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Submission of Articles

We welcome the submission of articles and recent developments for publication in the *TTLQ*. Authors may wish to check with the Editor about preemption of their topic. Articles should be approximately three to ten double-spaced pages inclusive of endnotes. Generally, citations should conform to the Bluebook form of citations. All articles should be submitted by e-mail to Miranda-Lin.S.Bailey@exxonmobil.com.

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State Bar of Texas International Law Section

2009 Law Student Legal Writing Contest

The International Law Section of the State Bar of Texas has the privilege of announcing the following winners of its 2008-2009 Law Student Writing Contest:

First Place

Travis King

University of Houston Law Center

East Meets West in the South: How Cooperation Holds the Key to Facing the Chinese Challenge in Africa

Second Place

Jonathan P. Wilkerson

Texas Tech University School of Law

Does Contemporary International Law Recognize a Right to Intervene Militarily in another State on Account of Serious Human Rights Violations?

Third Place

Rebekah J. Bailey

SMU Dedman School of Law

R2P: America's Responsibility to Prevent Incitement to Commit Genocide

Fourth Place

Francis Gradijan

University of Texas School of Law

Overcoming Challenges in China's Agricultural Quality: The Role of Law

We are also pleased to announce that *East Meets West in the South: How Cooperation Holds the Key to Facing the Chinese Challenge in Africa* and *Does Contemporary International Law Recognize a Right to Intervene Militarily in Another State on Account of Serious Human Rights Violations?* have been selected for publication as student submissions in this December 2009 issue of the TEXAS TRANSNATIONAL LAW QUARTERLY.

We sincerely thank all of the law students who participated in our writing contest and congratulate the winners! The judging this year was again made very difficult due to the high level of the submissions from entrants from various law schools. We encourage continuing law students to participate in our 2009-2010 Law Student Writing Contest and wish everyone much success. More information will be available at <http://www.ilstexas.org>.

“Single Business” Liability and International Business in Texas

By
David S. Coale

Consider these fact patterns:

- A critical component is flown from Asia, sent across the United States and Texas by a chain of brokers and distributors, and used in a local construction project;
- After a system crash, a local division of a software company asks programmers from an affiliate to travel from Europe to suggest possible solutions, and the customer accepts a new package in consultation with both the local company and the visiting experts;
- A Texas company, working as a subcontractor to another corporation on a consulting project for a business in South Africa, hires an Asian subsidiary of that other corporation to serve as its own subcontractor.

If something goes wrong in these “streams of commerce,” who may have responsibility and liability?

A 2008 Texas Supreme Court case changed the answer in a way particularly relevant for international business, and that case and subsequent court of appeals opinions offer several practical suggestions for day-to-day business.

End of “Single Business” Liability

Texas law generally protects the owners of a corporation from liability for the acts of the company.¹ Even so, under the “single business enterprise” doctrine, Texas law once held that a company could share responsibility for the liability of another if the two companies shared a name, or had common operations such as accounting, employees, offices, and finances.

In 2008, the Texas Supreme Court ended that doctrine in the case of *SSP Partners v. Gladstrong Investments*.² In that case, a Hong Kong-based company exported a defective

lighter, which a subsidiary then distributed in the United States. Because the court refused to call the Hong Kong company and its subsidiary a single enterprise, Gladstrong’s US subsidiary was found not liable for its Hong Kong-based parent’s defective product. The court held that “[d]ifferent entities may coordinate their activities without joint liability” because “there is nothing abusive or unjust” about companies sharing administration and resources.³

While this case dealt with a typical parent-subsubsidiary relationship, its reasoning would reach other common situations, such as separate businesses coming together to form a new entity for a particular project-related purpose.⁴ At the same time, the Supreme Court’s rejection of one shared liability theory leaves others in place. For example, Texas law does not allow companies to deliberately blur their identities to mislead and commit fraud.⁵ *SSP* also did not deal with civil conspiracy⁶ or the related concept of “joint and several” liability,⁷ both of which can make companies share liability if they are found to have participated together in wrongdoing. Distinct business entities can also potentially share liability if they form a partnership,⁸ or if one serves as the agent for another.⁹

Practical Consequences

The practical challenge after *SSP* is to share resources without creating confusion so as to avoid being viewed as a single enterprise. Companies should consider what their business partners perceive during the course of negotiations and the conduct of a project:

- In the early stages of a project, talks may involve entities besides the entities that ultimately enter a formal contract. A national or global parent may begin discussing those contracts with specific subsidiaries and affiliates appropriate for the particular project. Similarly, proposals and other marketing documents often refer to the combined resources of more than

one company in the same corporate family.

- When negotiations lead to a written contract, a “merger clause” may reduce confusion related to pre-contractual deliberations between the parties.¹⁰ A typical merger clause provides: “This Agreement represents the parties’ entire agreement concerning its subject matter and supersedes all prior negotiations, agreements, and understandings. There are no written or oral inducements, promises, agreements, or conditions made or offered in connection with the subject matter of the Agreement that are not specifically stated therein.”¹¹ (This can be particularly relevant in an international transaction where some of the individuals involved in negotiations are not native English speakers, and may not share the same understanding of American or British idioms.)
- Documents included in a project’s written record are often prepared under time pressure, and can be unclear. For example, meeting minutes may be vague about whom an attendee represents, or how responsibility is delegated amongst the parties. E-mails can also lead to confusion, particularly in long chains with a large distribution, or if a “form” footer does not accurately describe a person’s role on a particular assignment and project.
- While parties try to review their formal contracts closely, post-contractual legal documents such as change orders, lien waivers, and other modifications, may introduce ambiguity. This likelihood increases if the parties use boilerplate forms for the later documents while the underlying contract contains terms drafted specifically for the project.
- Any project of size will be surrounded by documents that the project did not create – letterheads, business cards, advertising, websites, press releases, manuals, product bulletins, etc. *SSP* recognizes that in these sorts of documents, a group of businesses may legitimately refer to itself by a “family” name. Reference to the wrong specific entities, however, may create further misunderstandings. A

merger, acquisition, or simple name change mid-project can confuse an otherwise well-organized situation. If one person wears several “hats” for different related businesses, signatures and signature blocks may prove especially problematic.

Whether a party’s decision to enter a Texas-related contract creates jurisdiction over that party in a Texas court depends on the surrounding circumstances, such as how and where the contract was negotiated and performed.¹² After *SSP*, it may be more difficult to sue a distant manufacturer or service provider, especially one based in a foreign country, on the sole basis that the business has a subsidiary or affiliate in Texas.¹³

For example, in the recent case of *All Star Enterprise v. Buchanan*, the Fourteenth Court of Appeals noted that “some of the factors previously considered in determining whether two companies acted as a single business enterprise still may be useful in determining whether to disregard the corporate structure,” but the court expressly rejected reliance on the single business enterprise theory as the sole basis for establishing personal jurisdiction over a nonresident defendant.¹⁴ A well-written forum selection clause or arbitration clause may reduce uncertainty about this point.¹⁵

In light of *SSP*, a business may also want to make express arrangements to confirm parties’ commitment to a project. Those forms of protection could include a written guaranty or indemnity, an adjustment in insurance strategy, or a larger performance bond. Although a formal contractual commitment may reduce uncertainty about a company’s relationship to a project, the negotiation of increased protection from the risk of liability introduces new costs.

Federal Law

Texas law is particularly protective of shareholders. For example, failure to follow all required corporate formalities will not by itself allow piercing of the corporate veil.¹⁶ Accordingly, the general commercial law of Texas focuses on whether the parties’ activities are misleading or deceptive. Some federal authority, especially in the area of labor law, recognizes a “single business enterprise” concept for other policy reasons, and should be

given weight when forming strategy in those specific areas.¹⁷

Conclusion

The *SSP* case recognizes that companies can work together for many good reasons and seeks to encourage them to do so as long their activities are not misleading. Awareness of that basic principle can help develop sound business practices, and help spot situations where further clarification of roles is needed.

Author: David S. Coale is a Partner at K&L Gates LLP, in Dallas, Texas. Any opinions expressed in this article are the author's alone, and not those of the firm or any firm client.

¹² See *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.3d 223, 228 (Tex. 1991); *Asahi Metal Indus. Co. v. Superior Cost*, 480 U.S. 102 (1987).

¹³ See *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 172-76 (Tex. 2007).

¹⁴ *All Star Enterprise*, *supra* note 3, at *16 n. 13 (citing *SSP*, 275 S.W.3d at 455).

¹⁵ See *In re International Profit Assocs, Inc.*, 274 S.W.3d 672 (Tex. 2009).

¹⁶ TEX. BUS. ORG. CODE § 21.223(a)(3).

¹⁷ See Stephen B. Presser, "The Bogalusa Explosion, 'Single Business Enterprise,' 'Alter Ego,' And Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary 'Abuse' Theory of Piercing the Corporate Veil," 100 NORTHWESTERN UNIV. L. REV. 405, 416-20 (2006) (summarizing key federal decisions and their interplay with state law).

¹ See generally TEX. BUS. ORG. CODE § 21.223 *et seq.*

² 275 S.W.3d 444 (Tex. 2008).

³ *Id.* at 456; see also *All Star Enterprise, Inc. v. Buchanan*, ___ S.W.3d ___, No. 14-08-01064-CV, 2009 WL 3210653 (Tex. App.—Houston [14th Dist.] Oct. 8, 2009) (noting that "the single-business-enterprise theory of liability . . . has been expressly rejected by the Texas Supreme Court" and citing *SSP*); *Plotkin v. Plotkin*, 2009 Tex. App. LEXIS 7709, at *67 (Tex. App. – Houston [1st Dist.] 2009) (noting that parties had raised the single business enterprise theory but "the Texas Supreme Court has since rejected its validity").

⁴ *But see St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 526 (Tex. 2002).

⁵ See TEX. BUS. ORG. CODE § 21.223(b); see also *Wilson v. Davis*, ___ S.W.3d ___, No. 01-06-00424-CV, 2009 WL 2526439, at *8 (Tex. App.—Houston [1st Dist.] Aug. 14, 2009) (citing *SSP* and noting "shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield").

⁶ See generally *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925 (Tex. 1979).

⁷ *Tex. DOT v. Able*, 35 S.W.3d 608, 613 (Tex. 2000) (describing how participants in a "joint enterprise" can share liability).

⁸ See *Big Easy Cajun Corp. v. Dallas Galleria Ltd.*, No. 05-07-1523-CV (Tex. App.—Dallas July 28, 2009) (discussing how evidence offered to prove a single business enterprise – a finding made moot after *SSP* – failed to establish an implied partnership).

⁹ See generally *GWTP Investments, L.P. v. SES Americom, Inc.*, 497 F.3d 478 (5th Cir. 2007).

¹⁰ See generally *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228 (Tex. 2008).

¹¹ See *Dick's Last Resort v. Market/Ross, Ltd.*, 273 S.W.3d 905, 913 (Tex. App.—Dallas 2008).

East Meets West in the South: How Cooperation Holds the Key to Facing the Chinese Challenge in Africa

By
Travis King

Chinese President Hu Jintao's visit to Africa in early 2009 was remarkable, not for the countries Hu visited, but rather for the ones he did not. As Hu crossed the continent, laying the first brick of a "Friendship Bridge" in Mali¹ and announcing an agreement to lend \$260 million to Mauritius to build an expanded airport,² the itinerary conspicuously bypassed all of the oil-rich African nations that have, in the past decade, received massive amounts of Chinese investment and aid. Previously, in 2003 and again in 2006, China's leaders toured Africa's largest oil-producing states, often accompanied by representatives of Chinese national oil companies ("NOCs").³ By avoiding these countries in 2009, Hu hoped to counter the widespread perception that China's unprecedented largesse in the region has occurred with the single-minded objective of capturing resources in Africa with little regard for the welfare of the Africans themselves.⁴

The reality, however, is that China needs oil and lots of it. China is predicted to have 56 million vehicles on the road in 2010 and 140 million by 2020.⁵ China has been a net importer of oil since 1993 and is now scouring the globe for reliable supplies.⁶ In this search, China's eyes have fallen in large part on Africa, which has emerged as a promising new area for upstream oil production, and with good reason.

The continent offers vast, unexplored reserves of high-quality, non-OPEC controlled oil, much of which is located either offshore or close enough to the coast to provide for easy export.⁷ China has proven itself adept at gaining access to these resources whether in countries such as Angola, where it is competing with Western interests, or Sudan, where it has the field almost entirely to itself. The challenge for the international oil companies ("IOCs") will be to meet the growing competition that China represents in Africa.

China-Africa Trade Has Exploded In Recent Years Because Chinese Enjoys Unique Advantages in Africa.

In the last ten years, trade between China and Africa has grown exponentially in all areas, including energy.⁸ As Christopher Alden argues in his book, *China in Africa*, this growth has been largely due to the unique advantages that China enjoys when doing business on the continent, specifically, China's comparative political advantage, comparative economic advantage, and China's ability to tie aid and diplomacy to commercial relations.⁹

In relations with the developing world, China takes the firm position that it will respect the internal sovereignty of other nations. Unlike Western governments that condition aid upon promises to make improvements in areas such as the environment or respect for human rights, the Chinese government offers aid with no such strings attached.¹⁰ Similarly, Chinese NOCs focus solely on the business of oil production and leave social policies such as transparency and democracy to the host government.¹¹

China also does not face many of the economic disadvantages faced by the IOCs when operating in Africa. Chinese NOCs are not answerable to impatient shareholders clamoring for immediate returns and rosy quarterly profit statements.¹² The Chinese government, as primary shareholder, is patient and can take the longer view.¹³ China's large-scale infrastructure investments across the continent represent one aspect of this long-term view.

Finally, China enjoys a diplomatic advantage. The Chinese government commonly uses state foreign policy to further the business objectives of its NOCs.¹⁴ When Chinese NOCs seek licenses from a host country, the Chinese government may freely tie aid packages to these deals. It can offer basic infrastructure such as

roads in Rwanda, a railway in Nigeria, and a port in Gabon,¹⁵ or “prestige projects” such as soccer stadiums in Sierra Leone and the Central African Republic or presidential palaces in Zimbabwe and Congo-Kinshasa¹⁶ alongside lines of credit as incentives to grant a concession.¹⁷

Since 2004, China has extended \$5 billion to Angola in loans for a refinery and an international airport, as well as for diamond mining and fisheries.¹⁸ By 2008 Angola had become China’s largest source of oil imports after Saudi Arabia.¹⁹ In contrast, when the U.S. government re-opened its embassy in the tiny African dictatorship of Equatorial Guinea in 2006, many at home decried the move as a crass attempt to curry favor with the island’s repressive regime for the benefit of American oil companies that wished to exploit the nation’s newly discovered offshore reserves.²⁰

Moving From Competition to Cooperation: Should Western Companies Partner With Chinese NOCs to Compete in Africa?

In February 2009, British Petroleum CEO Tony Hayward spoke in Houston about the possibility of consolidation among IOCs as a result of declining oil prices. Hayward discounted the possibility as unlikely, asserting that the IOCs currently have little to gain from acquiring one another. Rather, he predicted that future consolidation may take place between IOCs and NOCs.²¹ Is the best way for IOCs to compete with China for African petroleum resources to form partnerships with Chinese NOCs operating in Africa and to cooperate rather than compete?

IOC-NOC partnerships

Relations between IOCs and NOCs are changing.²² NOCs now control as much as 94 percent of known oil and gas reserves, making it a necessity that the IOCs become accustomed to dealing with them.²³ The nature of the relationship is changing as the NOCs realize that capturing the maximum possible value from their resources requires a shift from the traditional exchange of access to reserves for technical ability to a more vertically integrated approach.²⁴ Specifically, the NOCs seek expertise in “LNG, gas-to-liquid, secondary recovery, unconventional oil, and ultra deep water.”²⁵ Perhaps most importantly, less-efficient NOCs will rely on IOCs to develop

reserves that NOCs cannot economically reach in times of low oil prices.²⁶

What about the possibility of IOCs forming joint ventures with Chinese NOCs in Africa? IOC-NOC partnerships in the NOC’s home country frequently face difficulties because the NOC is worried about protecting the home country’s national sovereignty.²⁷ However, by working together in a neutral third country, IOC-NOC partnerships could develop without this concern.²⁸ The NOC would benefit by developing skills in upstream exploration and development in unfamiliar parts of the world. It could then expand its base of operations into areas with conditions unlike those it normally deals with in its home country.²⁹

IOCs are accustomed to dealing with host-country NOCs as a prerequisite to obtaining access to the NOC’s resources.³⁰ For an IOC to contemplate an NOC partnership in a third country, the NOC must have something of independent value to offer beyond the usual mineral access. The NOC might offer valuable experience in dealing with the third-country hosts, such as the experience that comes from shared colonial histories.³¹ An NOC from a highly bureaucratic nation or one with powerful trade unions could possess special skills in dealing with similar host country governments.³² China would bring some of these skills to the table in any IOC-Chinese NOC partnership. Furthermore, the Chinese NOCs could offer the fruits of the relationships they have forged across Africa, including in those the states where Western IOCs do not yet operate.

Smaller western independents have already begun to partner with Chinese NOCs in Africa,³³ and several majors have initiated joint operations with Chinese NOCs in other parts of the world.³⁴ This could reflect a trend that the IOCs have already recognized the importance of partnering with Chinese NOCs. The question remains whether China will improve its human rights record enough to permit the majors to partner with its NOCs in Africa.

China’s Human Rights Record Shows a Glimmer of Hope towards Reform.

By far, the highest barrier facing any partnership between Chinese NOCs and Western IOCs in Africa is China’s human rights record on the continent. As long as China continues to act as

Sudan's political protector and chief funding source,³⁵ the Western nations will not allow IOCs to work too closely with the Chinese NOCs. However, there are some signs that China is improving in its respect for human rights in a way that might one day make such partnerships in the region politically feasible. First, Chinese NOCs have taken conscious efforts to model themselves on the IOCs and might eventually succeed with respect to concern for the behavior of host governments towards local populations.³⁶ The Chinese NOCs have attempted to emulate IOC forms of corporate governance, respect for human rights, and transparency efforts.³⁷ Although the Chinese do not face the same type of scrutiny over their actions at home that most IOCs face, the Chinese government still seeks to maintain a positive image abroad.³⁸ China wants to appear as a responsible stakeholder and realizes that being seen as a supporter of unjust regimes comes with political prices of its own, which can reduce China's options in its quest for resources abroad.³⁹

As China develops internally, it will inevitably move towards the international consensus of responsible behavior.⁴⁰ For example, despite all it has done to support Khartoum and exacerbate the humanitarian crisis in Darfur, China has made efforts to create at least the image of promoting a peaceful resolution to the crisis.⁴¹ If nothing else, this could reflect that China recognizes the political necessity of heeding international opinion. At various times, China supported both the Khmer Rouge and the regime of Slobodan Milosevic, but in each case withdrew support after genocide charges and attendant international condemnation came to light.⁴² On the other hand, neither Cambodia nor Yugoslavia supplied China with large quantities of oil, which may increase China's tolerance for disapproval from the international community.

Moreover, with the fall of commodity prices worldwide, there are indications that China's tolerance for political risk is beginning to waiver. The viability of Chinese projects in Guinea have fallen into doubt in the wake of the 2008 coup, which saw the imposition of a military junta following the death of the former president,⁴³ and operations in Sudan and Nigeria have been threatened by the repeated kidnapping and murder of Chinese workers.⁴⁴

As China becomes increasingly invested in Africa, it will begin to crave political stability to protect its investments and attempt to include measures intended to improve stability in its aid and investment packages, echoing the experiences of the Western powers.

Potential Legal Liability under the ATCA and the FCPA Poses a Challenge to Partnerships.

The IOCs must carefully avoid any associations that could subject them to liability under the Alien Torts Claims Act ("ATCA"), which provides jurisdiction in U.S. courts to any non-citizen harmed in violation of international law, including torts such as torture, genocide, and forced labor.⁴⁵ The ATCA has been used against oil companies in the past that have faced accusations of aiding and abetting repressive regimes. For example, Unocal faced potential liability for its support of repressive government activities in Myanmar.⁴⁶ The IOCs will therefore avoid any association with the Chinese NOCs that would make them vulnerable to these types of charges.

Worries about corrupt practices of the Chinese NOCs pose another significant obstacle. Violations of the Foreign Corrupt Practices Act ("FCPA") have made due diligence of overseas partners an essential step in cooperative operations.⁴⁷ The FCPA prohibits U.S. companies from making illegal payments to foreign government officials,⁴⁸ and stepped up enforcement in recent years has led to eye-popping payouts by corporations found in violation.

For example, in February 2009, KBR, Inc. agreed to pay \$177 million in disgorgement to the Securities and Exchange Commission and \$402 million in fines to the U.S. Department of Justice to settle parallel charges under the FCPA, stemming from bribes allegedly paid in 2002 to Nigerian oil company officials to secure a contract for the construction of a liquefied natural gas terminal.⁴⁹ This followed the record-setting \$800 million in combined fines assessed by the U.S. government against German multinational Siemens AG in 2008.⁵⁰ The statute holds companies liable for bribes made through intermediaries, including joint venture partners.⁵¹

Any IOC that attempts to partner with one of the Chinese NOCs must necessarily conduct extensive inquiries to determine if the NOC is

likely to conduct operations in a way that will subject the IOC to FCPA liability. Such inquiries will require much openness on the part of the Chinese company. According to Transparency International's 2008 Bribe Payers Index (BPI), China scored 6.5 out of 10 points and ranks a lowly 21 on the list of 22 countries whose companies are least likely to pay foreign bribes, surpassing only Russia.⁵² However, China's 2008 raw score represents an absolute improvement over its 2006 raw score of 4.9. China's BPI score has improved in each index since 1999 and could reflect a trend towards greater compliance with international anti-corruption efforts.⁵³

Furthermore, the Chinese National Offshore Oil Company (CNOOC) and the China National Petroleum Corporation (CNPC), two of China's multiple competing NOCs, have subsidiaries listed on the New York Stock Exchange. These subsidiaries, by issuing securities that have been registered in the United States, are already subject to the FCPA and, in theory, should already comply with its restrictions on bribing foreign officials, thus reducing, at least somewhat, the due diligence burden on the Western company.⁵⁴ Thus, these subsidiaries might provide a good candidate for an IOC-NOC partnership.

Conclusion

China remains a relatively small player in Africa, purchasing approximately 9 percent of Africa's total oil exports in 2006, whereas the United States takes 33 percent.⁵⁵ However, China has shown that it is willing to take a long-term view in the continent. While China sows money and projects throughout the nations of Africa, its NOCs exploit the absence of Western competitors in countries like Sudan to gain expertise and experience they will one day employ across the continent.⁵⁶ Western IOCs should take a similarly long-term outlook in planning how to meet the challenge, taking into account the possibility of IOC-NOC partnerships.

China is not fully ready for these types of arrangements in Africa because the Chinese NOCs' records regarding human rights and their lack of transparency would cause strong reactions in any partner-IOC's home jurisdiction. However, there are signs that China has already started to move in the right direction. It is entirely plausible that China, despite its current policy of

disregard for the domestic policies, no matter how heinous, of its host governments, will, once firmly established in Africa, see the benefits of working with stable, transparent regimes that respect human rights. That, after all, is roughly the history of the Western nations in Africa.

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¹ Tiemoko Diallo, *Hu Launches China's "largest gift" to West Africa*, REUTERS, Feb. 13, 2009.

² Richard Lough, *China Signs \$260 Mln Airport Deal with Mauritius*, REUTERS INDIA, Feb. 17, 2009.

³ JOHN GHAZVINIAN, *UNTAPPED: THE SCRAMBLE FOR AFRICA'S OIL 277* (2007).

⁴ Sabidou Marone, *Chinese President Tours Senegal, Signs Deal*, ASSOCIATED PRESS, Feb. 14, 2009.

⁵ *Id.*

⁶ Richard Payne & Cassandra Veney, *China's Post-Cold War African Policy*, 38 *ASIAN SURVEY* 867, 869-70 (1998).

⁷ Chris Nwachukwu Okeke, *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?*, 42 *INT'L LAW.* 193, 199 (2008).

⁸ Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 *VAND. J. TRANSNAT'L L.* 505, 525-26 (2008).

⁹ CHRISTOPHER ALDEN, *CHINA IN AFRICA* 42 (2007).

¹⁰ *Id.*

¹¹ *Id.* at 103.

¹² GHAZVINIAN, *supra* note 3, at 279.

¹³ *Id.*

¹⁴ ALDEN, *supra* note 9, at 44.

¹⁵ Okeke, *supra* note 7, at 198.

¹⁶ ALDEN, *supra* note 9, at 23.

¹⁷ Ricardo Soares de Oliveira, *Making Sense of Chinese oil Investment in Africa*, in *CHINA RETURNS TO AFRICA* 83, 96 (Christopher Alden et al. eds., 2008).

¹⁸ ALDEN, *supra* note 9, at 67.

¹⁹ *China Energy Data, Statistics and Analysis – Oil, Gas Electricity, Coal*, Energy Information Administration, U.S. Dept. of Energy, <http://www.eia.doe.gov/cabs/China/pdf.pdf>.

²⁰ GHAZVINIAN, *supra* note 3, at 179.

²¹ *BP Chief Says Big Mergers Aren't Answer to Low Price*, WALL. ST. J., Feb. 4, 2009 at B2.

²² Rob Jessen, *IOC Challenge: Providing Value Beyond Production*, OIL & GAS JOURNAL, Feb. 2, 2009, at 24.

²³ *Id.*

²⁴ *Id.* at 25-26.

²⁵ Paula Dittrick, *National Oil Companies Invest Beyond Borders*, OIL & GAS J., Jul. 17, 2006, at 19.

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²⁷ VALERIE MARCEL, OIL TITANS, 221 (2006).

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²⁹ *Id.* at 222.

³⁰ Dittrick, *supra* note 25, at 25-26.

³¹ MARCEL, *supra* note 27, at 222-223.

³² *Id.*

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ENERGY SECURITY, INSTITUTE FOR THE ANALYSIS OF GLOBAL SECURITY 16, (2006) *available at* <http://www.iags.org/chinainafrika.pdf>.

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³⁹ ALDEN, *supra* note 9, at 33.

⁴⁰ IAN TAYLOR, CHINA'S NEW ROLE IN AFRICA, 33 (2006).

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⁴³ Lydia Polgreen, *As China Investment in Africa Drops, Hope Sinks*, N.Y. TIMES, Mar. 25, 2009, at A6.

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⁴⁶ *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

⁴⁷ See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 et seq. (2000).

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Military Intervention in another State's Human Rights Violations: Limited Permissibility under International Law¹

By
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The use of force for humanitarian or “just” wars is a *jus ad bellum* principle stemming from the Christian concept of “divine will” that emerged during the Roman Empire.² Despite this history, the use of force for humanitarian purposes is not a matter of customary international law. Rather, the rights of states to use force within another’s territory are currently governed by the United Nations (UN) Charter.

The UN Charter carves out two exceptions to the general rule against the use of force against other states, namely: (1) in circumstances where the Security Council has authorized the use of force to maintain international peace and stability, and (2) in cases of self-defense. There is no exception under the UN Charter permitting military intervention for the protection of human rights. Accordingly, human rights violations in countries like Sudan, however egregious, do not give rise to a legal exception for armed intervention, and any such intervention could violate well established principles of state sovereignty.

Unless a third exception is created by an amendment to the Charter or through another accord, or a new exception is eventually established through customary international law, the use of force for humanitarian purposes will remain contrary to international law.

The UN Charter Does Not Permit Military Intervention in Human Rights Abuse.

Article 2(4) of the UN Charter states, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”³

Pursuant to this general rule, member states may not use armed force for aggression or expansion purposes.⁴ (Non-member states are also bound by this principle under customary

international law.⁵) States cannot threaten force to solve international disputes.⁶ In addition, principles of sovereignty dictate that states may not interfere with another state’s affairs simply out of disagreement over “ideology or political system.”⁷ As expounded by the International Court of Justice (ICJ), states are free to choose their “political, economic, social and cultural choices” because no “general right of intervention” exists.⁸

Current international law sets forth exceptions to this general limitation on the use of force. First, Chapter VII of the UN Charter authorizes the Security Council to maintain international peace and stability.⁹ If peace is threatened, the Security Council may issue Resolutions that give legal authority for the use of force. Second, Article 51 provides for the individual or collective self-defense of a state if an armed attack occurs within its territory.¹⁰ Under this exception, requests for outside aid are permitted as a form of collective self-defense, as seen in Kuwait during the Gulf War.¹¹ Generally, however, ‘anticipatory’ or pre-emptive self-defense is not allowed.¹²

Although human rights are crucial for all, the UN Charter does not provide for humanitarian intervention as another exception to the general rule against the use of force. Instead, when human rights violations threaten regional or global peace, states and international organizations may respond to gross violations using a broad range of non-military strategies,¹³ such as providing medical aid or asylum to those in need, or must seek an authorizing Resolution by the Security Council before proceeding with the use of force.

Customary International Law and Military Intervention in Human Rights Abuse

Customary international law develops when there is a strong conviction in the international

community that a given action or practice is required as a matter of law. It is established through the act of states over time.

Recent actions during the 1990s and 2000s did not give rise to a new exception for the use of force and current customary international law does not permit armed intervention in another state's abuses of human rights.

NATO's Actions in Yugoslavia Were

In 1998, the Yugoslav army provoked international attention when it launched a campaign to kill thousands of Albanian Muslims living in Kosovo.¹⁴ The U.N. Security Council defined the situation as a "threat to peace and security in the region,"¹⁵ but did not explicitly authorize the use of force in the region.

After attempting peaceful alternatives, NATO took military action without UN authority,¹⁶ claiming that, under international law, "in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken."¹⁷ NATO expressed that, since the mass murder occurring daily in Yugoslavia was destabilizing the surrounding countries,¹⁸ it was justified in acting to protect the fundamental right to life.¹⁹ Thus, although the Security Council failed to take immediate and decisive action,²⁰ NATO argued that Security Council resolutions 1160, 1199 and 1203 served as "spring boards" to a military response.²¹

NATO's actions, however, were not justified as collective self-defense nor were they clearly approved by the Security Council.²² Furthermore, the actions were inconsistent with previous state practices, and thus had no foundation under customary international law.²³ Therefore, even if NATO were correct from a moral perspective, its actions did not have a strong legal basis.

Recent Instances of Humanitarian Intervention Have Not Created New Customs in International Law.

Again, a customary rule of law develops over a long period of time and only with widespread acceptance on the part of other nations through consistent state practice.²⁴

Some have argued that a custom has been developed by recent events, noting the increasing importance human rights have been accorded throughout the world.²⁵ For example, one commentator has opined that the concept of human rights has an *erga omnes* effect and that "any state, individually or collectively, has the right to take steps" to resolve the human rights violations,²⁶ as occurred in the Liberian civil war (1990), Iraq (1990), Somalia (1992), Bosnia (1992-1995) and Rwanda (1994).²⁷ Under this "new custom" theory, armed international intervention in Yugoslavia (1999), Afghanistan (2001) and Iraq (2003) was justified to repel instant and grave violations of human rights, just as armed force is justified to repel instant aggressions in instances of self-defense.²⁸

However, this approach undermines the core principles of state sovereignty underlying the UN Charter itself and has been the subject of intense debate.²⁹ Sovereignty protects states from the subjective prejudices and opinions of others regarding what liberties may actually constitute fundamental human rights.³⁰ Creating a new exception to the general restriction on the use of force would jeopardize international stability and could be misused to further improper expansionist interests.³¹

A New Exception Would Be Harmful Except in Extremely Limited Circumstances.

As the UN Security Council has stated, force should be used when it involves "gross, large-scale violations"³² that endanger international peace and stability.³³ Furthermore, force is inappropriate unless a "large number of lives" are at risk, the situation is urgent, other alternatives have been examined, and all peaceful means have failed.³⁴ In addition, large ethnic populations should be involved, as noted in Security Council Resolution 688 (1991), which condemned the treatment of the Kurd and Shia populations in Iraq.³⁵ Out of respect for principles of sovereignty, any military intervention for humanitarian purposes should be supervised by an international body and should be limited in time and in scope.³⁶ The intervening states must act without political motivation,³⁷ and an "overwhelming humanitarian necessity" should exist.³⁸

If a new exception is to develop, the circumstances in which force may be used must

be sufficiently unique and should not become the exception that swallows the general rule.³⁹

Conclusion

In sum, the use of armed force continues to be governed by Article 2(4) of the UN Charter. Given the lack of consistent state practice, the UN Security Council is best able to deal with serious violations of human rights through currently permitted measures. Armed humanitarian intervention on the basis of human rights represents a threat to legal order and is not a recognized right under existing international law.

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²² Cassese, *supra* note 13, at 23.

²³ Simma, *supra* note 12, at 5-10.

²⁴ Asylum Case (Colombia v Peru), Judgment of 20 Nov. 1950, ICJ Rep. 1950; North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and the Netherlands), Judgment of 20 Feb. 1969, ICJ Rep. 1969.

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