original text noted.

Riding the wave of increasing Islamophobia in the Western world, France announced in 2011 that it would include the Islamic niqāb and burqa¹ in its 2010 ban on public face covering. While some consider niqāb and burqa' to be optional garments, many Muslim women consider them a mandatory aspect of their religious observance. Muslims and human rights activists around the world were astonished and angered by France's perceived assault on religious freedom. Using French constitutional principles, exempt declarations, and claims of religious necessity, they entreated the government to exempt niqāb and burqa' from the regulation or to lift the ban entirely.

This paper aims to analyze the issue using the texts of the French law; relevant Islamic law;² French perceptions of Islam, Muslims, immigrants, France, and religion; and relevant international accords to determine if the French inclusion of Islamic garments in the ban on public face-covering violates Shari'a, thereby violating the religious rights of French Muslim women. As there is no specific textual requirement in Islam for face-covering, the French ban on face-covering does not explicitly violate Shari'a. However, as Shari'a allows for the interplay and adoption of local customs as religious law, the issue becomes more complicated. Domestic French law may constitutionally indirectly ban niqāb and burqa', but international declarations signed by France promote free expression of religious belief, which means that French 'local' law may oppose the new legislation. However, since international declarations have historically not interfered with domestic law, these declarations do not put the French legislation outside the bounds of Shari'a.

My analysis is best begun by understanding the French law: "Law number 2010-1192 of October 11, 2010 forbidding the concealment of the face in public spaces."³ To that end, the French government publishes a Circulaire, a document with further details designed to aid in comprehension and enforcement of a French law. This one — "Circulaire of March 2, 2011 relating to the enacting of the law number 2010-1192 of October 11, 2010 forbidding the concealment of the face in public spaces"⁴ — was written by François Fillon, the current Prime Minister of France. The law is vague in that it specifies only that it includes vast categories: "None can, in public space, wear a garment designed to conceal his face. ... For the application of the first article, public space is composed of public ways such as places open to the public or allocated to a public service."^{5,6} The word none is quite explicit. The law applies to anyone on French soil, even to foreigners and to people in predominantly Muslim areas.⁷ Alternatively, the commentary declines to clarify further the definition of public space, instead suggesting that is beyond comment, as if it were inherently obvious. The enforcer is thereby granted great discretion in application, and the accused is given no

room to argue or defend.⁸ Several places are specifically included, such as parks, hospitals, public transportation, and universities, and it makes the point that public services may be denied to anyone in violation of the law, except in emergencies.⁹ Evidently, only private residences and vehicles are not included in the scope of the law. However, the government intends to exempt religious places and other public spaces during religious processions of a “caractère traditionnel,”¹⁰ indicating a willingness to be flexible for long established practices — the interruption to which people might object — but not for daily life.¹¹ While religious places are considered public spaces, people engaged in religious observance therein may violate the ban with impunity.

Violations of the law are punished with a fine. Violators may also be made to attend citizenship classes¹² to remind people of “the Republican [related to the (French) Republic] values of equality and of respect for human dignity.”^{13,14} This response to the violation underscores the stated feelings of the government for including Islamic garments in the law, in addition to the other coverings it identified.¹⁵ Their perceived goals are to promote security by ensuring ease of identification of people in public¹⁶ and to promote active participation in the French identity, with which the government feels the niqāb is in conflict. The French identity will be discussed subsequently. According to the French government, this law is not meant to be discriminatory. Instead, it is the government’s manifestation of the will and the expressed desire of the French people to live together and to “reaffirm solemnly the values of the [French] Republic.”^{17,18} Nothing in the law itself is aimed at Islam or Islamic garments. Bearing in mind the regulations and expressed motivations of the French legislation, it is necessary to consider next the Islamic law.

Shari’a¹⁹ is even less explicit than the French legislation. Within Shari’a, there is no textual requirement of niqāb or face-covering. However, there are implications that it is an ideal, which could be motivating these French women. Much of the discussion in the Hadith²⁰ seems to stem from a qur’anic verse about how women should dress in public: “And tell the believing women ... to draw their veils over their bosoms, and not to reveal their adornment save to [select relations or children].”²¹ From that point, there are conflicting patterns of behavior. It is said that the Prophet Muhammad was once approached by a man who told the Prophet that his wives should be veiled, “but Allah’s Apostle did not do so.”²² However, there are other verses in which there are references to the Prophet Muhammad’s wives being veiled because they are more special than other women: “Narrated Aisha, Ummul Mu’minin²³: Riders would pass us when we accompanied the Apostle of Allah (peace_be_upon_him) while we were in the sacred state (wearing ihram). When they came by us, one of us would let down her outer garment from her head over her face, and when they had passed on, we would uncover our faces.”²⁴ Arguably, if the Mother of the Believers did something, it must be, at least, acceptable, if not laudable. Women who see her as a guide to a pious woman’s life might follow her example without any further textual guidance. In fact, face-veiling seems to have been a common response to verse XXIV:31: “Aisha used to say: ‘When (the Verse): “They should draw their veils (Khumur) over their necks and bosoms (juyyub),” was revealed, (the ladies) cut their waist sheets at the edges and covered their faces with the cut pieces.”²⁵ Face-covering, though, was not explicitly enjoined by the Prophet Muhammad. When given the chance, he, in fact, did not include a woman’s face as required covering: “Asma, daughter of Abu Bakr, entered upon the Apostle of Allah (peace_be_upon_him) wearing thin clothes. The Apostle of Allah (peace_be_upon_him) turned his attention from her. He said: O Asma’, when a woman reaches the age of menstruation, it does not suit her that she displays her parts of body except this and this, and he pointed to her face and hands.”²⁶ That the Prophet Muhammad specifically stated that a woman’s face may be uncovered suggests that, even though some religious women were covering their faces for religious reasons during his time, the Prophet Muhammad had no intention of requiring women to cover their faces.

That the Prophet Muhammad did not require face-covering in particular may not satisfy the needs or desires of Muslim women to do so now. While the niqāb was not specifically required, conspicuous modesty is the objective: “O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them (when they go abroad). That will be better, that so they may be recognized and not annoyed.”²⁷ The use of the word recognized indicates that the point of the modest dress is not only to hide themselves – it is to stand out, to let people know they are Muslims. Therefore, some may feel that more conservative garments, like the niqāb, may be necessary in parts of the world where simply wearing long clothes or loose outer garments is not unique to Islam. This aspect of veiling is of particular importance with respect to the French perspective on niqāb. The Qur’an does enjoin modesty — “Successful indeed are the believers ... who guard their modesty,”²⁸ — without explicitly defining it. While the text gives some suggestions, such as lowering one’s gaze, covering bosoms, and not revealing adornments except in front of certain people,²⁹ it is not clear what is sufficient. Therefore, an individual believer or interpreter may feel certain kinds of coverings, like niqāb, are necessary, though they do not have clear textual support for those coverings. This ambiguity creates problems for defending that choice or requirement to others, as is the case in France. Modesty itself is a relative term. In France, modesty likely means something different in people’s understanding than it does in Iran, Pakistan, Saudi Arabia, or 7th century ḥijāz, where Islam began. The admonition to modesty is thus insufficient to demonstrate that Shari’a requires face-covering. Consequently, a government may believe that it is allowing for the fulfillment of the qur’anic requirement and sufficiently allowing for free religious practice, despite banning face-covering; and some any government’s citizens may disagree.

The problem of modesty is further compounded by the question of motivation. Modesty is not explained as being required for its own sake. The identifiably modest covering is designed for the women’s protection. The principle being that Muslim women will be “not annoyed”³⁰ if non-believers understand that they are from a different group, that they are Muslims. However, as times have changed since that verse was revealed, if the object of that verse is the preservation of not only their modesty but also of their safety, the suggested behavior may need to change. If publicly distinguishing themselves were meant to keep them safe but now exposes Muslim women to harassment, the injunction could be interpreted to ordain that Muslim women not draw further attention to that part of their identity at a time when it may not be conducive to safety. This reading is not to condone the harassment of veiled Muslim women in contemporary society but to suggest an interpretation of the Shari’a that instructs responding to such treatment by modified attire, possibly including not wearing niqāb or burqa’.

Extremity of dress, even if for religious reasons, has qur’anic proscriptions of its own. Consequently, despite the religious intentions, wearing niqāb in France may be opposed to Shari’a. While the believers are encouraged to hold themselves apart,³¹ God censures extremity, especially in self-restriction: “O you who Believe, do not forbid the good things that God has allowed you, nor go to extremes, for God does not love those who go to extremes (Q. 5:87).”³² This verse leads to the question of whether the face-covering is extreme. To some degree, whether it is excessive must remain a matter of personal interpretation. However, since the Prophet Muhammad twice ruled that face-covering was unnecessary, though he permitted it to continue, it seems to be extreme manifestation of personal belief. This is especially evident in a relative evaluation. In France, where face-covering is less common, the extremity of face-covering seems heightened by the rarity and the lack of cultural encouragement. Therefore, as the Qur’an discourages extremity, face-covering motivated by religious zeal may be considered opposed to Shari’a.

In cases where the Shari’a is not explicit, local law and custom has generally been accepted as law. It is thus important to consider the society that generated the face-covering

ban, including the relationship of the society to religion, to Islam, and to Muslims. The rules explicated by the Prophet Muhammad were adjustments to traditional practice, not the creation of an entirely new and sufficient system:

Such rules of law as the Qur'ān and the sunna established were regarded simply as ad hoc modifications of the existing customary law. This existing law remained the accepted standard of conduct unless it was expressly superseded in some particular by the dictates of divine revelation. ... It served to perpetuate standards of the preexisting customary law by formulating the proposition that divine revelation tacitly endorsed the customary law if it did not expressly reject it.³³

Though the Prophet Muhammad received the revelations in a specific region with its own culture, there is no textual reason to suspect that that region's entire culture was to be exported. Any aspect the Prophet Muhammad did not himself require need not be adopted; in fact, not appropriating the culture 7th century Hijāz could arguably be a superior choice, as maintaining a society's original culture would be maintaining that which was "tacitly endorsed" by the Prophet Muhammad. As the Prophet Muhammad did not, when given the opportunity, endorse veiling, one might argue that France is more in keeping with Shari'a by not perpetuating it. Therefore, the French could legitimately expect, within the bounds of Islamic law, to have their cultural practices recognized as the option supported by Islamic law since Shari'a was unclear as to the wearing of niqāb in public.

The Prophet Muhammad recognized that voids existed in the legal system, yet there is little guidance in Islamic law about the appropriate response to such issues. When something is unclear, he advised believers to do as they believe is best for themselves and for their faith: "Both legal and illegal things are evident but in between them there are doubtful (suspicious) things and most of the people have no knowledge about them. So whoever saves himself from these suspicious things saves his religion and his honor."³⁴ This verse develops the philosophical and ethical conundrum of something being neither legal nor illegal. The dichotomy does not seem to leave much room for anything else, yet, if something were one or the other, it apparently would be "evident." Since the answer to the niqāb question is not readily apparent, it may be one of the doubtful situations against which the Prophet Muhammad warns. The Prophet Muhammad acknowledged that most people, with their limited understanding, cannot know whether some practices are within the bounds of Shari'a or not. He tells the believers, for the sake of their faith, to avoid committing acts of questionable holiness, but he does not say how to know what to do in a doubtful situation. That omission puts those attempting to respect religious law in the tough position of simply trying their best to determine the moral implications of some actions.

When Muslims, particularly legal scholars, interpret religious laws, they may accommodate changes in society and understanding. They may choose then, within Shari'a, to serve not just their own desires but to serve social ends by attempting "to accommodate change [and considering] public benefit (maṣalaḥa) which signifies anything that constitutes an advantage for society at large while not overtly contradicting the Shari'a."³⁵ The ability to consider general welfare is somewhat useful and bespeaks promising guidance about Shari'a's openness to modernization, but it is not a definite answer. The question still exists as to whether the French law is promoting a public good, which brings the argument back to local custom and law.

To clarify the religious obligation for face covering, French customary law must next be considered. France's most important values are enshrined in its Constitution and to its characteristics are all laws beholden. Above all, France seeks "Liberté, Égalité, Fraternité," and to maintain France as "an indivisible, laïque,³⁶ democratic, and social

republic.” Those principles demand that it “assures equality before the law to all citizens without distinction based on origin, race, or religion. It respects all belief systems.”^{37,38} Two of these values – equality and *laïcité* – are central to the French argument justifying the inclusion of Islamic garments in the ban on face-covering. The constitutionally enshrined *laïcité* does not provide freedom of religion per se. Rather, it protects people from other’s religions. Thus, even the constitutionally enshrined respect for different beliefs is not sufficient to defend public displays of religion, which arguably includes *niqāb*.³⁹ As it is not within French custom to overtly display religious markers,⁴⁰ by making other people aware of their religion, wearers of *niqāb* and *burqa* are contravening French practices. As that practice becomes part of *Shari’a*, the wearers of *niqāb* are violating *Shari’a*. It could even be argued that the French were restrained by only including garments that fell within the scope of the current legislation and not creating a new law that actually enforced *laïcité* on society by banning all religious symbols.⁴¹ Even the Declaration of the Rights of Men and Citizens,⁴² though recognizing the value of equality and religious liberty, considers them subordinate to the order and the utility of French society: “Men are born and continue free and equal in rights. Social distinctions cannot be founded except on the common utility. ... None may be troubled for his opinions, even religious ones, provided that their manifestations do not trouble the public order established by the law.”^{43,44} Beyond that, politicians are willing to reduce religious choice in the name of protecting women’s equality, which many French people believe is challenged by gender-based face-covering.⁴⁵ France’s domestic law seems to support decidedly the new legislation. The foundational documents of French society legitimate the ban on public face-covering, even as it pertains to religion. French custom has historically had no public face-covering. Therefore, as custom and law have no objection to banning face-covering, *Shari’a* should approve.

Immigration further complicates the issue. Though *Shari’a* may accept the use of local culture when *Qur’an* and *Hadith* are not specific, that allowance does not clarify the case of immigrants. If they are moving from one culture to another, how do they balance adopting the local culture versus continuing in the cultural tradition they have previously practiced? As previously discussed, *Shari’a* is slightly different internationally because of the role local culture plays in *Shari’a*. That alteration poses theological questions, as *Shari’a* is the law of God and should thus be unalterable. Some Muslims may not wish to change their behavior or recognize new customs. The tension between God’s-law-in-itself and God’s-law-in-practice imposes existential problems.

From the French legal perspective, though, the only customs at issue in this matter are those of French Muslims. French people do not tend to perceive French Muslims as wearing *niqāb* or *burqa*. The impression is that French Muslims come from *La Maghreb*, the region of North Africa previously colonized by France, and that French Muslims, thus, do not veil religiously: “[M]ost French Muslims originate from north Africa [sic], where traditionalists cover only the hair, not the face.”⁴⁶ Even when including *Afrique Noire*,⁴⁷ another origin of some French Muslims, tradition does not necessitate allowing face-covering. The perception also indicates that *niqāb* come not from French Muslims, or even North Africa, but from “hardline preachers trained in conservative Saudi Arabia” or the *Taliban*.⁴⁸ Consequently, the French government feels no need to make extra allowances. The government believes that it has accounted for the needs of the French — including the French Muslims — in writing this law and accounting for those needs, in this perception, does not require accounting for *niqāb*. Therefore, banning public face-covering is permissible. While there is a limited understanding that one can cover one’s hair religiously and still be French,⁴⁹ covering one’s face indicates in this perception that one has not absorbed and does not embody the French identity. Many believe that willingly accepting what some consider abusive and many consider a sign of inequality indicates that one does not understand what it is to be French, that one has not accepted the French principle of

égalité. This perception is reflected in the citizenship classes that violators of the ban may be mandated to take: there is the argument that if violators believe that they must engage in this because of where they are from, they should be educated in French culture and how they do not have to veil in France. While this argument may seem condescending, I argue that it squares with the French understanding of national identity, which is important to the local custom that is finagled into Shari'a.

It is not considered French to be this openly involved in or aware of another person's religious and ethnic ties. It is considered to be counter to the previously discussed republican ideals to question a person's private identity and to make decisions based on it.⁵⁰ Official documents have not asked about religion, mother tongue, or ethnic origin⁵¹ since a 1978 law banned it.^{52,53} Despite the drawbacks of this policy, it illustrates well an aspect of French culture that is critical to this issue. In France, one is French first and everything else is a personal matter and should be kept so. To be French is to partake in French values and beliefs as defined by the Constitution and other founding documents, including *liberté, égalité, fraternité, and laïcité*. Therefore, the culture, which is, by Shari'a, mixed with explicit qur'anic and hadith instructions to comprise Shari'a, supersedes Shari'a. Islamic law, thus, legitimates the subordination of this non-mandated expression of Islam to French law.

France's decision to include Islamic garments under its general ban on public face-covering, though not made with the Shari'a in mind, has been supported by Islamic clerics in France. Dalil Boubakeur, the rector of La Grande Mosquée de Paris, has stated, "neither the burqa, nor the niqab, nor any all-over veil, are religious prescriptions of Islam,"⁵⁴ a position reiterated by other French Muslim scholars.⁵⁵ Support from French clerics, though, is not like a papal verdict in Catholicism, wherein it becomes doctrine to which all believers must subscribe: "the Muslim world does not have a central authoritative body that can negotiate unity of purpose and action."^{56,57} Clerics from other states have certainly opposed the ban.⁵⁸ That is an unavoidable consequence of a decentralized system and does not invalidate the interpretations put forward by local clerics. As has previously been discussed, local law and local muftīs⁵⁹ may, according to Shari'a, be used to interpret Islamic texts and fill voids in regulation. One can extrapolate from that that local clerics deserve priority over foreign interpreters because of their combined familiarity with local custom and Shari'a law. Furthermore, as there is precedent for taking fatwas⁶⁰ only from certain muftīs and that shopping the case is permissible in seeking guidance, the French government has not stepped outside Shari'a principles in accepting the favorable rulings of French clerics. The French government, therefore, can be said to have Islamic and Shari'a backing for the legislation banning public face-covering.

Though the French law may have secured French legal justification and thereby be within Shari'a, it has not yet been compared to all pertinent standards. The French legal system has linked itself to a system of international principles and declarations of rights. That system, then, must also be answered in order to determine if French law sufficiently legitimizes the inclusion of Islamic garments in the public face-covering ban to say that France's law is within Shari'a. The Universal Declaration of Human Rights (UDHR), a nonbinding United Nations declaration, which French officials helped to draft and which was proclaimed for all members of the United Nations, affirms for all people, in its 18th Article, "the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."⁶¹ Not only does it guarantee freedom of religion, it guarantees manifestation of religion. Thus, if the niqāb could be argued as a manifestation of the practice of Islam, it would be protected by France's own accord. This document makes no stipulation as to who determines appropriate manifestation or what qualifies as observance; arguably the individual

believer has claim to the right and determination. Article 18.1 of the International Covenant on Civil and Political Rights, which France has ratified,⁶² uses similar language to the UDHR: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”⁶³ It too includes the right to manifestation of religious belief in observance and practice. The ICCPR, however, grants in Article 18.3, the right of the state to “limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁶⁴ France, in its new legislation, arguably fulfills the qualifications for this exemption. The law is public, and according to the French government is in the interests of public order and safety and of the security of several key French principles and rights: *égalité* and *laïcité*. For further corroboration of this exemption, two other international agreements to which France is a signatory may be consulted. The Declaration on the Elimination of All Form of Intolerance and of Discrimination Based on Religion or Belief, in Article 1.1, and the European Convention on Human Rights, in Article 9.1, both use similar language to support freedom of religion and manifestation thereof. Both, however, immediately provide the same concession, allowing states to restrict manifestation for public safety and order and for the maintenance of “rights and freedoms of others” in Articles 1.3 and 9.2 respectively.⁶⁵ That exemption arguably includes the French right to freedom from religion. France, therefore, has under several international accords the right to restrict the manifestation of Islam within its borders if it believes that public religious manifestation challenges its fundamental principles. *Laïcité*, then, provides France sufficient reason domestically and internationally to include locally Islamic garments in its public face covering ban.

That loophole, however, only extricates France from some of its international agreements. The only restriction that the Universal Declaration of Human Rights places on the human right to free practice of religion is that “[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”⁶⁶ Public face-covering, even for religious reasons, does not per se conflict with any of the rights listed in the UDHR, even if it conflicts with domestic French principles or rights. Women cannot be violating their own rights by choosing to veil; therefore this clause does not negate the UDHR’s claim against France’s inclusion of Islamic garments in the ban on public face-covering. If anything, it further buttresses the provision in the French legislation that punishes those who force people to cover their faces against their will.⁶⁷ France, then, has not escaped its international agreement.

The question then becomes whether a non-judicial document can be considered part of the customary law, which it would have to be in order to influence Shari’a. On one hand, the UDHR is not law. As a nonbinding declaration, it is just a statement of principle that the United Nations accepts. Thus, it may not count towards the customary law of France that would influence Shari’a and affect the relationship of the French legislation to Shari’a. On the other hand, not everything in the Hadith is stated as law; nevertheless, from statements of the Prophet Muhammad’s, regulation is deduced. Consequently, Shari’a could be argued to include regulation from expressed principles even if they are not expressed as codified law. Because France has entered itself into this organization whose declaration defines parameters of rights, France is beholden to those obligations, including the freedom of religious practice. France, therefore, has backed itself into a corner. In adopting the freedom of religious practice – full stop, no exemptions – into its laws internationally, though it does not domestically enforce it, France has called into question the part of its culture that would allow it to include Islamic garments in its ban on public face covering and not be in violation of Shari’a. The international law issue, though, would only become pertinent to

Shari'a if it had infiltrated French customary law, which it has apparently not. Thus, French law is not put in violation of Shari'a by international documents.

France has been accused, because of its 2010 ban on public face covering, of impinging on the free practice of Islam. This paper has attempted to trace the Shari'a as it pertains to burqa' and niqāb, leading from a discussion of the French legislation to explicit Islamic law in the Hadith and Qur'an to a discussion of French culture and law, which according to Shari'a would have the final say, as it is used when Shari'a is otherwise lacking. Next it considered the role of international accords in local law and, thereby, Shari'a. Shari'a thus continues its pattern of being reasonably defined in a specific area but becoming ambiguous as more states are involved. Two options became evident that provide distinct but potentially equally valid interpretations of international and Islamic law and, thereby, the situation in France. France, in France, as France, for France, is within the regulation of Shari'a when it includes Islamic garments in its ban on public face-covering. France, as a member of the international community, may not be acting in accordance with Shari'a, depending on the Shari'a value placed on non-law principles expressed by secular agents. If international law matters, France is obligated by international regulation to respect the religious practice, even if it includes niqāb, and would thus be obligated retroactively by Shari'a. If the UDHR does not control because it is not technically law, just an agreement that the right exists, then France is not obligated by Shari'a to make allowances for face-covering as the primary texts of Shari'a — the Qur'an and Hadith — have no explicit requirement to veil and French culture and local law permit the legislation to include Islamic garments. Ultimately, because international human rights declarations have never been considered law and are not treated as such in other situations, let alone actively restricting domestic law, and because the Qur'an and Hadith do not require niqāb or burqa', the French decision to include those garments under the ban on public face-covering is justifiable in accordance with Shari'a from a French-Islam-in-practice perspective.

Endnotes

¹ Niqāb is a veil that covers the face. The burqa' is a loose outer garment often covering the face, hair, and most or all of the body. It can be a combination of several garments. The law bans any part covering the face.

² There are two definitions of Shari'a: God's law and the human understanding and practice of Islamic religious law. This paper generally uses the term Shari'a to mean the human understanding and practice of God's law.

³ Law number 2010-1192 of October 11, 2010 forbidding the concealment of the face in public spaces.

⁴ Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi n°2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public

⁵ "Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage. ... Pour l'application de l'article 1er, l'espace public est constitué des voies publiques ainsi que les lieux ouverts au public ou affectés à un service public."

⁶ "Loi n°2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public" Article 1-Article 2. [In subsequent notes, this source will be listed as "Loi," followed by the article number].

⁷ "Loi," Article 6; Fillon

⁸ Forcing someone to uncover their face is not permitted and will be punished as assault.

⁹ Fillon, Francois. "Circulaire : Circulaire du 2 mars 2011 relative à la mise en œuvre de la loi n°2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public." [In subsequent notes, this source will be listed as Fillon.]

¹⁰ Id at Article 2; id.

¹¹ The law does not actually offer examples of which processions they would exempt as having a "traditional character", and if fact are more descriptive of the exemption for sports equipment that covers the face. However, as some Catholic groups cover the face for marches during Holy Week, one might suppose they intended to allow such things to continue, as well as other events of similar habitual and traditional nature.

¹² "Loi," Article 3

¹³ "les valeurs républicaines d'égalité et de respect de la dignité humaine." [Bracketed clarification was added by this author.]

¹⁴ Fillon.

¹⁵ While this law is considered by many to be pointed directly at Muslim women, some of the phraseology calls that into question. The law itself never mentions Islam, niqāb (نقاب), or burqa' (برقع). However, both terms are included in a not-exhaustive list of regulated items, along with masks and hoods, under the heading "voiles intégraux" (Fillon). This note certainly seems pointed; however, as the Circulaire also said "l'existence d'une intention est indifférente," (The existence of an intent is indifferent) (Fillon). As it is impossible to cover your face for religious reasons accidentally, the government's argument that there are other reasons, such as security risks of unidentifiable persons, for this law besides Islam, deserves some credence. By including other garments and suggesting that the law could be accidentally violated, the government created a general ban that happened to include Islam instead of writing a targeted law when it had the opportunity and would still have been within the bounds of French law, possibly, Shari'a.

This paper does not take this discussion beyond the text itself.

¹⁶ Gerntholtz, Liesl and Gauri van Gulik. "Beyond the Burqa: To Help Women, Leaders Should Dig Deeper than Religious Clothing." *Human Rights Watch*. 02 July 2009.

¹⁷ "réaffirmer solennellement les valeurs de la République"

¹⁸ Fillon.

¹⁹ This discussion of Shari'a will include only Qur'an and Hadith. There is no consensus and no need for analogy (two other methods sometimes employed in Islamic jurisprudence when religious legal text is lacking) as historic text is available for interpretation. Also, there is not one official *madhhab* in France, though many of the immigrants are from North Africa (Fassin), so most likely support the Maliki school. Even within that *madhhab*, there is no consensus on face-covering.

²⁰ The Qur'an is the holy text of Islam, reportedly the word of God as it was spoken to the Prophet Muhammad. The Hadith are accounts of the actions and sayings of the Prophet Muhammad, not the word of God. Both texts are considered equally valid sources of Islamic law.

²¹ Pickthall, Marmaduke, trans. *The Meaning of the Glorious Koran*. (Chicago: Kazi Publications, 1996.) 255. XXIV:31 [Subsequent notes will list Pickthall and the chapter and verse.]

²² University of South California: Center for Muslim-Jewish Engagement. "Sunnah and Hadith." al-Bukhari 4:148. [Subsequent notes will list University followed by the name and number of the Hadith citation]

²³ Aisha was the favorite wife of the Prophet Muhammad. "Ummul Mu'minin" is Arabic for Mother of the Believers. [Footnote added by author of this paper.]

²⁴ University. Abu Dawud 10: 1829.

²⁵ Id at al-Bukhari 60:282.

²⁶ Id at Abu Dawud 32:4091.

²⁷ Pickthall. XXXIV, 59.

²⁸ Id at XXII: 1,5.

²⁹ Id at XXIV: 31.

³⁰ Id at XXXIV, 59.

³¹ See XXXIV, 59 above.

³² Donner, Fred M. *Muhammed and the Believers: At the origins of Islam*. (Cambridge: Harvard University Press, 2010.) 68.

³³ Coulson, Noel J. *Conflicts and Tensions in Islamic Jurisprudence*. (Chicago: University of Chicago Press, 1969.) 4,19.

³⁴ University. al-Bukhari 2:50.

³⁵ Masud, Khalid M., Brinkley Messick and David Powers, eds. *Islamic Legal Interpretation: Muftis and Their Fatwas*. (London: Oxford University Press, 1996.) 284. [This source will be subsequently noted as Masud followed by the page number].

³⁶ *Laïque* is the adjectival form of the French noun *laïcité*, for which there is no direct English equivalent. Many English renderings use the word *secularism*, which the French dislike. This word is used almost exclusively for government, so the meaning is something like secularism-in-government. A good parallel is the English adjective *lay* in that it captures the notion that the entity is not an extension or component of a religious entity; however, the entity or those that comprise it can have religious convictions, like a lay pastor is not ordained but personally believes.

It is not important, for the purposes of this discussion, for Americans to understand the difference the French understand between *laïcité* and *secularism*. It is crucial that the difference between *laïcité* and the freedom of religion be understood.

³⁷ "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances."

³⁸ L'Assemblée nationale. "Constitution de la République française." "Constitution du 4 octobre 1958." Last modified June 2011.

³⁹ See discussion of XXXIV, 59 above.

⁴⁰ Small signs, like religious necklaces, are not uncommon for both Jews and Christians. Anything larger, though, is not.

⁴¹ There is some French legislation that limits the wearing of religious symbols in public schools; however, religious symbols are currently allowed in other public spaces, such that they do not cover the face.

⁴² *La Déclaration des Droits de l'Homme et du Citoyen*.

⁴³ “Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune. ... Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi.”

⁴⁴ “Déclaration des Droits de l'Homme et du Citoyen de 1789.” 50^{ème} anniversaire de la *Déclaration universelle des droits de l'homme (1948-1998)*. Assemblée Nationale. Articles I, X.

⁴⁵ Brumont, Laure. “Burqa ban riles French Muslim women.” *AFP Expatica*. 17 May 2010. [This source will be subsequently noted as Brumont.]

⁴⁶ “France’s ban on the burqa: The war of French dressing.” *The Economist*. January 14, 2010. [This source will be subsequently noted as “France’s.”]

⁴⁷ “Black Africa” is a common French expression for Sub-Saharan Africa.

⁴⁸ Brumont

⁴⁹ Fassin

⁵⁰ The scope of this issue, while still difficult to define, can be framed. France is the single largest Muslim nation in Europe. There are five to six million French Muslims (Barlow, Brumont). Estimates suggest that 12-20% of France’s population is made up of immigrants (Barlow). Approximately 1900 women in France wear niqāb (Brumont).

⁵¹ Barlow, Julie, and Jean-Benoit Nadeau. “The French Melting Pot.” *Sixty Million Frenchmen Can't Be Wrong: Why We Love France but Not the French*. (Naperville: Sourcebooks Inc., 2003.) 295-311. [Subsequent notes will list this source as Barlow.]

⁵² Bowen, John. “France’s Revolt: Can the Republic live up to its ideals?” *Boston Review*. January/February 2006. 29.

⁵³ This practice, designed to prevent discrimination, has somewhat backfired. It is subsequently difficult to determine the scope of problems associated with religious and ethnic minorities, such as increased unemployment, because all the government knows is whether or not people are French citizens. While with non-citizens there is often an assumption that they are from minority groups, often from former French colonies, once people become citizens all other characteristics are fundamentally statistically erased.

⁵⁴ “France’s”

⁵⁵ “Frances’”, Brumont

⁵⁶ There is a history of muftīs advocating the policies of the political elites of their states, “buttressing them with reference to quaranic text and prophetic precedent” (Masud, 300) that could potentially call into question the veracity and motivation of Boubakeur’s argument. There is nothing in this statement, though, to call its legitimacy into question.

⁵⁷ Masud, 306

⁵⁸ Brumont.

⁵⁹ A muftī is an Islamic legal scholar. It should not be confused with a qāḍī, which is an Islamic judge, though muftīs may advise qāḍī.

⁶⁰ A fatwa is an Islamic legal ruling.

⁶¹ Carson, Lesley, edit. 25+ *Human Rights Documents*. Center for the Study of Human Rights. (New York: Columbia University, 2005.) 6. [Subsequent notes will note this source as Carson followed by the page number.]

⁶² United Nations Treaty Collection. "International Covenant on Civil and Political Rights." Status of Treaties CHAPTER IV: Human Rights. 2011. United Nations.

⁶³ Carson, 20.

⁶⁴ Id.

⁶⁵ The Declaration also claims in Article 8 that "[n]othing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights" (Carson, 95). This is somewhat paradoxical as it provides a loophole for the restriction of the rights. This paper does not seek to resolve that paradox; it accepts the stated exemption in Article 1.3 for itself.

⁶⁶ Carson, 8.

⁶⁷ "Loi," Article 4

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Judgment at Tokyo: Crimes Against Humanity in the Tokyo War

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Abstract

*The International Military Trial of the Far East—or the Tokyo Trial—while situated under the shadow of its more famous sister Tribunal at Nuremberg, nevertheless had significant implications for future war crimes trials and the growing body of international humanitarian law, as well as the moral reconstruction of the world and the Japanese people after World War II. I argue that because of the difficulty of proving the existence of a deliberate, systematic policy akin to the “Final Solution” of the “Jewish Question” in Europe, which would impute personal culpability to the defendants on trial at Tokyo, the prosecution aimed rather to prove a “pattern” of recurring atrocities throughout the Asia Pacific theaters of war. This prosecutorial strategy, eventually solidified in the Judgment of the Tribunal, would reveal that these frequent and habitual breaches of the laws and customs of war were either explicitly ordered or tacitly approved by Japanese leaders, who otherwise had the knowledge, power, and duty to prevent the occurrence of these crimes. Ultimately, despite the criticisms surrounding the IMTFE proceedings, such as accusations of “victors’ justice” and arguments of *tu quoque*, the Allies resorted to a judicial exercise that they could have chosen to forego, giving the defendants in Tokyo a fair and sufficient forum where their actions could be judged.*

Introduction

On May 3, 1946, for a fleeting moment, the attention of a distraught world was focused on Tokyo when the first public session of the International Military Tribunal for the Far East was called to order. The historical significance of the “Tokyo Trial” continues to be lost in the shadow of its more famous sister Tribunal at Nuremberg, but I argue that exploring the many war crimes trials held following World War II has the merit of contributing to the deep moral understanding that mankind needs in order to survive from the viciousness of war. Although the charges for conventional war crimes and crimes against humanity were inevitably subsumed into the charge for crimes against peace or waging wars of aggression at both Nuremberg and Tokyo, it is the horrors of the Holocaust in Europe, as well as the atrocities committed against soldiers and civilian populations in the Asia Pacific, that would make these wars particularly distinctive. During wartime, the laws and customs of war are often violated by individual soldiers or officers in every army, but, in the words of Justice B.V.A. Röling of the Netherlands:

There is war criminality of a more significant nature, that which is ordered, recommended or tolerated by the authorities because they believe it furthers the aims of war...it is this kind of war criminality that leads to trials after the war, by national courts of the victors or by international tribunals established by them.¹

In this essay, I aim to explore the nature of crimes against humanity in the Tokyo Trial and elucidate on the question of how the prosecution and Tribunal succeeded in proving the systematic character of Japanese conventional war crimes and crimes against humanity. By analyzing the historical background of the trial, the language of the indictment, the

strategies employed by the prosecution, and contrasting the Judgment of the trial to the dissenting opinion of Justice Radhabinod Pal of India, I will argue that because of the difficulty of proving both the personal culpability of the defendants, as well as the existence of a deliberate, systematic policy akin to the Final Solution of the Jewish Question in Europe, the prosecution aimed instead to prove a “pattern” of atrocities throughout the Asia Pacific theater that would reveal either an explicit order for the frequent and habitual breaches of the laws and customs of war, or the tacit approval of the Japanese leaders on the dock, who otherwise had the knowledge, power and duty to prevent the occurrence of these crimes.

Aftermath of World War II in the Pacific

On July 26, 1945, the Potsdam Declaration called for the surrender of Japan, and the issue of war criminality, buried among the terms set out by the Allies, would be of paramount importance to the Japanese leaders. It stated that Japan’s war criminals, especially policymakers at the highest levels, must face stern justice. At this time, Japan had lost many battles throughout Asia and the Pacific, but the Imperial Japanese Army still had two and a half million troops and *kamikaze* suicide bombers at the ready, while the Empire itself still ruled over Korea, Manchuria, and almost all of Southeast Asia. With no response from Japan to the declaration and faced with the prospect of invading Japan, potentially killing millions on both sides, President Harry Truman authorized dropping atomic bombs on Hiroshima on August 6th and Nagasaki on August 9th.² Imperial conferences led to the Emperor’s speech announcing the end of the war on August 15, 1945, and the next day, the Allies accepted Japan’s surrender, under the condition that Emperor Hirohito himself could not be arraigned as a war criminal.³

The hiatus period until the American arrival in Tokyo caught the Japanese militarists in a panic. They began systematically falsifying and destroying evidence of criminality, such as physical evidence of murdered civilians and prisoners of war. Most importantly, many Japanese militarists “engaged in an orgy of self-destruction. *Hara kiri*, or suicide in the face of defeat or dishonor, was an old Japanese tradition, tracing back to the samurai.⁴ Taken together, these acts would have strong implications on the Tokyo Trial, both on the availability of incriminating evidence during the proceedings, but also on the composition of the defendants on trial.

Known formally as the International Military Tribunal for the Far East (IMTFE), the Tokyo Trial “was held at around the same time and under the same rationale as its more famous counterpart—the Nuremberg [Trial] of the major Nazi war criminals in Germany.”⁵ The IMTFE was formally announced on January 19, 1946, and similar to the Nuremberg Trial, operated under a Charter which included the tribunal’s jurisdiction and the responsibility of the accused. At the heart of the Charter, Article 5 states: “The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.”⁶ The latter, defined as “the planning, preparation, initiation, or waging of a declared or undeclared war of aggression or a war in violation of international law,” would inevitably become the main focus of the trial. Two other crimes were also included in addition to crimes against peace—conventional war crimes, described as “violations of the laws or customs of war,” and crimes against humanity, which were defined as inhumane acts committed against “any civilian population, before or during the war.”⁷

The Tribunal eventually consisted of eleven justices from the Allied nations – Australia, Canada, China (the Republic of China), France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom, the United States.⁸ General Douglas MacArthur and his office, the Supreme Commander for the Allied Powers (SCAP), established an International Prosecution Section with eleven chief prosecutors from the Allied nations, headed by the Chief of Counsel Joseph Berry Keenan (U.S.), and Associate

Counsel Arthur S. Comyns-Carr (U.K.). SCAP also established an International Defense Section, with both American and Japanese lawyers serving as defense counsel to the defendants.⁹ From 1945 through 1951, various Allied nations also held other war crimes trials throughout the Asia-Pacific region.

In contrast to the Nuremberg Trial, where seventeen of the twenty-two defendants were civilians, among the accused at the IMTFE were nineteen professional military men and only nine civilians. The indictment named the following men: four former premiers: Kiichiro Hiranuma, Koki Hirota, Kuniaki Koiso, Hideki Tojo; three former foreign ministers: Yosuke Matsuoka, Mamoru Shigemitsu, Shigenori Togo; four former war ministers: Sadao Araki, Shunroku Hata, Seishiro Itagaki, Jiro Minami; two former navy ministers: Osami Nagano, Shigetaro Shimada; six former generals: Kenji Doihara, Heitaro Kimura, Iwane Matsui, Akira Muto, Kenryo Sato, Yoshijiro Umezumi; and two former ambassadors: Hiroshi Oshima, Toshio Shiratori. The indictment also included three former economic and financial leaders, one nobleman and imperial adviser, one radical theorist, one admiral, and one colonel.¹⁰

Final arguments were not completed until April 16, 1948, and after 818 sessions over the course of 417 days in court, President William F. Webb of Australia read out the Judgment and handed down the sentences in court from November 4th through the 12th.¹¹ During the course of the trial, two of the accused, Matsuoka and Nagano, died and were discharged from the indictment, and the theorist Shumei Okawa was declared unfit to stand his trial, for which his proceedings were suspended. All of the accused were found guilty on various counts: seven were condemned to death, sixteen received life sentences, and two received lesser prison terms.¹² The defendants sentenced to death were hanged on December 23, 1948 at Sugamo Prison in Tokyo.

Prosecutorial Strategies at the IMTFE

Before the Japanese surrender in 1945 and the establishment of the IMTFE in 1946, the United Nations War Crimes Commission (UNWCC) produced a report that elaborated on the nature of war criminality. In their analysis of the war in the Asia Pacific, the Allies maintained that “Japan’s outrageous actions did not consist alone of individual and isolated incidents but were ‘deliberately planned and systematically perpetrated throughout the Far East and Pacific.’ Tokyo, and not just its commanders in the field, was responsible for the atrocities committed by imperial forces.”¹³ The UNWCC report further argued that Japanese leaders had devised and directed common criminal plans, which led to waging aggressive war and resulted in the oppressive occupation of various territories. By its nature, the charge for crimes against humanity was subsumed into the umbrella of a common plan or conspiracy, where “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes [against humanity] are responsible for all acts performed by any person in execution of such plan.”¹⁴ Thus, the Tribunal had to prove that conventional war crimes and crimes against humanity were part of a systematic government policy for Japanese leaders and high-level officials to be personally culpable of these crimes.

The indictment and the strategies of the prosecution would later employ similar language to the UNWCC report and its description of crimes against humanity in the region. The central theme of the indictment was that since 1928, “the internal and foreign policies of Japan were dominated and directed by a criminal militaristic clique.”¹⁵ Listing thirty-six counts of crimes against peace, sixteen counts of murder, and three counts of crimes against humanity, or conventional war crimes,¹⁶ the indictment further accused the defendants of promoting a scheme of conquest that “contemplated and carried out...murdering, maiming and ill-treating prisoners of war, civilian internees...forcing them to labor under inhumane conditions... plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity; [perpetrating] mass murder, rape,

pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries.”¹⁷

In making their case about Japanese war crimes and crimes against humanity, Allied prosecutors later sought to demonstrate the recurrence of atrocities with common patterns throughout the Pacific theater and implicate the accused in such acts. The prosecution “had to rely heavily on this strategy because they had great difficulty securing conclusive evidence of the personal culpability of individual defendants...[which] stemmed largely from the Japanese government’s coordinated effort in the last days of the war to destroy military records on a vast scale.”¹⁸ Thus, prosecutors had to substantiate the commonalities and similar patterns of war crimes and crimes against humanity that the Japanese army perpetrated in many regions of the war, showing “that these crimes could not have been committed without orders from, or the tacit approval of, the highest-ranking political and military leaders.”¹⁹

Chief prosecutor Keenan argued that the record demonstrated that in waging wars of aggression, Japan had indeed ignored “the laws and customs of war.”²⁰ In support of this statement, Keenan enumerated a litany of well-known and infamous atrocities such as the Rape of Nanking, the Rape of Manila, the Bataan Death March, and the Burma-Siam Death Railway, but also included lesser-known crimes such as “the massacre of Australian nurses at Bangka, Indonesia; the bayoneting to death of 450 Vietnamese and French prisoners of war at Langson, Vietnam; the slaughter of 18,000 Filipino men, women, and children at Lipa, Philippines; the murder of 3,000 Chinese at Liaoning, Manchuria; the Double Ten Massacre at Singapore; the murder of all Europeans at Balikpapan, Borneo,” among others.²¹ Keenan would further argue that these atrocities “were not merely accidental or isolated individual misbehaviors but were the planned results of [a] national policy.”²²

Meanwhile, in October of 1946, when the Nuremberg Judgment was read and the sentences were handed down in the trial at Germany, Owen Cunningham, the American defense counsel to Ambassador Oshima, was in a spirit of optimism: “It is my thought that the defendants in the Tokyo trial have a much better chance of acquittal than the Germans...” enumerating some of the reasons, including the following: “We have nothing comparable to the Jewish question here; [and] we had no continuing government or set of officials making the permanent policy...”²³ The prosecution, of course, was set to prove the patterned nature, as well as the gravity, of the conventional war crimes and crimes against humanity that the Japanese military perpetrated. When the Judgment was read in Tokyo in November of 1948, two years after Nuremberg, the Tribunal would agree with most of the prosecutorial findings and arguments:

The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practised by the Japanese Army and Navy. During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale so vast, yet following so common a pattern in all theatres, that only one conclusion is possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.²⁴

The Tribunal held that “the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded,”²⁵ further arguing that Japanese aggression towards China was a punitive war designed to punish the people of China “for their refusal to

acknowledge the superiority and leadership of the Japanese race and to cooperate with Japan.”²⁶ Furthermore, in a speech to the Japanese Diet on January 21, 1939, Prime Minister Hiranuma stated that he hoped “the intention of Japan will be understood by the Chinese so that they may cooperate with us. As for those who fail to understand, we have no other alternative than to exterminate them.”²⁷

In 1932, Prime Minister Koiso sent to the Vice-Minister of War an “Outline for Guiding Manchukuo” in which he stated: “Racial struggle between Japanese and Chinese is to be expected. Therefore, we must never hesitate to wield military power in case of necessity.”²⁸ In this spirit, the Japanese army massacred or “punished” the inhabitants of cities and towns for aiding Chinese troops, a practice that continued throughout the China War, the worst example of which was the Nanking massacre of December 1937. Throughout the Asia Pacific region, after Japanese forces occupied territory, they would freely commit massacres to terrorize the civilian population and subject them to domination of the Japanese.²⁹ Moreover, the Tribunal argued that this evidence supported the fact that most of these massacres were ordered by commissioned officers, and some by high-ranking admirals and generals. One Japanese directive issued between December 1944 and February 1945 in Manila stated: “Be careful to make no mistake in the time of exploding and burning when the enemy invades. When killing Filipinos, assemble them together in one place as far as possible thereby saving ammunition and labor.”³⁰ Tojo, a former premier, explained that the failure to prevent similar atrocities stemmed from the Japanese custom for a field commander to be given considerable autonomy when he is not subject to specific orders from Tokyo. The Tribunal took this to mean that, “under the Japanese method of warfare such atrocities were expected to occur, or were at least permitted, and that the Government was not concerned to prevent them.”³¹

Furthermore, the Japanese troops also indulged in torture practices, such as burning, electric shocks, water treatment, suspension, kneeling on sharp instruments, and flogging, during the entire period of the Pacific War. Some methods of torture were employed uniformly in all theaters of the war, signifying policy both in training and execution. The Tribunal argued that it “is a reasonable inference that the conduct of the Kempeitai [military police] and the camp guards reflected the policy of the War Ministry.”³² Although Tojo and General Matsui, the field commander of Japan’s armies in China during the Nanking massacre, contended that there were some lawless elements in the army, and that they always advocated strict discipline and punishment of evildoers,³³ Count 55 of the indictment charged all of the accused “with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the law and customs of war.”³⁴ Former war minister Hata, former generals Kimura, Matsui, Muto, former premier Koiso, and former foreign minister Shigemitsu were all found guilty under this count. Hata was sentenced to life imprisonment, while the four generals were sent to the gallows.

Although the indictment charged the twenty-eight defendants, except for Okawa and Shiratori, on the nineteen counts that strictly concerned conventional war crimes and crimes against humanity during the period from January 1st, 1928 to September 2nd, 1945, only nine of the defendants were proven guilty of any of these particular counts. Several counts in the indictment employed the language of “conspiring to murder the armed forces, disarmed soldiers and civilians.”³⁵ However, none of the defendants were even charged with these crimes. With the Tokyo Trial, it was more difficult to prove that there was indeed a conspiracy or systematic policy to commit wholesale murder or genocide, in contrast to Nuremberg, where the order for the Final Solution of the Jewish Question played a vital role in proving the guilt of several defendants of crimes against humanity. In Tokyo, the language employed by the prosecution and the Tribunal itself to describe conventional war crimes and crimes against humanity was that of a “pattern” of atrocities, which would denote either the

tacit or explicit approval of high-ranking Japanese officials. For example, former generals Dohihara, Kimura, Muto, former war minister Itagaki, and former premier Tojo were found guilty of Count 54, or “having conspired to order, authorize, permit the various Japanese Theatre Commanders, the officials of the War Ministry and local camp and labour unit officials to frequently and habitually commit breaches of the laws and customs of war against armed forces, POWs, and civilian internees...and to have the Government of Japan abstain from taking adequate steps to secure the observance and prevent breaches of the laws and customs of war.”³⁶

Thus, although it was more difficult to prove the systematic nature of Japanese atrocities in the Tokyo Trial, and while the main focus of the trial was inevitably the charge for crimes against peace or waging wars of aggression, the charge for crimes against humanity still occupied an important place in both the Nuremberg Trial and the Tokyo Trial. In Nuremberg, all of the defendants sentenced to death were convicted of crimes against humanity. In Tokyo, one salient feature of the verdict was that everyone convicted under Count 54, as well as General Matsui who was found guilty solely under Count 55, was sentenced to the gallows.

Pal's Dissent

Meanwhile, perhaps the most controversial figure in the Tokyo proceedings is Justice Radhabinod Pal from India, whose formal dissent was founded on his moral and philosophical objections against the trial. Aside from his objections over “victor’s justice,” he also questioned the illegality of aggressive war, arguing that there was no binding law before World War II that made war illegal. He whitewashed almost all acts of the accused, and voted to acquit all the defendants on all counts. In his dissent, he contended that the Rape of Nanking, the Bataan Death March, and other alleged symbols of Japanese-inflicted horror were “stray incidents,” and that the facts in the evidence were exaggerated and distorted to some extent. Furthermore, contrary to the prosecutorial findings, Pal argued that, “no such similarity of pattern [had] been established as would entitle us to hold that all these inhuman treatments [against civilians] were the result of the government policy or directive,” citing that there was also evidence that the War Ministry was against the atrocities.³⁷ According to Pal, there were no grounds to convict any of the individuals on trial at Tokyo, and the defendants were not directly responsible for the crimes committed by soldiers and officers in the field, many of whom he maintained had already been prosecuted, convicted, and punished at other war crimes trials in the Asia Pacific.³⁸

Pal further accused the West of imposing a double standard on the Tokyo defendants, arguing that Japanese atrocities were little different from the atomic holocaust of Hiroshima and Nagasaki. Largely denounced by the world press and others as “an apologist for Japanese tyranny, a lingering mouthpiece for Japanese propaganda, or as an Indian politico with a personal agenda,” Pal’s complex and virtually unreadable dissent won little appreciation.³⁹

Contrary to Pal’s dissenting opinion, I argue that there was indeed a pattern and recurrence of atrocities throughout the Asia Pacific theater, for which some of the defendants on trial at Tokyo could be found personally culpable, either by explicitly ordering, authorizing and permitting the frequent and habitual breaches of the laws and customs of war; or by failing to prevent the atrocities committed by officers and soldiers in the field when the Japanese leader in question had the power and duty to do so, revealing at the very least a tacit approval of these acts. Furthermore, the “pattern” of atrocities became heavily apparent when the prosecution presented the various cases of conventional war crimes and crimes against humanity, such as the Rape of Nanking and the Rape of Manila, among others.

The Cases of Nanking and Manila

When the prosecution began the Nanking phase of its case, the Tokyo Trial came to life. The magnitude of the Rape of Nanking was so vast “that two witnesses, independently of each other, said from the stand in an awed tone of bewilderment: ‘I don’t know where to begin.’”⁴⁰ On the night of December 12, 1937, resistance from the Chinese Army ended, and the following day the first Japanese military columns freely entered the city. According to one eyewitness account, Japanese soldiers “were let loose like a barbarian horde to desecrate the city...[and] that the members of the victorious Japanese Army had set upon the prize to commit unlimited violence.”⁴¹ During the first six weeks, the total number of murder civilians and prisoners of war was estimated at 200,000, not accounting for bodies that were destroyed by burning or disposal.⁴² There were also many cases of rape, where soldiers rounded up and gang raped women between the ages of thirteen and forty. Within the six weeks of the Japanese occupation of Nanking, an estimated 20,000 women were raped, and many of them were subsequently murdered or mutilated.⁴³ General Matsui and Colonel Muto, who would later become commander of the Japanese expeditionary force in the Philippines, entered and remained in the city for nearly a week during the occupation. Both defendants admitted that they were aware of the atrocities, and that foreign governments were protesting against the Nanking massacre, but neither Matsui nor Muto undertook any effective action to remedy the situation or punish the offenders.⁴⁴ Furthermore, high-ranking government officials such as foreign minister Hirota and war vice-minister Umezu had given or received reports of the atrocities, which were also discussed in the Liaison Conferences regularly attended by the premier, several cabinet ministers, and chiefs of the Army and Navy General Staffs.⁴⁵

Contrary to Justice Pal’s argument, I agree with the findings of the prosecution as well as the Tribunal that the Rape of Nanking was not an isolated incident. Although it was difficult to prove the existence of a deliberate and systematic policy of genocide in the region, the evidence revealing the pattern of atrocities throughout the Asia Pacific theaters of war show that the government at the very least tacitly approved of the atrocities at Nanking and elsewhere. The atrocities committed by Japanese soldiers were well known in the government, and news reports of the situation were widespread all over the world. The prosecutorial evidence of Japanese depravity at Nanking, “with the approval, tacit or otherwise, of the high command and with the knowledge of Prince Konoye’s cabinet,” was irrefutable.⁴⁶ In their assessment of the Rape of Nanking, the Tribunal agreed with the prosecution, stating in the Judgment that:

“The barbarous behavior of the Japanese Army cannot be excused as the acts of a soldiery which had temporarily gotten out of hand when at last a stubbornly defended position had capitulated – rape, arson and murder continued to be committed on a large scale for at least six weeks after the city had been taken and for at least four weeks after Matsui and Muto had entered the city.” (391)

The strategy of establishing commonalities naturally extended to each phase of the prosecution with regards to conventional war crimes and crimes against humanity. For example, the Philippine phase of the prosecution argued that, “between 1942 and 1945 the Japanese had carried out a broad, calculated plan of atrocities on orders from Tokyo,” and the purpose of the mass atrocities was to intimidate Filipino soldiers and civilians into submission.⁴⁷ Acknowledging that the pattern of these crimes had already been delineated in the Chinese phase of the prosecution, associate counsel Pedro Lopez attempted to further support this pattern by running through a roster of names and incidents in sickening detail, such as “the case of Lucas Doctolero, crucified, nails driven through hands, feet, and skull on September 18, 1943.” The particulars on mass murder of civilians were also shocking: at St. Paul’s College in Manila, 800 men, women, and children were machine-gunned, and at Ponson, in southern Philippines, “100 people were bayoneted and machine-gunned to death

inside a church while 200 on the outside were hunted down like game and slaughtered.”⁴⁸ The prosecution further sought to prove the culpability of high-level officials by bringing in official directives, as well as diaries of Japanese soldiers that reveal that these crimes were either ordered, willfully permitted, or at least tacitly approved by the government. One diary entry of a Japanese warrant officer dated October 24, 1944 read, “We are ordered to kill all the males we find.... All in all, our aim is extinction of personnel.”⁴⁹ After a while, as with many of the incriminating evidence employed in the various phases of the Tribunal, the statistics, documents, and witness testimonies of Japanese atrocities all over the Asia Pacific dulled the senses, but ultimately bolstered the prosecutorial strategy and proved the defendants’ guilt.

Conclusion

In sum, I have explored the nature of crimes against humanity in the International Military Tribunal for the Far East, and argued that because of the difficulty of proving the existence of a deliberate, systematic policy similar to the Final Solution of the Jewish Question in Europe, which would impute personal culpability to the defendants on trial at Tokyo, the prosecution aimed rather to prove a “pattern” of recurring atrocities throughout the Asia Pacific theaters of war. This prosecutorial strategy, eventually solidified in the Judgment of the Tribunal, would reveal that these frequent and habitual breaches of the laws and customs of war were either explicitly ordered or tacitly approved by Japanese leaders, who otherwise had the knowledge, power and duty to prevent the occurrence of these crimes. In contrast to Justice Pal’s contention that Japanese war crimes and crimes against humanity were isolated killings, I argued that these crimes did indeed follow a pattern, and that high-ranking Japanese officials, such as the defendants on the dock convicted of crimes against humanity, were aware of the atrocities and either secretly ordered or willfully permitted them to happen to further the aims of the war in the Asia Pacific.

The Tokyo Trial had significant implications for future war crimes trials and the growing body of international humanitarian law, as well as for the moral reconstruction of the world and the Japanese people after World War II. On June of 1946, the *Oriental Economist* observed that: “We, the Japanese...should go a step farther and think deeply, once again, why the individuals of this kind were ever developed in Japan. Then, we shall come to find that...Japan was so organized as to give birth to men of this kind.... The [International Military Tribunal of the Far East] in Tokyo is extremely significant in that it has given a chance to the Japanese people to reflect deeply upon this fundamental problem.”⁵⁰ Although not without its fair share of controversies, not least of which are the accusations of “victor’s justice” and arguments of *tu quoque*—with the denunciation of the Japanese “Rape of Nanking” countered by a condemnation of the American nuclear holocaust of Hiroshima and Nagasaki—the moral, ethical and legal significance of the Tokyo Trial should not be lost in this debate. Like in Nuremberg, the Allies resorted to a judicial exercise that they could have chosen to forego, giving the defendants a fair and sufficient forum from which to explain their actions. Ultimately, despite the criticisms surrounding the IMTFE proceedings, the Tribunal concluded on an optimistic note: having accomplished its basic tasks, the evils of the former Japanese militarist regime had been addressed, the unfortunate past could be put to rest, and by learning from past mistakes, a better world was now waiting around the corner.

Endnotes

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- ² Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: William Morrow & Co., 1987), 35.
- ³ Brackman, *The Other Nuremberg*, 39.
- ⁴ Brackman, *The Other Nuremberg*, 42-43.
- ⁵ Jeanie M. Welch, "Introduction" in *The Tokyo Trial: A Bibliographic Guide to English-Language Sources* (Westport, CT: Greenwood Press, 2002), 1.
- ⁶ "The Tokyo Judgment, Annex A-5: Charter of the International Military Tribunal of the Far East," Hyper War, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A5.html>.
- ⁷ The International Military Tribunal for the Far East, *The Tokyo Judgment*, Volume I, ed. B.V.A. Röling and C.F. Rüter (Amsterdam: APA – University Press Amsterdam BV: 1977), 21.
- ⁸ Welch, *The Tokyo Trial*, 3.
- ⁹ *Ibid.*, 3.
- ¹⁰ Brackman, *The Other Nuremberg*, 83.
- ¹¹ R. John Pritchard, "An Overview of the Historical Importance of the Tokyo War Trial," *Nissan Occasional Paper Series No. 5* (1987), 48.
- ¹² Brackman, *The Other Nuremberg*, 381
- ¹³ *Ibid.*, 26.
- ¹⁴ "The Tokyo Judgment, Annex A-5."
- ¹⁵ "The Tokyo Judgment, Annex A-6: Indictment," Hyper War, <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-A6.html>.
- ¹⁶ Brackman, *The Other Nuremberg*, 84.
- ¹⁷ "The Tokyo Judgment, Annex A-6."
- ¹⁸ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Press, 2008), 151.
- ¹⁹ Totani, *The Tokyo War Crimes Trial*, 189.
- ²⁰ Brackman, *The Other Nuremberg*, 108
- ²¹ *Ibid.*, 108-109.
- ²² *Ibid.*, 109.
- ²³ *Ibid.*, 225.
- ²⁴ I.M.T.F.E., *The Tokyo Judgment*, Volume I, 385.
- ²⁵ *Ibid.*, 385.
- ²⁶ *Ibid.*, 386.
- ²⁷ *Ibid.*, 386.
- ²⁸ *Ibid.*, 388.
- ²⁹ *Ibid.*, 397.
- ³⁰ *Ibid.*, 400.
- ³¹ *Ibid.*, 402.
- ³² *Ibid.*, 406.
- ³³ Brackman, *The Other Nuremberg*, 183.
- ³⁴ I.M.T.F.E., *The Tokyo Judgment*, Volume I, 21.
- ³⁵ "The Tokyo Judgment, Annex A-6: Indictment."

- ³⁶ I.M.T.F.E., *The Tokyo Judgment*, Volume I, 21.
- ³⁷ The International Military Tribunal for the Far East, *The Tokyo Judgment*, Volume II, ed. B.V.A. Röling and C.F. Rüter (Amsterdam: APA – University Press Amsterdam BV: 1977), 1010.
- ³⁸ Totani, *The Tokyo War Crimes Trial*, 220.
- ³⁹ Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington, KY: The University Press of Kentucky, 2001), 67-68.
- ⁴⁰ Brackman, *The Other Nuremberg*, 176.
- ⁴¹ I.M.T.F.E., *The Tokyo Judgment*, Volume I, 389.
- ⁴² *Ibid.*, 390.
- ⁴³ Brackman, *The Other Nuremberg*, 179.
- ⁴⁴ I.M.T.F.E., *The Tokyo Judgment*, Volume I, 390.
- ⁴⁵ *Ibid.*, 391.
- ⁴⁶ Brackman, *The Other Nuremberg*, 186.
- ⁴⁷ *Ibid.*, 244.
- ⁴⁸ *Ibid.*, 244-245.
- ⁴⁹ *Ibid.*, 245.
- ⁵⁰ *Ibid.*, 110.

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International Competition Policy: An Overview

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Abstract

Over the years, there have been extensive discourses as to the feasibility, reasons, and implications of including a competition policy within the WTO framework to regulate anti-competitive behavior in the global trading arena. In a parallel attempt, various international agencies including the World Bank, OECD and UNCTAD have worked towards formulating a competition code that is adaptable by developing countries which have hitherto lacked a domestic competition regime. Although the inclusion of a competition policy within the WTO is no longer on the WTO's agenda, after it was dropped in the sixth Ministerial Meeting at Hong Kong in 2005, we seek to reiterate and emphasize why the collective effort for an international cooperation in competition must not stop.

With globalization reaching new heights this decade, there has been an increase in developing countries transitioning to market economies resulting in a boom in the number of commercial transactions. Although this has proved to be a positive consequence, the complications that may arise from unregulated anti-competitive practices may hinder the benefits of trade globalization essentially affecting both the economic health of developed nations as well as the growth prospects of developing nations.

By discussing the past initiatives in this regard, analyzing current trends in the global economy and recommending changes for the future, we aim to comprehensively convey to the leaders in the international arena, the need for an international competition regime.

1. Introduction

Although it has been over seven years since the World Trade Organization (WTO) dropped the agenda to include a comprehensive international competition policy within its framework, we argue for a re-consideration by the WTO, along with other possible avenues through which an international competition policy can be brought about.

The article is divided into nine parts. To begin with, we trace the historical footprint of competition policy in the Working Group on the Interaction between Trade and Competition Policy, the result of the Singapore Ministerial Conference in 1996. Following the failure to reach any conclusive understanding regarding the interplay between international trade and competition law, the issue found a place in the Doha Development Agenda, which is discussed in depth in the second part. Given that there are prior references to competitive behavior by the WTO such as in the General Trade Agreement on Tariffs and Trade (GATT), The General Agreement on Trade and Services (GATS), the Agreement on Technical Barriers to Trade (TBT) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the third part discusses at length the provisions in various WTO agreements that establish a linkage to competition law.

The need for an international competition framework is emphasized when international trade disputes involve anti-competitive behavior, specifically when the dominant party abuses its position. We analyze landmark judicial decisions on such disputes in the fourth segment of the article.

Moving on to the fifth part, we acknowledge the contributions of the UNCTAD, OECD and World Bank by drafting guiding principles for a comprehensive competition

policy. These drafts also serve as major reference points for various developing jurisdictions that are yet to conceptualize a national competition regime for themselves.

The sixth part of this article explains why there is a pressing need for an international competition law framework. Amongst the developed nations, while the European Union has for a long time advocated for an optional code that will be enforceable by the WTO, the United States prefers bilateral cooperation. There exists a dichotomy between developed and developing nations regarding the arguments for an international competition policy.

The seventh part of the article takes a look at the growing number of cross-border mergers and acquisitions, FDI's, pro-competition clauses in free trade agreements, regional cooperative understandings and international cartels that threaten to disrupt international trade. Various focal areas such as export and import issues and competition spillovers have been suggested as an ideal competition framework. Finally, the article closes with our reiteration of the fact there is a valid ground for the establishment of an international competition framework as a WTO agenda item.

For more than seventeen years now, the World Trade Organization has laid down the legal tenets for strengthening the international trading system. By replacing the successful General Agreement on Tariffs and Trade 1947 with a global trade-integration process, the WTO has advocated non-prejudicial, lucid, and pro-welfare measures to augment trading between economies and aiding countries to transform into market economies. With 153 member countries and 26 observer countries,¹ the Marrakesh Agreement setting up the WTO is the longest agreement concluded (at more than 25,000 pages) and also one of the most legally complex document regulating world trade² and the movement of persons, capital, goods, and services. Given the tremendous strides accomplished in the global trading arena by the WTO, the role of competition policy becomes extremely relevant.

Competition law has existed over centuries, since the Roman Empire, when the *lex Julia de Annona* was enacted.³ Competition law prevents the market from edging towards monopoly and promotes competition in the market. It does this by preventing barriers in the market while keeping in mind its ultimate goal of raising consumer welfare. The internationalization of competition policy in the context of global trade practices involves a certain level of convergence between the two. While the WTO focuses on the removal of *barriers to trade* (in essence, to make market access easier), competition law strives to discourage and extract *barriers to market entry*. In other words, where the purpose of the WTO ends, the need for competition law arises.

The United Nations International Conference on Trade and Development (UNCTAD) was held in Havana, Cuba with the intention of setting up an International Trade Organization (ITO) that would overlook and coordinate the multilateral trade relations between countries. The negotiations at this conference, which began in November 1947, culminated in the Havana Charter in March 1948. The Charter completed work on the ITO, but it never came into force as it lacked the critical support of the United States⁴. However, in the context of the discussion undertaken in this article, the Charter has a very significant relevance. Chapter V, Article 48 of the Havana Charter, titled "General Policy towards Restrictive Business practices," had one of the earliest and most direct references to the potential interplay between international business practices and competition policy. The provision reads as follows:

Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain

competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.

In addition to recognizing the possible impact on competition, which regulated cross-border commercial transactions may effect, the Charter indicates a complaint procedure for violation of international trade law. Following this reference, in 1996, the first biennial Ministerial Conference of the WTO in Singapore undertook the discussion of restrictive anti-competitive behavior that international business may impose in domestic markets. Consequently, the growing concern came to be regarded as a “Singapore Issue.” The Declaration of the Conference mandated the setting up of a “Working Group on the Interaction Between Trade and Competition Policy.” The main objective of the Group was:

To study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.⁵

The Working Group issued its reports from 1997 to 2001 expressing that international trade and competition policy were, in fact, interrelated and this reasoned for cooperation amongst various states to address issues regarding the two spheres. However, what stalled this was the resultant conflicting opinions regarding the approach toward the proposed cooperation. While one group supported a multilateral framework, the other was more inclined towards a bilateral and regional approach. Unfortunately, the competition agenda was not taken up in the Seattle Ministerial Framework, but it was finally discussed in Doha Round in 2001 as part of the Doha Development Agenda.

2. The Doha Development Agenda and Beyond

There was agreement at the Doha Ministerial Conference to resort to a multilateral approach in drawing up of an international competition framework. The Doha Declaration also set out certain issues that the Working Group was to direct its attention to, including:⁶

- a) Core principles for the implementation of competition policy such as transparency, procedural fairness and non-discrimination
- b) Provisions dealing with hard-core cartels⁷
- c) Modalities for voluntary multilateral cooperation
- d) Support for progressive reinforcement of competition institutions in developing countries through capacity-building
- e) Needs of developing and least-developed country participants

With regards to transparency, the Declaration refers to the disclosure of legislation and regulations to the public through publication in either an electronic format or in the official gazette of a particular state. Although there are administrative glitches to the transparency requirements, they were generally included to foster an effective competition regime. Fairness in procedure is to prevent unjustifiable abuse of parties’ vis-a-vis, decisions and to make sure that they are given sufficient opportunities to be heard and to defend their stance such as the right to appeal, submit evidence and be notified of any formal investigation. The core principle of non-discrimination has attracted much attention and has been the most controversial in the WTO as it is viewed in light of the Most Favored Nation (MFN) treatment and the National Treatment.⁸ Certain bilateral and regional agreements for international competition cooperation tend to go against the MFN principles especially in

merger cases.⁹ For the sake of brevity of the article, we refrain from elaborating further on these five issues of the Doha Declaration as they will be covered in the course of the ensuing discussion.

Unfortunately, at the Fifth Ministerial Conference in Cancun in 2003, there was no consensus between member nations in regards to international competition cooperation and for negotiations in this area. In the July Package of 2004 signed in Geneva, it was decided that the Working Group would no longer discuss the issue of competition policy. Therefore, the Working Group on the Interaction between Trade and Competition Policy was rendered inactive and formally dropped in the Sixth Ministerial Conference in Hong Kong in 2005.¹⁰

3. WTO and Competition Policy- Not a New Issue

Article 8.1 of the Agreement on Technical Barriers on Trade states that,

Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5¹¹ and 6¹², with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.¹³

Private companies must not discriminate against foreign products and encourage discrimination in conformity assessment. Article VI of the GATT Agreement (referred to as the Anti-Dumping Agreement) requires that the anti-dumping authority of a member must take into consideration certain factors, including restrictive trade practices of domestic and foreign enterprises, when it determines injury to a domestic industry by reason of dumping. Similarly, the General Agreement on Trade and Services (GATS), as per Article 8, mandates the members to ensure that there is no abuse of monopolistic position by the suppliers of services holding a monopoly status. According to Article 9 of GATS, members must recognize that certain business enterprises may indulge in restrictive practices, and in light of this, members must enter into consultations with the purpose of eliminating such situations. Article 40 of the Agreement on Trade- Related Aspects of Intellectual Property Rights (the TRIPS), members can enact legislation to police restrictive provisions that can be contained in licensing agreements of intellectual property rights. Article 9 of the Agreement on Trade-Related Aspects of Investment Measures (the TRIMS) provides for consultations as to whether interaction between competition policy and investment policy will be added to the agreement.¹⁴

Despite the Havana Charter, the GATT, GATS, TRIPS and TRIMS reaffirm the fact that competition policy is not a *new* issue in the WTO. However, there are certain limitations in its implications which indicate that systematic development is required. There are no general obligations that bind member nations to create domestic competitive markets, or provide for remedies against private participants that engage in restrictive practices that affect the trade of other trading countries. The few exceptions are in Article XI on General Elimination of Quantitative Restrictions of the GATT which reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of another contracting party, or on the exportation or sale of export of any product destined or the territory of any other contracting party.

The phrase “prohibitions or restrictions other than duties” indicates the restriction of members from enforcing legislation that restrains exports and imports

and Article XI prohibits support of private enterprises by governments. But, if those private enterprises, disconnected from the backing of governmental agencies, are engaged in such anti-competitive and restrictive behavior, the provision under GATT is rendered inapplicable as Article XI deals with restrictive government measures with regard to exports and imports. Looking at the GATS, Article IX requires members to eliminate certain governmental and public business practices that may restrain competition.¹⁵ Moreover, the GATT's and GATS's national treatment are limited by their scope to consider only the treatment that is accorded to imported goods, services or service providers.¹⁶

4. Illustrations of Landmark International Trade Disputes

There have been numerous international trade disputes in which restrictive business practices have been the central issues. A few are discussed in this segment:

The Japan Film Case (Kodak-Fuji Dispute)¹⁷:

Kodak, a United States film maker, alleged that the Fuji Film Company, the largest film manufacturer in Japan, had 70 percent market share in the Japanese film market in 1995 and that it provided monetary cuts to distributors for the purpose of preventing them from handling competing film products, including Kodak products. The United States alleged that a vertically integrated distribution system—the system of relationships or agreements between firms at two different levels in the production-distribution chain—existed in the film market and further claimed that Fuji was maintaining an oligopolistic position through various government measures. Moreover, the United States alleged that this constituted anti-competitive behavior and unfair practice under section 301 of US Trade Act, 1974. The case went to the WTO Dispute Settlement Body in 1996, which ruled against Kodak, stating that the United States had failed to provide sufficient evidence that “Japan had rigged its domestic markets in favor of Fuji Film Company.”¹⁸

United States-1916 Anti Dumping Act Case¹⁹:

The United States-1916 Anti Dumping Act case was a tussle between the European Community and the United States as to whether the 1916 Anti Dumping Act was an anti-trust Act or an anti-dumping Act.²⁰ The European Community contended before the WTO Dispute Settlement Body that this Act was an anti-dumping Act. Thus the provision for attaching criminal charges and claiming damages from private players under the 1916 Act is contrary to the anti-dumping measure provided for under Article VI of the GATT. The United States contended that the 1916 Act was an anti-trust Act and hence did not violate Article VI of GATT. However, the Panel decided against the United States and held the Act to be squarely in violation of to the GATT Agreement on Anti-Dumping and directed for its repeal.

Mexico – Measures Affecting Telecommunications Services Case (United States v Mexico)²¹:

This case is the first panel proceeding in the WTO to solely deal with the rules agreed in GATS, especially the telecommunication-services industry and the rules agreed to in the Telecommunications Reference Paper (TRP).²² A leading telecom company was given the power to negotiate with foreign telecom companies to fix a rate that would have been acceptable and applicable to all telecom companies. The United States contended that Mexico acted inconsistently with its obligations in respect to the liberalization of its market for telecommunication services. Further, it also contended that Mexico had failed to ensure that Telmex provide interconnection to United States basic telecommunications suppliers on a cross border basis with cost based rates and reasonable terms.²³ The WTO Panel held it to be an infringement of The Telecommunications Reference Paper²⁴ an abuse of dominant position.²⁵

5. Role of the UNCTAD, World Bank and OECD in Formulation an International Cooperation in Competition

In the year 1980, the UNCTAD released “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,”²⁶ which is the only multilateral code in existence on competition policy and law.²⁷ On perusal of Part IV Section E of the Set, the UNCTAD expounds that states at national and regional levels should “adopt, improve and efficiently enforce appropriate legislations” in order to control restrictive business practices. The UNCTAD also mentions that judicial and administrative procedures could be utilized for this purpose. The Set further goes on to state that national legislation should rest on the foundation of eliminating certain characteristics of business enterprises such as abuse of dominant position, market allocation or other such practices that may be anti-competitive in nature.²⁸ The working of the Set is monitored by the Intergovernmental Group of Experts on Competition Law and Policy and the UN Review Conferences, which meets at five-year intervals.²⁹ The recommendatory nature of the Set and its non-binding effect were identified as its major drawback. In light of this, on August 15, 2002, UNCTAD collaborated with the Working Group on the International Trade and Competition Policy and submitted a proposal whereby the possibility of evolving a multilateral cooperation framework was explored. Further, the proposal discussed numerous prospects for nurturing a multilateral framework that can be fitted into the WTO. Pertinent questions as to whether it would be a binding and enforceable instrument by the dispute settlement mechanism were shrouded in ambiguity and no definitive stance was taken.

The World Bank, OECD (Organization for Economic Co-operation and Development) and the UNCTAD have been instrumental in prompting developing countries to implement competition laws in their jurisdictions. These agencies drafted competition laws for those developing nations that did not promulgate a competition policy for their territory. According to the World Bank-OECD Model Competition Law that was drawn up in 1999, competition law has been defined as “The Law that is intended to maintain and enhance competition in order ultimately to enhance consumer welfare.”³⁰ Similarly, UNCTAD’s definition reads as follows:

To control or eliminate restrictive agreements or arrangements among enterprises, or acquisition and/or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic and international trade or economic development.³¹

While the World Bank-OECD model law includes acts done outside the country but that have substantial effect in the country, the UNCTAD model law includes “natural persons (such natural persons include owner, manager or employee of enterprises)” as a separate entity to which the law is made applicable. UNCTAD also excludes all acts of the state and state-related agencies from the application of competition law.³²

6. International Competition Regim- The Skeptics View

The international competition policy has been brought up before the global community on a number of occasions. However, there have been various reasons for the policy not being accepted either under the auspices of the WTO or by any external body. This section of the article analyzes the various arguments against an international competition policy. At the outset it should be clarified that we have concentrated mostly on the conflicts between developing and developed countries regarding this issue. The prospect of bringing competition policy within the orbit of the WTO is supported by both the developed and the developing nations, however, with differing perspectives.

Supporting a liberalized world economy, developed nations perceived a shortcoming on the part of WTO for not covering competition aspects of trade.³³The

developed nations identified potential investment sectors in certain countries that did not have in place a working competition policy and were wary of their enterprises being subject to anti-competitive behavior by prevailing and leading local market players. This was not a concern for the developing nations as their comparative economic weakness did not compel them to make foreign commercial investments. Rather, they foresaw restrictive practices by foreign enterprises that could constrain the growth process of domestic firms, and thus proposed a code of conduct for such transnational enterprises. The varying intentions behind the cause have partly contributed to the delay in arriving at a coherent consensus. While the developing nations have not been inclined to acquiesce to a global competition regime that would dictate the behavior of their commercial markets, the developed nations have been hesitant to comply with norms that could check international cartels and their investigation. A plausible reason behind this lack of consensus can be attributed to the certain varying needs of the developing countries as opposed to the developed countries (an issue that was acknowledged by the Doha Declaration).

One must bear in mind that the Working Group does not concern itself with either the harmonization of competition policy in order to evolve uniform code or with the setting up of an international competition body. Rather it focuses on the complimentary aspects of competition laws and trade policies in specific nations, thereby aiding developing countries to formulate a competition framework symmetric to their needs.

As mentioned earlier, the Doha Agenda relieved itself of the negotiations dealing with competition policy in 2004. This was primarily due to the reluctance of the developing nations. As per Jackson,³⁴ the idea was further dropped due to other structural reasons. For instance, the whole process of integrating and harmonizing the competition policies into one would be intricate and exacting. This, as per Hufbaer and Kim, is due to the different natures and “factual determinations” used by the different nations to enact their national laws.³⁵ The initial problem faced by the faction supporting an international competition policy was the conflict of opinion between the United States and European Union, over the issue of multilateralism versus bilateralism.³⁶ Additionally, the EU’s vision of an international competition policy consisted of a clause whereby, developing and underdeveloped countries had the option of leaving out from their policies certain sectors, which were essential for their growth.³⁷ This suggestion, though supported by Latin American countries, was received with skepticism by the Asian countries.³⁸ Developing countries disagree with the implementation of an international competition code. According to Hufbauer and Kim, there are two factors that contribute to this reasoning. The diplomatic reason, or the reasons give to the public, went along the lines of inexperience of legislators in developing nations in formulating a watertight competition policy.³⁹ However, the major concern is that being a part of an international competition policy modeled on the structure of developed nations would hamper the developing countries’ national economic policies.⁴⁰ This goes in tandem with the view that developing countries often feel that it is the right of the government to frame their laws, especially in matters covered by the competition act.⁴¹ This is supported by the fact that competition law tends to protect the market and the various related aspects of the market. Because different countries have their own unique market structure, it is necessary that a competition law be specific to the market. Another aspect considered by the developing countries was the fear of giant corporate houses and multi-national corporations based in developed countries, which could encroach upon the markets of developing countries, thereby inhibiting the growth of smaller domestic industries.

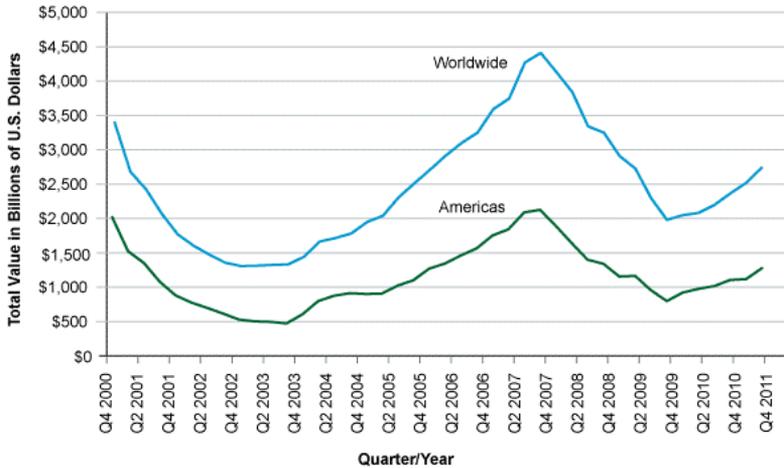
7. An International Competition Policy- Need of the Hour

This section of the article analyses the various issues, which need to be addressed by the international competition code.

7.1 Mergers & Acquisitions

The need for an international competition policy is imperative in the background of multiple commercial ventures that are cross-border and international in nature. The growing international relationships between countries have made competition problems more global than expected. For instance, in 1969, IBM's dominant market position led to the *United States v IBM*⁴² case, wherein the United States alleged violation of Section 2 of the Sherman Act 1890⁴³ by IBM on account of sizable dominance in the electronic digital computer market and monopolization of the same. Since 1991, 26 percent of the mergers and acquisitions (M&A) amounting to nearly \$8 trillion across the world have been cross-border.⁴⁴ Taking India and China for example, five years from 2001, outbound M&A deals by China amounted to nearly \$14 billion and \$8 billion by the Indian companies.⁴⁵ The following representation furthers the understanding of this concept.⁴⁶

Rolling Annual Quarterly M&A Activity: 4th Quarter 2000 to 1st Quarter 2011



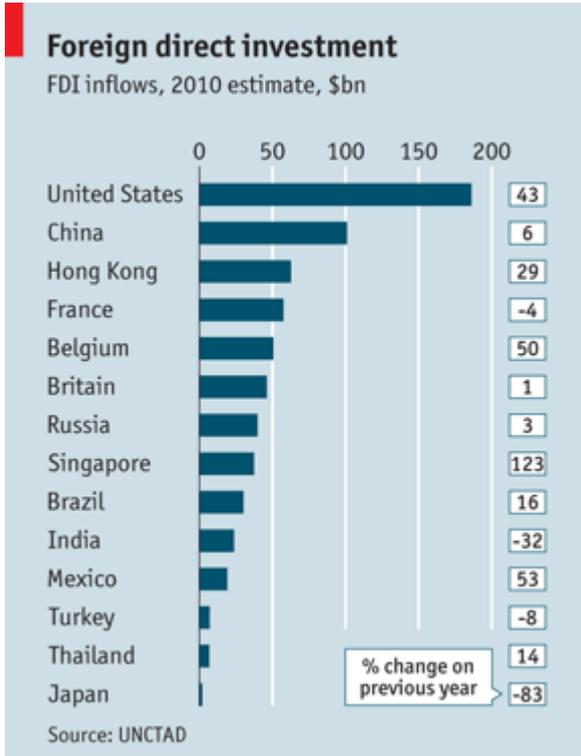
Source: Thomson Reuters

Global mergers pose distinct problems especially in countries that lack the necessary policy regimes to protect their local market interests. This was evident in the *Mannesmann/Italmipianti*⁴⁷ case. In this case, two companies, one Italian and the other German, which specialized in the making of pipes designed for oil drilling operations in developing countries, entered into a merger agreement that fell outside the scope of the European merger control. China was the principal buyer of this technology. While Germany cleared the merger, Italy put forth a condition of licensing obligations that would ease the monopoly problems in China before it would clear the merger. While fortunately in this case, Italy considered China's greater interest, in similar circumstances, developing countries are often left to the mercy of the changing tides of global markets and have practically no power during the process of a multinational merger. Apart from those developing countries that have great investment-making potential and are on the path to industrialization (such as Brazil, China and India), most developing countries face tribulations in overcoming anti-competitive behavior.⁴⁸

7.2 Foreign Direct Investments

The highly consequential link between foreign direct investment (FDI) and competition policy cannot be overlooked. When a country encounters high inflow of FDIs

into a country, it faces a challenge in protecting the interests of the local domestic market. According to the UNCTAD's estimates FDI flow into developing nations, especially into Asian and Latin American countries which have ebbed away the FDI flows into developed nations thereby makes the flow of FDI's to the wealthy nations fall by nearly 7 percent. The figures are evidentiary of this: A total of \$596 billion went into developing economies as opposed to \$527 billion into the developed countries in 2010.⁴⁹ The global inflow of FDI totaled up to \$1.12 trillion with more than \$100 billion of it poured into China, making it the world's second-largest recipient of such investment. The graph below illustrates the 2010 estimates of FDI⁵⁰:



Given this, having anti-competitive behavior may only impede FDI's around the world, which is detrimental to many of the emerging economies. It is pertinent to bring to notice the "race to the bottom," a conceptual phenomenon that is common in international trade vis-a-vis labor and environmental standards (wherein different countries, to increase trade inflow, reduce environmental and labor standards, thus reducing costs of production and additional costs, making the country more acceptable for foreign trade). Applying it to the context here, we opine that when a country poses a fertile terrain for FDI's, a "race to the top" occurs. Meaning, countries will be vying with one another to provide the best possible host environment for international business transactions to flow in through regulated competition. Internationalization of competition law will, in effect, aid and increase the flows of FDI's into growing economies.

7.3 Free Trade Agreements

Countries across the world have formed free trade agreements (FTA) and such cooperation, more often than not, calls for an integration of competition policies of the

participating members. The European Union is a case in point that has a common competition policy. Another example would be the understanding between North American Free Trade Agreement (NAFTA) and Canada, United States and Mexico, to adopt and maintain national measures against anti-competitive behavior and most importantly, to cogitate with one another when either member's interest is at stake.⁵¹ Canada and Chile have a similar FTA that even excludes anti-dumping laws in the in the free trade area.⁵² Other examples include the Australia New Zealand Closer Economic Relations Trade Agreement (CER)⁵³, a combination of the essence of the 1994 NAFTA agreement and the Canada-Chile FTA that provides for provisions for abuse of dominance and prohibition from applying anti-dumping measures in the free trade areas.⁵⁴

7.4 Bilateral Cooperation

Bilateral cooperation is another approach that can be taken towards the conception of an international cooperation. Bilateral cooperation refers to an agreement made between two countries with the objective of sharing resources, keeping in mind a common goal or objective. This phenomenon, with respect to anti-trust or competition law matters can be historically traced back to the United States. During the 1970's, a high number of anti-trust clashes led to the adoption of three memoranda of understanding, namely those between United States and Germany in 1976, United States and Australia in 1982 and the United States and Canada in 1984 (revised in 1995)⁵⁵. These agreements were based on an understanding that the countries would not challenge the neighbor's cartels. In September 1991, the United States and the European Commission signed a Cooperation Agreement Regarding the Application of their Competition Laws.⁵⁶

The important provision under this agreement is Article V, which provides for one party to take effective measures to protect market access for the firms of the others in the following manner: If one party believes that anti-competitive acts taken on the territory of the other are adversely affecting its important interests, it may request and advise the notifying party of its decision and developments. This is popularly referred as the "Positive Comity" clause.⁵⁷

Incorporating such clauses in prospective bilateral relations between countries can promote international cooperation on competition policy. The International Antitrust Enforcement Assistance Act enacted in 1994 encourages certain authorities to share business information for cross-border transaction-investigations, in countries that have signed agreements with the United States. The first agreement signed under this Act by the FTC was the one with Australia.

The most productive aspect of regional/bilateral agreements is the opportunity available for the lesser developed countries to integrate ideas and improve competition structures. As per the OECD, out of the 86 trade agreements analyzed by them, about a fourth was between developing and developed countries. Unfortunately, the non-binding nature creates difficulties in the implementation and enforcement of the provisions. More often than not, this leads to dependence on the goodwill of the other country.⁵⁸

7.5 International Cartels

The impact of globalization on competition policy is exemplified by international cartels. An international cartel refers to the anti-competitive agreement between two producers that are involved in anti-competitive agreements (say an agreement to increase price of products), usually for the purposes of achieving a monopoly. Various countries may enter into certain agreements to sell certain goods at a certain price in certain other countries. Cartels distort markets by restricting production and manipulating prices. This situation completely counteracts the advantages of international trade liberalization. Price fixing through such private international cartels can hinder movement of goods into the national markets of the target countries.

Nearly twenty years ago, both the anti-trust law of the United States and the European Commission directed their attention to fielding regional cartels. However, they rarely engaged in such practices beyond the limits of the local border. Tackling this problem, the anti-trust law in the U.S prohibits anti-competitive behavior within the country as exports and imports. Penalties are up to the limit of \$10 million, and although under 18 U.S.C. § 3571(d) defendant executives can face jail sentences, more often than not this is flouted by such executives through either probation or home detention. The ongoing international litigation *In re Vitamin C Antitrust Litigation*⁵⁹ is an example of how the anti-trust law in the United States is against the international cartel systems. In this case, the United States was a purchaser of Chinese produced Vitamin C. It was alleged that the Chinese manufacturers had formed an illegal cartel to fix prices and limit the supply of Vitamin C exports.⁶⁰ Although the Chinese manufacturers did not deny their anti-competitive behavior they moved to dismiss the suit on the ground of *foreign sovereign compulsion doctrine* to shield them from liability under United States antitrust laws.⁶¹ The doctrine, in essence, seeks to protect foreign companies that are compelled by their own government to break U.S. law. The evidence for the application of this doctrine has been considered to be very strong in this case and to test the stretch of the anti-trust laws. Had this defense been accepted by the court, it would have been a major blow to global competition, hurting many market economies and sending the wrong message ahead.⁶² The court termed the conduct of the Chinese companies as *consensual cartelization* and opined that: The foreign compulsion defense “*recognize[s] that a foreign national should not be placed between the rock of its own local law and the hard place of U.S. law,*” but held “*here, there is no rock and no hard place.*” Adding to this, the Court said that it doubted if the doctrine would apply in cases where, “*defendants enthusiastically embrace a legal regime that encourages, or even compels, a lucrative cartel that is in their self interest.*”⁶³ The case is currently on trial.

7.6 Hard-Core Cartels

The members of OECD have been working on an anti-hard-core cartel campaign since 1998 with the publication of the OECD Council Recommendation Concerning Effective Action against Hard Core Cartels in that same year. The Recommendation has defined hard core cartel as:

An anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce⁶⁴

The objective behind the publication of these Recommendations was to draw attention to this growing global concern that requires not only cooperation amongst the OECD nations but to synergize with non-Members as well. This urgency was advocated keeping in mind the extent of distortion international cartel can have especially in economies that are infant in their progress and strength. Apart from these Recommendations in 1998, the first, second and third Report on the Implementation of the 1998 Recommendation was published in 2000, 2003 and 2005 respectively. These Reports conclude that⁶⁵:

1. Countries must better their awareness programs,
2. Countries must collaborate with procurement officials in order to fight bid rigging.
3. Countries should introduce and impose sanctions against individuals, including criminal sanctions.
4. The report recommends enhancement of international cooperation in cartel investigations, and formal information exchange in cartel investigations.

8. Recommended Focus Areas of an International Competition Policy

This part of the article deals with the various areas that the international competition policy should address.

8.1 Focus on Export/Import Issues

Another perspective from which to look at the issue would be to not make the international competition framework, in the context of trade, purely myopic. Rather than focusing on weeding out anti-competitive behavior or policing international cartels, attention must be directed towards addressing practices that are restrictive of the exportation and importation of goods and services. This could be an addendum to the GATT and GATS so that the framework requirement in the context of the respective agreements is maintained. At the same time the addendum will make it an obligatory function of the Member nations to address an export/import issue if a related request on the same is done.⁶⁶ An example of this is found in Article 11 of the WTO Safeguards Agreement that also prohibits Members from making or maintaining any “voluntary export restraints, orderly marketing arrangements or any other similar measures⁶⁷ on the export or the import side.”⁶⁸

8.2 Partly-binding Multilateral Agreement

In September 2000, the European Community suggested an alternative model of multilateral framework: a partly-binding multilateral framework.⁶⁹ The core principles such as transparency, non-discrimination and due process of law would be incorporated, as well as part of the enforceability aspect of the multilateral competition policy. With regard to capacity-building and technical assistance for the same, the European Community suggested “arrangements” for the implementation of national competition policies of developing nations. Following this suggestion, the European Community, in 2002 communicated to the Working Group on Interaction between Trade and Competition Policy, the importance of recognizing the needs of developing nations and reiterated that any WTO policy on competition must essentially balance with the local competition authorities so that they can benefit extensively from the international competition cooperation. The EC further suggests that adherence to this can be achieved once a Competition Policy Committee is established when the proposed WTO framework agreement is concluded.⁷⁰

8.3 Tackling Competition Policy Spill-Over's

A competition policy spill-over occurs when the restrictive trade activities of one country affects enterprises in another country. This phenomenon is characteristic of export cartels or merger agreement between two or several firms which affect competition in another relevant market than the market that is covered by merger agreement.

In the case of export cartels, certain industries involved in the export of products belonging to a particular sector or industry are exempted from the competition regime. These kind of exemptions are usually given to developing to recognize the needs of the developing countries (for instances, in the case of TRIPS, developing countries are given a transition period of ten years to comply with the substantive provisions). While accommodating the needs of the developing nations is important, exemption from the application of regional competition laws will not serve the purpose, as eventually when these countries participate in cross-border trade, spill over into other countries will take place and only the exporting countries will be benefited.⁷¹ Spill-over's can also happen with a research and development (R&D) agreement where product markets are likely to be affected. But this is only true if the R&D venture is between firms that have adequate market power.

The criteria of power over market access can be used as the screening process to check spill-over's in the case of R&D joint ventures. Along with this, competition authorities must check for any ancillary effects of such ventures such as geographical market division amongst the ventures party to the R&D agreement. The fundamental question is whether the interests of consumers and firms in other countries are a determinative factor for national

competition authorities. If the national competition authorities decide upon the agreements, taking into considerations the impact over other countries, and there is no detriment to the rest of the world, then a provision in an international competition policy would not be of any effect. The international competition code will need to address the following, in such situations:

1. The national competition authorities render decision to the effect that the agreement has global negative consequences. This is relevant only if the spill-over is large enough and affects the welfare of the consumers and firms around the world
2. If a particular agreement between two companies of two different countries (A and B) is considered competitive in one country (C), but anti-competitive in another country (D).
3. If a particular agreement between two companies of two different countries (A and B) is considered competitive in country A, but anti-competitive in country B.

An ideal international competition code should contain provisions to address these preceding conflicting issues.

9. Conclusion

The requirement for an international competition code has been prevalent in the discussion for several decades. This paper argues that international competition code is a necessity in light of the increasing numbers of cross border mergers and acquisitions coupled with increased foreign direct investment. It would be foolhardy to have such an international commercial system and not an international competition code.

The reservation shared by the developing nations is understandable. However, even though their arguments seem to be rationale in the current commercial perspective, in the long run, with commercial transactions not knowing any national or territorial boundaries, these arguments are misguided.

There is an ongoing debate about who the responsibility to implement and even draft such policy should fall on. As recently as 2009, UNCTAD set up a draft proposal for a model competition law. This could be used as a starting point as far as the drafting is concerned. Moving on to the implementation aspect, we strongly feel that despite it being no longer on the WTO agenda, this matter should come under the aegis of the WTO, primarily because of three reasons: firstly, WTO has probably the most efficient dispute settlement mechanism, which does not have a tendency or appearance of bias towards developed countries. Secondly, there are so many member states, which are a part of the WTO, that it could be made applicable to all, which would in effect cover ninety percent of the states. Finally, the WTO has incorporated TRIPS, GATS, and TRIMs; hence, another provision for competition would not be a Herculean task. Additionally, as the EU had pointed out, developing nations could opt out of the applicability of this act to certain sectors, this would go in consonance with WTO agreements like TRIPs and SPS (Sanitary and phytosanitary measures), which provide for specific provisions for developing and under-developed nations.

The role of other institutes are no less important as they should join hands with the WTO and supplement their efforts. The trade agreements probably have the most important role, until an international competition code is formed, to carry the baton forward. It is essential that an international competition code be enacted for without one the international competition regime will head at an uncontrollable speed towards an era of monopolization—to the detriment of the consumers and the market.

Endnotes

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- ³ Cowen DV, *A survey of the law relating to the control of monopoly in South Africa*, The South African Journal of Economics, June 1950.
- ⁴ Matsushita, Mitsuo. Schoenbaum, Thomas J. and Mavroidis, Petros C. *The World Trade Organization: Law, Practice and Policy*, 2nd Edn, Oxford University Press, p. 2
- ⁵Paragraph 20 of Singapore Ministerial Declaration
- ⁶Paragraph 25 of Doha Declaration dealing with *Interaction between Trade and Competition Policy*
- ⁷'Hard core' cartels are anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets. This definition is taken from OECD Reports on Hard-Core cartels, 2000, p.6
- ⁸ MFN (Most Favored Nation) in context of the WTO ensures that all countries, treat the other member equally as a most favored nation, that is, ensures there is no discrimination. National treatment on the other hand refers to the equal treatment of national and imported/ foreign goods.
- ⁹Nikomborirak, Deunden. *Competition Policy in the World Trade Organization: How to Make it a developing Country's Agenda*, ; *The DOHA development agenda: perspectives from the ESCAP region* : By United Nations. Economic and Social Commission for Asia and the Pacific, Studies in Trade and Investment, p. 103
- ¹⁰ Refer <www.wto.org> trade topics > competition policy> accessed on January 23, 2012
- ¹¹ Procedures for Assessment of Conformity by Central Government Bodies
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- ¹⁴ Matsushita, Mitsuo. *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process*, in , *International Trade Law and the GATT/WTO Dispute Settlement System*, edited by Ernst-Ulrich Petersmann, Kluwer Law International, 1997, 361
- ¹⁵ Supra Note 9 at 102
- ¹⁶Mathis, James H. *UNCTAD Report on 'WTO Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy Framework'*, UNCTAD/DITC/CLP/2003/2, UN New York and Geneva, 2003
- ¹⁷ WT/DS44 R, 1998
- ¹⁸ Reuters Limited. "US loses WTO case over Japan film Market" Online. Internet. Available: <<http://cnn.com/world/asiapcf/9712/06/RB002207.reut.html>> accessed on January 24, 2012
- ¹⁹ WT/DS 136/ ARB, 2004)
- ²⁰ Anti dumping refers to a phenomenon, where a product exported to a country at prices lower than those in the exporting country.
- ²¹WT/DS 204/ R, 2004
- ²² Mexico – Measures Affecting Telecommunications Services Case, Report of the Panel, World Trade Organization, WT/DS204/R, April 2004.
- ²³ Panel Report, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, adopted 1 June 2004, par. 7.18

²⁴ Section 1.1 of the Reference Paper establishes that “Appropriate measures shall be maintained for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging or continuing anti competitive practices.” id, para 7.222

²⁵ Refer < http://www.cuts-grc.org/pdf/The_Mexico-Telecoms_Case.pdf> accessed on January 20, 2012

²⁶ By the UN General Assembly (Resolution 35/63 of 5 December 1980)

²⁷ Refer:

<<http://www.unctad.org/Templates/webflyer.asp?docid=15624&intItemID=4899&lang=1>> accessed on January 25, 2012

²⁸ Refer: <<http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4e.htm>> accessed on January 25, 2012

²⁹ The Fourth UN Review Conference from 25 to 29 September 2000 adopted a comprehensive resolution reaffirming the validity of the Set, calling for its implementation by States and setting the main lines of UNCTAD's work in this field for the years ahead. Refer <<http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpsetp4e.htm>> accessed on January 25, 2012

³⁰ WB-OECD (1999), 142

³¹ UNCTAD (2003), 13

³² Refer:<<http://www.competition-regulation.org.uk/conferences/southafrica04/lee.pdf>> accessed on January 25, 2012

³³ Singh, Ajit & Dhumale, Rahul. *Competition Policy, Development and Developing Countries*, in *Trade-related Agenda, Development and Equity (T.R.A.D.E)*, Working Paper Series No, 7, November 1999

³⁴ Jackson, John. *Sovereignty, the WTO, and Changing Fundamentals of International Law*. New York: Cambridge University Press 2006.

³⁵ Hufbauer, Gary Clyde *International Competition Policy and the WTO*, Paper presented at a conference titled *One Year Later: The Antitrust Modernization Commission's Report and the Challenges that Await Antitrust*, New York University, April 11, 2008.

Refer: <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=930>> accessed on February 1, 2012

³⁶ Supra Note 4, 895

³⁷ Holmes, Peter, *Trade, Competition and the WTO*, in English, Philip, Bernard M. Hoekman, and Aaditya Matto (Eds.), *Development, Trade and the WTO*, Geneva: World Trade Organization, p. p. 453, 2002

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³⁸ Id

³⁹ Supra Note 29, 142

⁴⁰ Id at 142.

⁴¹ Refer: <<http://www.cid.harvard.edu/cidtrade/issues/competition.html>> accessed on January 10, 2012

⁴² Civil Action No. 72-344 (AGS)

⁴³ Section 2 of the Sherman Act 1890 reads as follows: *Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.*

⁴⁴ Makew, T. *Waves of International Mergers and Acquisition*, AFA 2012 Chicago Meetings Paper, October 2011, p. 2

⁴⁵ Vardhan, Harsh. *Outbound M&A from India and China*, The Economic Times, December 26, 2006

⁴⁶ Refer: < http://www.advisorperspectives.com/commentaries/aci_52611.php> accessed on January 10, 2012

⁴⁷ *Case No. 3622 (C2227)*, Fiatimpresit-Mannesmann Demag-Techint/Italimpianti, Bolletino della Autorita Garante della Concorrenza e del Mercato, Mar. 4, 1996, pp. 15-6, 70-1, 130 (Italian Antitrust Auth. Feb. 15, 1996); Cited in Fox, Elanor M. 'World Competition Law: Conflicts, Convergence, Cooperation', in *Competition Policy Today: Concepts, Issues & Law in Practice*, edited by Vinod Dhall, Oxford University Press p.229

⁴⁸ Supra Note 32

⁴⁹ UNCTAD's Global Investment Trends Monitor (No. 5 of 17 January 2011)

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⁵¹ Refer North American Free Trade Agreement signed at Mexico City, Ottawa and Washington 1992 and into force on January 1, 1994, Chapter 15

⁵² Canada-Cile FTA entered into force in 1997, Chapter J.

⁵³ Australia New Zealand Closer Economic Relations Trade Agreement (CER), adopted in 1983

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⁵⁸ Supra Note 34.

⁵⁹ *In re Vitamin C Antitrust Litigation*, No. 06-1738 (E.D.N.Y. filed Feb. 22, 2006)

⁶⁰ *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008)

⁶¹ Lee, Jane, *Vitamin "C" is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense*, Va. J. Int'l L., Vol. 50 Is. 3. p.757

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⁶⁶ Supra Note 16

<http://www.unctad.org/en/docs/ditccpl20032_en.pdf> accessed on February 1, 2012

⁶⁷ Similar measure include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection. Refer <http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm#ftnt3> accessed on February 10, 2012

⁶⁸ Article 11 (1)(b). Available at <http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm#ftnt3> accessed on February 10, 2012

⁶⁹ Communication from the European Community and its Member States, WT/WGTC/W/152, September 25, 2000

⁷⁰ Supra Note 4, 905

⁷¹ Supra Note 9, 115

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