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PROPOSING A TREATY ON THE PREVENTION OF INTERNATIONAL CORRUPT PAYMENTS: CLONING THE FOREIGN CORRUPT PRACTICES ACT IS NOT THE ANSWER

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I. INTRODUCTION

The taking of a bribe or gratuity, should be punished with as severe penalties as the defrauding of the State.

- William Penn

If all statesmen shared this ideology, there would be no need for this article. However, a glance at current business journals and news agencies shows the great necessity to address global corrupt practices in today’s transnational business environment. No matter what label you

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1. WILLIAM PENN, SOME FRUITS OF SOLITUDE, IN REFLECTIONS AND MAXIMS 76 (Intro. by Edmond Goss, Folcroft Library ed. 1976).

use, *pot-de-vin*, *unto amarillo*, *schmiergeld*, *mordida*, *esca*, or grease payment, there is no disputing that today’s global business market is riddled with corruption. All too often these “accommodating” payments target public officials in order to secure favorable treatment in transnational business matters.\(^3\) As international trade and investment increases, the need for an international foreign corrupt practices treaty becomes more apparent.

This article will first evaluate past domestic and international attempts at combating transnational bribery of public officials by businesses. Next, the author will identify and describe the current international efforts in combating bribery of foreign officials. The third segment of this paper will identify why it is in the world community’s best interest to adopt a multilateral treaty to fight these “accommodating” payments. The author will then propose a draft of such a treaty that would be completely different from the past failed efforts. Critical thought on why this treaty should not emulate the Foreign Corrupt Practices Act (FCPA) will be put forth. Finally, avenues will be identified which will facilitate the ultimate ratification of this draft by the international community.

### II. Analyzing Past International Attempts to Combat Corrupt Payments to Foreign Officials

Bribes and kickbacks have gone hand-in-hand with human commerce since the birth of mankind.\(^4\) In the global market place, “Corruption is common because the rusty machinery of international business calls out for lubrication.”\(^5\) In fact, “greasing” of public officials

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is seen as a way of life in many societies. Switzerland has only recently considered the revocation of a long standing law that allowed businesses a tax deduction on payments of overseas bribes. Although there is a widespread acceptance of some forms of commercial "accommodation" payments, both the United States and the international community have made several attempts to curtail ongoing corrupt payments to public officials.

Nearly every nation has made it a crime to bribe or attempt to bribe its state officials. The United States is the only nation that currently has domestic laws in place to outlaw bribery of foreign public officials. The FCPA is America's main weapon in fighting illicit payments to public officials overseas. The Watergate investigation's exposure of huge secret corporate slush funds, used to finance bribery of foreign officials, acted as the catalyst for the formation of the FCPA. The FCPA was an attempt to halt the perceived erosion of corporate America's integrity. The American legislature seized the initiative and passed the FCPA provisions in 1977 assuming that a universal treaty was probable, impending, or at


7. Switzerland: Bribes May Soon Become Nondeductible, CROSSBORDER MONITOR, Mar. 16, 1994, available in LEXIS, World Library, Busint File; see also RUBIN & HUBBAUER, supra note 6, at 39 (Germany likewise had been granting tax deductions for these payments.).


the very least reasonably attainable in the near future. However, after being amended in 1988 to clarify its language, the FCPA remains a unilateral approach against foreign corruption.

The purpose of the FCPA is to deter a wide variety of activities which are deemed "corrupt." As amended, the FCPA includes accounting measures, anti-bribery provisions, affirmative defenses, and an advisory opinion process. Enforcement of this Act is the responsibility of the Securities and Exchange Commission and the United States Attorney General. Violators of the Act could face stiff monetary fines and possible prison terms. The FCPA is only one of the many possible legislative enactments that could be used to curtail illicit payments by United States business to foreign public officials. The FCPA has been hailed as the

13. Hirschorn, Foreign Corrupt Practices Act Narrowed, Significantly Clarified, NAT'L L.J., Dec. 2, 1988, at 16; Franklin Gevurtz, Using the Anti-Trust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade, 27 VA. J. INT'L L. 211 (1987). ("When Congress enacted the FCPA, it hoped that multilateral treaties would follow under which other trading nations would pledge to join in prohibiting corrupt acts committed by their own nationals."); S. RES. 265, 94th Cong., 1st Sess., 121 CONG. REC. 36, 108 (1975); S. REP. No. 486, 99th Cong., 2d Sess. 13 (1986); 78 DEP'T ST. BULL. No. 2010 at 27 (Jan. 1978) (statement of President Carter) ("The FCPA can only be successful in combating bribery and extortion if other countries and businesses themselves take comparable action," the President presumes other countries would follow.).

14. 15 U.S.C.A. § 78m (West 1991) (provisions which require United States businesses to keep a running record of their internal financial activities so as to allow the government, among other things, to accurately investigate alleged foreign corrupt payments).

15. 15 U.S.C.A. §§ 78dd-1, 78dd-2 (West 1991) (outlawing "payments" to foreign officials or foreign political parties and provides the "knowingly" standard).

16. 15 U.S.C.A. §§ 78dd-1(b), (c), 78dd-2(b), (c) (West 1991) (providing for the "routine governmental action" exception and affirmative defenses that include a "lawful" payment in light of foreign governments laws and the affirmative defense that such payments were "directly related to promotion, demonstration or explanation of the products or services; or the execution or performance of a contract with a foreign contract with a agency thereof").

17. 15 U.S.C.A. §§ 78dd-1(e), 78dd-2(f) (West 1991) (establishing a review procedure in which specific inquiries by issuers can be analyzed in light of the FCPA prohibited acts sections); see also 28 C.F.R. § 50.18(j-k) (1991) (providing the details of the review procedure and normally requires a thirty day response time by the Department of Justice).

18. 15 U.S.C.A. § 78ff (West 1991) (Fining could reach up to $2,000,000.00 and prison terms as long as 5 years.).

19. RUBIN & HUFBAUER, supra note 6, at 37 (The Tax Reform Act of 1976 and the International Security Assistance and Arms Control Act of 1976 indirectly help limit the occurrence of United States bribes targeted at overseas officials.); Aronoff, supra note 11 (Antitrust and RICO Laws may be basis to combat international illicit payments by United States businesses.); 134 CONG. REC. H183 & H2117 (1988) (Conference Committee rejecting Senate's exclusivity provisions of the FCPA and thus leaving the door open for concurrent prosecution under wire and mail fraud statutes).
"harshest, most comprehensive effort" to combat corrupt payments to foreign public officials.20

The 1988 Amendments were seen by most as the United States' attempt at "damage control." American law makers were criticized by their constituents for passing an act that had a chilling affect on United States businesses and exports.21 The 1988 amendments were an attempt to increase the competitiveness of United States business and to provide a level playing field in the international market place.22

To date, the FCPA still suffers from many problems. The Act is still considered vague by many in the legal and international business community, and thus its enforcement is always an issue.23 In light of the


21. Laura Longobardi, Reviewing the Situation: What Is To Be Done with the Foreign Corrupt Practices Act?, 20 VAND. J. TRANSNAT'L L. 431 (1987); S. REP. NO. 486, 99th Cong., 2d Sess. 13 (1986): The Committee recognizes the continuing need for international agreements outlawing bribery in the international marketplace. The unilateral position currently taken by the United States in terms of anti-bribery legislation, while laudable, constitutes a serious disadvantage to U.S. commerce. The Committee recognizes that bribery warps appropriate trade patterns and distorts the market as an efficient allocator of resources, but it believes that the most useful approach to this problem is a multilateral one. The Committee bill would enhance U.S. efforts to achieve such international agreement by presenting a statute that effectively curbs bribery without imposing unnecessary trade disincentives. Recognizing this need, the bill calls for renewed efforts, both on multilateral and bilateral levels, to achieve international agreement on the prohibition of bribery. Id. See also, 131 CONG. REC. 32,763, 32,778 (daily ed. Nov. 20, 1985) (statements that the 1977 FCPA's unclear language inhibited exports); Judith Roberts, Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact? 1989 B.Y.U. L. REV. 491, 494-956 (1989). But see 131 CONG. REC. S15,959 (daily ed. Nov. 20, 1985) (supporting the proposition that the FCPA was not truly hampering United States exporters in the global marketplace); Judith Roberts, The Foreign Corrupt Practices Act of 1977: An Analysis of Its Impact and Future, 5 B.C. INT'L & COMP. L. REV. 405, 429-30 (1982) (asserting that the FCPA is not a detriment to United States trade).

22. 134 CONG. REC. S2589-90 (daily ed. March 18, 1988). Senator Heinz participating in the debate for the passage of the Trade Act stated:

Now, however, as we continue work on major trade legislation, the issues of the FCPA and improving the trading position of American businesses increasingly focuses on both our ability to improve export performance and the various measures already in place to ensure a level playing field for all competitors. The burden of the U.S. trade deficit has enormous negative effects on the American economy, and it is clear that we have to do a better job of clearing away obstacles to export performance improvements, including ambiguities in the FCPA that discourage our exporters.

23. ALAN SWAN & JOHN MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS, 263-73, 277-84 (Doc. Supp. 1991) (interpretation problems of the FCPA Accounting & Bribery Provisions); Pines, supra note 9, at 195 ("Despite amendments in 1988, the FCPA is still plagued with problems that hinder its purpose. Without clearly defined terms and requirements, the FCPA proves ineffective in providing guidance for U.S. corporations.").
recent world events it has become more apparent that American companies are being locked out of today’s global market place due to the FCPA constraints. “Ineffective” and “slow” are the words used to describe the formal review process which could disclose sensitive information to the general public and business competitors. The FCPA’s major flaw however, is its unilateral character which limits its effectiveness in the world community.

On the international front, “accommodation” payments have been publicly criticized by multinational organizations, but privately ignored at the individual state level. In 1972, the International Chamber of Commerce (ICC) announced a set of rules to govern international transactions which were called “Guidelines for International Investment.” These guidelines, aimed at eliminating foreign bribes, were so controversial that the ICC members began to split their ranks. By 1977, two camps emerged in the ICC. Some wanted to follow the United States lead and adopt provisions similar to the FCPA. However, the majority of

24. See Operational Issues: Coping with Corruption in the CIS, BUS. E. EUR., June 7, 1993, available in LEXIS, World Library, Buereur File (stating foreign firms must be prepared to offer monetary incentives to Russian officials if they are to do business in the area); James Morgan, Corruption Without Sin, FIN. TIMES, Dec. 28, 1991, at 16 (asserting that to be competitive in India you must be willing to accept that bribery is a way of life in the business community); Continued Official U.S. Pressure Called Key to Winning Kuwait Reconstruction Contracts, 8 INT’L TRADE REP. 472 (1991) (stating that United States companies are at a disadvantage in the bidding process because the Middle East business environment favors bribes by foreign countries to secure contracts); Aftermath of Gulf War: Shaping Longer-Term Stability Major Task, GLOB. FIN. MKTS., Mar. 11, 1991 (stating United States businesses are “handcuffed” by national laws when competing for contracts in Kuwait). See generally Peter Semler, U.S. Companies Find Corruption a Competitor, J. COM., Apr. 18, 1994, at 8a (stating that one United States company recently lost as much as $1.3 billion dollars in a two week period because it refused to pay grease payments for contracts).

25. SCHAFFER ET AL., supra note 6, at 423:

The procedure has the initial disadvantage of subjecting the transaction to the scrutiny of the public at large, including the U.S. firm’s competitors. These competitors may be attracted to the situation and propose a more attractive relationship. . . . [The] delay [of the review period] is not very satisfactory in most business transactions. While the parties await a response, market conditions may change so as to make the deal less attractive or entirely unattractive for one of the parties.

Id. See also Katherine M. Albright & Grace Hon, Foreign Corrupt Practices Act, 30 AM. CRIM. L. REV. 773 (1993) (stating that the relatively ineffective review process, resulted in only one firm seeking an advisory opinion in the entire year of 1991).


the members refused to "follow the American banner on the crusade against international bribery." 28

In 1977, the ICC Counsel passed a collection of nonbinding rules of behavior to condemn bribery in the international marketplace. 29 The language used in these rules is broad enough so as to appease most ICC members. One of these basic, generalized rules was phrased, "No one may demand or accept a bribe." 30 Other basic rules address "kickbacks" and "off the books" secret accounts. 31 The ICC Counsel did, however, strongly advise the world community to formulate a treaty addressing overseas bribery. 32 These self-regulating rules, lacking in enforcement powers and non-binding on businesses, have generally failed to curtail "accommodation" payments to public officials by foreign companies.

Another non-binding code was announced by the Organization of Economic Cooperation and Development (OECD) in 1976. 33 These guidelines address multinational enterprises operating in OECD member countries. 34 General anti-bribery provisions found in sections 7 & 8 direct businesses to:

7. Not render and they should not be solicited or expected to render any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office.

8. Unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations. 35

However, this code proved to be ineffective in preventing international illicit payments. 36

28. LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES, supra note 20, at 228.


30. Id. at 420.

31. Id.

32. Id. at 418.


35. Id.

The United Nations has also attempted to regulate international corrupt payments. On December 15, 1975, the U.N. General Assembly passed a resolution condemning illicit payments by multinational corporations. This resolution states that the General Assembly:

1. Condemns all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries; . . .

3. Calls upon both home and host governments to take, within their respective national jurisdictions, all necessary measures which they deem appropriate, including legislative measures to prevent such corrupt practices, and to take consequent measures against the violators;

4. Calls upon governments to collect information on such corrupt practices, as well as on measures taken against such practices, and to exchange information bilaterally and, as appropriate, multilaterally. . . ;

5. Calls upon home governments to cooperate with governments of the host countries to prevent such corrupt practices, including bribery, and to prosecute, within their national jurisdictions, those who engage in such acts; . . .

Other than in the United States, this proclamation was bold on words but weak in implementation. No other state, besides the United States, has implemented Section 5 to criminalize this form of corruption. Little, if any cooperation, requested in sections 4 and 5 has been put forth by U.N.

[The] Declaration, which, along with some member-state "considerations and understandings" prefacing the Guidelines, is not legally binding by virtue of the OECD treaty itself, but could be considered to be so in any aspect in which it expresses in convenient and systematic form some existing rule of general international law, or could become so by incorporation into a treaty duly ratified by OECD member states; and . . . the Guidelines, which are expressly stated within their own framework to be "not legally enforceable . . . ."

Id.


38. Id. at 510.
member nations. History has revealed that this was just another legislative code of conduct enforced only in "never-never land." 39

An impressive attempt to forge a multilateral treaty against foreign corrupt payments came before the United Nations Economic and Social Council (ECOSOC). On May 18, 1979, the U.N. Committee on an International Agreement on Illicit Payments transmitted a proposed treaty to ECOSOC. 40 Article I of this draft treaty outlaws and criminalizes:

(a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

(b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction. 41

Article II defines terms such as "Public Official," "International Commercial Transaction," and "Intermediary" with more definite terms than any multinational agreement against corrupt practices has before. 42 Other provisions require accounting procedures 43 and extradition of alleged offenders. 44 This draft, penal in nature, was heavily supported by the United States, but was never adopted by the United Nations. 45 This


41. Id. art. 1 Sec.(1).

42. Id. art. 2(a), (b), (c).

43. Id. art. 6.

44. Id. art. 11 (1). "The offenses [referred to in Article 1] shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include said offence as extraditable offenses in every extradition treaty to be concluded between them." Id.

45. RUBIN & HUFBAUER, supra note 6, at 38; Thomas H. Reynolds, Clouds of Codes: The New International Economic Order Through Codes of Conduct: A Survey, 75 LAW. LIB. J. 315,
proposed treaty, like all other previous multilateral attempts to outlaw or condemn international "accommodation" payments, failed to effectively prevent multinational corporation's corrupt practices.

Recently, the world has seen a flurry of activity by international organizations determined to stamp out foreign bribery of public officials. On May 4, 1993, a new organization called Transparency International met for two days in Berlin for its inaugural conference. This nonprofit organization is dedicated to preventing international kickbacks, bribes, and corruption. Its goal is to assure that state officials around the globe will behave in a more "transparent" and honest fashion when considering international contracts—hence the name Transparency International. Its financial support comes from United States multinational corporations and European aid agencies.

Transparency International is a voluntary group that mirrors the tactics and structure of Amnesty International. Transparency International seeks to bring corruption out of the shadows in hopes that such exposure will cause public opinion to demand an end to international bribery. To effectively fight bribery, Transparency International intends to introduce legislation similar to the FCPA in all OECD countries, request chairmen to annually sign pledges against corruption, and to work towards universal accounting procedures that would disclose overseas payments. Slowly, this organization intends to establish "Islands of

342-43 (1982) (stating ECOSOC attempts are bogged down by the United States attempt to impose morality and business ethics on the international community).

46. Clean Not Laundered, supra note 5.


48. Id. at 136; Karen Pennar, A New Globo-Cop For Crooks In High Places, BUS. WEEK, Dec. 6, 1993, at 136 (asserting financial support is coming from U.S. companies like Boeing and General Electric).


50. George Moody-Stuart, Questions of Bribery, LONDON TIMES, Nov. 15, 1993, available in LEXIS, World Library, Txtnws File; Michael Holman, supra note 49 (stating T.I. will also help strengthen rules and systems for international procurement bidding to help end corruption).

51. Id.

52. Id.
Integrity”\textsuperscript{53} and branch out to other targeted countries\textsuperscript{54} using quid pro quo tactics.\textsuperscript{55}

One thing is certain, this “coalition against corruption” has developed an impressive membership roster.\textsuperscript{56} Transparency International’s exposure tactics, public indignation, and quid pro quo strategy will likely obtain more tangible results than all of the past multilateral efforts combined. It seems clear that any anti-bribery treaty must have Transparency International’s active endorsement and support if such an agreement stands a chance at ratification.

The OECD has decided to reanalyze and take collective action against bribery of public officials by transnational corporations. On December 9, 1993, the United States presented proposals to the OECD’s “Working Party on Illicit Payments” that would make international corporate bribery a crime.\textsuperscript{57} Transparency International has further pressured the OECD to revisit the issue.\textsuperscript{58} Negotiations went on for over eighteen months as fears of United States extraterritorial attempts of expanding the FCPA divided OECD ranks.\textsuperscript{59} Britain, Japan, Germany,

\begin{itemize}
  \item \textsuperscript{53} Michael Holman, Ecuador Shows Lead in International Anti-Corruption Drive, FIN.
  TIMES, May 6, 1993, at 4 (stating Ecuador will be the first “Island of Integrity” as T.I. begins its work to clean up that government).
  \item \textsuperscript{54} Berlin Based Company Wants to Fight Corruption, REUTERS, May 31, 1994, available in LEXIS, News Library, Reuter File (T.I. will be setting up branches in Southern Africa to compliment their work already in Benin and Ecuador.).
  \item \textsuperscript{55} Michael Holman, supra note 49:
  What may help make the code effective is the quid pro quo tactic T.I. will employ. Initially there may be only a few countries where business and government abide by our code, a few “islands of integrity,” as Mr. Eigen puts it [T.I. director]. The campaign will therefore focus at the start on five or six governments in developing countries and Eastern Europe who are prepared to support the code. These governments—some have already had discussions with T.I.—will restrict tendering for state contracts to corporations who have themselves signed the pledge. “We expect these leading countries will create a momentum by their example” says Mr. Eigen.
  \textit{Id.}
  \item \textsuperscript{56} Pennar, supra note 48, at 136, (Former World Bank officials and anti-corruption experts, are among T.I.’s founders and directors.); Holman, supra note 49 (Behind the project, nearly two years in gestation, is a group of hard-headed veterans of aid, commerce and development, eminent in their own fields, and with experience spanning the developing world.).
  \item \textsuperscript{57} Stella Dawson, U.S. Spearheads Effort to Ban Bribes in OECD, J. COM., Dec. 6, 1993, at 3.
  \item \textsuperscript{58} Rosie Waterhouse, War Declared on Corruption, INDEPENDENT, June 7, 1994, at 7; Rosie Waterhouse, The Good Business Guide to Bribery, INDEPENDENT, Mar. 27, 1994, at 10.
  \item \textsuperscript{59} Tara Patel, OECD Reaches Compromise on Pact to Rid Governments of Corruption, J. COM., May 2, 1994, at 3A; George Graham, OECD to Discuss Policy Against Bribery, FIN.
  TIMES, Apr. 25, 1994, at 6 (Although criminalization raises complex questions about the extraterritorial reach of national laws, specific measures have been proposed to ensure that bribes
and France have all refused to allow the formation of a binding criminal agreement against corrupt payments. Britain lead the coalition to block the United States attempts to secure a multinational agreement against foreign corrupt bribery since many English economists see bribe offerings as "good business."

Although the final agreement had not been released to the general public at the time of writing this work, it will fall short of criminalizing international bribery. The guidelines are intended to be a series of proposals that member nations can adopt. The codes are to encourage the review of domestic criminal, civil, and administrative regulations and to take steps in combating bribery. The code also encourages international cooperation and information exchange between member nations. This new agreement basically allows OECD members to pick and choose whatever steps they deem necessary to fight bribery in international commercial transactions. Once again, the United States attempts to criminalize transnational bribery were soundly rejected by the international community.

The United States is again attempting to create a multinational agreement to fight corrupt payments in international business transactions. The United States government has decided to push the new World Trade Organization for laws paralleling the FCPA. President Clinton addressed

paid by companies are not treated as tax-deductible business expenses.); George Graham, OECD Meets in Effort to Fight Bribery, FIN. TIMES, Feb. 14, 1994, at 5. Other OECD members are concerned of U.S. attempts to force criminal laws onto other nations. Id.


62. This paper is based on research available before June 12, 1994. The 1994 OECD declaration was expected to be widely available within a month after its late June or July signing.


64. Id.

65. Id.

66. George Graham, U.S. Seeks OECD Foreign Bribes Ban: Many Countries Wary of Extending Laws Beyond Their Own Frontiers, FIN. TIMES, Dec. 6, 1993, at 3 ("U.S. senior official said the OECD working group's recommendations amounted to a shopping list from which countries could pick one or two measures . . . ").

67. GATT: United States Will Urge Other Countries to Adopt Anti-Bribery Rules in New WTO, INT'L TRADE REP., Mar. 16, 1994, at 11. (Mickey Kanter is quoted as saying: "There is
international bribery at Miami’s Summit of Americas held in December of 1994. Transparency International has lobbied the Clinton Administration for just such an agenda. It is unlikely these new attempts will secure a multilateral agreement. Since the United States continues to demand international criminalization of transnational bribery, it will leave the negotiation table empty handed and its attempts will again be branded as “extraterritorial.”

One can learn from past and present attempts at adopting a legally binding anti-corruption code. A future code based on the FCPA’s “criminalization” will be stigmatized as American “moral imperialism” and ultimately fail. However, codes without some enforcement mechanism will be legally non-binding and ineffective. Finally, to effectively define a “bribe”, one must evaluate each individual nation’s customs.

An analysis of past attempts to construct a universal code reveals two general camps that emerge in the negotiation phases. These distinct theoretical groups seem to counter each other’s attempts and eventually stifle any multinational enterprise (MNE) code.

One is known as the “maximalist position”, and favors legally binding, internationally enforceable rules of conduct for MNEs. This position is adhered to generally by the international trade union movement and developing nations. The other is the so-called “minimalist position”, and promotes the notion of voluntary rather than legally enforceable guidelines. This position is predictably advocated by the international business community and generally by highly capital-intensive industrialized nations.

With the exception of the United States, this division seems to be true as to a country’s alignment concerning both recent OECD negotiations and acceptance of Transparency International. America and developing...
countries are pushing for an international agreement with strong anti-bribery language. However, nations like Japan and Britain want only another general proclamation and a non-binding declaration.

In between these two poles is a “zebra” position composed of both binding and non-binding rules containing words like “should” or “shall.”71 Realistically, a proposed international treaty against illicit payments must satisfy both “Minimalists” and “Maximalists” and fall within the “zebra” zone to have a chance at ratification. Furthermore, a proposed treaty must avoid imposing criminal sanctions which led to the demise of its predecessors.72 Enforcement of treaty provisions must come from non-government entities since state officials tend to adopt broad statements of policy but never truly act on them. Finally, any treaty must respect principles of sovereignty if such an agreement is to be ratified.73

III. THE NEED FOR A MULTINATIONAL TREATY TO COMBAT INTERNATIONAL FOREIGN CORRUPT PAYMENTS

Transnational illicit payments to foreign public officials demand the world community’s attention. Nations have a compelling interest to prevent the bribery of their own officials. Such prevention can be effective only through international cooperation. The United States’ interest in passing such a multilateral treaty is apparent considering that the FCPA remains the only unilateral approach. An analysis of these foreign payments shows that other nations have a vested interest in following America’s lead.

These illicit payments undermine the values which democratic nations are founded upon. Illicit transnational payments to public officials improperly influence and precipitate decisions potentially to the best interests of the citizens of the host nation.74 Once a bribe is accepted, the public official is susceptible to blackmail tactics. Bribes aimed at political parties conceptually undermine both the democratic process and diminish

71. Id.

72. Reynolds, supra note 45, at 343. States have rejected American moral imperialism and generally have not been “particularly disposed to assist the United States out of problems of its own making” [referring to the FCPA which put U.S. companies at a disadvantage]. Id.

73. Id. (A certain amount of caution must be exercised in attempting to appraise what are properly national functions and what are more suitably international functions in regulating the MNE, since the multinational enterprise has been perceived as a political as well as an economic phenomenon, and legal “answers” and categorizations cannot be expected to eliminate all the political repercussions stemming form MNE activity.)

74. Berlin Based Company Wants To Fight Corruption, REUTERS, May 31, 1994 available in LEXIS, World Library, Txtnews File (contending that bribery distorts decision making).
the hope that the government will be impartial and represent the interests of its citizens.\textsuperscript{75}

Bribery causes political instability and interferes with foreign policy. Bribery by foreign business entities have contributed to the fall of governments in Japan, Bolivia, Honduras, the Cook Islands, Italy, and the Netherlands.\textsuperscript{76} A nation's ability to conduct effective foreign policy is compromised when its national corporation's corrupt practices are exposed.\textsuperscript{77} A recent transnational bribery incident involving English firms and the government of Malaysia has caused a breakdown between the two nations on foreign investment and trade levels.\textsuperscript{78} Such a breakdown could have been prevented if an international agreement was in place. Foreign corrupt payments also produce waste and distort prices in host countries. The foreign official who is under the influence of a bribe, may make decisions that are detrimental to the country's economy.\textsuperscript{79} Bribery induces public officials to favor foreign firms which offer accommodating payments even though such contract awards will ultimately distort consumer prices.\textsuperscript{80} Transparency International's interim chairman has explained:

\begin{itemize}
  \item 75. Arthur Leathley & Jonathan Prynn, Labor Deputy Denounces 'Odor of Corruption', LONDON TIMES, June 23, 1993 (Labor trade and industry spokesman is quoted as saying: "Britain has no right to interfere in the elections of foreign countries. Foreigners have no right to interfere in the elections of Britain. Party of the foreign millionaire was not likely to understand the pressures on pensioners at home."); U.S. to Propose Steps Against Bribing Foreign Officials, Kyodo News, Dec. 2, 1993, available in Westlaw, Japanecon Database (stating that "bribery seriously undermines the very democratic institutions the OECD seeks to promote").
  \item 76. Pines, supra note 9, at 205; See also Raymond J. Dowd, Civil Rico Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act, 14 FORDHAM INT'L L.J. 946, 947. Revelations of United States bribery of foreign officials overseas in mid-1970's caused the resignation of many important foreign officials in Japan, Italy, and the Netherlands. Id.
  \item 77. RUBIN & HUFBAUER, supra note 6, at 40. Dowd, supra note 76. The FCPA was passed to prevent this vary same interference with foreign policy.
  \item 78. Malaysia Bans British Firms Over Corruption Allegations, Kyodo News, Feb. 25, 1994, available in Westlaw, Japan econ Database.
  \item 79. The Political Scene: Corruption is Spreading, ECONOMIST INTELLIGENCE UNIT, June 1, 1993 available in Westlaw, Bus-Intl database (reporting that Mozambique politicians sell off land cheaply to foreign investors who are bribing the decision makers); Heneghan, supra note 49 (claiming foreign illicit payments are robbing the third world of needed resources).
  \item 80. Waterhouse, supra note 58. Bribery and corrupt practices distort decision-making. Contracts may be over-priced and therefore the country over-charged, as the contract is inflated by as much as 20 percent to accommodate the bribe. Id. Bribes may lead to the selection of incompetent or unscrupulous suppliers and deliberate cost-cutting. Id. The availability of "back-handlers" may also encourage countries to buy goods and services that are unsuitable for or
\end{itemize}
The damages to third world economies...goes beyond the fact that the wrong supplier or contractor might be chosen. When a government is persuaded—that is bribed—that it needs aircraft or a food processing plant which are unnecessary or unjustified, not only is there a loss of scarce foreign exchange resources. Those resources will have been deprived from worthwhile projects.  

In other words, international accommodating payments promote inefficiency and waste. Vital world trade and investment is also a victim of bribery. Foreign illicit payments can produce a “backlash” against the country of origin and international business generally.”  

As a result, protectionists and isolationists ultimately gain credibility and acceptance from the local population.  

All nations have an interest in fighting bribery, but why the need for a multilateral agreement? Applying the FCPA extraterritorially will offend other sovereigns and ultimately create more problems. Multinational corporations by their very nature span numerous sovereigns. They can possess more political and economic clout than some governments. International bribes come from entities located outside the host country. As a result, such acts of bribery are likely beyond the jurisdiction of the host country’s law. For a country to effectively fight the bribery of its public officials, some international tool is needed to punish outside bribery attempts. Therefore, “[i]t is necessary to have international measures that match the international dimensions of this surplus to their needs. Id. See also, Yuri Lopatin, OECD Urges Step-Up of Action Against Corruption in Trade, Tass, June 3, 1994, available in LEXIS, World Library, Tass File.

81. Holman, supra note 49.
82. RUBIN & HUFBAUER, supra note 6, at 40.
83. Id.
84. DIETER LANGE & GARY BORN, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 3 (ICC 1987) states:

1. Extraterritoriality creates considerable commercial and legal uncertainty, particularly where unpredictable applications of national competition and securities laws are involved. This uncertainty discourages international businesses from engaging in productive trade and investment ... . 2. The overall impact of the extraterritorial application of national laws is to discourage or prevent useful economic activity in the from of international investment, and to reduce the profitability of existing investment. This distortion of market processes, caused by extraterritoriality, reduces productive economic activity and the employment opportunities and income that would flow from such activity.

Id.
problem."

A multinational treaty is the only way to effectively deter foreign corrupt practices.

In light of the past attempts to form an international agreement and the need for a multinational approach, this author proposes a solution to the problem of corrupt overseas payments. This work proposes a mechanism of enforcement based on private causes of action rather than making accommodation payments a crime, an approach that has doomed earlier agreements. This work also uses the tools of disclosure and exposure to deter possible offenders. Finally, the proposed treaty respects each individual nation's political and cultural customs regarding accommodating payments. As a result, this unique draft has a better chance at ratification and deterrence than previous multinational agreements.

The preamble of this proposed treaty sets forth recitals and the ultimate goal to be achieved. The recitals are necessary to establish why transnational bribery is detrimental to individual nations and the world community as a whole. The recitals conclude by stating that only multilateral cooperation can eliminate these illicit payments. The purpose of the strong condemnation language in the resolution clause is to reflect the world community's intention to completely eliminate this form of corruption. These statements are modeled after language adopted by the United Nations General Assembly.

Identifiable terms are essential to the treaty if it is to be functional. Therefore, Article I sets forth concise definitions of terms used throughout the treaty which would otherwise impede its effectiveness. The definition of the term "corrupt payment" is taken in light of the host country's laws. Likewise, local laws concerning the definition of the word "illegal" are paramount when a corrupt payment is alleged to have occurred. References to local laws are an effort to respect the world's diverse customs.

85. Rubin & Hufbauer, supra note 6, at 40.
89. G.A. Res. 3514, supra note 37.
cultures and legal systems when it comes to defining bribery. By acknowledging individual local laws and avoiding a universal definition of these terms, this treaty guards the notions of sovereignty and increases its chances of ratification.\textsuperscript{90}

Article I defines the term "intermediary" and "international commercial transaction" in a manner that is parallel to ECOSOC's proposed treaty.\textsuperscript{91} The definition of the term "knowingly" is similar to the definition of the term "scienter" in the FCPA, and encompasses the "knew or should of known standard" that is essential to avoiding the defense of ignorance. The "reason to know" standard of the 1977 FCPA has not been adopted because it was perceived by many American businessmen and legal advisors as too vague and confusing.\textsuperscript{92} The definition of the term "offended private party" is an attempt to limit the number of parties who may bring an action by imposing a standing requirement. The term "payment" is broadly defined to include any pecuniary gain or social advantage that realistically could influence the decision of a public official. Language from both ECOSOC's proposed treaty\textsuperscript{93} and the FCPA\textsuperscript{94} help to broadly define the term "public official" so that it includes almost any governmental decision maker. Finally, the definition of "suspect private party" allows all transnational corporations to fall under this treaty even though their home country may not be a signatory to it. By holding all international commercial entities accountable, this treaty will be a true deterrence from the common practice of commercial bribery.

Article II is an attempt to clearly define what activities will not be tolerated. Article II sets forth specific conduct which is more succinct than the vague wording of the ICC guidelines and OECD general pronouncements.\textsuperscript{95} This article therefore clearly puts forth standards of conduct that individual entities can realistically be held accountable to. Article II establishes enforceable criteria, and targets corrupt payments or

\textsuperscript{90} Chelminski, \textit{Pots of Wine}, SAT. REV., July 9, 1977, at 14; SCHAFFER, \textit{supra} note 6, at 416-19 (discussing cultural differences as to what is "illegal" or "accepted" in the context of bribery).

\textsuperscript{91} U.N. ECOSOC, \textit{supra} note 40, at 3.


\textsuperscript{93} U.N. ECOSOC, \textit{supra} note 40, at 3.


\textsuperscript{95} \textit{Compare} G.A. Res. 3514, \textit{supra} note 37 (ambiguously stating condemned behavior and what should be done by home government in response to said behavior) \textit{with} U.N. ECOSOC, \textit{supra} note 40, art. 1, sec. 1 (enumerating behavior in violation of proposed treaty).
offers thereof to political parties and to public officials.\textsuperscript{96} Since most nations criminalize bribery of their public officials, this treaty should be limited to multinational commercial transactions and not domestic bribery. Accordingly, article II concludes with a limiting phrase restricting this agreement to international commercial transactions.

Article III sets forth affirmative defenses and further limits the scope and applicability of this agreement. It adopts the logical and often used defenses found in the FCPA.\textsuperscript{97} Section (a) of this article also honors an individual nation's laws and the general notions of sovereignty. Section (a) and other provisions which defer to national laws, neutralize any charges of extraterritoriality. Such charges have consistently been brought up in OECD discussions and have ultimately derailed negotiations on the formation of an international anti-bribery treaty.\textsuperscript{98}

Section (d) of Article III expands available affirmative defenses even further. A "good faith" defense is created so that an administrative board has the flexibility to decide each case in light of the particular facts and circumstances surrounding a transaction. Furthermore, a reliance defense based on an advisory opinion is available to possible respondents. This defense will promote the use of the advisory opinion process established in Article VIII, and can offer clear advice to avoid possible bribery scenarios. A similar process is utilized in the FCPA.\textsuperscript{99}

Article IV is a necessary provision in this draft. This Article requires accounting procedures which are essential to realistically detecting alleged illicit payments. This Article encourages states to supplement their current accounting procedures by adopting bookkeeping standards promulgated by the Article VII Committee. Forcing signatory countries to adopt Committee accounting standards would be seen as an attempt to abrogate a sovereign's rule making authority and would be rejected by most states. However, these disclosure requirements may prevent future bribes.\textsuperscript{100} Therefore, each individual state should be allowed to decide

\textsuperscript{96} See U.N. ECOSOC, supra note 40, art. 6 (modeled after 15 U.S.C. §§ 78dd-1(a)(1)-(2), -(a)(1)-(2) (1988)).


\textsuperscript{98} Patel, supra note 59; see Reynolds, supra note 45.


\textsuperscript{100} RUBIN & HUFBAUER, supra note 6, at 42-43. This approach [disclosure] involves the public reporting of foreign payments. The underlying idea is, as Justice Brandeis said:

[T]hat sunlight is the best disinfectant . . . The simplicity of these requirements makes them relatively easy to enforce. No question about intent, or reasonable knowledge that a bribe would be paid to a foreign official, will arise. The minimum thresholds would eliminate any need to report the relatively innocuous "grease" payments. These disclosures could be made annually and with a significant time delay
whether it will adopt the Committee accounting procedures, so long as their procedures are sufficient to track corrupt payments.

Article V's purpose is to place the international business community on notice of this treaty. This Article is an attempt to inform all international business contractors that a treaty is in existence and they should be aware of its provisions. Like Article IV, this part uses the phrase "under penalty of law." This is merely an enforcement mechanism to encourage international business contractors to circulate this clause in their agreements. Each signatory country will directly determine and enforce this phrase within its territory. However, the failure of a sovereign to do so may result in Article II (a)(iii) arbitration.

The present tax deductions of illicit payments should cease if the international community is serious about combating these bribes. Article VI encourages signatories to disallow tax deductions for illicit payments. This Article may now be more warmly received since many States have recently questioned or abandoned their legislation which allows these deductions. Without Article VI, the laws of signatories, which encourage overseas bribery, would circumvent this draft's recitals and resolutions.

The use of the word "should" in Article VI is an attempt to cater to "Minimalists." However, the presence of Article VI appeases "Maximalists" as well. If a signatory country wishes to preserve its present bribery tax deduction laws, its multilateral companies will be more inclined to offer bribes. As a result, businesses in these countries are more likely to be "suspect private parties" in this treaty's review process. After several adverse Article XII Certifications are filed against a country's multinational corporations, that nation will be economically pressured to repeal its tax deduction regulations. The economic benefit of these

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after the year-end, in order to protect a corporation's legitimate interest in the secrecy of ongoing negotiations . . . . If known in advance that embarrassing payments would have to be disclosed, most such payments would not be solicited or made. In this modest way, we might achieve an international regime to ensure that foreign bribery is finally halted.

_Id._

100. _Id._ at 38-39 (noting states "have endorsed high-level policy statements against corrupt payments," but foreign countries' tax deduction for bribes show an inherent legitimization problem).

102. Switzerland: Bribes May Soon Become Nondeductible, _supra_ note 7; Patel, _supra_ note 59, at 3A.

103. Wallace, _supra_ note 36, at 443. This phrase makes Article VI nonbinding and satisfies minimalists since they believe: "Any code of conduct for transnational corporations should not be binding, since the diversity of national situations makes it impossible to apply uniform rules to all countries." _Id._
deductions to a country would be offset by the loss of international business. Therefore, this Article is also an attempt to find middle ground between both camps and increase the chances of ratification.

The Corrupt Practices Committee is one of the two regulatory bodies created by this draft. The administration of this treaty is left to the Corrupt Practices Committee and the Corrupt Practices Commission since past experience has revealed that states lack the necessary attitude to fight overseas corrupt payments. Article VII establishes the Corrupt Practices Committee with the responsibility for the treaty’s smooth operation. Sections (a), (b), and (d) establish the membership of this Committee. The membership compensation assures neutrality and gives signatory countries a chance to participate in the rule making process in order to protect their sovereign rights.

Article VII (a)(iii) arbitration is one of the various powers and responsibilities the Corrupt Practices Committee will receive. “In-house” disputes between members should be settled in arbitration to lessen the chance of a mutual recession of the agreement. Another important provision in Article VII is the Committee’s ability to create supportive subcommittees. These inferior bodies will aid in administering the Committee’s various functions. Sections (a)(iv) and (g) set up a mechanism of checks and balances between the treaty’s regulatory bodies.

An advisory opinion process, similar to the FCPA’s, is also provided by this draft agreement. Article VIII requires that all requests must originate by possible “offending private parties” or signatory countries. This Article further limits the review procedure to nonhypothetical situations. All of these committee advisory opinions should logically be privately heard to avoid public disclosure of surrounding facts. This is to safeguard international business leads and promote the use of this process. Article VIII requires a mandatory fourteen day response period which is aimed at avoiding the problems of delay that have discredited the FCPA.

The second body created by the proposed treaty, the Corrupt Practices Commission, is established by Article IX. This would be considered the judicial body of the treaty since its main function is to hear disputes concerning possible corrupt practices. This body is a combination of nationals from various signatory countries. Sections (a) and (b) structures this body to allow all member states some participation in the judicial review process. Section (b) ensures that a “suspect private party”

104. RUBIN & HUFBAUER, supra note 6, at 38-39 (claiming many countries seem unreliable and uninterested in fighting these illicit payments).

105. Albright & Hon, supra note 25.
from a signatory country will not be judged by a commission composed entirely of foreigners. By allowing at least one fellow national to participate in the complaint process, “suspect private parties” may feel that proceedings will be more equitable.

One of the more controversial provisions of this treaty is found in Article IX (a)(ii). This subsection gives the Corrupt Practices Commission international discovery powers. In light of the fact that a multinational agreement was necessary to facilitate international discovery, this subsection is somewhat controversial. However, this provision is necessary to facilitate the investigatory stage of any proceeding. These discovery powers would only be possessed by the Commission and not the individual private parties. Article XV (a) would protect sovereignty rights since each nation is only obligated to assist in discovery to the degree their national laws allow.

Article X’s nature is one of limitation. It restricts the right to file a complaint to certain entities and provides for a statute of limitations. To prevent the filing of frivolous complaints by private parties, Article X provides for the award of attorney’s fees if the Corrupt Practices Commission finds that a complaint was not filed in good faith. Article X is one of the unique factors which distinguishes the proposed treaty from its predecessors. This Article provides for a private cause of action, which may be a more effective means at controlling corrupt payments. As a result, nations would not be responsible for coming forth with allegations; rather independent private entities would pursue their claims.

The most controversial provision is located in Article XI. Article XI provides a confidential complaint procedure to guard internationally sensitive business documents. Section (b) sets forth the standard of proof in these proceedings. Since bribery is shielded in the “shadows” of commercial trade, its very nature is one of secrecy and underhandedness. As a result, evidence is hard to obtain. Therefore, an evidentiary standard of “more likely than not” is the most appropriate standard of proof for plaintiffs to meet. More stringent standards would be impossible to prove. “Suspect private parties” are in a better position to prove the nonoccurrence of a bribe since they were supposedly in union with the governmental authorities they allegedly bribed. This standard is fair since


107. Pines, supra note 9, at 191 (claiming that a cause of action in the FCPA would significantly improve enforcement of the Act); RUBIN & HUBBAUER, supra note 6, at 38-39 (claiming that many countries seem unreliable and uninterested in fighting these illicit payments).
“suspect private parties” can more easily account for all their expenditures.

Article XI section (c) is another controversial provision. This section creates a presumption of guilt if one party refuses to take part in the complaint process. This vital provision will encourage participation in the judicial process and help facilitate the facts surrounding transnational commercial activities. However, some signatory countries may find this provision offensive to local constitutional laws or rules of evidence. This section could be interpreted as infringing on one’s right against self incrimination. Furthermore, many countries would perceive this as a violation of the presumption of innocence that all suspects should be afforded.

However, this provision is not as controversial as potential critics would suggest for two reasons. First, Article XV limits the applicability of Article XI (c) since it provides for the respect of laws of contracting nations. Second, this treaty is not criminal in nature and only establishes civil causes of action. Criminal liability will only attach if the “suspect private party’s” home state has adopted legislation similar to the FCPA.

Article XI concludes with provisions that concern the disposition of a claim. Subsection (d)(i) provides that if a corrupt payment is not discovered, the Committee will seal the proceeding’s records to protect confidential business. This subsection also empowers the Committee the option of awarding attorney’s fees. Subsection (d)(ii) orders the release of all documents to both parties if a claim is certified (i.e. a corrupt payment is discovered). This provision is targeted at supplying the “offended private party” with necessary documentation to facilitate a civil suit which may be filed pursuant to Article XII (c).

Article XII (a) mandates that the Corrupt Practices Committee announce its findings to the general public. This essential provision is a method of punishing transnational businesses that participate in corrupt practices, and it also deters future businesses from offering bribes to public officials. An international business does not want to be stigmatized as a corrupt and bribing entity because public opinion of that business would become unfavorable resulting in a backlash against that company’s goods and services. Therefore, the tactic of exposing and announcing the corruption to the world would be an effective deterrent and punishment even without criminal sanctions attaching. This tactic is used by

108. This provision is to avoid one of the draw backs of the FCPA’s advisory opinion process. See SCHAFFER, supra note 6, at 423 (stating that the FCPA review process has the potential to disclose information to international competitors and thus is not often used).
Transparency International to counter world corrupt payments and may be more effective then any fine or penalty.\textsuperscript{109}

Under Article XII (b), all signatory countries agree to refrain from doing business with "suspect private parties" who are determined to have bribed a public official. This provision's detrimental to multinational corporations that bribe public officials because they could lose a substantial amount of transnational contracts. Section (c) allows an "offended private party" to file a lawsuit in its home country. Although section (d) encourages signatory countries to honor the foreign judgments for collection purposes, it still preserves a country's right to question such foreign judgments.\textsuperscript{110}

International criminalization of transnational bribery of public officials would be ideal from the American standpoint. However, past attempts by the United States to secure such provisions have doomed multilateral negotiations and have been labeled as "American Imperialism."\textsuperscript{111} Therefore, Article XIII only encourages countries to adopt penal laws to counter overseas bribery by their nationals. However, with or without these penal laws, this treaty's effectiveness is based on a civil recourse that will eventually make bribery economically cost inefficient.

Article XV (a) protects a contracting nation's sovereignty by preventing the proposed treaty from contradicting its laws. This provision preserves a nation's sovereignty and reduces the need for reservations which ultimately would be filed to protect national laws. It is also important to provide financial support for the bodies created by this treaty. Therefore, section XV (a) secures funds for the Commission and Committee by requiring all signatories to provide assistance for the "general operation of this treaty."

Articles XIV and XVI are procedural items. Article XIV is created so that member states can monitor each other's compliance. This is a common and necessary provision in many treaties.\textsuperscript{112} Article XIV becomes a necessary provision because the actions of states have often contradicted their publicly stated policies regarding overseas bribery.

\textsuperscript{109} Scott, \textit{supra} note 49, at 6.

\textsuperscript{110} Sec. (d) is modeled after Article 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Mar. 18, 1965), \textit{reprinted in} 4 I.L.M. 532 (1965).

\textsuperscript{111} Reynolds, \textit{supra} note 45, at 343.

\textsuperscript{112} Kenneth Abbott, \textit{Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements}, 26 CORNELL INT'L L.J. 1 (1993) (stating that clauses providing mechanisms of monitoring promote trust among signatory parties and dispel many wrongful accusations).
Article XVI delays the commencement of responsibilities under this treaty until there is a sufficient number of contracting nations.\textsuperscript{113} This practical provision is modeled after a suggested change to the Economic and Social Council's draft treaty.\textsuperscript{114}

This purposed treaty is unique but controversial. Formation of a treaty is a ritual of stages.\textsuperscript{115} The purpose of this work is to provide the first step in this diplomatic process. Its other purpose is to promote critical thought on this issue. Proposing a treaty that contains some very controversial provisions will surely touch the nerves of many international legal practitioners. However, this draft is not so controversial as to be unattainable. Its provisions are targeted to preserve the sovereignty of individual nations, and it appeases both Maximalist and Minimalist theorists. This treaty is feasible and it can be ratified by enough nations to effectively deter illicit payments in the global market place. The key is to secure its acceptance by the world community.

V. STRATEGIES TO SECURE SIGNATORIES

The ratification of this treaty, like many other international documents, will be a slow tedious process. There are various ways to secure the world community's acceptance. Unfortunately, acceptance of this treaty will not occur quickly, and it will be accompanied by considerable debate. However, once enough signatories are mustered, world opinion will most likely force the remaining countries to enter into the treaty. Their failure to sign this treaty may result in a "Sleazy State" stigmatization.\textsuperscript{116}

The vital ingredient in the ratification process is the willingness of the United States to compromise. Congress must realize that it will not succeed in cloning the FCPA into an international treaty.\textsuperscript{117} The United States should embrace this treaty because of its unprecedented potential at curtailing corrupt payments. Even though the language and penalties are

\textsuperscript{113} Bonnie Jenkins, \textit{The Role of the Attorney in the Treaty Making Process}, 6 INT'L L. PRACTICUM 29 (1993) (stating that such provisional application clauses are not uncommon and serve a useful and necessary purpose).

\textsuperscript{114} U.N. ECOSOC, \textit{supra} note 40. Notes accompanying the draft discuss the addition of an "Article 13" which contains provisions on entry into force. \textit{Id.}

\textsuperscript{115} Kenneth Vandevelde, \textit{Treaty Interpretation Form a Negotiator's Perspective}, 21 \textit{VAND. J. TRANSNAT'L L.} 281 (1988) (stating that the process of treaty formation includes text presentation, issue identification and issue resolution).

\textsuperscript{116} Waterhouse, \textit{The Sleazy State: Britain Resisting Moves to Halt Bribes to Officials}, \textit{supra} note 60, at 3.

\textsuperscript{117} Repeated past attempts have failed. \textit{See id.} at 10-20.
inferior to the FCPA, the United States should compromise and push for its international acceptance. Once the acceptance of the treaty by the United States is attained, the first step in the ratification process will be complete.

Once the United States supports this draft, America's economic and political power can be a valuable tool in facilitating the adoption of this treaty by the world community. The United States' foreign policy must reflect its firm commitment to fight foreign corrupt practices. Now that the cold war is over, America can be more flexible with its foreign policy and aid. As a result, the United States could restrict its foreign aid to signatories of this draft. This policy would greatly increase the number of parties to this agreement. The United States could place this draft on the “bargaining table” during the next round of General Agreement of Tariffs and Trade negotiation sessions. This would start dialogue on the topic and publicly expose those countries who are reluctant to fight bribery. The United States could also condition future bilateral friendship, commerce, and navigation treaties on the prerequisite that its partner be a signatory to this treaty.

Directing the public's attention to certain transactions or governmental actors is a vital tool in securing this treaty’s acceptance. Therefore, Transparency International is an essential group that can help to secure ratification of this treaty. Transparency International's unique status as an independent organization allows it to confront and expose foreign corruption without jeopardizing “political relations”. Transparency International could use its tactics to target certain key countries and indirectly force them to become signatories. For example, Transparency International could promote a public campaign designed to expose English officials who take bribes. A powerful media campaign uncovering graft in the English government would likely enrage English citizens and force local politicians to address the issue. Eventually, the issue would become detrimental to any English politician who disfavors the signing of such a treaty. Once England becomes a signatory, another country is targeted and a “snowball” affect will eventually occur.

118. This is an effective tactic used by T.I. through its Directors who write letters to local press agencies. See e.g., Implications of British Overseas Aid, TIMES, Jan. 28, 1994, available in LEXIS, World Library, TTimes File (letter written by Jeremy Pope, Managing Director of T.I.); Questions of Bribery, TIMES, Nov. 15, 1993, available in LEXIS, World Library, TTimes File) (letter written by George Moody-Stuart Chairman of T.I. in the United Kingdom).

119. England is used for illustrative purposes only. The author does not suggest that English Officials are necessarily corrupt.

120. The FCPA was born out of the same public outrage. See Timmeny, supra note 11.
Introducing this draft as a protocol or a supplemental document to an existing treaty may help facilitate its acceptance. There are currently treaties in place that this agreement could logically supplement. The strategy is to target an existing treaty that is logically related to this agreement. This draft would become an extension of the already established goals of operational treaties and thus cast it in a less radical light.

Despite its inadequate attempts to date, the OECD is still a vital actor in the adoption of this treaty. The majority of multinational corporations can be found within the territory of OECD member nations. Furthermore, the bulk of international commerce comes from nations in the OECD. Any treaty receiving the blessing of the OECD will significantly affect international foreign corrupt practices. Therefore, Transparency International and the United States should concentrate on pressuring individual OECD members to become signatories. A combination of diplomatic maneuvering and political pressure arising from the discontent of the public, can result in the world community’s leaders embracing this treaty.

VI. CONCLUSION

Transnational bribery has been an issue before the world community for a generation now. Prior multinational attempts at reducing these illicit payments have been ineffective. The United States continued demands for the international “criminalization” will again be labeled as “moral imperialism” and will be met by considerable opposition from other nations. Cloning a treaty after the FCPA is not the answer to this problem. The proposed multilateral agreement has the potential of both controlling overseas accommodation payments and receiving the international community’s acceptance. New organizations and a new world order makes the timing right for this proposed draft to be submitted to world leaders. As a result, this operational, effective, and ratifiable agreement could be the first real multinational deterrent to foreign corruption.


123. LANGE & BORN, supra note 84, at 52.
PROPOSED TREATY ON THE PREVENTION OF INTERNATIONAL CORRUPT PAYMENTS

WHEREAS international commercial transactions have become more common and increasingly facilitated by corrupt payments to public officials;

WHEREAS such corrupt payments are socially undesirable;
WHEREAS acceptance of these corrupt payments erode the public’s confidence in their state’s leadership;
WHEREAS several governments have become politically unstable due to the exposure of these ongoing corrupt payments;
WHEREAS such corrupt payments increasingly cause international incidents and strain relations between nations;
WHEREAS such corrupt payments are detrimental to a nation’s ability to secure goods and services at an economically efficient and fair price;
WHEREAS such corrupt payments deprive legitimate entities from securing international commercial contracts;
WHEREAS such corrupt payments originate from transnational corporations and can only be eliminated through multinational cooperation;

WE ARE RESOLVED to condemn and eliminate all corrupt practices of bribery of a public official by transnational corporations, their intermediaries, and others involved in violation of the laws and regulations of Host Countries.

ARTICLE I

For the purpose of this Agreement:
(a) “Commission” means the Corrupt Practices Commission created by Article IX.
(b) “Committee” means the Corrupt Practices Committee created by Article VII.
(c) “Corrupt Payment” shall be defined by the host state’s internal laws concerning illegal payments, bribes, or gratuities to governmental entities at the time of the alleged act taken in account all host state rulings, codes, regulations, cases, or written opinions construing or creating these internal laws.
(d) “Host State” means the sovereign territory in which the alleged recipient or benefactor of a corrupt payment holds a “public official” position.
"Home State" means the sovereign territory in which the Offended Private Party is incorporated or, if the Offended Private Party is a natural person, means his or her domiciliary State.

"Illegal" shall be defined by the Host State's internal criminal or penal laws concerning illicit payments to public officials taken in account with all Host State rulings, codes, regulations, cases, or written opinions construing or creating these internal laws.

"Intermediary" means any enterprise or any other person, whether juridical or natural, who negotiates with or otherwise deals with a public official on behalf of any other enterprise or any other person, whether juridical or natural, in connection with an international commercial transaction;

"International commercial transaction" means any sale, contract, or any other business transaction, actual or proposed, with a national, regional, local government, any authority or agency referred to in paragraph (l) of this article. International commercial transaction also refers to any business transaction involving an application for governmental approval of a sale, contract, or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital, or technology emanating, wholly or substantially, from a State or States other than the one in which those goods, services, capital, or technology are to be delivered or rendered. It also means any application for or acquisition of proprietary interest or production rights from a government by a foreign national or enterprise;

"Knowingly" (with respect to conduct) means being aware that such a person, intermediary, agent, subsidiary, or any entity is engaging in conduct in violation of this Agreement or that such circumstances exist that should reasonably place a party on notice that a result is substantially certain to occur, or has occurred, from conduct in violation of this Agreement.

"Offended Private Party" means aggrieved private person or legal corporate entity which, through loss of a possible contract, is damaged by a corrupt payment. The Offended Private Party must have been a legitimate business competitor to the Suspect Private Party and in direct competition with the Suspect Private Party in securing a contract involving an international commercial transaction.

"Payment" means the delivery of any item or intangible of value.

"Public official" means any person, whether appointed or elected, whether permanently or temporary:
(i) Who, at the national, regional or local level holds a legislative, administrative, judicial or military office or who holds such an office in an international intergovernmental organization; or

(ii) Who, in performing a public function is an employee of an international intergovernmental organization or of a government or of a public or governmental authority or agency or who otherwise performs a public function;

(m) "Suspect Private Party" means any person or legal corporate entity which is suspected of violating this Agreement by knowingly making, offering, or allowing another on their behalf to make or offer a corrupt payment. A Suspect Private Party does not necessarily have to be a domiciliary of a signatory country.

ARTICLE II

It is a violation of this Agreement to knowingly offer, promise, or give, directly or indirectly, or through an intermediary, any corrupt payment to:

(a) a public official or intermediary for the purposes of influencing any act or decision of such public official in his official capacity, or induce such public official to do, or omit to do, any illegal act in violation of the lawful duty of such public official; or

(b) a public official or intermediary in an attempt to induce a public official to influence a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or

(c) any political party or official thereof or any candidate for political office for the purpose of influencing any act or decision of such party, official, or candidate in their official capacity, or induce such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate in connection with an international commercial transaction.

ARTICLE III

It shall be an affirmative defense to actions under this Agreement that:

(a) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the
foreign official’s or candidate’s political party, party official, or country; or

(b) the payment, gift, offer, or promise of anything of value, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, public official, or candidate and was directly related to:

(i) the promotion, demonstration, or explanation of products or services; or
(ii) the execution or performance of a contract with a foreign government or agency thereof; or

(c) the payment, gift, offer, or promise of anything of value was to facilitate or expedite payment to a public official, political party, or party official, and the purpose of which is to expedite or to secure the performance of a routine governmental action by the public official, political party, or party official, and such payment is not in violation of Host State’s internal laws; or

(d) the Suspected Private Party was acting in good faith or in accordance with an advisory opinion rendered pursuant to Article VIII of this Agreement.

ARTICLE IV

Each signatory country shall ensure that enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connection with an international commercial transaction. Each signatory country agrees to consider for adoption all accounting procedures promulgated by the Committee. All transnational payments over $10,000.00 to public officials or political parties should be disclosed to the Committee on an annual basis.

ARTICLE V

Each signatory country shall require, under penalty of law, that enterprises or other juridical persons established in its territory include the following clause in all transnational commercial transaction contracts:

“One or more of the parties to this transnational commercial transaction is bound by the Treaty on the Prevention of International Corrupt Payments. Both parties are aware of the existence and details of said treaty. A contracting party, of this contract, from a signatory country verifies that no corrupt payments were offered or delivered in violation of
this treaty. Any contracting party, of this contract, from a signatory country must keep accurate accounting records pursuant to Article IV of said treaty and is encouraged to solicit advisory opinions on questionable transactions pursuant to Article VIII of said treaty.”

ARTICLE VI

Each signatory country should refrain from permitting tax deductions on expenditures that are determined to be “corrupt payments.”

ARTICLE VII

(a) This Agreement establishes the Corrupt Practices Committee composed of fifteen (15) representatives from signatory countries who will be known as Counselors. The Counselors shall meet routinely and:

(i) promulgate accounting rules that are intended to prevent and disclose corrupt payments in international commercial transactions; and

(ii) render advisory opinions pursuant to Article VIII of this Agreement; and

(iii) arbitrate all disputes between signatory countries concerning the interpretation of and enforcement of this Agreement; and

(iv) formulate and amend the procedural rules of the Corrupt Practices Commission.

(b) The Counselors shall be elected by signatory countries every three (3) years serving staggered terms of three years. The candidates for this committee shall possess excellent credentials. Each signatory country is limited to having only one (1) national on this regulatory board at any given time.

(c) The Committee shall formulate rules of procedure concerning its responsibilities.

(d) All Committee Counselors shall be neutral, impartial decision makers and be of the highest moral character.

(e) The Committee shall work closely with all nations and regional organizations to combat corrupt payments in international commercial transactions.

(f) The Committee shall create, coordinate and administer all necessary support staff and committees as it deems necessary to carry out its obligations under this treaty.
(g) The Committee shall hear petitions to recuse a member of the Corrupt Practices Commission, and replace a commissioner if necessary.

ARTICLE VIII

All signatory countries persons, companies, or corporate entities may request an advisory opinion concerning a questionable situation that may, or may not, be a corrupt payment. Hypothetical situations will not be considered by the Committee. All requests must be filed by possible offending private parties or signatory governments and be supported by all the facts sufficient for the Committee to render a reliable advisory opinion. Upon receiving a valid advisory opinion request the Committee shall:

(a) Immediately analyze the provided facts; request more information from the filing party if necessary; and render an opinion within fourteen (14) days; and

(b) Not disclose the identities of any of the parties involved or the facts surrounding the advisory opinion unless an Offended Private Party raises the affirmative defense of relying on an advisory opinion pursuant to this section and in defense of corruption complaint filed pursuant to Article X of this Agreement.

ARTICLE IX

(a) This Agreement establishes the Corrupt Practices Commission composed of seven (7) Commissioners from signatory countries elected by signatory countries, with individual tenure of five years, serving in staggered terms. All Commissioners should be neutral, impartial decision makers possessing the highest moral character. No two Commissioners shall be from the same signatory country. The Commission shall have the power to:

(i) hear all complaints filed pursuant to Article X of this Agreement; and

(ii) to discover all documents, depose witnesses, and audit accounting records kept pursuant to Article IV of this agreement; and

(iii) interpret Host Country laws on corrupt payments; and

(iv) certify a cause in which it believes a corrupt payment has taken place in violation of this treaty; and

(v) award attorney's fees and costs to a prevailing party; and
(vi) request a bond be posted by an alleged Offended Private Party to assure that an innocent Suspect Private Party can recover reasonable attorney's fees and costs.

(b) A Suspect Private Party can demand the replacement of one of the Commissioners which will be replaced with a Commissioner from the Suspect Private Party's domiciliary State if:

(i) There are presently no Commissioners sharing the same nationality of the Suspect Private Party; and

(ii) The Suspect Private Party is from a signatory country.

ARTICLE X

An Offended Private Party of a signatory country has the right to file a complaint with the Commission alleging a corrupt payment was made or offered in an international commercial transaction. Both the Offended Private Party and Suspect Private Party have the right to notice, opportunity to be heard, and ability to produce evidence on their behalf. A complaint must be filed within 180 days of the alleged corrupt payment and be based on good faith. If the Commission finds that a complaint was not filed in good faith, then the Suspect Private Party may be awarded attorney's fees and costs to be paid by the complaining Offended Private Party.

ARTICLE XI

(a) The Commission's complaint procedure shall consist of:

(i) Notifying all parties concerned in the complaint; and

(ii) Confidential investigation of the entire circumstances surrounding the alleged corrupt payment; and

(iii) Collecting evidence through subpoenas and depositions to render a fair decision;

(b) The Commission must establish, by competent evidence, that more likely than not, a corrupt payment occurred.

(c) A presumption of a corrupt payment arises if the Suspect Private Party refuses to honor a Commission's discovery request or refuses to take part in these proceedings.

(d) If the Commission finds that:
(i) a corrupt payment has not occurred, the proceedings shall be closed and all documents shall be sealed. The alleged Offended Private Party may be ordered to pay reasonable attorney’s fees and costs incurred by the Suspect Private Party.

(ii) a corrupt payment has occurred, the cause will be “Certified” and all records and documents will be turned over to the both the Offended Private Party and the Suspect Private Party.

ARTICLE XII

Upon certification of a cause:
(a) The Commission shall release a public statement that describes its findings and conclusions.
(b) Signatory countries shall bar the Suspect Private Party from doing business within its territory for a period of Ten (10) years; and
(c) The Offended Private Party has the right to sue, under a contract interference tort theory, if one is available in his/its Home State and if that Home State is a signatory to this Agreement.
(d) All signatory countries agree to recognize and enforce foreign judgments of fellow signatory countries in civil/private causes of action described in subsection (c) of this Article. This section shall not be interpreted in denying a signatory country the right to refuse enforcement of foreign judgments if such refusal is consistent with local laws, standing treaties and/or international legal principles.

ARTICLE XIII

Signatory countries are encouraged to pass local legislation criminalizing corrupt payments in international commercial transactions. However in no way is this Agreement to be interpreted to:
(a) require a signatory country to adopt criminal legislation concerning international commercial transactions; or
(b) exclude any criminal jurisdiction exercised in accordance with the national law of a signatory country.

ARTICLE XIV

Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.
ARTICLE XV

(a) Contracting States shall afford one another, the Committee and Commission the greatest possible measure of assistance in connection with investigations and proceedings brought pursuant to this Agreement, as far as permitted under their national laws, and all Contracting States shall provide assistance in the general operation of this treaty.

(b) Contracting States shall, upon mutual agreement, enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of mutual assistance in accordance with this article.

(c) The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in legal matters.

ARTICLE XVI

This Agreement shall enter into force thirty (30) days after the date of deposit of the Twenty-second (22nd) instrument of ratification, acceptance, approval or accession. The instruments of ratification shall be deposited with the Secretary General of the United Nations.

Jo L. Southard*

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I. INTRODUCTION

American law schools use appellate court decisions to teach the implementation and progression of the law. Typically, the first case in a series will stand for the proposition that a plaintiff is entitled to a certain right. A later case demonstrates that a subsequent plaintiff is also entitled to the right. After a number of cases are presented, the student is expected to understand the law, policy, doctrine or test that applies to situations revolving around the right. When a court veers in a new direction, this method results in the appearance that the court inexplicably did a doctrinal about-face. For example, NLRB v. Jones & Laughlin and U.S. v. Darby,

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cases marking the end of the Lochner\textsuperscript{3} era, appear illogically decided when measured only by the precepts of \textit{stare decisis}.

Judges, however, do not operate in a case book world. They operate in a world with politicians, citizens and their interest groups, the media, economic upheavals, wars, and myriad other extra-judicial factors. Studying a legal doctrine or trend in its historical context may provide a less myopic view of the law's progression, demystifying seemingly irrational decisions. When one understands President Franklin Roosevelt's "Court packing plan," the Supreme Court's decisions in \textit{NLRB} and \textit{Darby} are more comprehensible. A discussion of the Court packing plan is often included in constitutional law case books as an illustration of outside influences on the judicial process;\textsuperscript{4} however, it is one of only a few historical explanations contained in most case books.

This paper analyzes the historical settings of several significant cases in which plaintiffs asked the courts to apply the U.N. Charter, casting these cases in a new light. It has frequently been argued that U.S. courts have been at best ambivalent about utilizing international treaties in U.S. courts.\textsuperscript{5} Judges often have invoked the political question doctrine, which allows them to remove themselves from involvement in an international issue.\textsuperscript{6} Another method of avoiding treaty application in U.S. courts is the doctrine of non-self-execution, which requires enabling

\textsuperscript{3} Lochner v. New York, 198 U.S. 45 (1905). During the Lochner era, the Supreme Court frequently applied substantive due process to invalidate regulations that were aimed at redressing societal inequalities. For example, Lochner struck down a New York law aimed at limiting the number of hours that bakery employees could work. The Lochner Court held that the "right to make a contract . . . [was] part of the liberty of the individual protected by the 14th Amendment." \textit{Id.} at 53. By the 1930's, this reasoning was used to find several of Franklin Roosevelt's New Deal provisions unconstitutional. Roosevelt responded with a plan to reform the Supreme Court that would have allowed him to appoint six new Justices to the Court. Although the plan was never enacted, the Court responded by upholding several New Deal regulations, beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).


\textsuperscript{6} The political question doctrine holds that when an issue is textually dedicated by the Constitution to a political branch of the government, lacks standards by which the judiciary can resolve it, requires an initial policy determination, or if decided by a court could cause embarrassment to the U.S. government in its foreign relations, it should be found to be nonjusticiable. \textit{See} Baker v. Carr, 369 U.S. 186 (1962).
legislation for a treaty to apply domestically. These doctrines have produced a line of cases that overwhelmingly-but not exclusively-reject the application of treaties (especially human rights treaties) in U.S. courts. Yet placing these cases in a historical setting and viewing them with an eye on events surrounding the decisions shows that U.S. courts are becoming more willing to consider and apply human rights treaties.

A. Background

Even before the emergence of the modern Nation-State system in the 17th century, States have concluded treaties with one another. For most of that time, treaties dealt with matters arising between States in their sovereign capacity; rarely has a treaty dealt with issues that applied to individuals within a State. Only recently have States begun to make international agreements that relate to the treatment of nationals within their own borders.

In the past, treaties were generally enforced by the use of sanctions. If one State violated its treaty with another State, the latter State would apply sanctions-diplomatic, economic or military reprisals. For the most part, the threat of reprisals kept States from violating their treaty obligations. With the formation of the League of Nations after World War I, the world community began exploring human rights as a new subject matter for treaties and created new enforcement mechanisms with the League itself and the Permanent Court of International Justice. Although the League eventually dissolved, it provided a foundation for the formation of the United Nations. The Permanent Court of International Justice evolved into the current International Court of Justice (ICJ). States

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7. When a treaty is non-self-executing, it cannot be applied to individuals in U.S. courts without further enabling legislation. In other words, a non-self-executing treaty will bind the U.S. in its relations with other nations, but not in its relations with its own citizens. See JOHN H. JACKSON, UNITED STATES, IN THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 148-56 (Frances G. Jacobs & Shelley Roberts eds., 1987).
8. See infra note 20.
10. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2 (1988).
11. See STARKE, supra note 9, at 14. See also Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 953 (D.C. Cir. 1988) (noting that government officials may be held responsible for certain egregious violations of their own citizens' rights but nonetheless holding that this "expanded law of nations" does not (1) include, as a principle of jus cogens, protection of citizens from harms resulting from their own government's contravention of an International Court of Justice decision; and (2) alter the domestic law principle that congressional enactments cannot violate, but only supersede, prior inconsistent treaties or customary norms of international law).
continue to make treaties on sovereign issues, but the human rights of their citizens have increasingly become a subject for international agreements.

A treaty provides the most authoritative method of ascertaining and defining a precept of international law. As a matter of international law, a treaty is any written agreement between two States, regardless of what title it is given. Under U.S. law, however, an international agreement becomes a treaty only after it has been signed by the President and ratified by the Senate. Article VI of the Constitution makes treaties “the supreme law of the land”; Article III(2) places jurisdiction for cases “arising under” treaties with the federal courts. Since the Statute of the ICJ gave that body jurisdiction only over matters arising between States—and since a State submits to the ICJ's jurisdiction only voluntarily—domestic courts are left to enforce treaties that deal with individual rights.

B. Scope

The U.N. Charter is a duly signed and ratified treaty of the United States. Because the United States has ratified only one other international human rights treaty and because innumerable cases containing the phrase “human rights” or similar phrases are outside the scope of international


16. The Vienna Convention obligates a State to “refrain from acts which would defeat the object and purpose of a treaty” which a State has signed, but not yet ratified. Vienna Convention, supra note 12, art. 18. Therefore, under the Convention, a signed, unratified treaty still has a somewhat binding effect on a State. However, the U.S. Constitution recognizes a “treaty” only after it is ratified by the Senate and signed by the President. The U.N. CHARTER is a treaty under U.S. law. See BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER (Burns Weston et al. eds., 2d ed. 1990).

17. The United States has signed several international human rights treaties, but ratified only one. Among the treaties signed, but not ratified, by the U.S. are: the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social, and Cultural Rights, The Covenant on Civil and Political Rights, the American Convention on Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The U.S. ratified (with reservations) the Convention on the Prevention and Punishment of the Crime of Genocide in 1988, 37 years after its entry into force. See BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER (Burns Weston et al. eds., 2d ed. 1990).
law, this paper focuses on the application of the human rights provisions of the U.N. Charter in U.S. courts.

The doctrine of non-self-execution has had a significant impact on attempts to employ the U.N. Charter in U.S. courts. The doctrine of non-self-execution, a domestic law concept, determines whether a ratified treaty is directly incorporated into U.S. law or whether it requires further legislation to make it applicable within the United States. The human rights provisions of the U.N. Charter have been found non-self-executing and therefore do not apply within the United States in the absence of further legislative implementation. The political question doctrine, as developed in *Baker v. Carr*, also limits application of the Charter and other treaties in U.S. courts.

In spite of these restrictions on the use of treaty law, over 250 cases make reference to the U.N. Charter; seven cases in particular provide parallel and contrasting applications of the human rights precepts of the Charter in U.S. courts. *Oyama v. California* and *Sei Fujii v. State* were challenges to the California Alien Land Law. These two cases, decided in 1948 and 1952, represent the minority's initial commitment to the application of the human rights provisions of the U.N. Charter, this commitment was severely curtailed by the doctrine of self-execution. In the 1980s, *Filártiga v. Peña-Irala* and *Tel-Oren v. Libyan Arab Republic* resulted in a "one step forward, two steps back" application of the Charter. The *Tel-Oren* retreat was halted by *Forti v. Suarez-Mason*. In 1991 and 1992, *United States v. Verdugo-Urquidez* and *United States v. Verdugo-Urquidez*. 


24. CAL. CODE § 261 (Deering 1943).


26. *Tel Oren*, 726 F.2d at 774.


Alvarez-Machain arose from incidents involving alleged violations of an extradition treaty between the United States and Mexico, resulting in divergent holdings which heartened, then disappointed, proponents of international human rights. These cases, viewed in isolation, represent at best a vacillating commitment by the courts to the Charter. However, the historical context of the formation of the United Nations and domestic political concerns reveals Oyama to be the first step toward greater acceptance by the courts of the principles of the U.N. Charter.

Courts often refer to the Universal Declaration of Human Rights when discussing the U.N. Charter. The human rights provisions of the Charter and the Universal Declaration may be used interchangeably. Although the Universal Declaration is a non-binding expression of the U.N. General Assembly, it is regarded as authoritative in interpreting the human rights provisions of the Charter.

C. The Creation of the United Nations

The U.N. Charter was signed in San Francisco on June 26, 1945. The rise of Nazism, the deaths of millions of ethnic minorities in World War II, and the Nuremberg and Tokyo trials after the war all contributed to the formation of the United Nations. While the Charter supported human rights ideals, it retained the principle of a State's sovereignty over its own citizens and a balance of power that favored the Allies-China, France, the USSR, Great Britain, and the United States. Nonetheless, for those who lived through the horrors of World War II, the Charter provided hope that a State would never again have free rein over the treatment of its own citizens. The United States was at the forefront in arguing to include protection of individual rights in the U.N. Charter.

34. U.N. CHARTER, arts. 1, 2, 26, 55.
In 1948, without a dissenting vote, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, largely authored by Eleanor Roosevelt. Upon its passage, she said, "[t]his must be taken as testimony of our common aspiration first voiced in the Charter of the United Nations to lift men [sic] everywhere to a higher standard of life and to a greater enjoyment of freedom." Although the United States was actively involved in the promulgation of international human rights standards, the question addressed here is whether the United States has championed these rights in its own courts.

II. APPLICATION OF THE CHARTER IN U.S. COURTS

A. 1948 - 1980

1. The Doctrine of Non-Self-Execution

The earliest mention of the U.N. Charter by the U.S. Supreme Court occurred in *Oyama v. California*. *Oyama* arose under the California Alien Land Law, which made it illegal for aliens who were ineligible for naturalization to own, occupy, lease or transfer agricultural land in California. It also required any land acquired in contravention of the law to escheat to the state. Under U.S. naturalization laws in force at the time, the Alien Land Law applied only to East Asian aliens. Kajiro Oyama, ineligible for citizenship because of his Japanese birth, purchased agricultural land in California and had the deeds executed to his minor son, Fred, who was a U.S. citizen by virtue of his birth in California. In 1942, the Oyamas, along with all persons of Japanese descent, were forcibly removed from California and sent to an interment camp. In 1944, when Fred was sixteen years old and still interred outside of California, the state filed a petition to declare an escheat on Fred's land as deeded to him with the intention of violating the Alien Land Law. The trial court ordered the land to revert to the state and the California Supreme Court

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38. 332 U.S. at 633.
39. *Id.* at 647 (Black, J., concurring). Federal immigration law permitted only "whites and Negroes" to become naturalized citizens. See ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 22 (1972). The California Alien Land Law forbade ineligible aliens from owning land in California. Therefore, the law worked only to exclude aliens of Oriental ancestry from owning land.
upheld the ruling.\textsuperscript{40} The U.S. Supreme Court reversed the California Supreme Court in 1947.\textsuperscript{41} The opinion of the Court, written by Chief Justice Vinson, found that Fred had been discriminated against solely on the basis of his Japanese ancestry. The Court found a conflict between a state's right to determine land use policy and the right of a U.S. citizen to own land anywhere in the country, holding that under the Supremacy Clause, the state right gave way to the federal interest. The Court took issue with the California court's presumption that the transfer of the land to Fred was suspect. If the Oyamas had not been Japanese, the transfer would have been presumed a gift. Because the Court did not reach the issue of whether the Alien Land Law violated the Equal Protection Clause, the statute itself remained in force.

Justice Black, joined by Justice Douglas, concurred in the decision, although he would have struck down the Alien Land Law on equal protection grounds.\textsuperscript{42} In addition, he noted the international implications of such a law. "[W]e have recently pledged ourselves to cooperate with the United Nations to 'promote ... human rights ... for all without distinction as to race....' How can this nation be faithful to this international pledge if state laws which bar land ownership ... on account of race are permitted to be enforced?"\textsuperscript{43} Justice Murphy, joined by Justice Rutledge, also concurred in the Court's decision, noting that the Alien Land Law's "inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."\textsuperscript{44}

The U.N. Charter, then, had an auspicious beginning in the Supreme Court. Four justices would have applied the Charter to invalidate California's Alien Land Law. Justices Murphy and Rutledge advocated striking down the Land Law because it violated human rights provisions of the Charter, as well as equal protection. Justices Black and Douglas also noted the United States' commitment to the U.N. Charter as a reason (in addition to equal protection and conflict with federal laws) to invalidate the Alien Land Law. Neither concurring opinion mentioned the doctrine of non-self-execution.

\begin{itemize}
\item \textsuperscript{40} People v. Oyama, 173 P.2d 794 (Cal. 1946).
\item \textsuperscript{41} \textit{Oyama}, 332 U.S. at 633.
\item \textsuperscript{42} \textit{Id.} at 649.
\item \textsuperscript{43} \textit{Id.} at 649-50 (Black, J., concurring) (footnote omitted).
\item \textsuperscript{44} \textit{Id.} at 673 (Murphy, J., concurring). For an in-depth discussion of the \textit{Oyama} and \textit{Sei Fujii} decisions see Bert B. Lockwood, Jr., \textit{The United Nations Charter and United States Civil Rights Litigation: 1946 -1955}, 69 IOWA L. REV. 901, 917-31 (1984).
\end{itemize}
The seminal case applying the doctrine of non-self-execution to the U.N. Charter was heard in 1952. *Sei Fujii v. State* arose under the California Alien Land Law that was at issue in *Oyama*. As in *Oyama*, California had reclaimed land purchased by a Japanese national. Sei Fujii challenged the Alien Land Law under the U.N. Charter and the Fourteenth Amendment. The California Supreme Court found that the Alien Land Law was unconstitutional under the Fourteenth Amendment as arbitrary discrimination against a non-citizen. However, the court also found that the human rights provisions of the U.N. Charter were not self-executing and therefore did not override local laws. The court held that the human rights provisions of the U.N. Charter "[s]tate general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons." The court's reading of the Charter led it to conclude that "it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country . . . ." Although *Sei Fujii v. State* was never appealed to the U.S. Supreme Court, this reasoning has been adopted consistently by U.S. courts-including the U.S. Supreme Court-since *Sei Fujii* was decided. Yet four years earlier in *Oyama*, four justices of the Supreme Court would have applied the Charter's human rights provisions to overturn the law that was eventually overturned in *Sei Fujii*, without calling for further legislation to implement the Charter. What happened in those four years to change judicial attitudes toward the Charter?

2. Anti-Communism and States' Rights

Judges, although in theory insulated from the political process, are nonetheless influenced by public opinion. Judicial decisions are based not only on logic, but "the felt necessities of the time, the prevalent moral and political theories, [and] institutions of public policy." In the 1950s, politicians, educators and other commentators decried the United Nations as a communist tool to implement world domination. After the decision in *Oyama*, one journalist noted that "what four justices of the Supreme Court

45. 242 P.2d at 617.
46. Id. at 620-21.
say in one case, five may say in another . . . . [leading to] revolutionary consequences in our internal affairs. For example, it would be impossible to remove Communists from government offices . . . .”49 One allegation of communist infiltration of the United Nations involved Alger Hiss, who organized the San Francisco meeting that produced the U.N. Charter and was later accused of being a Communist spy.50 This concern led the Senate Judiciary Committee to hold hearings on U.S. citizens who were employees of the United Nations and suspected of being Communists.51 Supposed Communist dominance of the United Nations was summed up by William Fleming, who contended that “[t]he United States delegation [to the U.N.] has, unfortunately, not realized that the struggle against communism is a global one....it is waged...everywhere, including the Council chambers of the United Nations ....”52

Not only was the United Nations viewed as an agent of world communism, but its creation fueled the concern of states’ rights supporters about using international agreements to dismantle discriminatory laws in Southern states.53 Indeed, the two issues were often joined: charges of Communist ties were leveled at civil rights organizations working for desegregation in the South.54 The concern that international agreements would adversely impact states’ rights predated the formation of the United


50. Hiss was a career diplomat who was an advisor to President Roosevelt at the Yalta Conference and then was given responsibility for organizing the U.N. Conference on International Organization in San Francisco in 1945. Representatives of fifty nations attended the conference which resulted in the signing of the U.N. Charter. See Hovet, supra note 32. In 1950, after being named by Whittaker Chambers as a communist agent, Hiss was imprisoned for four years on charges of perjury. In 1992, General Dmitri Volkogonov announced that the files of the former Soviet Union contained no evidence that Hiss had ever been recruited. See, e.g., Jeffrey A. Frank, Stalin Biographer Offers Latest Twist in Hiss Case, No Evidence Diplomat Collaborated with Soviets, WASH. POST, Oct. 31, 1992, at A3.


54. See ANNE BRADEN, HOUSE UN-AMERICAN ACTIVITIES COMMITTEE: BULWARK OF SEGREGATION (n.d.); see also Dudziak, supra note 4, at 75.
Nations, arising when Justice Holmes delivered the opinion of the Supreme Court in Missouri v. Holland. Dictum in this opinion indicated that the federal government could legally ratify a treaty that could take away rights reserved to the states by the Tenth Amendment. Although Missouri v. Holland arose under a treaty dealing with migratory birds, it was seen to have a sweeping impact on the powers reserved to the states. One commentator argued that "[t]his language [in Missouri v. Holland] can really mean nothing more nor less than that an act of Congress, concededly in contravention of...[a] constitutional prohibition, may be rendered valid by enactment pursuant to a treaty on the subject ...."57

Formation of the United Nations heightened the concern that federal action over traditionally local issues would expand. If held to the standards of international human rights agreements, a U.S. state might be "compelled to forego its right to deal with its own social problems in accordance with its own judgment."58 To safeguard states' rights, Senator John Bricker of Ohio proposed amending the Constitution so that no treaty could be applied domestically without specific implementing legislation.59 In other words, the Bricker Amendment would have foreclosed the possibility of self-executing treaties. When the Senate voted on the amendment in 1954, it fell one vote short of the two-thirds necessary to amend the Constitution.60

During this period, the Supreme Court decided Brown v. Board of Education.61 This case, although it did not analyze the application of international agreements to segregation issues, reinforced the fears of Southern states' rights advocates of federal government interference in essentially state decisions. While civil rights battles were being fought in


56. Missouri v. Holland, 252 U.S. 416 (1920) (documenting Justice Holmes' observation that: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States").


58. Fleming, supra note 52, at 817.


60. THOMAS FRANCK & MICHAEL GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 256 (1987).

the courts, culminating in the Brown decision, African-Americans also petitioned the United Nations for relief for segregation and related issues. Although the United Nations did not support the civil rights movement, the U.N. Charter, with its human rights clauses, was perceived as a vehicle for abrogating states’ rights in racial issues, just as the treaty in Holland invalidated Missouri’s laws regarding migratory birds.

3. Validating the Doctrine of Non-Self-Execution

Between 1947 and 1956, the make-up of the Supreme Court changed. Justice Murphy, whose concurrence in Oyama cited the U.N. Charter, and Justice Rutledge, who joined that concurrence, were both off the Court by 1949. They were replaced by Justices Tom Clark and Sherman Minton. In 1953, Earl Warren, who was perceived at the time as a “mildly liberal Republican,” was named Chief Justice. The appointment of Warren, along with Clark, Minton, and John Harlan in 1955, represented an attempt to move the Court in a direction more amenable to “legislative discretion, state police power, and society’s concern for stability, security, and continuity.” All of these factors diminished the Supreme Court’s enthusiasm for the U.N. Charter. Indeed, the self-execution of the Charter had never been the majority view, although it was supported by a strong minority.

In 1955, the Court, demonstrating this lack of enthusiasm for the Charter, denied certiorari for Rice v. Sioux City Memorial Park Cemetery, letting stand the Iowa Supreme Court’s finding that the U.N. Charter was irrelevant to state law. In 1965, the Court of Appeals for the

62. See Dudziak, supra note 4, at 93-98.
63. KELLY & HARBISON, supra note 59, at 582.
64. 252 U.S. at 435.
65. KELLY & HARBISON, supra note 59, at 569.
66. Id. at 568.
67. See Oyama, 332 U.S. 633; Lockwood, supra note 44; Sei Fujii 242 P.2d 617.
68. Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880, aff’d per curiam, cert. dismissed, 349 U.S. 70, 80 (1955). The case arose when a cemetery in Sioux City, Iowa, refused to bury Plaintiff’s husband, a Winnebago Indian. Id. The contract for the sale of the cemetery plot stated, “burial privileges accrue only to members of the Caucasian race.” The trial court found the clause was not void, but was unenforceable as a violation of both the Iowa and U.S. Constitutions. Id. However, the cemetery, could rely on the clause as a defense and such reliance would not constitute state action. Id. The trial court further found the U.N. Charter was irrelevant to the issue. The Iowa Supreme Court affirmed and the U.S. Supreme Court granted certiorari and the decision was affirmed by an evenly divided Court. Id. A re-hearing was granted but the decision was vacated and certiorari was dismissed as improvidently granted. Id.
Second Circuit was presented with a petition to review a determination of the Immigration and Naturalization Service (INS) in Hitai v. Immigration and Naturalization Service. 69 Thirteen years after the human rights provisions of the U.N. Charter were found to be non-self-executing in Sei Fujii by the California Supreme Court, the Court of Appeals dismissed the petitioner's claim that the INS's refusal to adjust his immigration status violated Article 55 of the U.N. Charter. The court noted in two sentences that, according to Sei Fujii, the U.N. Charter could not serve to overturn a domestic law. After Hitai, the Charter was infrequently invoked by petitioners. When it was presented as a basis for determination, the courts maintained the Sei Fujii rule. 70

B. The 1980s

1. Customary International Law

Under the doctrine of stare decisis the courts continued to treat the U.N. Charter as non-self-executing, but starting in 1980 the Charter began to take on a role in the courts which had origins in a line of cases from the beginning of the twentieth century. In 1900, the Supreme Court decided the case of The Paquete Habana. 71 When war broke out with Spain in 1898, U.S. ships captured two fishing vessels sailing out of Havana under the Spanish flag. The case arose over the issue of the condemnation of the vessels and their cargoes as prizes of war. Because the Constitution commits "all cases of admiralty and maritime jurisdiction" to the federal courts 72 and because U.S. admiralty law derives from international law, the Court was accustomed to applying international law in admiralty cases. 73 The importance of The Paquete Habana to U.S. law is the Court's statement that "[i]nternational law is part of our law." 74 The Court also recognized the sources of international law, including the "customs and

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69. Hitai v. Immigration and Naturalization Serv., 343 F.2d 466 (2d Cir. 1965).
71. The Paquete Habana, 175 U.S. 677 (1900).
73. 175 U.S. at 700.
74. Id.
usages of civilized nations; and as evidence of these, ... the works of jurists and commentators."75

The Supreme Court recognized that customary international law—law not codified in a treaty, but existing because of its recognition by nations, jurists or commentators—is part of U.S. law. In recent years, courts sympathetic to the human rights goals of the United Nations have used the Charter as evidence of individual human rights generally. Other sources, such as the Universal Declaration of Human Rights or laws of individual nations, provide the specific content of individual human rights.

Customary international law is by its nature more difficult to ascertain than law codified in a treaty. However, its advantage in U.S. courts over treaty law is that the doctrine of non-self-execution does not apply.76 This advantage crystallized in cases brought by plaintiffs invoking the U.N. Charter as evidence of the existence of individual human rights. These cases show a change in the Charter's role from a treaty specifically applicable in isolated situations to an expression of the existence of general human rights for individuals.

2. The Charter and Individual Rights

Almost thirty years after Sei Fujii, Filártiga v. Peña-Irala77 offered a court an opportunity to utilize the U.N. Charter's human rights provisions more meaningfully than they had been in U.S. courts since Oyama. The Second Circuit Court of Appeals found in Filártiga that the plaintiffs had suffered a violation of their human rights as guaranteed by international law. The violation occurred in Paraguay in 1976 when Joelito Filártiga was kidnapped, tortured, and killed by Americo Peña-Irala, the Inspector General of Police in Asuncion. Joelito's death was in retaliation for his father's vocal and long-standing opposition to President Alfredo Stroessner, who had been in power in Paraguay since 1954. After Joelito was tortured and killed in Peña-Irala's home, his sister, Dolly, was taken to the home and shown the body of her dead brother. Joelito's father, Dr. Joel Filártiga, began a criminal action in the Paraguayan courts against Peña-Irala and the Asuncion police. Filártiga's attorney, who was

75. Id. As further support for these sources of international law, the Statute of the International Court of Justice lists "general principles of law recognized by civilized nations" and "judicial decisions and the teachings of the most highly qualified publicists" among its sources of international law. The Statute of the International Court of Justice, supra note 15, art. 38.


77. Filártiga, 630 F.2d at 879-80.
later unjustly disbarred, was taken to police headquarters, chained to a wall and threatened with death. During the criminal proceeding, which was still pending in 1980, the police produced a witness, Hugo Duarte, who claimed to have killed Joelito after finding him with Duarte's wife. This crime of passion was not punishable under Paraguayan law. In any event, independent autopsies did not bear out this version of Joelito’s death.

In 1978, Dr. Filartiga, his daughter Dolly, and Americo Peña-Irala were all in the United States. When Dolly learned of Peña-Irala’s presence in the United States, she reported him to the INS and he was arrested for remaining beyond the term of his visitor’s visa. The Filartigas then filed a civil suit against Peña-Irala in federal district court, alleging causes of action that arose under wrongful death statutes, the U.N. Charter, the Universal Declaration of Human Rights, the U.N. Declaration Against Torture, and the American Declaration of the Rights and Duties of Man. The district court dismissed the complaint on jurisdictional grounds. On appeal to the Second Circuit, however, Judge Irving Kaufman found that torture violated customary international human rights law and that U.S. courts had jurisdiction over the case under the Alien Tort Act. Unfortunately, because of the original dismissal, the Filartigas were unable to delay the deportation of Peña-Irala and he was allowed to leave the country.

In applying the U.N. Charter to this case, Judge Kaufman noted:

While [the human rights provisions of the Charter have] been held not to be wholly self executing, this observation alone does not end our inquiry. For although there is no universal agreement as to the precise extent of the “human rights and fundamental freedoms” guaranteed to all by the Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of

79. Id. at 284.
80. Id. at 285.
81. Filartiga, 630 F.2d at 879-80.
82. Alien's Action for Tort, 28 U.S.C. § 1350 (1948). “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id.
83. 630 F.2d at 880.
customary international law, as evidenced and defined by
the Universal Declaration of Human Rights ....

Judge Kaufman's approach to the U.N. Charter was unique in several
respects. First, he noted that the Charter was not "wholly self-executing"
(emphasis added). In past cases, courts had dismissed the human rights
provisions of the Charter as entirely non-self-executing. Second, he found
that the lack of self-execution in itself did not foreclose the possibility of
reliance on the Charter. Rather, Judge Kaufman utilized the Charter to lay
the foundation that human rights guarantees exist in international law, then
consulted other sources such as the Universal Declaration of Human
Rights to determine the extent of these rights. Judge Kaufman's approach,
therefore, layered international obligations one on top of the other to arrive
at the international norm of freedom from torture.

Judge Kaufman noted a lack of agreement on the "precise extent"
of the human rights norms that are guaranteed by the Charter. The
Charter was consulted not to show the content of a specific human right,
but rather that the inclusion of "human rights and fundamental freedoms"
in the Charter demonstrated the presence of human rights under
international law. Judge Kaufman went on to examine other U.N.
declarations characterized as "specify[ing] with great precision the
obligations of member nations under the Charter," noting that a
"[d]eclaration creates an expectation of adherence." Judge Kaufman also
examined the domestic law of various nations as a means determining
international norms, observing that the United States and Paraguay, as well
as at least fifty-three other nations, explicitly outlawed torture in their
constitutions. The significance of the Filártiga court's analysis to U.S.
domestic law was that the U.N. Charter was judicially held to be a
guarantee of human rights that may be applied to an individual in the U.S.
courts. Judge Kaufman thus restored the Charter, whose human rights
provisions had been deemed too vague to be self-executing. Clearly,
further action was needed to list and define the specific rights that are
guaranteed under international law, but Judge Kaufman's analysis allowed
measures other than domestic legislation to demonstrate the execution of a
treaty. The Paquete Habana clearly stated that international law is part of
U.S. law. Judge Kaufman used international customary law discerned
from U.N. documents, treaties, domestic laws, and the writings of scholars

84. Id. at 881-82.
85. Id. at 883.
86. Id. at 884.
to define the extent of the rights in the Charter and provide the necessary "legislation" to execute those provisions.

The court's decision in Filártiga was seen as a milestone by international human rights lawyers who had previously been frustrated in their attempts to apply international human rights law in U.S. courts. But hopes that were raised by Filártiga were dashed four years later by Tel-Oren v. Libyan Arab Republic. The story behind Tel-Oren was as horrendous as the factual backdrop of Filártiga. In 1978, thirteen members of the Palestine Liberation Organization (PLO) landed by boat in Israel and seized two civilian buses, a taxi, and a private car, taking the passengers hostage. The passengers were tortured and eventually twenty-two adults and twelve children were killed. Eighty-seven people were seriously injured. The suit was brought by survivors and next-of-kin of those murdered, mostly Israeli citizens. The defendants included the PLO and the Libyan Arab Republic. It was alleged that Libya trained the terrorists and financed the operation.

The District court dismissed the suit as lacking subject matter jurisdiction. The D.C. Circuit upheld the dismissal with three concurring opinions. Many saw this dismissal as a retreat from the principles set forth in Filártiga. However, only Judge Bork explicitly denounced the Filártiga court's reasoning. His disagreement was based largely on the question of whether the Alien Tort Act created a cause of action or simply provided for jurisdiction. Judge Bork found the Alien Tort Act was a jurisdictional statute only and went on to opine that no individual cause of action arose under the U.N. Charter (or the other treaties cited) because of the doctrine of non-self-execution. He further noted that the Alien Tort Act, drafted in 1789, must be read in light of the international law recognized at that time. Judge Robb did not explicitly disagree with the Filártiga court, but found that terrorism as a crime is not clearly defined in international law. Asserting that the executive branch should more appropriately declare the U.S. position on the crime of terrorism, he found the case nonjusticiable under the political question doctrine. Judge Edwards, however, agreed with "the legal principles established in Filártiga," although he found a lack of consensus in the international community that terrorism committed

87. See, e.g., Claude, supra note 78.
88. 726 F.2d at 775-827.
89. The Tel-Oren court did not address the evidence, if any, that proved the participation of the PLO in this attack. Id. at 775.
91. For a definition of the political question doctrine, see supra note 6.
92. Tel-Oren, 726 F.2d at 776.
by a non-State actor (the PLO) was a violation of international law. (Libya was only accused of financing and training the terrorists, not of participating in the event.)

In spite of the decisions in *Tel-Oren*, the U.N. Charter is still seen as a source of international human rights law in U.S. courts. Although the Charter is not universally accepted by jurists, the reasoning of the Charter’s most vociferous opponent in *Tel-Oren* is not widely accepted. Judge Bork found the U.N. Charter non-self-executing and further claimed that the Alien Tort Act, enacted in 1789, gave jurisdiction only if the claimed violation would also have been an international law violation recognized in 1789. Judge Bork consulted Blackstone and found three possible offenses against the law of nations: violations of safe conduct, infringement of the rights of ambassadors, and piracy. Judge Edwards pointed out, this construction ignored the precedent established in *The Paquete Habana*, for applying international law as it exists “at the present day.” On its surface, *Tel-Oren* appeared to cut against the *Filartiga* principles. However, the factual differences in the cases as well as the dissimilarity of the torts claimed (torture and terrorism) make the two cases easily distinguishable. Certainly *Filartiga*, which has been questioned by subsequent courts, does not necessarily establish precedent. Nonetheless, one recent case in particular indicates that the *Filartiga* doctrine is still good law.

The U.S. District Court for the Northern District of California decided *Forti v. Suarez-Mason* on October 6, 1987, three years after the *Tel-Oren* court cast doubt on the *Filartiga* principles. Once again, the facts of the case tell a disturbing tale. In the late 1970s, in Argentina, both left-wing and right-wing extremists waged a war of terrorism against suspected subversives. In response to this “dirty war,” President Peron declared a state of siege in 1975 and gave the military the responsibility for suppressing terrorism. Suarez-Mason was Commander of the First Army Corps. In 1976, the Army ousted Peron and took control of the country. The state of siege continued, and between 1976 and 1979 an estimated 12,000 people disappeared at the hands of the military. In 1984, Raul Alfonsin was elected President of Argentina and the government began investigating human rights abuses, bringing criminal charges against offenders. Suarez-Mason was one of those charged, but he fled the

93. *Id.* at 813.
country. In 1987, he was arrested in California and while awaiting extradition was served with the complaint in this case. The petition was filed by Alfredo Forti and Debora Benchoam. The complaint was based on activities that took place in the area of Argentina commanded by Suarez-Mason. On February 18, 1977, military officials seized Alfredo along with his mother and four brothers. Although no charges were ever filed against them, the five brothers were held in detention for six days, before being released-blindfolded-on a street in Buenos Aires. Their mother was not released and in 1987 her whereabouts were still unknown. An Argentine court held the First Army Corps, commanded by Suarez-Mason, responsible for the seizure of the Forti brothers and the disappearance of their mother.

The second petitioner, Debora Benchoam, was sixteen when she and her seventeen year old brother were taken from their home by the military in 1977. Debora was held by the authorities for more than four years. While imprisoned, she was blindfolded, handcuffed, and deprived of food and clothing; one of her guards attempted to rape her. As a result of international and domestic pressure, she was finally granted the "right of option" which allowed her to leave Argentina. The body of Debora's brother was returned to his family the day after his abduction. He had been severely beaten and died of bullet wounds. Both plaintiffs accused Suarez-Mason of torture, prolonged arbitrary detention, summary execution, causing disappearance, and cruel, inhuman, and degrading treatment.

The Forti court found that the Alien Tort Act provided jurisdiction in the case, following the reasoning of the Filártiga court and Judge Edwards in Tel-Oren. The court noted this analysis is the "better reasoned and more consistent with principles of international law. There appears to be a growing consensus that § 1350 provides a cause of action for certain 'international common law torts.'" The court found that the "proscription [against official torture] is universal, obligatory and definable." The court also found causes of action for prolonged arbitrary detention and summary execution, but could find no international consensus on prohibitions against causing disappearance or cruel, inhuman and degrading treatment. Conspicuously absent from the court's analysis

96. Id. at 1536.
97. Id. at 1537.
98. Id.
99. Id. at 1539.
100. Forti, 672 F. Supp. at 1541-43.
is any mention of the U.N. Charter. Perhaps the court’s silence meant that the Charter was so clearly understood to guarantee individual human rights that it need not even be argued.\textsuperscript{101}

C. The 1990s

The trend of relying on the U.N. Charter to provide statements of the basic, underlying principles of international law as they relate to individuals has continued. In \textit{U.S. v. Verdugo-Urquidez},\textsuperscript{102} the court was required to interpret an extradition treaty between the United States and Mexico.\textsuperscript{103} Since a legal document was available, the court did not need to perform an exhaustive search for customary principles of international law. Verdugo-Urquidez had been abducted in Mexico by Mexican citizens working on behalf of the U.S. government. He was brought to the United States and tried and convicted in the murder of a U.S. Drug Enforcement Agent in Mexico. He appealed his conviction on the ground that the United States had violated their treaty obligations with Mexico and therefore could not exercise jurisdiction over him. The Court of Appeals overturned his conviction.\textsuperscript{104} The U.S. government argued that since the extradition treaty did not specifically forbid abductions, their actions did not violate the treaty. In rejecting this argument, the court turned to the U.N. Charter as proof that the “territorial integrity of a sovereign nation may not be breached by force.”\textsuperscript{105} While territorial integrity is not usually thought of as an individual right, in this instance it provided the rationale for proving that the extradition treaty and hence Verdugo-Urquidez’s individual rights had been violated. In 1992, the Supreme Court was called upon to decide this issue in \textit{U.S. v. Alvarez-Machain}.\textsuperscript{106} Under the same extradition treaty and in response to the same murder in Mexico, the U.S sponsored the abduction of another Mexican national. The Supreme Court found, contrary to the \textit{Verdugo-Urquidez} court, that the United States had not violated the

\textsuperscript{101} In a recent case dealing with the international laws of the sea, the Court of Appeals for the Second Circuit noted, “the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas.” Amerada Hess v. Argentina, 830 F.2d 421, 424 (2d Cir. 1987), rev’d, 488 U.S. 428 (1989), reprinted in 26 I.L.M. 1374, 1378 (1987).

\textsuperscript{102} 939 F.2d at 1341.


\textsuperscript{104} Verdugo-Urquidez, 939 F.2d at 1341.

\textsuperscript{105} Id. at 1352.

\textsuperscript{106} Alvarez-Machain, 112 S. Ct. at 2188.
extradition treaty because the treaty did not specifically prohibit the abductions. The Court noted that the defendant raised the issue that the U.N. Charter should inform the interpretation of the extradition treaty. However, the Court did not reach the issue of sovereign territorial integrity, a State claim, noting instead that Alvarez-Machain did not claim that the U.N. Charter provided him any individual rights in this context. The Court examined closely the language and purposes of the extradition treaty itself, and concluded that the determination of a treaty violation was better left to the diplomatic offices of the two governments.

Although the majority in *Alvarez-Machain* glossed over the issue of territorial integrity presented by the U.N. Charter, the three dissenting Justices were not so dismissive. Justice Stevens, joined by Justices Blackmun and O'Connor, mentioned the U.N. Charter only once in his dissent, in a footnote. However, that footnote was one of at least five references in the dissent to the doctrine of sovereign territorial integrity. Just as the *Forti* court's failure to mention the Charter may be construed as a sign of its acceptance, the relegation of the Charter to a footnote in this dissent may also indicate acceptance of the Charter's authority. Justice Stevens found no need even to argue whether the Charter provided an authoritative statement of the principle of territorial sovereignty.

III. CONCLUSION

The context of *Alvarez-Machain* is similar to *Sei Fujii* and *Tel-Oren*. All of these cases followed precedents (*Oyama*, *Filártiga*, and *Verdugo-Urquidez*) that were milestones in incorporating international law via the U.N. Charter into U.S. domestic law. On the surface, all three of the subsequent cases appear to restrict the application of the U.N. Charter outlined by the precedents. *Sei Fujii*, with its long-unquestioned doctrine of non-self-execution, especially operated to restrict the application of the Charter principles to individual rights in the United States. However, the historical context proves these cases to be less damaging to applying the Charter than they first appeared. It is premature to assess the impairment to applying Charter principles caused by *Alvarez-Machain*, as it was decided just two years ago. The earlier decisions, however, as evidenced by *Forti*, convey that the U.N. Charter is not merely a "moral commitment

107. Id. at 2193.
108. Id. at 2196.
109. Id. at 2198, 2199, 2201, 2202, 2206 (Stevens, J., dissenting).
of foremost importance,""110 but a document that “guarantee[s] [human rights and fundamental freedoms] to all ....”"111

In 1952, the Supreme Court of California was influenced by political concerns to back away from the commitment to the United Nations expressed by four Justices of the Supreme Court in Oyama. But over the last four decades, the Court has slowly regained its commitment to the United Nations and to the U.N. Charter as an authoritative document. What is the context of this renewal? The changing government and public opinion toward the United Nations may be traced back to the late 1960s. As the Commission to Study the Organization of Peace noted, in 1968, “[i]t cannot be doubted that the provisions of the Charter and the continuous worldwide debate about their implementation have brought a change in the moral and political climate ....”112 In 1977, speaking before the U.N. General Assembly, President Jimmy Carter said that “no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.”113 President Carter renewed the drive for the United States to ratify the major human rights treaties, although this was not accomplished during his presidency.114

In 1979, the U.S. Court of Appeals for the Second District requested an amicus curiae brief from the U.S. Department of Justice in the Filártiga case. The Department of Justice, with the input of the Department of State, delineated the U.S. position in regard to the U.N. Charter. The brief noted that the Charter “imposed on U.N. members a general obligation to promote "universal respect for, and observance of, human rights and fundamental freedoms ...."”115 The brief went on to state that “in nations such as the United States where international law is part of the law of the land, an individual’s fundamental human rights are in certain situations directly enforceable in domestic courts.”116

111. Filártiga, 630 F.2d at 881.
114. See supra note 17.
116. Id. at 603.
The Reagan and Bush administrations have also participated in the legitimization of the United Nations and the Charter. Under the Reagan Administration in 1988, the Senate ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the first human rights treaty ratified by the United States since the U.N. Charter. In a very different context which may have called into question U.S. allegiance to human rights per se but reaffirmed U.S. commitment to the United Nations, President Bush chose to work within the framework of the U.N. Security Council in pursuing military intervention against Iraq.

The expansion of the U.S. commitment to the United Nations and the Charter may be too recent to forecast a change in international law. The presidential campaign and election of Bill Clinton in 1992 reveal growing discontent in the United States with concern over foreign affairs. However, since the founding of the United Nations in 1945, U.S. acceptance of the U.N. Charter has increased, although that growth has not been without its waning periods. While the U.S. public is weary with government preoccupation with foreign matters, the safeguarding of human rights for all individuals, as expressed by the U.N. Charter, appears to be firmly entrenched in the U.S. court system. The next few years may not see a burgeoning of the human rights recognized by the courts, but it appears unlikely that the courts will retreat from the Charter and its dictates.

While fears of communism and diminution of states' rights hobbled the U.N. Charter in U.S. courts in the past, another concern is raised today. With increasing respect for the diversity among cultures, the question of the appropriateness of a U.S. court ruling on matters pertaining to foreign nationals and foreign governments arises. Fears of paternalism by the United States are not unfounded. However, the application of the U.N. Charter in U.S. courts also presents opportunities that were not available in the past. Although the cases discussed herein dealt only with foreign nationals, the growing acceptance of customary international human rights law as evidenced by the U.N. Charter may provide relief for

117. See supra note 17. See also Reagan Oks Genocide Treaty, ST. LOUIS POST DISPATCH, Nov. 5, 1988, at 1B.


119. See, e.g., Michael Kranish, Little Political Gain Seen for Bush at G-7 Summit, BOSTON GLOBE, July 5, 1992, at A9; Leslie H. Gelb, They Agree to Disagree, Bush Creates a Fake Fight to Avoid a Real One, DETROIT FREE PRESS, July 31, 1992, at 11A.
U.S. citizens in the future. As noted above, African-Americans attempted to solicit the help of the United Nations in the struggle for desegregation. Similarly, Native American tribes have filed formal complaints with the U.N. Human Rights Commission relating to issues of self-determination and property rights. Although the United Nations has taken no action on these petitions, the U.S. courts may soon determine such claims by U.S. citizens based on international law. The closest a U.S. court has come to taking this type of action was in Rodriguez-Fernandez v. Wilkinson. Rodriguez-Fernandez was not a U.S. citizen, but a Cuban seeking refugee status. While in Cuba, he had been convicted of burglary and theft. Based on these convictions, the I.N.S. ordered him deported, but Cuba would not accept him. He was held in a federal penitentiary, pending his acceptance by Cuba. He filed a writ of habeas corpus, on the grounds that his indefinite detention violated the Constitution and international human rights law. The district court found that Rodriguez-Fernandez, as an excludable alien, could not claim Constitutional protection, but that his detention violated customary international human rights norms. On appeal, he was ordered released as a matter of domestic law. The court of appeals did not as obviously acknowledge the claim as based on international law, but nonetheless noted that their decision was consistent with international law.

As a matter of international law, domestic courts have long been seen as an appropriate enforcement mechanism. Indeed, "[g]iven the dearth of truly effective human rights fora, national courts are the primary guarantors of the rights of man [sic]." Certain violations of international law are universal offenses, to be tried by a State even when they occur outside its territory. Piracy and genocide are such offenses; the Filártiga opinion adds torture to this list. The lack of international fora make this use of national courts necessary. "The cause of international law and justice demands application of international law by national courts." The reliance on the U.N. Charter and customary norms of international law by U.S. courts in recent decades expresses the evolution of international law

120. See Dudzian, supra note 4, at 93-98.
124. Id. at 1390.
126. Amerada Hess, 830 F.2d at 421.
and the importance of U.S. compliance with such law. The potential for chauvinistic application of human rights norms certainly exists, but the understanding that international law applies within the borders of the United State is a decidedly non-paternalistic stance. While application can be problematic and approaches are not universal, the United States is a member of the world community and as such is subject to international law. This historical analysis of the U.N. Charter and the U.S. courts denotes an increasing awareness of the obligations and duties of the United States as a member of the world community.
RESHAPING TRADEMARK PROTECTION IN TODAY'S GLOBAL VILLAGE: LOOKING BEYOND GATT'S URUGUAY ROUND TOWARD GLOBAL TRADEMARK HARMONIZATION AND CENTRALIZATION

Harriet R. Freeman*

I. INTRODUCTION: TRADEMARK PROTECTION IN THE GLOBAL VILLAGE: THE NEED FOR GLOBAL HARMONIZATION AND CENTRALIZATION

II. INTERNATIONAL AGREEMENTS: THE FAILURE TO PROTECT TRADEMARKS IN THE GLOBAL VILLAGE

A. Paris Convention for the Protection of Industrial Property of 1883, as revised and amended (Paris Convention)

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I. INTRODUCTION

TRADEMARK PROTECTION IN THE GLOBAL VILLAGE: THE NEED FOR GLOBAL HARMONIZATION AND CENTRALIZATION

The world has become a "global village" in which the "medium is the message."¹ A business engaged in international trade uses its trademark² as the medium to convey its message. As the medium of the


². A “trademark” falls within the legal concept of “intellectual property.” This Article discusses only trademark rights and not other intellectual property forms such as copyright and related rights, patents, trade secret, industrial designs, and layout designs of integrated circuits.

The term “trademark” includes any word, name, symbol, or device, or any combination thereof--(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127 (1994). Further, section 1127 of the United States Code describes a “mark” as “any trademark, service mark, collective mark, or certification mark.” Id. A “service mark” “identifies and distinguishes the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.” Id. A “collective mark” indicates a trademark or service mark used by the members of a cooperative, an
message, the trademark becomes a valuable business asset which must be protected from unfair competition and deceptive trade practices, including counterfeit products and dilution. However, international trademark protection does not come easy because the global village lacks the framework to provide such protection. Even if counsel possesses knowledge and experience in both international trade and trademark law, international trademark protection may be evasive.

This Article demonstrates the need to rethink and reshape international trademark protection for the global village rather than maintaining a status quo controlled by territoriality. The doctrine of territoriality recognizes that a trademark has a separate existence in each sovereign territory where registered or legally recognized as a mark. This means modern "trademark rights exist in each country solely according to that country’s statutory scheme." Thus, international trademark protection must be sought in each country where a business intends to use its association, or other collective group or organization. Id. A “certification mark” demonstrates the use by persons other than its owner “to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.” Id. In this article, trademark includes service mark, collective mark, and certification mark.


4. Yelpaala, supra note 1, at 840 (explaining that the global market demands international counsel possess greater knowledge of related subject matter to handle more complex and innovative transactions).


However, statutory schemes differ in procedure and substance, which makes obtaining such protection complicated and beyond the financial resources of many businesses engaged in international trade. Further, even when a country offers trademark rights, it may enforce those rights inadequately or ignore enforcement entirely, which, unfortunately, vitiates a country's offer.

During the past year, international negotiators took a giant leap towards international trademark protection for the global village when they completed The Uruguay Round of the General Agreement of Tariffs and Trade (GATT 94) and The Trademark Law Treaty (TLT). Although


To register, the international businessman is forced to meet different procedural and substantive requirements in every country, to complete a bewildering variety of different forms in different languages, to cope with different and sometimes unintelligible systems of classifications of goods, to submit electro-types and prints differing in size and number, and to pay disparate official fees in a plethora of currencies. After registration has been obtained, its assignment, licensing or renewal is again subject to differences in national treatment. Perhaps most painful of all, the international businessman's inability to cope directly with all these differences compels him to retain, in each country in which he desires protection, trademark attorneys or agents to do the necessary, against payment, of course, of a reasonable professional fee for the unravelling of the mysteries of national law.


9. See, e.g., Leaffer, supra note 3, at 274-75 (describing the schism between developed and developing countries in attitudes toward trademark enforcement); Giunta & Shang, supra note 8, at 328. In addition, the United States uses the common law system which relies on case precedent, but many countries (i.e., most of Central America, South America, and Western Europe) rely on the civil law system which grounds itself in the codified law and, generally, ignores case precedent. See Sandoval & Leung, supra note 7, at 152-53. Moreover, civil law does not provide injunctive relief or other pre-trial remedies, unlike our common law system. Id.


11. The Final Act of the Multilateral Trade Negotiations (The Uruguay Round) and Introductory Note, 33 I.L.M. 1125 (1994) [hereinafter GATT 94]. Other documents annexed thereto are reproduced also in volume 33, I.L.M.: Agreement Establishing the World Trade Organization, id. at 1143; General Agreement on Tariffs and Trade 1994, and The Uruguay Round Protocol GATT 1994, included under Agreements on Trade in Goods, id. at 1154; Agreement on Trade-Related Aspects of Intellectual Property, Including Counterfeit Goods, id. at 1197; Agreement on Trade in Services, id. at 1168; Understanding on Rules and Procedures Governing the Settlement on Disputes, id. at 1226; and various Ministerial Decisions and Declarations, id. at 1248. See infra pp. 92-96.
these two agreements leave some problems unresolved, they demonstrate the global village's desire to provide a basic multilateral framework for international trademark protection. In addition, the United States Trade Representative (USTR) has been negotiating bilateral and regional trade agreements which reinforce and even strengthen the international trademark protection provided in GATT 94.\textsuperscript{13}

This Article advocates the expansion of these endeavors to create adequate protection for the international trademark. The author argues that this expansion cannot occur until international negotiators view the world as the global village it has become. Protectionists must be deserted, and the doctrine of territoriality must be reshaped, or even abandoned, in favor of expansion which strengthens the global village.

The author further argues that global harmonization of national laws to acquire trademark rights and centralization of trademark filings and registrations must occur, because such harmonization and centralization create the foundation for international trademark protection in a global village. Given the lack of substantial opposition to centralization and the current availability of computer technology, a centralized system for international trademark filing and registration could exist today, but negotiators have failed to put in place such a system. This failure will continue until the negotiators embrace the global village and initiate global harmonization.

Furthermore, the needs of both the developed and developing countries must be considered. When initiating global harmonization, the developed countries take the position that the trademark owner possesses a property right in the trademark, and the developing countries take the position that all their citizens need access to information for their economies to grow.\textsuperscript{14} The developing countries confront "two often conflicting challenges. First, they must enter and participate in the global marketplace on a substantive basis. Second, they must structure meaningful legal regimes which legitimize their participation."\textsuperscript{15} While the trademark laws in many developed countries are well-established, such laws are still evolving in most developing countries.\textsuperscript{16}

In addition, trademark laws among the developed countries may differ, and even directly conflict. For example, to file a trademark, the

\begin{itemize}
\item \textsuperscript{12} Trademark Law Treaty and Regulations Under the Trademark Law Treaty, Oct. 27, 1994, TLT/DC/53 WIPO [hereinafter TLT]; see infra pp. 92-96.
\item \textsuperscript{13} See 19 U.S.C. § 2171 (1994); Sandoval & Leung, \textit{supra} note 7, at 147-48.
\item \textsuperscript{14} See Giunta & Shang, \textit{supra} note 8, at 328-33.
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} Sandoval & Leung, \textit{supra} note 7, at 147.
\end{itemize}
United States requires use of, or a bona fide intent to use, a trademark in commerce, but other countries do not require use or even an intent to use. However, this Article's purpose is not to enumerate those conflicts but rather to advocate international trademark protection through global harmonization of national trademark laws and centralization of trademark filing and registration. Thus, this Article focuses only on global harmonization and centralization, and it does not discuss the enforcement of trademark laws or other problems of domestic and international trademark protection.

Part One surveys international agreements containing trademark rights and obligations. It further analyzes the failure of these agreements to protect trademarks in the global village. At best, they provide a minimum standard for international trademark protection. Generally, they do not address global harmonization of national trademark laws. This failure prevents the establishment of a viable centralized trademark filing and registration system, even if these international agreements address centralization.

Part Two proposes that multilateral, regional, and bilateral agreements provide the medium for global harmonization and centralization. Section One of Part Two recommends that the Council for Trade-Related Aspects of Intellectual Property be the primary initiator of global harmonization and centralization. Section Two of Part Two further recommends that regional and bilateral agreements strengthen and reinforce a Council for TRIPS' initiative for global harmonization and centralization. Finally, this Article concludes, optimistically, that a Council for TRIPS' initiative supported with regional and bilateral agreements can provide adequate trademark protection in the global village.

II. INTERNATIONAL AGREEMENTS: THE FAILURE TO PROTECT TRADEMARKS IN THE GLOBAL VILLAGE

This section delineates, in historical order, the principal international agreements which contain trademark rights and obligations. In addition, it demonstrates the lack of international trademark protection

19. These agreements, which include treaties and conventions, may be multilateral, regional, bilateral, or bipartite.
because none of these agreements provide both harmonization of national trademarks laws and centralization of trademark filing and registration.

A. Paris Convention for the Protection of Industrial Property of 1883, as revised and amended (Paris Convention)

In 1883, the Paris Convention established intellectual property rights and obligations in an international agreement, resulting in the first multilateral agreement addressing trademarks. Prior to this time, a few bilateral treaties, some involving the United States, and at least sixty-nine bipartite treaties offered some form of trademark protection to foreigners. Although the Paris Convention addresses trademarks and other marks, patents, utility models, and industrial designs, this Article examines only the rights and obligations relating to trademarks.

The Paris Convention provides trademark protection based on national treatment, priority rights, and registration. National treatment prohibits a country from providing less favorable trademark treatment to foreigners than to its citizens, but no requirement of reciprocal treatment exists. The Paris Convention further prohibits any signatory from


On March 20, 1883, eleven countries signed the original convention, the Convention of the Union of Paris, and the United States became a signatory in 1887. Today, the Paris Convention has 103 members, but not all signatories have signed the same version. Generally, the most recent version signed by all nations in question constitutes the applicable version unless, when ratifying or acceding, a nation excluded certain articles of that version. John B. Pegram, Trademark Law Revision: Section 44, 78 TRADEMARK REP. 141, 151 (1988).

The later versions tried to preserve the original numbering of the articles. Beginning with the Washington Conference, any new provisions which did not fit into the old article was inserted as a new article having French ordinal suffixes bis, ter, quinter, quinquies, sexies, and septies. See id. at 154.


The Nationals of any country of the Union shall, as regards the protection of [trademarks], enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement
requiring domicile or establishment in its country to obtain trademark protection.\textsuperscript{24} National treatment for trademark protection existed prior to the Paris Convention\textsuperscript{25} and has continued as the basis for most international agreements offering trademark protection. The Paris Convention has been criticized because of its use of national treatment which allows a country to avoid providing trademark protection for foreigners if it does not provide trademark protection for its citizens.\textsuperscript{26}

However, the Paris Convention initiated the right of priority, which creates a nationally-based priority filing date.\textsuperscript{27} The filing date of a duly filed trademark application in one of the Union countries can be claimed as a right of priority at any time within six months in corresponding applications in other Union countries.\textsuperscript{28} The domestic laws of each country determine the conditions for the filing and registration of a trademark.\textsuperscript{29} The Paris Convention does not provide for centralized filing or registration. Thus, a trademark owner must file and register in each country where protection is desired\textsuperscript{30} unless another agreement exists which provides for centralization of filing and registration.\textsuperscript{31}

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of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

\textit{Id.}

The Union consists of the Paris Convention signatories and exists for the protection of industrial property, including trademark protection. \textit{Id.} art. 1.

24. \textit{Id.} art. 2.
27. \textit{See} Pegram, \textit{supra} note 20, at 155 (explaining no prior bilateral treaty contained right of priority).
28. \textit{See id.}; Paris Convention, \textit{supra} note 20, art. 4.
29. Paris Convention, \textit{supra} note 20, art. 6. Article 6 provides: (1) a trademark registration application by a national of a Union country in any Union country "may not be refused, nor may a registration be invalidated, on the ground that filing, registration, or renewal has not been affected in the country of origin," and (2) "[a] mark duly registered in a country of the Union shall be regarded as independent of marks registered in the other countries of the Union, including the country of origin." \textit{Id.}
30. \textit{See} Browning, \textit{supra} note 3, at 342 (explaining that the Paris Convention "does not provide trademark protection across Paris Union members' borders").
31. Paris Convention, \textit{supra} note 20, art. 19. "[T]he countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention." \textit{Id.} This allows additional agreements without violating the international agreement principle of specialty.
Although the Paris Convention sets some minimum standards for national trademark laws in Union countries, no serious discussion regarding harmonization of national trademark laws has occurred among Union countries. Since the global village did not exist in 1883 and was only in its infancy during the Stockholm Convention in 1967, the lack of such discussion during those times can be understood. However, the global village does exist today, but the International Bureau and the World Intellectual Property Organization have been unwilling to seriously discuss global harmonization of national trademark laws. This has resulted in failed attempts to create a global centralized trademark filing and registration system. Such failure supports the author’s argument that global centralization of trademark filing and registration will not be viable without global harmonization of national trademark laws.

B. Madrid Agreement Concerning the International Registration of Marks of 1891, as revised and amended (Madrid Agreement)

In 1891, some of the Paris Union countries established the Madrid Agreement to create a uniform system for the international filing and registration of trademarks. The Madrid Agreement allows its member countries to “secure protection [in all Madrid Union countries] for their marks.”

32. Paris Convention, supra note 20, arts. 6-11 (enumerating specific rights and obligations of trademarks and other marks). This Article’s purpose is not to enumerate such rights and obligations in any international agreement, but rather to determine if global harmonization of national trademark laws, and centralization of trademark filing and registration occurred, and if not, whether such harmonization and centralization should occur.

33. See Yelpaala, supra note 1.

34. The Paris Convention established the International Bureau to administer the Convention. Paris Convention, supra note 20, art. 15.

35. The International Bureau was incorporated into the World Intellectual Property Organization when it took over the administration of the Paris Convention and the Madrid Unions. See infra pp. 79-80.

36. See infra pp. 76-78, 81-84.


38. “The countries to which this Agreement applies constitute a Special Union for the international registration of marks.” Madrid Agreement, supra note 37, art. 1(1) [hereinafter
[trademarks], registered in the country of origin, by filing the said [trademarks] at the International Bureau39 . . . , through the intermediary of the Office of the said country of origin."40 This extends the Paris Convention's territoriality principal by allowing individual national registrations in the Madrid Union if the trademark applicant procedurally followed the Madrid Agreement and its Regulations, and the individual countries, where registrations are sought, approve the application based on their individual national laws.41 Without such approval, the registrations by themselves confer no substantive rights because such rights flow only from the national laws where the applicant sought registration.42 Thus, filing a trademark registration application with the International Bureau offers a single location to apply for trademark registration in multiple Madrid Union countries, but extends no substantive rights unless and until the individual national trademark offices recognize the trademark registration as valid under their national laws.43

Although general support existed in the United States for a centralized trademark filing and registration system, the United States did not join the Madrid Agreement. The United States' rejection was based on numerous objections. First, the Madrid Agreement requires the filing of a trademark application based on perfection of a home country or basic

39. See Paris Convention, supra note 20 The International Bureau was incorporated into the WIPO when it took over the administration of the Paris Convention and the Madrid Unions. See infra pp. 79-80.

40. Madrid Agreement, supra note 37, art. 1(2).

41. See Browning, supra note 3, at 342-43 (describing the method of filing and registration); Samuels & Samuels, supra note 10, at 442-43 (enumerating the Madrid Agreement's specific articles pertaining to filing and registration); Joseph Greenwald & Charles Levy, Madrid Agreement Concerning the International Registration of Marks, Introduction, 1 B.D.I.E.L. 759 (1994) (explaining not only filing and registration procedure, but also Madrid Agreement facilitates trademark filing in different countries by allowing applicant to file one application, in one language, and to pay one set of fees to seek protection in multiple jurisdictions); Roger E. Schecter, Facilitating Trademark Registration Abroad: The Implications of U.S. Ratification of the Madrid Protocol, 25 GEO. WASH. J. INT'L L. & ECON. 419 (1991) (finding Madrid Agreement provides efficient, economical means to obtain simultaneous trademark protection in numerous foreign countries and explaining procedure).

42. Samuels & Samuels, supra note 10, at 442.

43. See Browning, supra note 3, at 343 (citing INT'L TRADEMARK ASS'N, MADRID PROTOCOL: A PRACTITIONER'S GUIDE (1993)).
registration requirement.\textsuperscript{44} This disadvantages the United States trademark applicant because registration takes longer in the United States than in most countries.\textsuperscript{45} Next, the Madrid Agreement requires a twelve month time limit for refusing to register a trademark registration.\textsuperscript{46} This time limit is too short because examination of a trademark in the United States involves a lengthy process.\textsuperscript{47} For the United States to complete its examination within twelve months would require giving Madrid Union Application priority over domestic applications which would cause a longer pendency for domestic applications.\textsuperscript{48} The Madrid Agreement also requires the inclusion of a central attack provision which requires the trademark protection resulting from the Madrid registration to cease completely if within five years from the date of such registration, the home country registration is successfully attacked, in whole or in part.\textsuperscript{49} This is considered to be unfair to the United States trademark owners because the United States has many more grounds for attacking registration than most other countries.\textsuperscript{50} Next, the Madrid Agreement lacks a use or bona fide intent to use requirement for filing or registration.\textsuperscript{51} This disadvantages the United States which requires use or intent to use for registering a trademark.\textsuperscript{52} The Madrid Agreement also lacks a standard description for classifying goods and services in trademark registrations.\textsuperscript{53} The Madrid Agreement increases the likelihood of increased dead wood (abandoned trademarks) on the national registry.\textsuperscript{54}

Thus, since the Madrid Agreement conflicted with aspects of United States trademark law and did not harmonize national trademark laws, its centralized filing and registration system could not be accepted by the United States. However, regardless of the shortcomings of the Madrid Agreement, support was not lost for a centralized trademark filing and registration system.\textsuperscript{55}

\textsuperscript{44} See Samuels & Samuels, \textit{supra} note 10, at 443-44.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} See Samuels & Samuels, \textit{supra} note 10, at 443-44.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} See Samuels & Samuels, \textit{supra} note 10, at 443-44.
\textsuperscript{55} See Anthony R. DeSimone, \textit{In Support of TRT}, 63 TRADEMARK REP. 492 (1973); \textit{infra} pp. 77-78, 81-86.
C. Pan American Convention of 1929, as revised, including the General Inter-American Convention for the Protection of Trademarks (Pan American Convention)

The Pan American Convention of 1929, as revised, consists of two separate parts: a Convention for Trade Mark and Commercial Protection, and a Protocol on Inter-American Registration of Trade Marks. This Convention was the first attempt in the Western Hemisphere to harmonize national trademark laws and provide a centralized filing and registration system. Although the Convention provides for national treatment and a centralized filing and registration system, it does not strengthen the Paris Convention nor the Madrid Agreement. However, it does show the desire for cooperation among countries located in the same region even before the world had become a global village.

Fourteen nations of the Western Hemisphere, including the United States, but not Canada, are parties to at least one of the conventions. The United States is a member of the Pan American Convention, but it renounced the Protocol in the mid-1940s. The Bureau administering the Convention, the Inter-American Trade Mark Bureau, was located in Havana, Cuba, but it has closed. Compared to the Paris Convention, this Convention never acquired any significance. Now, with GATT 94 and other recent regional developments, this Convention becomes irrelevant.

D. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 1957, as revised (Nice Agreement)

The Nice Agreement constitutes an international trademark classification agreement compatible with the global village. When registering a trademark, most countries require the applicant to describe the goods and services to be protected. However, such description may be problematic because trademark classification systems in various countries

57. See Browning, supra note 3, at 356.
58. Id.
59. See infra pp. 100-102.
differ in the particularity of their description requirements. Thus, the International Bureau established the International Classification system, creating specific descriptive classes for filing an international application. If, at any time, the International Classification system needs to be changed or revised, the Committee of Experts may make such changes or revisions.

The Nice Agreement exemplifies an agreement which embraces the global village, but it merely addresses the issue of descriptive classification of trademarks. The Nice Agreement is procedural in nature; it does not address any substantive trademark issues. No rights or obligations flow from any classification designation in the Nice Agreement. However, it does facilitate trademark searching which may help to prevent trademark confusion and infringement.

E. Convention Establishing the World Intellectual Property Organization of 1967, as revised (WIPO)

The WIPO has attempted to govern international intellectual property matters since it entered into force in 1970. The expressed objectives of the WPO are "to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization," and "to ensure administrative cooperation among the Unions."

61. See Paris Convention, supra note 20. The International Bureau was incorporated into the World Intellectual Property Organization when it took over the administration of the Paris Convention and the Madrid Unions. See infra pp. 79-80.

62. Nice Agreement, supra note 60, art. 1(1). Although Article 1 requires the use of the International Classification system, Article 2(2) allows each member country to "reserve[] the right to use the classification either as a principal or as a subsidiary system." Id. art. 2(2). The author contends that this reservation causes no substantial problems so long as the International Classification system is used.

63. Id. art. 3(3).

64. Id. art. 2(1).

65. See Browning, supra note 3, at 354.


67. WIPO, supra note 67, art. 3.
The WIPO succeeded the International Bureau for the Protection of Intellectual Property which the Paris Convention created. In 1974, the WIPO became a specialized agency of the United Nations with its headquarters in Geneva, Switzerland. It has a General Assembly, a representative body consisting of delegates from each of its 116 member states, which appoints its Director General.

Currently, the WIPO administers seventeen multilateral and regional agreements, such as the Paris Convention, the Madrid Agreement, and the Nice Agreement. Within its committee structure, two groups focus on international trademark law: the Permanent Committee on Industrial Property Information ad hoc Working Group on Trademark Information (PCIPI/TI) and the Committee of Experts on the Harmonization of Laws for the Protection of Marks (CEHLPM). The PCIPI/TI explores trademark information collection and storage including trademark search systems, examination methods, application numbering systems, and classifications. The CEHLPM examines harmonization of the trademark laws and recently developed a trademark administration treaty to facilitate worldwide trademark filing called the TLT.

At its inception, some WIPO convention delegates thought "[the WIPO's] existence [would] affect trademark rights at least in the same of affording a better structured and administrated vehicle through which our trademark interests [could] be identified and debated." However, by 1987, the United States General Accounting Office, Division of National Security and International Affairs (GAO) concluded that although the WIPO constitutes the foremost multilateral intellectual property forum, the government had made only limited progress towards strengthening international intellectual property rights and obligations through the WIPO. The GAO further concluded that this limited progress was due to the United States government actively opposing the efforts of developing countries to weaken existing international standards for trademark

68. See Paris Convention, supra note 20 and accompanying text; see also Browning, supra note 3, at 341.
69. See Cordray, supra note 26, at 122 n.1.
70. Id. at 122 n.2.
71. See Browning, supra note 3, at 352.
72. TLT, supra note 12; see infra pp. 92-96.
73. See McAuliffe, supra note 66.
74. Id. at 124 n.8. Dissatisfied with the WIPO's lack of progress in protecting and enforcing intellectual property rights, the United States, in 1986, shifted its efforts from the WIPO to the GATT's Uruguay Round negotiations. Id. at 121.
Freeman

While agreeing with the GAO's conclusion, the author continues to argue that international trademark protection will remain inadequate until both the developed and developing countries view the world as a global village and begin serious efforts toward harmonizing national trademark laws.

F. Vienna Trademark Registration Treaty, 1973 (TRT)

The TRT resulted from the WIPO's failure to negotiate a revision to the Madrid Agreement acceptable to the countries, including the United States, which refused to accede to the Madrid Agreement but wanted to participate in an international filing and registration system. When the negotiations deadlocked, the WIPO asked the United States for a solution, and the United States responded by proposing the TRT.

The TRT created a compromise between those countries establishing ownership based on registration without priority of trademark use and those requiring priority of trademark use. It eliminated the Madrid Agreement's requirement of home registration and eliminated the United States' priority of trademark use requirement in favor of a declaration of intention to use. In addition, it allowed a minimum of three years with a discretionary extension to five years or more before trademark use becomes mandatory. It also permitted national law to bar an infringement action until after actual trademark use occurred within its borders.

However, the international trademark community views the TRT as a failure. Although over fifty countries participated in the Vienna diplomatic conference, the TRT was ratified only by the five Paris Union

75. Id.


The TRT went to the Vienna diplomatic conference on May 12, 1973. Although the United States signed it on June 12, 1973, it never ratified the TRT due to the TRT's inherent conflict with its trademark law (both the Lanham Act and common law). See Browning, supra note 3, at 346.

77. See infra pp. 82-83.


79. See Frayne, supra note 8, at 422-29.

80. See Derenberg, supra note 78, at 438-39.
countries which brought the TRT into force: Burkina Faso, Congo, Gabon, the Soviet Union, and Togo. In addition, the TRT no longer appears in the publications listing current treaties in force. The author argues that the basic compromise contained in the TRT could have been a beginning for harmonization of national trademark laws, but the international trademark community was not ready for the global village which was only in its infancy at that time.


After the TRT failed to attract sufficient signatories to make it viable, the Madrid Union requested the WIPO to continue considering changes to the Madrid Agreement which would allow Great Britain, Ireland, Denmark, Greece, and the United States to join. The WIPO responded with the Madrid Protocol. Initially, the international trademark community, including the United States, hailed the Madrid Protocol as acceptable to everyone.

Although the Madrid Protocol was similar to the Madrid Agreement, the Madrid Protocol seemed to cure the ills of the Madrid Agreement for several reasons. First, the Madrid Protocol allowed an international trademark application (WIPO application) based on a mere filing of a national trademark application rather than a perfected national registration. In addition, it extended the time to refuse the WIPO application from twelve months to eighteen months. It also revised the fee structure by allowing a member country to charge its national fees for examining the WIPO application. The Madrid Protocol further...

81. See Browning, supra note 3, at 346.

82. See Browning, supra note 3, at 347-48. In addition, the Madrid Union wanted the WIPO to consider how to link the Madrid Agreement and the proposed European Community Trade Mark. See id. at 348.


85. See infra pp. 82-83.

86. Madrid Protocol, supra note 83, at 2(1).

87. Id. art. 5(2)(b).

88. Id. art. 6(3)(4).
diminished the negative effects of central attack because an attacked registration could be converted into a separate national registration with an effective filing date of the original WIPO application's filing date. Finally, it designated French and English as the official languages. 

Anticipating ratification of the Madrid Protocol, Congress introduced implementing legislation. Initially, this legislation received wide support from the Clinton Administration, Congress, and the domestic trademark and intellectual property associations. Unexpectedly, the Administration withdrew its support because of the Madrid Protocol provisions relating to the intergovernmental organizations and their voting rights. However, the Administration had "no problem with the substance of the treaty beyond these issues."

The House of Representatives passed the implementing legislation on October 3, 1994, but before passing this legislation, the House of

89. Id. art. 8(7)(a).


91. Madrid Protocol, supra note 83, art. 14 (requiring four instruments of ratification, one of which must be from a Madrid Union member).


Under the terms of the Protocol, members may be countries or, under certain conditions, intergovernmental organizations with regional trademark offices. These organizations would receive a vote in the assembly of the members in addition to votes exercised by the member states of the organization. They would also be counted towards the members needed for the Protocol to enter into force, in addition to their member states. Finally, there is no provision for the intergovernmental organization to make a declaration of its competence. The United States does not accept such an expansion of the role of intergovernmental organizations and their members. In other agreements, we consistently have insisted on safeguard provisions to prevent concurrent voting and double counting, and on a declaration of competence.

The Administration recognized the problems when giving its endorsement, but, at that time, viewed it as "an exception to the general obligations... problems were outweighed by the benefits of the agreement. But the EU recently has been citing the Madrid Protocol as precedent for similar voting rights in the negotiations on the TLT and the Hague Agreement on Industrial Designs." U.S. Will Not Join Madrid Protocol on International Trademarks, 48 Pat. Trademark & Copyright J. (BNA) No. 1180, at 81-82 (May 19, 1994) (describing the Journal's conversation with Attorney Advisor Carlisle Walters from PTO's Office of Legislation and International Affairs).

95. Id. at 82.
Representatives took into consideration the Administration's position. The House of Representatives amended the legislation (H.R. 2129) with the following new language on the effective date: "Subject to satisfactory resolution of the issues relating to voting rights of Member nations under the Madrid Protocol, this Act shall take effect on the date on which the Madrid Protocol enters into force with respect to the United States."96

The Madrid Protocol has not entered into force because only Spain has ratified it to date.97 The history of the Madrid Agreement, the Trademark Registration Treaty, and the Madrid Protocol evidences the desire for an international centralized filing and registration system, but prove that desire is not enough. Although the global village existed when the WIPO began its negotiations which resulted in the Madrid Protocol, the international trademark community refused to recognize the global village.

H. The General Agreement on Tariffs and Trade (GATT 94)

1. A Brief History

The words, "The General Agreement on Tariffs and Trade," or "GATT," belong to a multilateral trade agreement concluded in October 1947 between 23 developed and undeveloped countries (GATT 47).98 This occurred immediately after World War II, a time when most agreed that economic recovery depended on restoring and expanding former levels of international trade.99 However, the war left two major barriers: high

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97. To obtain the current status of the Madrid Protocol, contact the WIPO: 34 Chemin des Colombettes, CH 1211 Geneva 20, Switzerland; telephone number: (22) 730 91 11; and fax number: (22) 733 54 28. The Madrid Protocol will not enter into force until five countries ratify it.


99. Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 3, 4 (1993). This book provides an excellent history and explanation of the initial negotiations for an International Trade Organization Charter (ITO) and the Preparatory Committee's negotiation of a trade agreement, GATT 47, among themselves, which they intended to be merely provisional and would fold into the ITO structure after its ratification. Id. at 4-7. However, the ITO was never ratified; thus, GATT 47 and its seven additional rounds evolved into the foremost international trade agreement without the support of the ITO or any formal organization. Id. Yet, GATT has functioned as an organization de facto, having a building in Geneva, a staff, committees, budgets, and internal rules, but until the conclusion of The Uruguay Round, most member countries viewed GATT 47 and its seven additional rounds solely as an agreement, refusing to acknowledge an organization. See Andreas F. Lowenfeld,
The GATT 47 provided a means to substantially reduce tariffs and limit the right to use other trade restrictions. In addition, it established five basic principles which continue to evolve: the most favored nation principle, the national treatment principle, the tariff concession principle, principle against nontariff barriers, and the fair trade principle.

Since GATT 47, seven additional rounds of negotiation have occurred: Annecy (1949), Tourquay (1950), Geneva (1956), Dillon (1961), Kennedy (1962-67), Tokyo (1973-79), and Uruguay (1986-1993). The first five rounds concentrated on reducing tariff barriers to trade in goods. The sixth round, the Tokyo Round Codes, focused on reforming dispute resolution and reducing non-tariff barriers to trade in goods, including regulatory measures to deal with counterfeit goods. This was the first time a GATT round discussed trademark rights, although it was only in the context of controlling infringement of trademark rights.

The Tokyo Round permitted member countries to approve separate Codes, and they were bound only by the Codes they signed and approved. The Uruguay Round (GATT 94) departed from the first six

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100. Id.


102. See Marshall A. Leaffer, Protecting United States Intellectual Property Abroad: Toward a New Multilateralism, 76 IOWA L. REV. 273, 299 (1991) (enumerating and explaining GATT's basic principles, citing GATT's article numbers); John W. Head, Making International Trade Less Foreign: A "Nutshell" for NonSpecialists on the Changing Rules Governing International Trade, J. KAN. B. ASS'N 42, 43 (1992) (enumerating and explaining GATT's basic principles, citing GATT's article numbers). Since this Article focuses on trademark protection in international trade, the author relies on Leaffer's explanations for the principles that do not relate to trademark protection; and, for those principles that do relate, they are explained throughout this Article.

103. See HUDEC, supra note 99, at 3-273; see also JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 37 (1990).


106. Id.

rounds because it included an intellectual property annex and established the World Trade Organization (WTO) among other initiatives. In addition, it was an “all or nothing” agreement, meaning that a signatory had to agree to the entire agreement with its annexes and be bound by it, or not be a member country. Could this mean the GATT 94 signatories recognize our global village and will embrace it by promoting global harmonization of national trademarks laws and centralization of filing and registration?

2. Trademark Protection in GATT 94: The TRIPS

“... Today, the world has chosen openness and cooperation instead of uncertainty and conflict. This is a success that will reinforce economic growth,” declared GATT’s Director General Peter Sutherland to the representatives from the 117 member countries in Punta del Este, Uruguay, on December 15, 1993. Although the Uruguay Round took seven years to complete, and “at times seemed more likely to reveal the irreconcilable trade rivalries of the post-cold war world than its determination to pursue a quest for freer trade, lower tariffs and greater economic cooperation,” it resulted in GATT 94 “provid[ing] the basis for global economic growth and cohesion into the 21st century.” Since GATT 94 now exists, and the United States recently enacted implementing legislation, this section analyzes

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110. Other innovative initiatives in GATT 94 include the Trade-Related Aspects of Investment Measures (TRIMS), Trade in Services, and the Dispute Settlement Understanding.

111. See Lowenfeld, supra note 99, at 478-79; The GATT Lady Sings: What the New WTO Will Mean for the U.S. and World Trade, 11 Int’l Trade Rep. (BNA) No. 15, at 595 (Apr. 13, 1994) (quoting John H. Jackson, a scholar in GATT, “[n]o longer will the Tokyo Round approach of side codes--resulting in ‘GATT a la carte’--be the norm,” but rather WTO will reinforce “single package” idea that country must accept all Uruguay Round agreements annexed to WTO, with few exceptions, or nothing at all).


113. Id.

114. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter URAA]. The URAA was enacted under the “fast-track” mechanism for trade agreements, which mandates Congress to approve or reject the entire implementing legislation
only the TRIPS agreement. It does not discuss the negotiations after the Tokyo Round leading to the Uruguay Round and the inclusion of intellectual property into GATT 94.115

"The TRIPS agreement establishes substantially higher standards of protection for a full range of intellectual property rights that are embodied in current international agreements, and provides for the effective enforcement of those standards both internally and at the border."116 The TRIPS consists of a preamble117 and seven parts, divided into a total of 73 articles.118 Although TRIPS covers seven forms of intellectual property, this Article addresses only trademarks. First, it

proposed by the Clinton Administration without any revision. See 19 U.S.C. §§ 2902(e), 2903(b) (1994). The URAA makes few changes to U.S. trademark law. Sections 521 and 522 of Public Law 103-465, the URAA, contain the trademark provisions, amending the definition of "abandonment" in section 45 of the Lanham Act, 15 U.S.C. 1127, by increasing from two years to three years the time of non-use that is prima facie evidence of abandonment, and adds to the end of Section 2(a) of the Lanham Act a prohibition against registering misleading geographic indications for wines and spirits.


116. Intellectual Property Rights, Trade Information Center and GATT Uruguay Round, U.S. Dep't Com. (Dec. 10, 1993); see also TRIPS, supra note 108. With few exceptions (and none related to trademarks), the TRIPS obtained its aims: "establishing adequate minimum standards for the protection of intellectual property rights; ensuring availability of effective procedures, internally and at the border, for enforcing those rights; and taking advantage of the procedures in the GATT for the settlement of disputes regarding the Members' obligations to establish the minimum standards and the enforcement procedures." Id. Carlisle E. Walters, Multilateral Trademark issues Affecting the United States, 367 PRAC. LAW INST./PAT. 67 (1993).

117. TRIPS, supra note 108. The Preamble sets forth the TRIPS' purpose "to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade . . . ." Id.

118. TRIPS, supra note 108.
discusses the articles relevant to trademarks. Then, it analyzes whether the GATT 94 signatories recognized the global village and embraced it through global harmonization of national trademark laws and centralization of trademark filing and registration.

Articles 15-21 establish the minimum standards for protecting trademarks in member countries. Other articles provide support for and enforcement of Articles 15-21.

Article 15 delineates the subject matter capable of constituting a registered trademark. Such subject matter consists of any signs, including personal names, letters, numerals, figurative elements and color combinations or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings. Even if a sign possesses no inherent capability to distinguish the relevant goods or services, it may still be registered based on distinctiveness acquired through use. Even if a sign possesses no inherent capability to distinguish the relevant goods or services, it may still be registered based on distinctiveness acquired through use. A member country may condition registration on a trademark’s visual perceptibility. In addition, registration may be conditioned on use, but filing may not be conditioned on actual use. An application must not be refused solely on the basis that the intended use has not occurred within three years from the date of filing the application. In addition, the nature of the goods and services connected with the trademark must not be an obstacle to registration. A trademark must be published before registration or promptly thereafter, and other member countries must be afforded a reasonable opportunity for cancellation. Member countries may also be afforded an opportunity to oppose registration. Finally, a member country may deny registration on grounds other than those in Article 15(1), providing such grounds do not derogate from the Paris Convention.

Article 16 confers to a registered trademark owner exclusive right to prevent all unauthorized third parties from using, in the course of trade, a sign affixed to identical or similar goods or services as those goods or services connected with an owner’s registered trademark, if such use

119. Id. art. 15(1).
120. Id.
121. Id.
122. Id. art. 15(3).
123. TRIPS, supra note 108.
124. Id. art. 15(4).
125. Id. art. 15(5).
126. Id.
127. Id. art. 15(2); Paris Convention, supra note 20.
would result in a likelihood of confusion.\textsuperscript{128} However, this exclusive right must not prejudice any existing prior rights, nor affect a member country from extending rights based on use.\textsuperscript{129} In addition, Article 16 expands the protection offered to well-known marks under Article 6bis of the Paris Convention.\textsuperscript{130} When determining if a trademark is well-known, knowledge of that trademark in the relevant public sector must be considered; this includes knowledge obtained from the trademark’s promotion which may include any promotion in international trade.\textsuperscript{131} This also applies to a sign affixed to goods or services, even if the goods or services are not similar to the goods or services connected to a registered trademark, if such use would indicate a connection with a registered trademark that is likely to damage the registered trademark owner’s interest.\textsuperscript{132}

Article 17 allows a member country to provide limited exceptions to the trademark rights. However, before permitting any exceptions, the legitimate interests of the trademark owner and third parties must be considered.\textsuperscript{133}

Article 18 requires a minimum term of seven years for an initial trademark registration, which shall be renewable indefinitely.\textsuperscript{134} Like the initial registration term, each renewal term must be at least seven years.\textsuperscript{135}

Article 19 explains that when a member country requires use of the trademark to maintain registration, the registration may be cancelled only after non-use for at least three continuous years, unless the trademark owner can show a valid reason for non-use.\textsuperscript{136} The use of a trademark by a third person, subject to the owner’s control, must be recognized as a use for maintaining the registration.\textsuperscript{137}

Article 20 prohibits special requirements which cause an unjustifiable encumbrance upon the use of a trademark in the course of

\textsuperscript{128} TRIPS, supra note 108, art. 16(1). A presumption in favor of likelihood of confusion exists, if a sign appears to be identical to the registered trademark. \textit{Id.}

\textsuperscript{129} Id.

\textsuperscript{130} Id. art. 16(2)(3); Paris Convention, supra note 20, art. 6.

\textsuperscript{131} TRIPS, supra note 108, art. 16(2).

\textsuperscript{132} Id. art. 16(3).

\textsuperscript{133} Id. art. 17 (fair use of descriptive terms constitutes a limited exception).

\textsuperscript{134} Id. art. 18.

\textsuperscript{135} Id.

\textsuperscript{136} TRIPS, supra note 108, art. 19(1). Circumstances beyond the owner’s control creating an obstacle to use, such as import restrictions on or other government requirements for goods or services protected by a trademark, constitute a valid reason. \textit{Id.}

\textsuperscript{137} Id. art. 19(2).
Trade. However, this does not preclude requiring a trademark to identify the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.\textsuperscript{138}

Article 21 allows member countries to determine conditions on trademark assignment and licensing. At the same time, it prohibits requiring compulsory licensing and requiring the transfer of the business when assigning its trademark.\textsuperscript{139}

In addition, TRIPS provides trademark protection similar to those sections of the Lanham Act addressing filing and prosecution of trademark applications by the United States Trademark office.\textsuperscript{140} The TRIPS also supports the status quo controlled by territoriality, which allowed President Clinton to sign GATT 94 without considering the need for global harmonization of national trademark laws or the viability of a centralized trademark filing and registration system. Furthermore, TRIPS requires member countries to comply with Articles 1-12 and 19 of the Paris Convention\textsuperscript{141} which do not harmonize national trademark laws.\textsuperscript{142}

However, TRIPS does evidence a desire to establish international standards for trademark rights and obligations by the 117 countries who signed GATT 94 in Marrakesh, Morocco, on April 15, 1994. These countries agreed to implement national legislation to meet TRIPS' minimum standards for trademark rights and obligations. For some member countries, such implementation involves a measurable change in policy. Most developing and least-developed member countries possess inadequate national trademark laws, and some possess no national trademark laws. This implementation of national trademark laws in the

\textsuperscript{138} Id. art. 20. Requiring a trademark's use in a special form or in a manner detrimental to its capability to distinguish goods or services of one undertaking from those of other undertakings constitute special requirements, which are prohibited, encumbering unjustifiably the trademark's use. Id.

\textsuperscript{139} Id. art. 21. See 15 U.S.C. § 1060 (1994). See also Walters, supra note 116. The transfer of a business may be distinguished from the goodwill associated with the trademark. This distinction is relevant, as some countries, including the United States, do not require a valid trademark assignment to include the transfer of the business with the trademark but do require a transfer of "the goodwill of the business connected with the use of and symbolized by the [trade]mark." Id.


\textsuperscript{141} TRIPS, supra note 108, art. 2(1)(2) (prohibiting any trademark provision in TRIPS from derogating the existing obligations which member countries may have to each other under the Paris Convention); Paris Convention, supra note 20, arts. 1-12, 19.

\textsuperscript{142} See supra text accompanying notes 11-18.
developing and least-developed member countries constitutes what could be the beginning of global harmonization and centralization.

In order to accomplish this beginning, TRIPS addresses the concerns of the developing and least-developed member countries by providing transitional arrangements that entitle developing and least-developed countries to delay implementing TRIPS for four years beyond the one year extended to the developed countries, except for Articles 3 (national treatment), 4 (most favored nation treatment), and 5 (multilateral agreements on acquisition or maintenance of protection) of Part I which must be implemented within one year. In addition, the provisions for patent protection of pharmaceutical and agricultural products are extended an additional nine years.\(^{143}\) The transitional arrangements also require that the developed countries provide technical and financial cooperation to the developing and least-developed countries.\(^{144}\) Further, a Council for TRIPS must be established to monitor the operation of TRIPS and implement cooperation with the WIPO.\(^{145}\) International cooperation, including the exchange of information, must be instituted to eliminate international trade in counterfeit goods which infringes trademark rights.\(^{146}\) Finally, TRIPS provides the registered trademark owner with specific civil and criminal procedures for enforcement of trademark rights within each country and at each country’s borders.\(^{147}\) However, TRIPS lacks a global centralized trademark filing and registration system. The author argues such a system would provide the basis for information exchange, and without such basis, enforcement would be difficult if not impossible.

I. The Trademark Law Treaty, 1994 (TLT)

The most recent effort to harmonize national trademark laws and to create a centralized global trademark and registration system resulted in the Trademark Law Treaty (TLT). However, the TLT does not provide any harmonization or centralization, but it does establish common procedures for national trademark filing and registration, and creates

\(^{143}\) TRIPS, \textit{supra} note 108, arts. 65-66. See, e.g., Meltzer, \textit{supra} note 115, at 30. This view demonstrates the United States approved GATT 94 due to what it perceived as protecting its sovereignty rather than viewing the world as a global village. If the United States recognized and embraced the global village, it would advocate the need to grant developing and least-developed member countries additional time to conform their legal systems to TRIPS.

\(^{144}\) TRIPS, \textit{supra} note 108, art. 67.

\(^{145}\) \textit{Id.} arts. 68, 71 (requiring Council for TRIPS to review implementation of TRIPS five years after agreement establishing WTO entered into force).

\(^{146}\) \textit{Id.} art. 69.

\(^{147}\) \textit{Id.} arts. 41-61.
standardized international application forms which all trademark offices must accept.\textsuperscript{148} The WIPO\textsuperscript{149} initiated the TLT discussions following the lack of participation in the TRT\textsuperscript{150} and the Madrid Protocol.\textsuperscript{151} Anticipating an increase in international trademark application filings,\textsuperscript{152} the WIPO convened six sessions of its Committee of Experts on the Harmonization of Laws for the Protection of Marks (CEHLPM) to discuss a draft trademark harmonization treaty.\textsuperscript{153}

At the first session, in 1989, the CEHLPM discussed harmonization of substantive trademark law.\textsuperscript{154} Harmonization also dominated the discussion at the second session but proved too controversial.\textsuperscript{155} Since the CEHLPM participants maintained their protectionist attitudes, refusing to discuss seriously global harmonization of national trademark laws or even a centralized trademark filing and registration system, the remaining sessions ignored substantive trademark law.\textsuperscript{156} These sessions focused on a draft trademark treaty prepared by the WIPO’s International Bureau, which addressed only administrative and procedural matters, including implementing regulations and model international forms for filing and registration.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{148} See TLT, supra note 12.
\item \textsuperscript{149} See WIPO, supra note 67.
\item \textsuperscript{150} See TRT, supra note 76.
\item \textsuperscript{151} See Madrid Protocol, supra note 83; see also infra p. 151. Although the United States did not join the Madrid Protocol, it recognized the importance of an international trademark filing and registration system, and, thus, it committed to joining such a system if the system provided safeguard provisions including voting rights. See State Dep’t Announcement That U.S. Will Not Join Madrid Protocol, supra note 94.
\item \textsuperscript{152} See Browning, supra note 3, at 352.
\item \textsuperscript{153} See Walters, supra note 116.
\item \textsuperscript{154} The Committee based its discussion on a 1987 proposal from Dr. Arpad Bogsch, the Director General of the WIPO. See Diplomatic Conference Adopts TLT, Geneva, WIPO PRESS RELEASE NO. 99 (Geneva), Oct. 28, 1994.
\item \textsuperscript{155} See, e.g., Hearings, supra note 84 (supporting attempt to first harmonize current trademark formalities rather than substantive law because difficult to harmonize different national trademark laws); Samuels & Samuels, supra note 10, at 437-38 (describing participants’ lack of hope in reconciling substantial differences in world trademark law); Walters, supra note 116 (explaining that the United States expressed interest in a trademark harmonization treaty to create business certainty and uniformity in obtaining international trademark protection but emphasized that the treaty must recognize United States trademark law, including use-based rights, and allow United States to enact substantive trademark law); Louis T. Pirkey, Treaty Would Harmonize Many Trademark Laws, NAT’L LAW J., Oct. 31, 1994, at C17.
\item \textsuperscript{156} See id.
\item \textsuperscript{157} See Walters, supra note 116.
\end{itemize}
On October 10, 1994, the WIPO's Diplomatic Conference for the Conclusion of the TLT occurred in Geneva. Ninety-seven countries and intergovernmental organizations, and twenty non-governmental organizations' attended and discussed the CEHLP M draft treaty. On October 27, 1994, the Conference adopted the TLT. The 117 countries and international organizations signed the "Act of Presence" which concluded the Conference; thirty-five countries, including the United States, signed the TLT, which opened for signature on October 28, 1994, for one year. The WIPO member countries and certain intergovernmental organizations may join the TLT even if they are not a member of the Paris Convention.

The TLT contains twenty-five articles and regulations consisting of eight rules and eight model international forms. It applies to "marks consisting of visible signs, provided that only those Contracting Parties which accept for registration three-dimensional marks shall be obliged to apply this Treaty to such marks," and to "marks relating to goods (trademarks) or services (service marks) or both goods and services."

158. See WIPO, supra note 66, at 2. "The participation of non-governmental organizations in the preparatory meetings and in the Diplomatic Conference ensured that the views of the users of the trademark system were taken into account." Id.

159. See id.

160. See State Dep't Announcement That U.S. Will Not Join Madrid Protocol, supra note 94 and accompanying text. Only one obstacle occurred having the potential to kill the TLT: the European Union (EU) demand of the same voting rights it received in the Madrid Protocol. (These voting rights resulted in the United States refusing to sign the Madrid Protocol.) See U.S., 96 Other WIPO Members Conclude International TLT, 49 Pat. Trademark & Copyright (BNA) No. 1203, at 22 (Nov. 10, 1994). The EU claimed it was entitled to its own separate vote since trademark applications may be filed both with national patent offices in the EU member states and through the recently established European Harmonization Office for the (European) Internal Market. Id. The United States opposed such a separate EU vote throughout the negotiations and at the Diplomatic Conference. Unlike the negotiations for the Madrid Protocol, the WIPO officials reached a compromised solution. The TLT eliminated the "Assembly" of member countries, avoiding the need of voting procedures since any voting would be through the WIPO's General Assembly. Id.

161. See Diplomatic Conference Adopts TLT, supra note 154.

162. See id. at 2; U.S., 96 Other WIPO Member Conclude International TLT, supra note 160, at 23 (explaining that the TRIPS agreement bound all GATT 94 signatories to Paris Convention, and most GATT 94 signatories belong to WIPO, so not requiring membership in Paris Convention lacks any diplomatic significance).

163. See TLT, supra note 12.

151. See id.

165. See id.

166. See id. art. 2(1)(a).

167. See id. art. 2(2)(a).
However, it does not apply to "hologram marks and to marks not consisting of visible signs, in particular, sound marks and olfactory marks," nor does it apply to "collective marks, certification marks and guarantee marks." The TLT establishes maximum procedural requirements which a member country may impose prior to granting an application filing date, a trademark registration, or recording an assignment or license. The United States Patent and Trademark Office is drafting proposed legislation to implement the TLT which will cause only procedural changes to United States trademark law since the TLT contains no substantive trademark law provisions. The major United States trademark organizations, including the International Trademark Association, trademark owners, and bar associations, support the TLT which has no substantial opposition.

Although the TLT provides no global harmonization of national trademark laws or centralization of trademark filing and registration, the author argues that the TLT constitutes a step towards global harmonization and centralization. First, an exchange of ideas must occur for the international trademark community to recognize the global village and to move toward it. The TLT has encouraged such an exchange of ideas. Although the participants decided global harmonization of national trademark law was not feasible at that time, they continued their discussions until a common procedure and application for trademark filing and registration was developed and approved. The TLT emerged as the treaty evidencing these discussions.

"[The TLT] will have a clearly positive economic impact in a global economic environment in which trademarks become increasingly important." The numbers of registered trademarks are staggering. The WIPO has handled over three hundred thousand actual trademark registrations, and has estimated seven million national trademarks are registered worldwide, including numerous duplications for registrations in

168. See TLT, supra note 12, art. 2(1)(b).
169. See id. art. 2(2)(b).
170. See id. art. 3(7); Walters, supra note 116.
171. Telephone Interview with Andrew D. Lawrence, Attorney-Advisor, P.T.O., U.S. Dep't Com. (Jan. 4, 1995) (explaining proposed legislation implementing the TLT will simplify filing and registration application). See also Samuels & Samuels, supra note 10, at 439-40 (analyzing draft TLT and its effect on United States trademark law); Pirkey, supra note 155 (analyzing draft TLT and its effect on United States trademark law).
172. See Hearings, supra note 84.
173. See Pirkey, supra note 155, at C18.
174. See supra note 155.
different countries. When considering the number of registrations and the important differences in relevant national trademark law throughout the world, the TLT constitutes an important step in unifying the international trademark community toward global harmonization and centralization. Furthermore, the TLT shows that compromise can solve differences when the participants want to proceed toward embracing the global village.

III. IMPLEMENTATION OF TRADEMARK PROTECTION IN THE GLOBAL VILLAGE

In 1995, multilateral, regional, and bilateral agreements provide the medium for acquisition and maintenance of trademark rights and obligations in the global village. Part Three discusses the role of this medium in implementing trademark protection through global harmonization of national trademark laws and centralization of trademark filing and registration.

A. Multilateral Implementation: Council for TRIPS and WIPO

The global village demands multilateral implementation of trademark rights and obligations. Once the international trademark community recognizes and embraces the global village, the need for multilateral implementation becomes self-evident. Both the WIPO and the Council for TRIPS may negotiate global harmonization and centralization. This section analyzes whether the WIPO or the Council for TRIPS, or both, should initiate such negotiation.

As previously discussed, the WIPO functions as a specialized United Nations' agency, administering numerous agreements with trademark rights and obligations. If the Council for TRIPS did not exist, the WIPO would provide the primary medium to negotiate global harmonization and centralization. However, the Council for TRIPS does exist; and, it exists, in part, because the WIPO conceded jurisdiction of intellectual property rights to the Uruguay Round.

175. U.S., 96 Other WIPO Members Conclude International TLT, supra note 162, at 24.
176. See supra p. 79.
177. See supra note 18 and accompanying text.
178. See supra pp. 79-81.
179. See Cordray, supra note 26, at 141. The developing countries argued GATT lacked jurisdiction over intellectual property rights because Article 18 of the Paris Convention required any improvement in intellectual property be made through revisions of the Paris Convention. However, the WIPO lacks a mandate from its members to revise the Paris Convention and, further, has no funding, so it refuses to revise the Paris Convention, or increase its enforcement. Id. Thus, the TRIPS agreement became part of GATT 94, and falls within the scope of Article
Article 68 of TRIPS authorizes the member countries to assign to the Council for TRIPS the responsibility to negotiate global harmonization and centralization:

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with [WIPO].

No substantial discussion occurred at the Uruguay Round regarding global harmonization and centralization with respect to trademarks. However, TRIPS provides that "[i]n order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system." The author argues this provision can be extended to include a notification and registration system for trademarks, but without harmonization of national trademark laws because such a system would


180. See supra note 18.

181. The TRIPS establishes minimum standards, not harmonization. See TRIPS, supra note 108.

182. See TRIPS, supra note 108, art. 23(4).

183. Author argues that an extension of Article 23(4) of TRIPS to trademarks does not conflict with Article 62(1), which allows member countries to require "as a condition of the acquisition or maintenance of the intellectual property rights provided under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement." See TRIPS, supra note 108, art. 62(1).
lack effectiveness. The author further argues the Council for TRIPS must take charge and be the dominating force to propel global harmonization and centralization because unlike the WIPO, TRIPS provides enforcement for trademark rights and obligations. This enforcement will occur through the WTO's\textsuperscript{184} dispute settlement mechanism.\textsuperscript{185}

In addition, the WTO provides the institutional framework needed for global harmonization and centralization. As the Ministers declared in Marrakesh, Morocco, on April 15, 1994, when accepting and acceding to GATT 94:

\textit{[T]he establishment of the World Trade Organization (WTO) ushers in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples. Ministers express their determination to resist protectionist pressures of all kinds. They believe that the trade liberalization and strengthened rules achieved in the Uruguay Round will lead to a progressively more open world trading environment.}

\ldots

Ministers welcome the fact that participation in the Uruguay Round was considerably wider than in any previous multilateral trade negotiation and, in particular, that developing countries played a notably active role in it. This has marked a historic step towards a more balanced and integrated global trade partnership. Ministers note that during the period these negotiations were underway significant measures of economic reform and autonomous trade liberalization were implemented in many developing countries and formerly centrally planned economies.\textsuperscript{186}

However, the Council for TRIPS must not ignore the WIPO, because Article 68 of the TRIPS requires the Council for TRIPS to establish appropriate arrangements for cooperation with the WIPO, and the WIPO possesses a tremendous amount of expertise in international trademark law, both procedurally and substantively. The WIPO's main

\textsuperscript{184} \textit{See} WTO, \textit{supra} note 109.

\textsuperscript{185} \textit{See} TRIPS, \textit{supra} note 108, arts. 64, 68.

\textsuperscript{186} Marrakesh Ministerial Declaration, April 15, 1994, 33 I.L.M. 1263, 1264.
activity, which occupies two-thirds of its 450 staff, involves registration of patents, trademarks, industrial designs, and appellations of origin rather than negotiation. In addition, the WIPO offers technical assistance to its member countries on drafting intellectual property legislation and managing their offices. Thus, the Council for TRIPS should propose a working arrangement with the WIPO, which allows it to take advantage of the WIPO's skill and expertise, especially in light of the TRIPS' lack of staff and the controversial issues involved in implementing global harmonization and centralization.

The ideal situation would be for the United Nations to transfer its jurisdiction over the WIPO to GATT 94, but the author does not advocate considering such a transfer until the Council for TRIPS proves its worth as a global protector of trademark rights and obligations. For the present, the author advocates the Council for TRIPS establishes with the WIPO a respectful, working relationship in which they recognize and embrace the global village and initiate the negotiation of global harmonization of national trademark laws and centralization of trademark filing and registration.

B. Regional and Bilateral Implementation

Since the end of World War II, the United States relied primarily on GATT to establish international trade policy. Except in rare cases, the United States viewed bilateral and regional agreements as, at best,
ineffective, and at worst, a serious threat to GATT members' commitment to the multilateral process.\textsuperscript{192} However by the mid-1980's, the government began to challenge this conventional position as causing, in part, its trade deficit.\textsuperscript{193}

The passage of the Canada-United States Free Trade Agreement helped to support the challenge against the conventional position.\textsuperscript{194} In addition, with the passage of the North American Free Trade Agreement\textsuperscript{195} and the signing of the Summit of the Americas Declaration of Principles and the Plan of Action (Summit DOP/POA),\textsuperscript{196} the conventional position crumbled. Regional integration\textsuperscript{197} emerged as the United States' new

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\textsuperscript{192} The United States perceived bilateral and regional agreements as jeopardizing GATT's most favoured nation principle. Article 4 of the TRIPS defines most-favoured-nation. With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded by a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; and (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the Agreement Establishing the WTO, provided that such agreements are notified to the Council for [TRIPS] and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

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\textsuperscript{197} Christopher P. Lion, Regional Trade Arrangements in the Western Hemisphere, BUS. AM., Dec. 1994, at 17. Regional integration occurs through a free trade area, customs union, or common market: customs unions ("the CU") eliminate trade barriers between member countries while maintaining them with third countries not participating in the agreement, and they maintain
These regional agreements support GATT. They pose no threat to GATT since they constitute GATT-consistent agreements. They require their provisions to be interpreted consistent with GATT’s provisions. In addition, most of these agreements include intellectual property rights and obligations, which, at least, meet TRIPS’ minimum standards, or a higher standard.

Such agreements promote a dialogue on international trademark protection, and further, they encourage countries to address trademark rights and obligations in international trade. They provide an additional medium for understanding not only international trademark issues but also the global village. The author argues a GATT-consistent bilateral or regional agreement, which provides strong trademark protection, constitutes a viable medium to encourage the Council for TRIPS to work toward global harmonization of national trademark laws and centralization of trademark filing and registration.


For additional information on bilateral and regional agreements the author refers the reader to an in-depth article written by C.A. Primo Braga and Alexander J. Yeats, which provides an analysis of “minilateral and managed” trade throughout the world, listing statistics and the major bilateral and regional trade agreements. See C.A. Primo Braga & Alexander J. Yeats, Minilateral and Managed Trade in the Post-Uruguay Round World, 3 MINN. J. GLOBAL TRADE 213 (1994).

199. See, e.g., Summit DOP/POA, supra note 183, at 12.

IV. CONCLUSION

In the global village, trademarks constitute valuable business assets, but they lack the protection valuable business assets customarily receive. The GATT 94 and, in particular, TRIPS, provide hope that adequate global protection can be provided for trademarks. However, such protection will evade the global village until the Council for TRIPS works in conjunction with the WIPO to harmonize national trademark laws and creates a centralized filing and registration system.

The international trademark community must take an active role in their own governments to ensure global trademark protection. GATT-consistent bilateral and regional agreements, which address trademark protection, serve as impetuses to the Council for TRIPS to work toward global trademark harmonization and centralization. In addition, all people and their governments must abandon yesterday's ideas of protectionism in favor of today's global village. Then, and only then, will trademarks receive adequate global protection.
WATCHING CZECHS LOOK WEST

Norman Silber

I. DISORIENTATION

"I prefer the way we live in my home of Krevitsonitze," the Czech factory computer engineer named Dzhenek told me. Together we flew toward Prague, conversing in broken English and pitiful Czech with the aid of a bilingual dictionary. Dzhenek was going home after four months spent in Pennsylvania, where he had been part of a team installing his Czech company's first American export: a giant computer-directed lathe in a machine-tools factory. I, on the other hand, was beginning my journey. Through the courtesy of grants from Hofstra University, several foundations, and the U.S. government, I was visiting Prague, on my way to help to "install" a Western "export" in a city a hundred miles to the East. I was there as part of a project designed to nurture a new, western-modeled law school at Palatzky University in Olomouc (pronounced Alamohzt), an ancient city in Moravia, the region that now constitutes the eastern part of the Czech state.

Dzhenek had an illuminating, but often frustrating and difficult experience in the United States. American dollars were dreadfully expensive in exchange for Czech currency - about 30 Czech Crowns (Cr.) to one dollar, when the wage for Czech professionals, including well-paid engineers and computer experts such as he, was under 3000 Cr. per month. In Krevitsonitze, Dzhenek lived well by Czech standards - the markets provided food and most other needs at acceptable prices. In Pennsylvania, Dzhenek barely could afford necessities. The supermarkets and "discount" stores seemed too impersonal, unfriendly and confusing, and not particularly affordable. Even the cheapest and shoddiest of souvenirs and toys that he considered taking home for his children were overpriced.

At home Dzhenek could go anywhere he needed in town by foot or bicycle or tram but public transportation was not a viable option in his new surroundings. With no car, it proved difficult for Dzhenek to go anywhere, especially after work. He felt himself a captive of the suburban block on...
which his engineering team was housed. And he missed his wife and children. A telephone call to home was much too expensive to contemplate.

At work, the employees of the American company resisted any suggestion that they try to overcome the Czech language barrier to learn about their new equipment from the Czech team. They steadfastly insisted on being spoken to in English. The U.S. company bought the Czech equipment because, compared to the German machinery which it previously bought, the price was much better and the specifications of the Czech lathe were superior - the lathe was much too good to resist. But unlike the German equipment, which had come with precise instructions written in English, and which was calibrated with English as well as in metric measurements, the Czech machinery was far less "user-friendly."

Dzhenek designed the computer software that the machinery required, and he understood the equipment backwards and forwards. But the American managers discounted Dzhenek's intelligence and expertise because his English was weak. They declined to learn or even to try to figure out the smallest amount of Czech. Dzhenek was surprised by the low level of education of workers below the management level; furthermore, and he was absolutely astonished—offended, really—by the machinist's lack of interest in, or pride of, workmanship. It came as a shock for him to understand just how "fool-proof" the machinery control designs needed to be to pass muster in Pennsylvania.

Dzhenek’s enjoyments in America had nothing to do with shopping the American way or experiencing the American workplace. The fun happened when he could interact socially with his hosts in backyard parties, enjoying the weather and meeting American families at play and also when his team borrowed a car and travelled to Washington for a trip to the various national monuments. And then, when Dzhenek was about to head home, a friend he had made in the American company presented him with a quality point-and-shoot Japanese camera as a going-away gift. He thought the camera was terrific.

Conversation ended as we landed at the airport in Prague. After we cleared customs I offered to let Dzhenek share my taxi to downtown. He was about to take the bus, and was afraid he might miss his only good train connection to Krevitsonitz. Since I had never learned Czech and only recently had borrowed two infuriating Berlitz cassettes, I asked Dzhenek to arrange for the cab ride at the curb. He approached the cab driver to discuss the fare. As he questioned the driver a short, but very heated exchange ensued. Dzhenek returned, fuming. He told me that both of us should take the bus instead of a cab, even if it meant that he would miss his train. He dissuaded me from paying what seemed to him an exorbitant charge. The fare, which had been 300 Crowns (about ten dollars) when he left for the
United States, was now 800 Crowns. Since the taxi commission had been
deregulated, he explained, a cartel had formed. The taxi drivers had become
free to exercise their notorious—I’m tempted to say nearly universal—habit
for treating not only tourists but natives abusively.

An American graduate student witnessed the interchange with the
taxi driver. He introduced himself as we all boarded the bus. He told me in
English, and Dzhenek in Czech, that he had the same experience with the
taxis recently. He positively refused to take the cabs anymore because the
drivers were not trustworthy. He told us that he spoke Czech quite well-
that he was born and grew up in Texas but his mother only spoke Czech.
Thus he had acquired the valuable ability to speak fluent Czech. And he
held a law degree from a Texas school and now was earning an M.B.A. at
Columbia University. We learned on the bus ride how his talents already
were paying off.

His mother wanted to invest in Prague real estate. And so the Texan
took a video camera through some of the streets of the beautiful parts of
Prague. He photographed countless residential buildings that looked
attractive. He flew back home, and screened the video to his mother, who
pointed to thirty buildings she liked. Back to Prague, where our Texan
found most of the addresses he needed by searching the property records at
the City records office. He wrote thirty “cold letters” to owners, offering to
negotiate a purchase, in Czech. Three positive responses, along with a few
“go straight to hell” letters. And so the Texan’s mother bought an apartment
building in Prague for about a hundred thousand dollars, making the
previous Czech owner a very rich woman by Czech standards, overnight.

And now the Texas graduate student was back in Prague. A partner
at a large New York law firm had paid him $20,000 to spend the summer
writing a “business plan” for constructing a large, modern hotel somewhere
in the city. Did I know any lawyers in Prague? Anyone in the Privatization
Ministry? Did I happen to teach or know much about Czech real estate law?
The Texan was busily building an address book of valuable contacts, he
acknowledged, because that was the way to get business done. Something
like a gold rush was going on in Prague, he said. He said so with all the
enthusiasm of a Forty Niner.

Dzhenek stepped off the bus earlier than the Texan or I did. We
exchanged addresses, but I was not able to see him again, despite my efforts
to carve out time to visit his small town. The Texan stepped off a little bit
later, shouting good-bye and telling me the name of the stop for the
dormitory I was to stay at in Prague.

Of course I got off at the wrong bus stop. The names of the stops
just didn’t sound to me like their bizarre Czech spellings. So I was lost. I
paid another 250 Cr. to take one of the infamous rip-off taxicabs to my
dormitory, at Kayatanka. I probably paid an exorbitant fee for the ride, but I will never know for sure since I don’t have the vaguest idea of where I started from.

II. THE DUBLINERS

The elderly woman presiding at the reception desk of the Kajetanka Medical College Dormitory spoke no English, of course, and she resisted any suggestion that she be the one to try to overcome the Czech language barrier. Like vratnas at almost all of the buildings I entered throughout my trip, she gave me a blank stare when I tried to use the pigeon Czech in the Berlitz booklet. I went off searching for anyone who spoke English and Czech, and so I found a half dozen students of Irish journalism and their professor - who, having been around for more than a week, managed to get me a key and a phone card. And the journalism group kindly asked me to join them for dinner at the bar a few blocks away.

Not knowing other Irish journalists, I can’t say if it is traditional for them to vent their frustrations during dinner with strangers, but it seemed a matter of habit for these good people. Entering their conversation that evening was like coming into a theater in the middle of a play. From bits and pieces of discussion I pieced together a rather interesting story.

It seems they had come to Prague under the auspices of two organizations: the BBC, to co-produce, with students of the Charles University Journalism school, some radio spots about contemporary Czech life; and the EEC, to help Charles University journalism students and faculty to develop an understanding of Western ways of reporting and of the Western approach to investigative journalism. Things weren’t going smoothly.

As their first story, the Irish students suggested to their Czech counterparts that it would be instructive for all concerned to investigate racism and ethnic bigotry in the Czech Republic. The Czech students and professors didn’t think it was particularly useful or friendly on the part of their guests to undertake such an investigation. But the Irish students maintained that “we’re here to demonstrate to you the job of the press in a free society: to expose such underlying social problems, to attract attention to the issues that should be confronted.” “Well, go ahead,” said the Czechs. “But there isn’t any racism here.” One of the Czech professors provided a taped interview to say as much.

Then off to the Bosnian refugee camps went the Irish students - to record the way refugees felt about their Czech hosts. And off they went to speak with Romani’s, who are more often called Gypsies - to record their
views about their life at the bottom of Czech society. Much evidence of prejudicial attitudes was gathered.

And then back to the editing room, where the conflicts between Czech and Irish became fierce. Why were they making the Czech professor sound so foolish? Why weren’t they giving the Czech professor the last word? The Irish students were rather upset that their Czech counterparts weren’t catching their zest for investigative reporting. The Irish professor told me that it was proving to be an intriguing lesson for him and his students.

The next night I joined the group at the same bar, where they had finished dinner and were having drinks. Things had not gotten better.

The Irish students had chosen their second story. In East Germany, on the Czech border, and in parts of Hungary, there appeared to be a rise of neo-nazi attacks and a growing number of fascist “Skinheads”. Wouldn’t it be an interesting story to learn if there are skinheads in the Czech Republic? Not particularly, replied the Czech guests: “You display a rather glaring misunderstanding of our Czech society. We are perhaps the most pacific nation in Europe. There are no assaults or episodes of brutality here. And we have deep-seated and historically rooted hostility toward fascism in all of its forms.” (And, historically, this is essentially a truthful account.)

And then off went the Irish students to a bar known to teenagers in Prague to be a meeting ground for punks and skinheads. Much verbal evidence of prejudice was gathered on the skinhead subject. A young Irish woman elicited venomous statements about wanting to evict non-whites and non-Czechs from the country. She feared for her safety at points.

More conflict erupted in the editing room. Why were the Irish students insistent about portraying Czech society in a negative light, the Czechs wanted to know? I must say that at this point I too felt sympathy for the Czech outlook, since I have little use for exposing open sores without increasing the likelihood that they will thereby be healed.

But the Irish students that night seemed irate. “I could have understood these hostile attitudes to our reporting if we were interviewing officials of the Czech government,” one told me. “But these are journalism students at the leading journalism school in the country. They’re not learning to be an opposition press, they’re continuing to be the government’s mouthpiece - it’s just a Western-style government that they’re supporting now.”

III. CRIMSON

I arranged visits with lawyers and business people in Prague who I thought could help me to understand the role Czech lawyers would be
playing in the new society that is unfolding there. In New York, I had spoken to someone attached to the Czech Ministry of Privatization. He referred me to an investment banker, M., who was working at the ministry, and who invited me to lunch when I called him after arriving in Prague.

I soon learned that M. grew up a few minutes away from my house in suburban Chicago. We graduated a year apart, from sister high schools (Niles East and Niles West). His father owned a clothing shop my mother visited. We spoke with the same Chicago twang. We both were bred with visions of success and achievement that emerged from the post-War suburban assimilationism of our parents. We had a nearly identical starting point in a midwestern, predominantly Jewish, pedigree conscious, somewhat intellectually inclined, materialistic and upwardly mobile environment - subverted somewhat by the political and social spirit of the sixties. He went to an Ivy League business school while I went to an Ivy League graduate school. He went West to California while I stayed East in New York. And perhaps it was the fact that we came from the same place, or were educated in roughly the same ways at the same time; but I found it difficult to believe that the intricate and delicate task of successfully carving into hundreds of little pieces the assets of an Eastern European Socialist State with a complex culture and a tortured political and social history, and auctioning the pieces to foreign investors, could be carried off successfully any more by M. and his team than by me, or any other such kids from our parochial world.

And yet here he was, laboring along with half a dozen others much like him at notebook computers on small desks in an open office on the upper floor of a shabby building in Prague, deconstructing Socialism and reconstructing Capitalism. He'd joined the "Crimson Group," the elite investment banking unit somehow related to Harvard, retained by the Czech President Vaclav Klaus to work with the government to transform the Czech Republic into a private, Western economy as rapidly and profitably for the Czechs as possible. The Crimson Group was proceeding full speed ahead when I encountered it. Already it had helped to transfer billions of dollars of assets that formerly were part of the Czech state—factories and stores and utilities—into the hands of American, German, French, and other investors. According to M.'s sources, there would be essentially nothing of marketable value left in government hands before the end of 1995.

Few in Crimson have any need to speak Czech, since everyone, or almost everyone it does business with, speaks English or has English translators at hand. "Why bother learning Czech, when Czech is spoken by fewer people than any other major language? We will be going soon, and who will there be to talk Czech to back home?" Members of Crimson often bring their families to Prague, but basically they remain apart from Czech life, and dip only selectively into Czech culture. They are part of the large
population of Americans - perhaps as many as 20,000 - who have been attracted to Prague by business opportunities, a strong dollar, and the intrinsic beauty and excitement of the city. Because of the concerns widely expressed about the contamination of the Czech food supply, however, many of them import milk, meat and other staples from Western countries.

Crimson's legal documents are simultaneously produced in English and Czech. Agreements are negotiated in English. The law is a brand of generic Western commercial law that has been grafted into the Czech law just for the purpose of making Western foreign investors comfortable.

Typical business days are as likely to be spent talking with foreign investors and "doing deals" as dealing with Czech authorities. Much time is spent estimating the price at which assets will be sold. How do they figure out how much to sell a brewery or a record company or a utility concession for? At Harvard, they were taught that valuation involved careful estimates of every asset under the control of the corporation to be sold, using internal and external estimates of costs of production and the value of goods produced. But in Czech terms this would be futile. How can you measure the value of a factory which has never produced what its buyer wishes? How do you determine the value of a company which never calculated its own costs of production in Western terms? Even if one could accomplish such measurements, they would require more time and effort to compute than the Czech government is willing to spend.

And so the Crimson Group has created its own rule of thumb: an asset is worth as much as the last dollar that Czechs can get from the foreign investor they have in mind, to pay for it. For example, if Crimson knows that Budweiser is interested in buying Pilsner, it looks at Budweiser closely to determine what it would be willing to pay for a fine Czech brewery. This method has yielded a considerable amount of money for the government, and a rapid disposition of assets.

But what happens in 1995, or whenever the last asset has been sold? Where is the needed revenue to come from? "A combination of severe personal taxes and corporate taxes on gains from properties purchased from the Czech State is projected. A major measure of the funds is to be gathered through a tax on private corporate earnings from the newly privatized firms." But is the collection of such taxes realistic? "It's true that there is a problem ahead. Since most of these companies will show losses indefinitely, there may be no actual profits, let alone paper profits, for years. And even in the United States, it is nearly impossible to enforce the tax rules against subsidiaries of foreign parents. Foreign businesses often escape taxation concealed as expenses to parent, offshore corporations. The impact of bankruptcies, furthermore, has yet to be calculated." With his eyes tilted
toward the ceiling and his shoulders hunched, M. implied that the fiscal picture for the years after 1995 looms as potentially a dark one.

If, as M. implied, the net effects of rapid privatization on Czech society as a whole are uncertain, it is surely true that the effects on M.B.A.'s and lawyers are overwhelmingly positive. Lawyers, in particular, are in great demand. Their status has been rising in rough proportion to their liberation from dependence on state employment and the magnification of their salaries. Legal education, consequently, has become heavily sought after.

With the new role of lawyers in mind I went back to the dormitory and prepared to leave Prague for Olomouc and the Palatzky law school. As I packed up to take the train out of the city and checked out of the dorm, I met my friend the Irish journalism professor. He, too, was preparing to depart.

I asked him how his project was faring. He told me that the Czech faculty had been quite cordial in their meetings, and in fact invited him back for future collaborative endeavors. But there were some more unfriendly words between the Czech and his Irish students - and some further conflicts about the editing of the radio stories. And so he decided to discourage his students from doing a third story that they were contemplating - a story about the underground sale and shipment of Centex plastic explosive by certain Czechs arms merchants to terrorists in Northern Ireland. In light of the objections to the stories about racism and skinheads, the professor thought the Centex story would be a bit too incendiary.

The professor also surprised me when he stated that his students were forced to leave the dormitory that very day. The dormitory's accommodations office informed him that, "regretfully," there had been an unfortunate misunderstanding about the length of their reservations; all the dorm rooms were actually booked on behalf of others. And so the Irish journalism students finished their radio series on a rather sour note and moved out when I did.

IV. DISHEARTENING REALISM

Eva, the young woman who prepared my visitor's program, and who had been assigned by the Vice Dean as my English translator, greeted me pleasantly at the train station in Olomouc. She led me to my boxy underfurnished flat in the back of a former Russian Army Headquarters, which now houses the Pedagogical Faculty of Palatzky University. For perhaps an hour or more, she took me on a walking tour of the city, with its narrow streets, fortress walls, ancient buildings and historic churches. And then to a restaurant on the town's upper square. Cheerfully she dropped me back at
my flat and told me to expect a visit from the Vice Dean of the Law School the next day.

What Eva didn’t tell me was that she was pregnant - and apparently feeling very ill. The walking and touring may have done her some harm. Eva also neglected to inform me that I had unknowingly scheduled my arrival on a national holiday. And she didn’t tell me that the Vice Dean had postponed her holiday plans to wait at home, or that the Vice Dean expected Eva to call when I arrived.

Helena, the Vice Dean, told me all this on the next day. She said that Eva’s doctor had advised her to stay in bed at least for the next month, and that Eva would be unavailable and out of reach for some time. Arrangements Eva had made would need to be changed. Eva had not shown the Vice Dean my itinerary. Most items on the itinerary were incomplete and some were not possible to accomplish. My accommodations were not secure for the last week of my stay. Faxes I sent had not been received by the proper parties. Not all of the classes I had come prepared to teach could be taught. Different arrangements would have to be made for a translator.

Few of these problems could be solved easily, the Vice Dean warned. And there were others of a more general nature. The students didn’t understand English very well. These law students were not graduate students, as in the United States. They were undergraduate students who had little enough background in Czech law, let alone American law. It was nearing the end of the term and the students were losing interest in everything unessential to their examinations.

We needed to discuss which of the series of lecture subjects I had prepared would be presented. It would overwhelm the students to discuss the detailed word-for-word translations of the privatization agreements I had brought with me from the Ministry in Prague to illustrate warranties and contractual risk allocation. Furthermore, there would be no commercial specialists from the faculty available to attend or help. The historical material I had sent ahead about the Nuremberg trial released a very old and bitter fight; it might be better left to talk about this with the faculty legal historian. As to my suggested topic of nonprofit organizations, “We are at a loss in this country to know what to do about such groups and this might be a subject of great usefulness, but it would be too complicated to discuss - the students don’t even know what a nonprofit corporation is, after all.” My lectures about consumer law would be the most appropriate, she felt.

I needed to appreciate that translation of law school material would require extraordinary preparation and great care, and there was little time available. I needed to understand that the university administration chronically took on more in the way of foreign visitors than it adequately could handle. I needed to realize that there were only six full-time faculty on
the law school, of whom only three spoke any English at all. And I needed to know, quite frankly, that there was no true appreciation on the part of those above, of the difficulty of making foreign visits work. Vice Dean Helena, it seemed, was fairly tired of taking up slack whenever problems arose. And now she must prepare a new program for me.

She would see what she could do; I must go now to meet the Dean.

V. OPTIMISM

A broad smile greeted me as I looked into the eyes of Mirek, the Dean. He looked genuinely glad to see me. His was the first familiar face I had seen arriving in Europe. And since the first time we had first met at my apartment in New York more than a year earlier, he had become much more familiar with English.

“We are so happy to see you. Perhaps we can return to you some of the hospitality you showed to us in New York. Our faculty is very interested to learn about commercial law and consumer protection from you. You know that we have made great advances here, with the help of your school and your colleagues. We have more than 2,400 students applying for less than 70 spots; they all come on one day to take an entrance examination. Our enrolled students are learning more and more English, every day. We have a Peace Corps volunteer here who is teaching our students English.”

“It is unfortunate that Eva became ill, but we will find another translator for you. The students are enthusiastic about learning about American law, and it is important for them to do so. They are having a valuable experience with our foreign lecturers. You know we have just returned from a field trip to Graz in Austria, where our students learned much about law in the European Community. The students are eager to learn anything they can about law in the West.”

“I hear you have a very nice flat, and whatever problems you have we will iron out.”

“How is your little daughter and your wife? I understand they will be joining you soon. You have seen all the stores up and down the streets? Five years ago there were hardly any. It is incredible.”

“Would you like to go with us on a trip into the countryside, perhaps? You will see how beautiful it is here.”

“We have all been looking forward to your visit.”

I was relieved and buoyed to receive all of these enthusiastic comments from the Dean. But I wasn’t sure whose outlook—Helena’s or Mirek’s - was the more constructive one for making a new institution like this one work.
VI. CONSUMERISM

The Vice Dean, Helena, took it upon herself to translate my three-part lecture on the subject of consumer protection law, and she did a superb job. She and other visitors had been dissatisfied with student translators who had no background in the law, because they could not describe the legal terms with sufficient refinement or precision. And so she worked together with me to be sure that she understood concepts like "private right of action," "common law," "representation," "reliance," "concealment," and "odometer fraud." I wrote these and other terms on a giant blackboard on the podium of the lecture hall.

The Palatzy law school is new but class attendance rates here, as at all other law schools in the Czech Republic, are generally low. As at the other law schools, the days are heavy with large lectures. Grading is not anonymous, so students rarely ask questions that might challenge a professor. Students seek out the back of the rooms, accustomed to passively listening to canned speeches.

Forty or fifty students assembled lethargically into the "Large Hall," an auditorium originally built for Communist Party meetings that could seat perhaps five or six hundred. Helena called the class to order and asked the students to come sit up in the front. In Czech she told them who I was, and provided a general description of the topic I would speak about. Then Helena turned to me, and, as I spoke, she proceeded to translate, phrase by phrase.

I began by telling the students about the problem of deception in a free marketplace. I explained that buyers usually depend upon sellers for representations about the goods and services that they are buying. "Both mainstream economic theories and the American common law support the view that bargains should be enforced in cases where buyers receive honest and complete information about goods," I said.

But I then emphasized something less obvious: that mainstream economic theories and the common law both suggest that it is inefficient and also unjust to enforce bargains that are based upon frauds or misrepresentations. "If the law approved of dishonest misrepresentations, buyers would buy goods they didn't truly agree to buy, and producers would be encouraged to produce goods that buyers didn't want. Society as a whole would be less well off than if such bargains were not enforced," I said. All of this was rather abstract, but I with the help of Helena, seemed to get it across.

I later learned, the students, found my proposition fairly hilarious: that Western theory and law embraces the view that a seller is not free to represent anything at all about a product in order to make a sale! Salesmen
in Eastern Europe apparently make exaggerated claims fearless of legal impediments. Isn’t any kind of salesmanship tolerable under the new Westernized Czech deregulatory order? Under prior Czech law, it was theoretically possible to bring a complaint before a commission, and this occasionally happened. However, nobody today holds the new breed of consumer marketers responsible for their false statements if those representations are not embodied in a contract.

I talked about representations. “Representations aren’t only those contained in a written contract, or only limited to oral representations made at the time of a sale,” I said. “Actionable representations can be made, for example, by the distant manufacturer of a car.” I opened up a Czech magazine to a car advertisement and suggested that the picture of a car winding around a turn was a representation that the car could handle well. “At American common law, an individual can bring a lawsuit against a seller and claim a misrepresentation, even if the misrepresentation is not written up in a contract.”

Suggesting that distant manufacturers could or should be held responsible for the advertisements of their goods which consumers bought from local stores, I later learned, also seemed unreal to the students because under current Czech law, notions of privity that made sense in a socialist state still apply. A consumer’s recourse in most cases of economic injury is against the retail merchant he bought from. When the merchant goes out of business, the consumer is basically out of luck.

It ran contrary to the students’ experience with the stores they were visiting and the advertising they were encountering, furthermore, to suggest that these claims could be tested in court. These law students are also buyers themselves, and they are new to the world of consumer marketing tactics. They are regularly disappointed by the quality of the goods they are buying and regularly absorbing the cost of their reliance upon less than truthful merchants.

I started to speak about the history of odometer frauds. “Setting back odometers, (which I figured correctly) is not uncommon in the used car market in the Czech Republic.” “How many of you know somebody who has had problems after buying a used car?” Guessing that everyone in the class would know at least one other person who at some time had purchased a used car, I had decided to discuss fraud in the purchasing of used cars. Two people raised their hands - most students didn’t know anybody wealthy enough to purchase a used car.

I explained how difficult it was under common law misrepresentation doctrines to establish all of the elements necessary for a recovery: Materiality, Reliance, Scienter, Injury, Causation. Then I traced the development of the federal statute. “In 1972 Congress had made
recovery much easier by creating a federal statute which simplified the matter of proof greatly, criminalized certain conduct, and provided for the recovery of lawyers fees and treble damages. Since then, the problem of the setting back of odometers has become much less severe than it was."

Finally, I discussed fraud as a general matter and expressed the view that in the new social order Czech lawyers would prove to be a necessary component of consumer protection efforts. "If there are enough statutes which contain private rights of action with provisions for attorney fees and damage awards," I suggested, "lawyers can thrive while playing a constructive and important role in improving the safety and honesty of the marketplace."

The lecture took place over three hour-and-a-half sessions. In spite of the many efforts I made to generate a conversation, there was very little comment by students in the first talk. By the second class, I realized that the evolution of legal and economic doctrines and the role of lawyers in vindicating consumer rights was too abstract to be meaningful to the students. The suggestion that these law students might actually be able to do something about the stings and bites they themselves were suffering in the new unlicensed and unregulated marketplace was far more interesting to them.

During the second class, most of the thirty or forty students who came stayed engaged and many of them responded when I posed questions. Others came up to discuss their own consumer problems after the class. These problems proved to be not too different from the ones American students present to me after class. For example:

1. According to three or four students' personal experience, new shoes fall apart much too quickly, and merchants refuse to take them back;

2. It seems that many small businesses are beginning to fail, leaving consumers out in the cold and without a remedy for services and goods unprovided;

3. Several in the class stated that theft is on the rise, and the police appeared unwilling or unable to take action that they would have taken under the old regime when personal property crimes (including the theft of bicycles) are concerned;

4. A student talked about his unhappy experience trying to return goods that were sold to him as appropriate for his
needs (an audio speaker) but which proved to be unsatisfactory;

5. Students talked about being denied refunds or replacements for defective goods simply because they had no receipt; since it is still almost exclusively a cash economy, there are few other ways to prove a purchase.

Consumer grievances in the new Czech economy are real, and they are growing more severe.

My third consumer lecture concerned a problem which surely will emerge for Czechs in the near future: checking accounts and credit cards. Although the acceptance of credit cards is ubiquitous in Prague, only one store in the whole city of Olomouc accepted VISA card payments during the time I was there. Nonetheless, it is apparent that within a short time Czechs will have their own debit and credit cards. I talked about the benefits involved in credit, and the legal issues that would be raised by a growing credit card debt: usury regulations, mandating accurate credit card charge disclosures, barring discrimination in granting credit to women and minorities, preventing telemarketing frauds, and forestalling personal bankruptcies.

The students were very interested in most of this discussion about credit. After class, one of them came up to tell me he was travelling to New York, and he had only cash and no credit card. He had heard on CNN that New York merchants would not let some consumers buy items with cash but insisted on credit cards. I told him not to worry; he had confused the credit card phenomenon with a federal tax law which required car dealers to record the name of those who pay for a car or boat with more than $10,000 in cash. Another student had heard somewhere that cash customers were going to be charged more than credit customers in absolute terms in some places and felt that this was a kind of discrimination that should be prohibited. I told her that while it was common for cash customers to subsidize credit card customers by paying an identical price for goods, I was unaware of the existence of the practice of cash customers being charged more for goods and could not envision it happening.

At the end of my last consumer lecture, I suggested that students seek out honest representations about products, and that they try to obtain reasonable consumer regulations and disclosure laws in Czech consumer markets which have become increasingly chaotic. I left them with a copy of a Consumer Transactions lawbook, a compilation of consumer statutes, the Consumer Reports Buying Guide, and best wishes.
VII. WADING WARILY

What amazes me still is how quickly the law school developed its own identity and a strong presence within the University. Despite a great deal of Western "influence," and despite the intensity of its gaze West, the identity of the law school is fundamentally un-Western in its outlook: so Czech in its approach to making faculty appointments; in its approach to teaching; in its approach to examining students; and in its approach to defining the curriculum. Although the University's Rector would like to move faster, Palatzky University is wading very gingerly into the Western academic ocean.

By the time I left the law school I came to feel that I had given it a wee, incremental assist, by teaching, offering help in composing grant requests, and providing some advice to the Rector of the University about American law. My inner reaction, however, often resembled the engineer Dzhenek's response to consulting in Pennsylvania: With so much useful knowledge to share, why wasn't there more eagerness to listen?

I believe that in my educational zeal, in one way or another, I revealed a great deal of obtuseness toward Czech culture and social behavior. So did most of the other Westerners I encountered—including M. in his economic planning and the Irish in their efforts at journalistic reform. However well-intentioned we were, this obtuseness no doubt contributes to widespread reticence and well-placed skepticism about the wisdom of our approaches.

It is possible to estimate the prospects for the Country as a whole, but not with any confidence. If the Czechs can continue to tap two forceful dimensions of their character that I encountered, they will make the necessary transformations of the Czech economic and legal systems. They will need the liberal spirit of the optimists like Mirek, who vividly see how far they have come. They also need the pragmatic coolness of realists like Helena, who recognize immediately the difficulty of taking even the smallest steps.

Sustaining hope and realism simultaneously, however, is not an easy task—not anywhere today in Eastern Europe.
WHAT THE PRINCIPLE OF SELF-DETERMINATION MEANS TODAY:

Mitchell A. Hill

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I. INTRODUCTION

The right of all peoples to self-determination has been one of the most vigorously promoted and widely accepted contemporary norms of international law.¹ There is no clear consensus, however, as to what the meaning and content of that right is, and it has gained the distinction of "being one of the most confused expressions in the lexicon of international relations."² The meaning of the principle is as vague and imprecise today as it was when, after World War I, President Woodrow Wilson told a cheering session of Congress that "self-determination" is "an imperative principle of action."³ Lee Bucheit used the following analogy to describe the principle of self-determination:

As a descriptive phrase the title "Holy Roman Empire" was defective, Voltaire noted, inasmuch as it denoted an entity neither holy, nor Roman, nor an empire. As a legal term of art, "the right to self-determination" fails in much the same fashion. The expression itself gives no clue to the nature of the self that is to be determined; nor does it provide any enlightenment concerning the process of determination or the source and extent of the self's putative right to this process.⁴

This paper will explore the principle of self-determination by examining its development over time from Woodrow Wilson's Fourteen Points to its modern day meaning as expressed by the United Nation's 1970 Declaration on Friendly Relations. Once the principle has been explored, a modern interpretation of self-determination will be explained in the context of the recent break-up of Yugoslavia.

II. THE HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF SELF-DETERMINATION DURING THE TWENTIETH CENTURY

The historical and current development of the right to self-determination shows that it has become one of the most important and dynamic concepts in contemporary

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³ George F. Will, Bedeviled by Ethnicity, NEWSWEEK, Aug. 24, 1989, at 47; see also HANNUM, supra note 1, at 27.
international life and that it exercises a profound influence on the political, legal, economic, social and cultural planes, in the matter of fundamental human rights and on the life and fate of peoples and individuals.  

The historical development of self-determination during this century can be divided into two distinct periods: the post-World War I period of nationalism and the post-World War II period of decolonization.  

A. Post-World War I  

The first World War is sometimes referred to as the "war of self-determination." President Woodrow Wilson claimed that the Allies' objective was to free the many small nationalities of Europe from the domination of the Germans and the Russians. Wilson identified the honorable aim of the war as the achievement of self-determination for these trapped nationalities. In an address to Congress in May of 1917, Wilson declared, "No peace can last or ought to last, which does not accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."  

The realization of Wilson's idealistic vision of self-determination and self-government for all peoples required a victory against the aggressors of Europe. He made this clear on January 8, 1918, when he announced the goals of World War I in his Fourteen Point Plan to a joint session of Congress. Although the term "self-determination" was never specifically mentioned in Wilson's Fourteen Points, seven out of the fourteen points embodied the principle. Wilson, however, would not see
his idealistic vision fulfilled by the Allies' World War I victory. The goal of the war—self-determination for all the oppressed nationalities—could not be fully achieved in the aftermath of the war.

At the peace conference following the Allied victory, President Wilson and the other world leaders redrew the boundaries of Europe and confirmed the independence of certain territories formerly dominated by their stronger neighbors. Due to many agreements entered into after the war, however, they could not give all the individual nationalities the right to self-determination. Consequently, many of the newly created states contained groups of minorities who were now, for one reason or another, worse off than they had been before separation.

In addition, Wilson and the other world leaders realized that they could not extend the right of self-determination beyond the confines of Europe without greatly disturbing the world order. Wilson realized that his idealistic goal of self-government for all peoples was over ambitious and that he had stretched the principle of self-determination too far. The Allies and the League of Nations subsequently denied the application of self-determination principles to colonial territories which were held by the Allies. Because of World War I, the principle of self-determination was push to the forefront of international politics.

B. Post-World War II

The second major historical period important to the development of the principle of self-determination is the post-World War II era. Since 1945 the principle of self-determination primarily has been used to provide a legal basis for the process of decolonization. The United Nations ("UN") has successfully used the principle to justify its unequivocal stand against colonialism, and has worked diligently to achieve the independence of peoples under colonial rule. The UN, however, has been far from clear regarding whether the right to self-determination should be extended

12. Id. at 22.

13. For example, the redrawing of a border often resulted in splitting up a minority group or placing a minority group within a larger majority, thereby giving that group an even smaller minority presence than they had previously. The world leaders may have assumed that they had the knowledge and the foresight to divide Europe properly; the divisions they made, however, are the cause of many of today's problems in central Europe. See Will, supra note 3, for a discussion of the carving up of Europe at the Versailles peace conference.

14. UMORURIKE, supra note 7, at 22. President Woodrow Wilson said that "[i]t was not within the privilege of the conference of peace to act upon the right of peoples except those who had been included in the territories of the defeated empires." Id.

15. BUCHEIT, supra note 4, at 16.

16. Id. at 17.
beyond the colonial context and used as a basis for allowing the secession of oppressed minority groups within an independent state.\textsuperscript{17}

The UN and other international governmental organizations ("IGOs") are reluctant to recognize the right of secession as a part of the principle of self-determination because by doing so, they would be inviting or justifying "attacks on the unity and integrity of their own member states."\textsuperscript{18} Colonial self-determination does not invite this political danger.\textsuperscript{19} The fact that the UN wholly embraces the right of colonial self-determination but not the right to secession highlights that the two concepts are not equivalent. The self-determination/secession distinction is at the heart of the majority of self-determination debates taking place today.\textsuperscript{20}

III. UNITED NATIONS AGREEMENTS CONCERNING THE RIGHT OF SELF-DETERMINATION — THE CONTEMPORARY VIEW

United Nations agreements form the core of the contemporary interpretation of the principle of self-determination. The United Nations has also been the primary arena in which the claims and counterclaims of self-determination have been advanced and debated.\textsuperscript{21}

In the practice of the UN, the principle of self-determination has been recognized to mean that all peoples have the right to determine freely

\begin{enumerate}
\item\textsuperscript{17} Id. Applying the principle of self-determination in the colonial context appears to be a politically more salient alternative than applying it to the right of secession. \textit{Id.} Whether or not a group is recognized as a colony under international law is a reflection of historical luck and political circumstances rather than a reflection of reality. \textit{See A GLOBAL AGENDA: Issues Before the 46th General Assembly of the United Nations 73} (John Tessitore & Susan Woolfson eds., 1991).
\item\textsuperscript{18} ALEXIS HERACLIDES, THE SELF-DETERMINATION OF MINORITIES IN INTERNATIONAL POLITICS 23 (1991).
\item\textsuperscript{19} BUcheit, \textit{supra} note 4, at 7.
\item\textsuperscript{20} The problems concerning the self-determination/secession distinction are complex and far-reaching. For example, if every nationality that existed within a nation state had the right to secede, there would be a huge upset in the balance of power in the U.N. General Assembly. Consider the following excerpt by John Quigley:

Tanzania, though not a large state, includes 120 nationalities, each with its own territory, language culture, and traditions . . . . If Tanzania were to divide along nationality lines, these nation-states would outvote a combined Europe and North American constituency in the U.N. General Assembly. If the same development occurred elsewhere in Africa, the world community would have a majority of African states.

\item\textsuperscript{21} OFUATEY-KODJOE, \textit{supra} note 2, at 39.
\end{enumerate}
their own sociopolitical and economic circumstance. Among the UN documents reflecting this position are the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples (the "1960 Declaration"); the two covenants on human rights—the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights; the Definition of Aggression; and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the "1970 Declaration").

A. The United Nations Charter

The UN Charter expressly mentions the principle of self-determination in articles 1(2) and 55. The UN Charter also acknowledges the principle in Chapters XI, XII, and XIII by imposing upon the trustee states of Non Self-Governing and Trust Territories the obligation to help those territories achieve self-government. Although the UN Charter embraces the notion of self-determination, it contains surprisingly little

28. U.N. CHARTER art. 1, para 2. Article 1(2) states that one of the purposes of the United Nations is to "[to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace." Id.
29. U.N. CHARTER art. 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

30. See, e.g., U.N. CHARTER art. 73(b) (explaining that members assuming the responsibility for the administration of a territory must assist the people in the "progressive development of their free political institutions").
information about it. Therefore, an examination of other pertinent UN documents is necessary to understand the principle of self-determination and its contemporary interpretation.

B. The 1960 Declaration

The 1960 Declaration proclaimed unconditionally that colonialism must end. It declared that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic social and cultural development." This reaffirmation of the right of peoples to self-determination was extremely important because the principle of self-determination was to "constitute the driving force in the decolonization activities undertaken by the United Nations." In addition to reaffirming the principle of self-determination, the 1960 Declaration in combination with the International Covenants on Human Rights provides the basis for the "unquestioned acceptance in international law" of the fact that the right to self-determination applies only to peoples under colonial and alien domination. The concept of "peoples" encompasses "a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future." Under contemporary notions of international law, this concept of peoples has not been extended to include minorities; thus minorities do not have the right to self-determination.

31. QUAYE, supra note 22, at 213.
32. 1960 Declaration, supra note 24, at pmbl., para. 2.
33. Cristescu, supra note 5, at para. 682.
34. See supra note 25.
36. Espiell, supra note 35, at para. 56.
37. Id.
38. Id.
C. The 1970 Declaration

1. Generally

The United Nations has established that the principle of self-determination is primarily, if not exclusively, a vehicle for decolonization, not a justification of secession. 39 "The right does not apply to peoples already organized in the form of a State which are not under alien domination." 39 The theoretical basis for this anti-secession position is that secession disrupts the borders and the political structures of independent states. Consequently, the principles of territorial and political integrity, embodied in the majority of UN documents addressing self-determination, are violated.

This pure and restrictive interpretation of the principle of self-determination was not shared unanimously by the members of the UN. Some members felt that a more liberal interpretation should be adopted that would allow the right of self-determination to extend beyond the colonial context. The UN attempted to clarify the meaning of self-determination and resolve the differences between its members in the 1970 Declaration.

The differing opinions of the UN members about the principle of self-determination were evident from the discussions and meetings which preceded the drafting of the 1970 Declaration. 41 The majority of the members expressed their belief that secession should not be recognized as a legitimate form of self-determination. 42 The 1970 Declaration is representative of this majority view; however, it also contains specific language which extends the right of self-determination beyond the realm of traditional colonial domination and recognizes that in some situations groups suffering oppression within an independent state may have the right to seek self-determination. 43

The 1970 Declaration advances the theory that if colonial and alien domination exists under a guise of national unity, then the group of peoples

39. Id. at para. 60; BUCHEIT, supra note 4, at 87.
40. Espiell, supra note 35, at para. 60.
41. See BUCHEIT, supra note 4, at 88-92. For example, the Polish government, as did the majority of Eastern Bloc countries, felt that the right to secession was inherent in the right to self-determination. Id. at 88-89. The United Kingdom, on the other hand, felt that self-determination was a political principle, not a legal right, and that the U.N. Charter was not meant to be a basis on which a province could claim a right to secede from an independent state. The United Kingdom feared that if the right to secession was incorporated into the principle of self-determination, then Wales could conceivably secede from England. Id. at 89.
42. Id. at 90.
43. See Espiell, supra note 35, at para. 60.
subject to this domination have the same right to self-determination as do traditionally defined colonial peoples." The 1970 Declaration simultaneously protects the concept of territorial integrity for independent states and the right of self-determination for this special group of peoples. The Declaration protects both concepts by reaffirming the need to preserve the territorial integrity of sovereign and independent States, but imposing on States the requirement that they must be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."45

This interpretation of the 1970 Declaration appears to be crucial to an understanding of the modern concept of self-determination. The following is a detailed analysis of that portion of the 1970 Declaration which directly addresses the principle of self-determination of peoples.

2. The Self-Determination Section of the 1970 Declaration

The 1970 Declaration contains a separate section on the principle of self-determination entitled: "The principle of equal rights and self-determination of peoples" (the "Self-Determination Section").46 The Self-Determination Section is an attempt to codify the principle of self-determination and reconcile the divergent opinions that were expressed by the members during the drafting phase of the 1970 Declaration.47 The following paragraphs describe the content of various parts of the Self-Determination Section.

Paragraph one of the Self-Determination Section emphasizes that self-determination is a right and not a mere political concept.48 Paragraph two imposes the duty on every state to promote equal rights and self-determination of peoples. In addition, paragraph two differentiates between the denial of human rights and the denial of the right to self-determination by stating that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination], as well as a denial of fundamental human rights."49 Paragraph three reiterates the principle that every state is to promote respect for human rights and fundamental freedoms.

44. Id.
45. Id. (quoting The Self-Determination Section of the 1970 Declaration, para. 7).
46. 1970 Declaration, supra note 27. [For the convenience of the reader, the text of the Self-Determination Section has been reproduced in the Appendix.]
47. BUCHEIT, supra note 4, at 90-91. See 1970 Declaration, supra note 27.
48. BUCHEIT, supra note 4, at 91.
49. 1970 Declaration, supra note 27, at para. 2.
Paragraph four sets out the four modes by which people may assert their right to self-determination: (1) the establishment of a sovereign or independent state, (2) the free association with an independent state, (3) the integration with an independent state, or (4) the emergence into any other political status freely determined by a people.\(^{50}\) It is important to note that this implementation provision is addressed to the people themselves rather than to states or nations, thereby implying that there is a right to self-implementation by a "people.\(^{51}\)

Paragraph five imposes a duty on states to refrain from using force to deprive peoples of their right to self-determination and entitles people that are subject to such forcible action on the part of a state to receive support in their endeavor to resist that force. Paragraph six gives a colony or other non-self-governing territory a distinct and separate status from the state that is administering it.

Finally, and most importantly, paragraph seven appears to recognize that secession may be a legitimate option under certain circumstances.\(^{52}\) The paragraph is divided into three parts. The first part reaffirms the principle of territorial integrity expressed in the 1960 Declaration.\(^{53}\) It warns that nothing in the preceding paragraphs should be construed as authorizing or encouraging the dismemberment or impairment of the territorial or political unity of sovereign and independent states. A similar admonishment is made in paragraph eight which directs states to refrain from actions which are aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.\(^{54}\) Paragraph seven implies, however, that only those states "conducting themselves in compliance with the principle of equal rights and self-determination of peoples described above" will enjoy this "guarantee" of sanctity for its borders and political unity.\(^{55}\) The final phrase of paragraph seven implies that a state will be in "compliance" and therefore protected against violations of its territorial integrity and political unity if its

\(^{50}\) Id. at para. 4.

\(^{51}\) BUCHEIT, supra note 4, at 92. "However, when the People and the Nation are one and the same, and when a people has established itself as a State, clearly that Nation and that State are, as forms or manifestations of the same People, implicitly entitled to the right of self-determination." Espiell, supra note 35, at para. 56.

\(^{52}\) BUCHEIT, supra note 4, at 92.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. at 92-93.
government is representative of "the whole people belonging to the territory without distinction as to race, creed, or color." 56

The notion expressed in this final clause of paragraph seven derives from the beliefs of Woodrow Wilson that government gains its legitimacy from the consent of the governed, and that consent cannot be forthcoming unless it is given by all segments of the population. 57 This consent-of-the-governed concept has been interpreted to mean that if a government is not representative of the whole people it is illegitimate and in violation of the principle of self-determination. This illegitimate character of the government serves in turn to legitimize "action which would dismember or impair, totally or in part, the territorial integrity or political unity" of the state which is violating the principle. 58 In other words, the fact that a government is unrepresentative may provide an oppressed group within a state with the justification for their secession from that state. An unrepresentative or abusive government will be viewed as if it were a colonial power; therefore, the people under its "colonial" rule will have the right to self-determination. The Self-Determination Section of the 1970 Declaration appears to establish that a denial of political freedom and/or human rights is the *sine qua non* for a valid separatist claim by an oppressed group within an independent state. 59


The recent recognition of the secession of Croatia, Slovenia, and Bosnia-Herzegovina (the "Provinces") from Yugoslavia by the UN 60 can be explained in terms of the "pseudo-colonial" theory which was expressed in the Self-Determination Section.

A. Background

Yugoslavia originated in 1918 as a State of three peoples (Serbs, Croats, and Slovenes) and emerged after World War II as a federation of six

56. *Id.* at 93.
57. *BUCHEIT,* supra note 4, at 93; *see also* text accompanying note 9.
58. *BUCHEIT,* supra note 4, at 93.
59. *Id.* at 94.
republics and two autonomous provinces. Eight of the major ethnic populations live in areas that roughly correspond to the political boundaries of each-federation. The names of the republics generally correspond with the ethnic groups that occupy them. For example, Serbia is named for its Serbian majority.

Not all of the minorities, however, live in federations that bear their name. One province, Bosnia-Herzegovina, is populated by three major ethnic groups—Serbs, Croats, and Muslims. The current crisis in Yugoslavia is the result of differences in ethnicity, religion, and wealth among the warring parties and each sides’ claims to self-determination.

B. Croatia, Slovenia, and Bosnia-Herzegovina Claim Independence

In mid-1991 Croatia, Serbia and Bosnia-Herzegovina declared their independence from Yugoslavia. All three provinces held plebiscites, or referendums of independence, that resulted in a majority of the population voting for independence. The Serbian minorities in both Croatia and Bosnia, however, did not vote for independence and have rebelled against their province’s majority in order to oppose secession from Yugoslavia. Because of this uprising, the federal government of Yugoslavia, which has a Serbian majority, sent federal troops into the seceding republics to restore order, but apparently the federal government has actually been supporting the Serbian Guerillas. All out civil war followed, and stories of atrocities committed by Serbian forces against Croats, Slovenes, and Bosnians were heavily publicized in the world media.

61. Iglar, supra note 6, at 215. The republics of Yugoslavia are Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Montenegro, and Macedonia. Serbia possesses two autonomous provinces: the province of Vojvodina and the province of Kosovo. Id. at n.21.

62. Id. at 215.

63. For example, the Krajina Region in the Republic of Croatia is considered a major Serbian enclave. See John Darton, Croatia’s Chief Vows ‘Liberation’ of More Land in Serbian Enclave, N.Y. TIMES, Feb. 1, 1993, at 3, for a discussion of the dispute over the Krajina Region and the problems associated with the different ethnic groups trying to live within the same boundaries as each other.

64. Whereas the civil war in the former Yugoslavia generates many different issues and questions concerning the principle of self-determination, this paper will only concentrate on the initial claims of independence (secession) of Croatia, Slovenia, and Bosnia-Herzegovina from Yugoslavia and the U.N. ’s subsequent recognition of their independence.

65. See Iglar, supra note 6, at 216-21.

66. Id. at 216, n.29.

C. The Recognition of Slovenia, Croatia, and Bosnia-Herzegovina and the Self-Determination Section of the 1970 Declaration

At first the world community denounced Slovenia's, Croatia's, and Bosnia's attempts at self-determination through secession as being in violation of the principle of territorial integrity. Yet, after the federal government of Yugoslavia began to use force against the peoples seeking self-determination and news reports emerged of the human rights violations committed by Serbs in the Federal Government, the UN and the world community changed its mind. In May of 1992, the UN formally recognized the republics of Slovenia, Croatia, and Bosnia-Herzegovina and the republics become official members of the world organization.68

UN recognition of the Provinces can be explained in terms of the Self-Determination Section of the 1970 Declaration. Prior to their unilateral claim of independence, the Provinces were part of an existing state which as a member of the UN. Because they were neither under colonial rule nor alien domination, the Provinces were not entitled to claim the right of self-determination and unilaterally secede from the Federal Republic of Yugoslavia according to the principle of territorial and political integrity.

The Self-Determination Section of the 1970 Declaration provides that in certain circumstances the right to self-determination will be applied to groups which do not fall in the traditional colonial category. When a government is not representative of its people and operates under the guise of national, the oppressed groups within that state will be treated as if they were under colonial or alien domination (a "pseudo-colony") and will have the right to self-determination. The provinces arguably meet these conditions and should be viewed as having been colonies of or dominated by the Serbian government of Yugoslavia. Thus, the Provinces have the right to self-determination by means of secession from Yugoslavia under the principles expressed in the Self-Determination Section of the 1970 Declaration.

There is no bright line rule that can be used to determine when this "pseudo-colony" theory will be applied to grant the right of self-determination and hence the right to secession to groups within sovereign states. It appears that this theory is applied by the world body when it is politically popular to do so: In the case of the Provinces, the media reports of aggressive tactics of the Serbian-dominated Yugoslav Army coupled with the reports of human rights violations committed against the seceding peoples have made the secession of the Provinces politically acceptable.

68. Friedman, supra note 60.
V. CONCLUSION

The principle of self-determination has undergone many stages of development since Woodrow Wilson concluded that his idealistic goal of self-determination for all peoples could not be realized in the aftermath of World War I. Unfortunately, if Wilson were alive today he would find that his idealistic vision has not yet been achieved. Today, right to self-determination is still a limited one and is not something to which all peoples are entitled. Furthermore, it remains a right which depends upon the current political climate; the politicians only seem to support and sanction claims of self-determination when situations escalate into crises. Hopefully, in the future, the right of self-determination will be more clearly defined so that conflicts like the one in the former Yugoslavia can be avoided.
VI. APPENDIX

THE DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order

(a) To promote friendly relations and co-operation among states; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible
action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the state administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right to self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.
DELIMITATION, EXPLOITATION, AND
ALLOCATION OF TRANSBOUNDARY OIL & GAS
DEPOSITS BETWEEN NATION-STATES

Thomas A. Reynolds*

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I. INTRODUCTION

Liquid hydrocarbon deposits often extend across national frontiers in such a manner that an entire deposit may be exploited, wholly or in part, from either side of the boundary line. This characteristic of liquid hydrocarbons has been a fundamental cause of disputes, conflicts, and even wars in many parts of the world. As the economies of nation-states grow more dependent on this relatively cheap energy source, the likelihood of conflict will increase unless an international legal regime can be developed to resolve these disputes on a fair and equitable basis and upon which future treaties and agreements may be predicated. As a result, this area of law has increasingly attracted the attention of legal scholars and the international legal community.

Because of the major impact this subject has on geopolitics and the world economy, it is difficult to understand why the most recent United Nations Convention on the Law of the Sea (UNCLOS) in 1982, did not squarely address the issue of liquid hydrocarbons. Although the 1982 UNCLOS specifically addresses some transboundary marine resources, such as submarine hydrocarbon deposits, it does not address the transboundary element of hydrocarbon deposits between two or more states or, between states and special zones.

Although hydrocarbon market prices have fluctuated dramatically, experts predict that demand for this relatively cheap energy source and

2. Id. at 215.
chemical feedstock will grow significantly. As a result, pressure to develop transboundary energy reserves will also increase, and conflicts will be difficult to avoid. Thus, the development of transboundary hydrocarbon resources requires the attention of specialists to provide an adequate legal regime in order to prevent future conflicts. These legal regimes must also promote efficient and environmentally sound exploitation by those nations involved.

The issues of delimitation and exploitation of transboundary liquid hydrocarbon deposits are a branch of international law that has immense global impact but, surprisingly, has remained quite stagnant with relatively few exceptions. This paper will attempt to give the reader a basic understanding of oil and gas exploration and extraction principles, summarize the existing international case law on transboundary oil and gas deposits, review developing trends, and postulate some rules for possible inclusion in the next United Nations Convention on the Law of the Sea. Alleviating the existing confusion surrounding the law of transboundary oil and gas deposits might help to defuse the international tensions associated with the indefiniteness of the current legal regime concerning transboundary oil and gas deposits.

II. HISTORICAL PERSPECTIVE

A. The Basics

Due to the migratory properties of oil and gas, liquid hydrocarbon deposits often extend across national boundaries in such a manner that the entire deposit may be exploited from either side of the boundary line. In this respect, deposits of fluid hydrocarbons differ from hard mineral deposits which are separated into discrete units by a state's frontier or boundary. Transboundary oil and gas deposits, clearly, "[d]o not conform well to property lines, licensing demarcations or political boundaries."

5. Id.
6. Id.
7. Szekely, supra note 3, at 738.
8. Lagoni, supra note 1, at 215.
10. Id.
Oil and gas deposits are typically composed of porous rock bounded by impermeable strata which trap the hydrocarbons usually under high pressure. Drilling through the impermeable cap decreases the reservoir pressure allowing the oil and gas to migrate through the porous media to the source of lower pressure. This source is usually the newly drilled well. The fluids are then propelled to the surface by the hydraulic pressure of the water table exerted on the deposit and the expansion of gas trapped in the liquids. One can achieve a similar result by shaking a bottle of soda and then decreasing the internal pressure by opening the cap.

This production of hydrocarbons under the reservoir's own pressure is called primary production. Based on empirical data, primary production is usually capable of recovering fifteen to twenty-five percent of the oil in the deposit. By using secondary recovery methods, such as injecting gas or water into the well, well pressures can be maintained and recoveries of up to eighty percent may be achieved. Newer, more complex and costly methods of enhanced recovery, known as tertiary recovery, include surfactant flooding, carbon dioxide flooding, steam injection, and fire flooding can further increase recoveries.

Over many years, the United States has developed some rules of law, consisting of federal and state statutes, that address the problem of adjacent land owners exploiting transboundary oil and gas deposits. The rules center around an attempt to develop the deposit as a single unit with the cooperation from all other property interests in the deposit. This method of exploitation allows for optimum geologic placement of wells and produces maximum hydrocarbon recovery from the deposit.

B. The Early Years of Oil and Gas Law in the United States

A brief explanation of the development of oil and gas law in the United States may provide some perspective on possible solutions to transboundary oil and gas problems and issues in the international arena. During the period of the development of oil and gas law in the United States, the courts lacked "adequate understanding of the physical properties of oil and gas . . . and the subsurface structures containing

12. Uutton & McHugh, supra note 9, at 722.
13. Id.
15. Id. at 469.
Consequently, courts used the Rule of Capture, by way of analogy to migratory wild animals and marine life, as the basis of law for transboundary oil and gas deposits. The courts held that liquid hydrocarbons, within transboundary deposits, belonged to the land owner who extracted and controlled them, regardless of whether the hydrocarbons being extracted on A’s property had initially come from beneath B’s property. In essence, B’s property rights in oil and gas beneath his land were conditional upon his extraction and control of them. In fact, B’s property rights extended to that portion of the deposit beneath A’s property if B could extract and acquire them from his side of the boundary. Thus, the only solution an owner apparently had, if he was to retain the hydrocarbons that lay beneath his property, was to drill first and fast in order to extract and control the hydrocarbons before his neighbor did. Consequently, the early law created incentive to drill as many wells as quickly as possible in order to maximize individual production from the deposit, usually at a neighbor’s expense. This self-serving and haphazard race to drill wells and produce the underlying oil and gas unnecessarily reduced the pressure in these reservoirs and, thus, reduced overall hydrocarbon recovery. Little regard was given to the most efficient and effective development of the reservoir as a whole unit.

Spacing legislation eventually was passed limiting the number of wells that could be drilled per acre. This was followed by legislation regulating the production from each well based on overall market demand for hydrocarbons. These legislative acts helped maintain reservoir characteristics which maximized recovery of the deposit and thereby conserved the resource. Also, the legislation, by regulating production in an attempt to establish a balance between oil and gas supply and demand, helped to stabilize declining prices.

16. Utton & McHugh, supra note 9, at 722.
17. Id. at 722 n.28.
18. Id. at 722.
19. Id.
20. Id. at 723.
21. Utton & McHugh, supra note 9, at 723 n.32.
22. Id. at 723.
23. Id.
C. Forced Pooling and Unitization

The most cost effective method of maximizing production from oil and gas deposits requires the strategic placement of wells in the deposit. By properly placing wells based on the physical and geological characteristics of the entire deposit, favorable reservoir characteristics can be maintained and production is thereby maximized. Unitization, as it was called, requires all land owners to submit to development of the entire hydrocarbon deposit as a unit. The trend has been toward compulsory unitization because of the obvious problems associated with voluntary unitization.

Unitization and forced pooling promote drilling and production by allowing a producer to force other nonconsenting lease holders within the specified drilling area to participate in the drilling activities as either a full working interest partner, wherein the land owner would have a percentage ownership in the well and bear the burden of his fair share of expenses, or as a royalty interest owner, wherein the producer would pay the land owner a one-time state determined bonus plus a royalty interest in lieu of ownership. While there is no international law on the subject of joint management schemes, the United States law of unitization can be used to make a persuasive argument for its regular international use by analogy. Unitization was used internationally with success in some of the North Sea operations.

Rainer Lagoni suggests that international state practice, as reflected in common deposit arrangements in the past, may support the emergence of a customary rule of international law that would require states to cooperate in the exploration and exploitation of common deposits of oil and gas. If this were accomplished, and the 1982 UNCLOS required unitization for transboundary oil and gas deposits, the result would lead to maximized recovery (value) for all concerned parties, minimized waste, and minimized environmental concerns and operating

24. Id. at 724.
25. Id. at 723.
27. Id. at 469.
28. Id. at 470 n.3.
29. Id. at 471.
31. Lagoni, supra note 1, at 243.
costs because transboundary deposits would be developed as a whole unit. It is also likely that a single operator would develop the deposit which would eliminate the duplication of effort and costs associated with multiple operators.

D. Marine Based Subsurface Hydrocarbon Deposits

Marine based subsurface hydrocarbon deposits pose a different set of problems. These problems usually concern the delimitation of the boundaries of the continental shelf and the Exclusive Economic Zone (EEZ) between the adjacent or opposing nation-states. The first problem is delimitation of the continental shelf.

E. Continental Shelf: Delimitation - The Drawing of Boundaries

Article 83 of the 1982 UNCLOS deals specifically with the delimitation of the continental shelf between nation-states with opposite or adjacent coasts. In essence, it says that nation-states engaged in the delimitation of adjacent or opposite boundaries of their continental shelves shall do so by agreement in accordance with Article 38 of the Statute of the International Court of Justice (ICJ) "[i]n order to achieve an equitable solution." This provides little direction except to advise states that it is up to them to negotiate.

The adoption of a bargaining process, rather than a more mathematical approach to delimiting the continental shelf area leads some experts to believe that Article 83 was intentionally left vague by the states during negotiations. It is further believed that it was motivated by greed for the resources within the shelf. Under the current system it may be possible for states with stronger bargaining positions to end up with more than their fair share of the continental shelf and its resources at the expense of others. However in many instances, it is all too probable that agreement will not be reached, and this will result in dispute, gridlock, or submission to the International Court of Justice for resolution.

It seems as though the drafters of the 1982 UNCLOS have not taken a definitive posture on this contentious issue. Perhaps this was done

32. See Lagoni, supra note 1, at 217.
34. Id. at 1286.
35. Szekely, supra note 3, at 741.
36. HENKIN ET. AL., supra note 30, at 1231.
to accommodate as many states as possible with a watered down agreement in order to get the requisite number of states to ratify the treaty and deal with the tough issues later, or to sit back and wait for the states themselves to create law on the issue of continental shelf delimitation by their customs and practice over time.

F. High Seas Exploitation of Natural Resources

The freedom to fish remains one of the oldest freedoms of the sea. The 1982 UNCLOS confirmed the freedom of fishing for all states and their people, but also recognized the need to regulate and conserve the living resources of the seas. Articles 116 through 118 address states' rights and duties of fishing, conservation of living resources of the seas, and cooperation and management of those living resources.

1. Who Owns the Resources of the High Seas?

An attitude already exists that the living resources in the water column of the high seas have always been available to all nations. That attitude has yet to extend to the minerals on and beneath the seabed. At present, the option to explore and extract minerals from the seabed is available only to those few nation-states who have adequate technology and financial resources. However, given that technology and financial resources are readily available, the resources must be able to be exploited in a commercially economical manner in order to make the effort worthwhile.

As high technology reduces the cost and increases the commercial viability of exploration and extraction of minerals in the deep waters of the seas, the legal question becomes: Who is, or should be, entitled to exploit these resources and under what bases and limitations? What is needed is a legal regime that will give incentive to the nations with the technology and financial resources to exploit the seabed, ensure that a state's claim is protected against encroachment by other nations, and assure that those who take the risks will be able to reap the rewards. As with other branches of the law, it is virtually impossible to define the entire legal regime prior to allowing exploitation to begin; however, some basic rules become necessary if conflicts are to be avoided. The law should then develop

37. Id.

38. Id.

39. Id.

40. Id. at 1308.

41. HENKIN ET. AL., supra note 30, at 1308-09.
naturally based on practice or custom and the treaties that are formed between nations. It should be noted that General Assembly Resolution 2574D (XXIV) (1969) deals with the Moratorium on Exploitation of Resources of the Deep Seabed. The United States challenged the statement of law reflected in the resolution and the authority of the Assembly to declare a "moratorium."\textsuperscript{42}

In the 1982 UNCLOS, Articles 136 through 140 address the mining of natural resources of the seabed. Articles 136 and 137 state that the seabed area of the high seas and its resources are for the common heritage of mankind and that no state, natural person, or juridical person shall claim or exercise sovereignty or sovereign rights over any part of the area or its resources.\textsuperscript{43} Any attempt to acquire such rights will not have legal recognition by the appropriate authority.\textsuperscript{44} Article 139 specifies that joint and several liability will apply to parties who, while acting together, fail in their responsibilities or duties to maintain compliance with the Convention which results in damages to other parties.\textsuperscript{45} Article 140 specifies that seabed mining in the high seas shall be carried out for the benefit of mankind as a whole. This article also provides that equitable sharing of financial and other economic benefits derived from activities in the high seas area shall be made on a nondiscriminatory basis.\textsuperscript{46}

2. Share the Bounty—Share the Cost?

Some may argue that the seabed resources belong to all the nations of the world, and that even though they may be exploited by a few nations that are financially capable, they should be made available to all. The international marketplace and international commerce have already created a system of distributing wealth based on supply and demand which, in turn, determines price and availability. However, some regulation may be necessary to ensure the world’s access to these resources. Perhaps all nations should have the opportunity to participate in the bounty of the seabed by either sharing in the cost of exploitation or by being afforded the opportunity to purchase these minerals at fair market value.\textsuperscript{47} The same

\textsuperscript{42} Id. at 1316.

\textsuperscript{43} United Nations Conference on the Law of the Sea, \textit{supra} note 33, arts. 136, 137.

\textsuperscript{44} Id.

\textsuperscript{45} Id. art. 139.

\textsuperscript{46} Id. art. 140.

\textsuperscript{47} When dealing in global economies, even something apparently as simple as deciding on a fair market price is problematic. Price is usually a function of local market demand and, varies based upon the geographic location of the nation wishing to purchase. This complication allows one to look more favorably upon the joint participation scenario.
guiding principles that govern transboundary resources should apply to seabed exploration: duty of good faith and cooperation, duty to share data, duty to protect the environment, and the duty to avoid wasteful practices in order to conserve the resources.

III. THE INTERNATIONAL LAW OF TRANSBOUNDARY RESOURCES

Liquid mineral deposits that extend across national frontiers on land or a dividing line on the continental shelf between adjacent or opposite states have increasingly attracted attention in international law during the late 1960's and 1970's. An emerging legal concept of cooperation between neighboring states has already occurred when two or more states share water resources. It appears likely that this concept of cooperation will be extended to transboundary hydrocarbon deposits.

The 1982 UNCLOS does not address the transboundary element of these deposits between nation states and special zones; therefore, nation-states are left to their own devises within the context of a few guiding principles to formulate a solution. Several principles have developed over time and proven useful in transboundary issues, such as consultation and negotiation toward the conclusion of agreements for joint cooperation, the principle of adequate and effective exploitation, the principle that the coastal state may enter into joint cooperation schemes without relinquishing its rights over that part of the deposit on its side of the delimitation line, the emerging principle of equal sharing in benefits derived from the exploitation of the transboundary deposit, and the emergence of the principle of unitization.

Mexican-U.S. experience in the field of transboundary resources has contributed to some of the guiding international principles ruling the use and conservation of transboundary resources, namely: the duty of each country at either side of the border, when exploiting its part of the resource conceived as a natural unity, to refrain from producing a sensible harm; the principle of equitable

48. Lagoni, supra note 1, at 215.


50. Lagoni, supra note 1, at 215.

51. Szekely, supra note 3, at 738.

52. Id. at 766.
and rational utilization; and the duty to undertake previous consultations and to exchange information. 53

These principles constitute "good neighborliness." 54

Mexico proposed the concepts of good faith and non-abuse of rights at the third UNCLOS. 55 These concepts are basic to transacting business between nations and should be directly incorporated in the legal regime of transboundary resources. Hard mineral deposits across frontiers are dealt with in reference to territorial sovereignty, sovereign rights, and territorial integrity.

A. Legal Concepts

1. Sovereignty and Sovereign Rights

"The territorial sovereignty of nation-states extends to the mineral resources in the soil and subsoil of their land territory and territorial sea to an unlimited depth." 56 "This exclusive authority exists whether or not the deposit has been discovered or the state is able or intends to exploit it." 57 No nation-state may exercise rights over these mineral resources without consent of the state under whose territory they reside. 58 This holds true as well for mineral resources within the territory of the continental shelf; however, in that situation nation-states have exclusive sovereign rights rather than full territorial sovereignty over the resources. 59 Although the literature makes a distinction between sovereignty and exclusive sovereign rights, none will be made for purposes of this discussion. 60

53. Knedlik, supra note 11, at 683.
54. See Szekely, supra note 3, at 738.
55. Id.
56. Lagoni, supra note 1, at 216 (citing L. OPPENHEIM, INTERNATIONAL LAW 462 (8th ed. H. Lauterpacht, 1955); I, 2 P. FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 99 (H. Bonfils, 8th ed. 1925)).
57. Lagoni, supra note 1, at 216.
58. Id.
59. Id. (citing North Sea Continental Shelf Cases, 1969 ICJ 3, at 22 (Feb. 20). See also Geneva Convention on the Continental Shelf, art. 2, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. The state's authority over the mineral resources of its land territory and territorial sea is based on the concept of territorial sovereignty as an essential part of its legal personality, whereas its sovereign rights over the mineral resources in the soil and subsoil of its continental shelf are derived from the geographical concept of natural prolongation. Id. at 31.
60. Id. at 216.
2. Territorial Integrity

Territorial integrity is a "necessary corollary to the principle of territorial sovereignty." It protects the sanctity of a nation-state's territory from unauthorized invasion by another nation-state. For example, this principle would be violated by the unauthorized mining through the boundary line by state A into part of a shared deposit residing within the territory or continental shelf of state B or by state A conducting mining operations within its boundary which results in material damage to the territory of state B. The rule of law that another state is responsible for material damage it causes to another state's territory has been developed by analogy to the damage to a state by extraterritorial effects such as air and water pollution.

Violations of the principle of territorial integrity for oil and gas deposits are especially difficult to establish. Complicated characteristics of these deposits such as equilibrium of rock pressure, gas pressure, and underlying water pressure affect the extraction process to the extent that extracting hydrocarbons at one point will inevitably change conditions within the entire contiguous deposit. Thus, this character of transboundary fluid hydrocarbon deposits often creates tension even between nations who may have enjoyed the best of relations in the past. In this author's opinion there has been some suggestion and speculation in the media that land based transboundary hydrocarbon issues were, in part, responsible for Iraq's invasion of Kuwait.

3. Territorial Sea

Once states had acknowledged the idea of a territorial sea about the coast, they had to address themselves to the matter of its breadth.

61. Lagoni, supra note 1, at 217.
62. See, Lagoni, supra note 1.
63. Id. at 217.
64. Id. (citing Gunther Handl, Territorial Sovereignty and the Problem of Transnational Pollution, 69 AM. J. INTL. L. 50, 72 (1975)). The author inferred this rule from extensively discussed principles and concepts, basing it on well known precedents and state practice, such as, the principle of territorial integrity, the emerging principle of sic utere tuo ut alienum non laedas, the concept of good neighborliness as representing an expansion of the principle of abuse of rights, and, inter alia, the Corfu Channel Case, 1949 I.C.J. 22 (Apr. 9), and the Trail Smelter Arbitration, 3 R. INT'L ARB. AWARDS 1905, passim.
65. Id. at 217.
Territorial sea limits varied over historical time and were based on such theories as the line-of-sight doctrine, the cannon-shot rule, and the marine league doctrine. These doctrines have outlived their usefulness. Based upon the principles for which they were originally formulated, where does one draw the boundary line now?

In 1793, the United States became the first country to adopt a three mile limit in its domestic laws. Later the three mile limit generally became recognized by international treaty and was accepted by nations states until the early 1960's. Although it was recorded by the 1930 Hague Conference as common practice, it was never codified. The ILC suggested a twelve mile upper limit in its 1956 report, but it did not specify any specific limit between three and twelve miles. In accordance with the 1982 UNCLOS, every nation-state has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from the low water line along the coast unless otherwise provided. As a matter of course, the limit is generally set by states at twelve nautical miles.

4. Continental Shelf

"The concept of national jurisdiction over a continental shelf beyond the territorial sea is relatively modern in origin, usually being traced to the 1945 Truman Proclamation." The 1958 Geneva Convention on the Continental Shelf defined the continental shelf "[t]he seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas." Later, in the North Sea Continental Shelf Cases, the International Court of Justice (ICJ) recognized the continental shelf of the coastal state as a "[n]atural prolongation of its land territory existing ipso facto and ab initio, by virtue of its sovereignty over the land,

67. Henkin et. al., supra note 30, at 1240.
68. Id. at 1241.
69. Id. at 1240-44.
70. Id. at 1242.
71. Id. at 1243.
72. Henkin et. al., supra note 30, at 1245.
73. Id.
and as an extension of it, an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."

5. Exclusive Economic Zone (EEZ)

Louis Henkin notes that during the negotiations for the 1982 UNCLOS, extensive pressure from states with varying interests at stake led the Convention to adopt the Exclusive Economic Zone (EEZ). Articles 55 through 58 of the 1982 UNCLOS establish and define the EEZ at 200 nautical miles from the baseline of the territorial sea. The EEZ gives the coastal state sovereign rights, but not sovereignty, for certain sanctioned activities such as for the purpose of exploring, exploiting, conserving, and managing the natural resources, whether living or non-living, on the seabed, in the subsoil, and the superjacent waters. The EEZ also gives coastal states rights to other activities for the economic exploitation and exploration of the zone. All other states enjoy freedom of navigation, overflight, and other lawful acts associated with the operation of ships, aircraft, submarine cables, and pipelines that are compatible with the 1982 UNCLOS.

Although the 1982 UNCLOS does not specifically designate the EEZ as part of the high seas, the United States and other maritime states believe the convention reflects the general understanding that, as a matter of customary law as well as under the convention, their rights and freedoms of navigation, overflight, and laying of submarine cables and pipelines, are available to other states in the EEZ and are the same as on the high seas. However, the rights of noncoastal states to participate in fishing and other commercial activity is subject to the special rights of the coastal state.

76. Willheim, supra note 74, at 826 (citing North Sea Continental Shelf Cases, 1969 I.C.J. 3 (Feb. 20)).

77. HENKIN ET. AL., supra note 30, at 1291.

78. Id. at 1293.

79. For purposes of this discussion, there is no discernible distinction between sovereign rights and sovereignty for minerals beneath the continental shelf.


81. Id. at 1292 (referring to Article 58 of the 1982 UNCLOS).

82. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 514, cmt. b, c, d, e (1987).
6. Contiguous Zone

Kenneth P. Beauchamp states that "[t]he theory of free ocean use beyond the territorial sea became subject to certain recognized exceptions in a belt of water adjacent to, and extending seaward from, the territorial sea.\(^{83}\) Initially during time of war, a coastal state would stop and search vessels nearing its coast."\(^{84}\) This activity grew into state enforcement of various other specific functions in line with its economic and trade interests and activities, such as a state's concern for drug running close to its shores or territorial sea.\(^{85}\)

William W. Bishop, in a paper prepared for the sixth conference of the Inter-American Bar Association in 1949, justifies the expansion of control of the coastal state over the seas adjacent to its coast:

The exercise of jurisdiction in contiguous zones of the high seas becomes necessary in view of the inadequacy under modern conditions of any reasonable breadth of territorial waters; whatever we may regard as the breadth of marginal sea now accepted under international law, there are occasions and purposes for which jurisdiction must be exercised farther out from shore. This differs from an attempt to declare such areas territorial waters subject to the full sovereignty of the coastal state.\(^{86}\)

Bishop describes a state's sovereign rights as distinguished from sovereignty in what is now known as the Contiguous Zone. Article 33 of the 1982 UNCLOS defines the Contiguous Zone as that area of sea, contiguous to its territorial sea, in which a nation state may exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. The contiguous zone may not extend beyond twenty-four nautical miles from the

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84. *Id.*

85. *Id.*

7. High Seas

Principles of common usage and freedom once governed all the seas. Emergence of the territorial sea and other special zones reduced the areas subject to the regime of the high seas. Further reduction in the area governed by the principles of the high seas resulted as an exclusive economic zone, and archipelagic states were recognized. The high seas are reduced even further by the special purpose zones that are specifically designated for scientific research and pollution control, etc., and by states' sovereign rights in extended continental shelves beyond the 200 mile limit of the EEZ. Articles 86 through 90 of the 1982 UNCLOS define the EEZ and some of the rights of its use.

As technology allows drilling efforts to take place in deeper water, resolution of ownership of transboundary hydrocarbon deposits across the EEZ and the high seas will become an issue for which nations should prepare. There will be many concerns, such as: who has rights to that portion of hydrocarbons beneath the high seas; who is responsible for the costs associated with extraction of that portion of the hydrocarbons beneath the high seas; on what basis will production be allocated, and to whom will it be allocated? These appear to be simple questions until it is realized that, in theory, the entire global community of states has rights to the resources of the high seas.

8. Joint Development Zone (JDZ)

States may designate joint development zones (JDZ) by agreement absent the desired agreement on boundary delimitation: Article 83 section 3 of the 1982 UNCLOS provides that parties "[p]ending agreement . . . the states concerned . . . shall make every effort to enter into provisional arrangements of a practical nature." This type of arrangement permits business and commerce to continue by allowing exploitation of the natural resources so that they may be utilized by both states while the delimitation of the boundary is still in dispute. Upon entering into a joint development arrangement most states are concerned that any interim arrangement does

88. HENKIN ET. AL., supra note 30, at 1297.
89. UNCLOS, supra note 87, at 1276.
not prejudice its long term interests toward a favorable delimitation. While agreeing on the delimitation of the JDZ is a substantial task, the more formidable task is that of applying the legal and administrative systems of both states to the JDZ so that all the attributes of sovereign rights of both states are effectively combined.

This situation also presents the possibility, and the potential danger, of discovering hydrocarbons on the boundary of one of the states and the JDZ. This possibility will be a sufficient reason to enlarge the JDZ at the expense of narrowing that state's continental shelf area, diminishing the JDZ to the detriment of the other state, or to work out some sort of equitable arrangement to avoid a conflict. As desirable as it might be to have a definitive set of rules to apply to a boundary dispute situation, there will always be exceptions. Why not just let legal precedent evolve naturally by treaty and custom? Joint development is a workable situation, but only if the nation-states involved have the intention of making it work.

9. Functional Zones

The functionalistic view of the state doctrine based on territorial sovereignty is that it is inappropriate for the resolution of international conflicts over global issues. Therefore, functional zones provide a state with control for limited purposes not based on sovereignty, but rather, based on specific sovereign rights that have been granted. The EEZ can be said to be a functional zone since the state only has exclusive rights to the resources of the water column, the seabed, and the subsurface minerals, but not sovereignty over this area.


A law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three hundred years, it was probably the most stable and least controversial branch of international law. It was essentially reaffirmed and codified as recently as 1958. By 1970, it was in disarray.

"An early and basic principle of the law of the sea was that of freedom. The sea could not be acquired by nations and made subject to

90. Beauchamp, supra note 83, at 633.
Coastal states have recently sought to increase and expand their jurisdiction over their adjacent sea areas through different zones of jurisdictional control articulated in the United Nations Conference on the Law of the Sea (UNCLOS). The law of the sea was largely customary law, until it was codified and developed by the International Law Commission in a major undertaking culminating in the first United Nations Conference on the Law of the Sea (UNCLOS) in 1958. That Conference adopted conventions: on the Territorial Sea and the Contiguous Zone, on the High Seas, on the Continental Shelf, and on Fishing and Conservation of the Living Resources of the High Seas.

In the decades following the 1958 UNCLOS, worldwide changes necessitated a rewriting. In 1973, following the U.N. General Assembly's effort in dealing with the resources of the seabed beyond national jurisdiction, the third U.N. Law of the Sea Conference was convened at which virtually the whole law of the sea was reexamined. Eight years of negotiations produced the Draft Convention on the Law of the Sea which was considered virtually complete. However, the provisions on the contentious issue of seabed mining were largely rejected. A final draft of the UNCLOS was approved on April 30, 1982, by a vote of 130 states in favor, 4 against, and 17 abstentions. The United States, Israel, Turkey and Venezuela voted against the final draft. It is interesting to note that Turkey and Venezuela were embroiled in continental shelf delimitation disputes during this time. The Treaty received the necessary 60th ratification on November 16, 1993, and came into force in 1994. “Insofar as the Convention merely codifies customary law, it reflects law binding also on states that have not adhered to it.”

92. McHugh, supra note 91, at 1029.
93. HENKIN ET. AL., supra note 30, at 1289.
94. Id. at 1232 (citation omitted).
95. Id.
96. Id.
97. Id.
98. HENKIN ET. AL., supra note 30, at 1313.
99. Id.
100. Id.
102. HENKIN ET. AL., supra note 30, at 1232.
This Convention is significant in that it enables a coastal state to establish an EEZ beyond its territorial sea. The state's EEZ may extend 200 nautical miles from its territorial sea baselines, within which it has sovereign rights for the purposes of exploring and exploiting the natural resources of the water column and the seabed. The coastal state also has jurisdiction in the EEZ for purposes such as the protection of the marine environment. It also adopted a two part definition of the continental shelf: either 200 nautical miles from the base lines from which the territorial sea is measured, or to the limits of the actual continental shelf beyond 200 nautical miles through the prolongation of the state's land territory to the outer edge of the continental margin. In the latter case, a wealth sharing system operates in which the coastal state makes contributions to an escrow fund for distribution based on its production of the non-living resources beyond the 200 mile limit. This raises an interesting question of whether the state has sovereign rights in the water column of its continental shelf extending beyond the 200 mile limit.

C. Jurisdiction

Traditionally, international law divided the seas into two legal categories: those under sovereignty of the coastal states; and the high seas. In the recent past, however, coastal states have sought to increase and expand their jurisdiction over their adjacent sea areas. This expansion of coastal state jurisdiction has changed people's perception of the sea and the applicable law. The seas have been divided into different legal regimes, with the principle of common usage applicable only in the areas beyond national jurisdiction where the high seas begin. Difficulties and conflicts can sometimes arise in the overlap areas, over which more


104. Id. at 827 (citing Official Records at 33, art. 76).

105. United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1982), reprinted in 21 I.L.M. 1261, 1285 (1982) (article 76). The contributions are to begin after the first five years of production at that site. In the sixth year, the rate of payment or contribution is one percent of the value or volume of production at the site. The rate increases by one percent for each subsequent year until the twelfth year and remains at seven percent thereafter. Id. See also HENKIN ET. AL., supra note 30, at 1279-80.

106. McHugh, supra note 91, at 1028.

107. Id.

108. Id. at 1029.

109. Id.
than one nation state has jurisdiction because of these recent extensions of coastal states’ jurisdictions.  In these areas of dual or multiple jurisdiction, which law should govern in the delimitation of the boundary? These are some of the useful but difficult questions to answer.

D. Customary International Law

Customary international law is comprised of two distinct elements: general practice, and its acceptance as law. As you can imagine, the development of sufficient practice among nations and its acceptance as a means of legal precedent is a painstakingly slow process. In 1958, the International Law Commission codified customary practices in the first UNCLOS.

E. International Treaty Law

“Some debate exists as to whether treaties should be viewed as a source of international law or merely as a source of obligation, much like a contract.” In the former case, treaties would set legal precedent. Insofar as these Treaties reflected current world views on the subject matter of transboundary hydrocarbon resources, it would be consistent to view the doctrines embodied in these treaties as emerging international law.

Although treaties governing transboundary resources describe unique situations between nations, common issues consistently arise. In the event that these common issues are treated by nations in relatively the same manner, the solutions should and would be considered to be emerging principles of international law.

The reality of the situation is that issues of transboundary resources between nations are resolved with each nation having its particular socioeconomic interests in mind. We are, therefore, not likely to see the solutions to these problems themselves emerge as law, but, rather, the guiding principles used in arriving at specific solutions appear to be the substance of the emerging law.

110. See Henkin et. al., supra note 30. See also Lagoni, supra note 1; UNCLOS, supra note 33.
111. McHugh, supra note 91, at 1029 n.26.
112. Henkin et. al., supra note 30, at 1232.
113. McHugh, supra note 91, at 1030 n.35.
114. Szekely et. al., supra note 4, at 609.
115. Id.
F. International Case Law

"Article 38 of the Statute of the International Court of Justice requires the Court to apply judicial decisions, subject to the provisions of Article 59, as a subsidiary means for the determination of rules of law. Article 59 states that decisions of the Court are not binding except between the parties and in respect of that particular case. The Court's decisions, therefore, are not governed by the principle of stare decisis." 116 However, this does not mean that the Court ignores precedent. It uses precedent as a persuasive argument rather than a binding one. If the Court does not follow precedent, those cases are likely distinguished from the one at bar. 117

1. The North Sea Continental Shelf Cases

A partial delimitation of the continental shelf had been in effect by agreement in 1965, between Denmark, Netherlands, and Germany on the basis of equidistance from the nearest points on the baselines of the territorial seas of the parties. 118 Agreement could not be reached on the remainder of the boundaries because of differences over the rules to be used. 119 The Netherlands and Denmark asserted that due to lack of agreement between the parties and absent special circumstances, the principle of equidistance should be used. 120 Germany responded that the equidistance method would not lead to a just and equitable solution and that delimitation should be governed by equitable principles. 121 The court left the final solution of delimitation to the parties and limited itself to providing criteria that the parties would take into account during negotiations including "[t]he physical and geological structure, and natural resources, of the continental shelf areas involved." 122

The court further stated in its decision, that the parties should resolve their differences by agreement, "[o]r failing that, by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question

116. McHugh, supra note 91, at 1032 nn. 43-45.
117. Id. at 1025.
120. Id.
121. Id.
122. Id.
of preserving the unity of a deposit." The court also said that it "[d]oes not consider that unity of deposits constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation." Even at this early stage of resolving transboundary issues, it appears that preserving the unity of the deposit as a means of economic and efficient exploitation was recognized but that it did not rise to the level of creating a special circumstance and that, in and of itself, would not alter the boundary delimitation.

2. United Kingdom/France Arbitration

France and the United Kingdom engaged in negotiations between 1970 and 1974, with the purpose of delimiting the continental shelf that lay between them. The negotiations resulted in only limited agreement and the dispute was submitted to an arbitration commission by agreement in 1975. The matter at issue in the arbitration had to do with the meaning of "special circumstances." Although the International Court of Justice (ICJ) in the North Sea Cases stated there "[i]s no legal limit to the considerations which states may take account of for the purpose of making sure that they apply equitable procedures . . ." it subsequently determined that the presence of hydrocarbons within the continental shelf alone was not sufficient to invoke special circumstances unless the parties otherwise provide by agreement. Thus, it would not be sufficient to require a delimitation of boundaries based on equitable principles.

3. Greece/Turkey Aegean Sea Continental Shelf Case

In 1974, Turkey granted petroleum research permits and began to explore for oil and gas in the Aegean Sea outside the territorial sea of islands belonging to Greece. Greece did not recognize Turkey's claim to...

123. Id.
125. Id.
127. Id.
128. Id.
129. Id.
that portion of the seabed. Subsequently, the parties engaged in unsuccessful negotiations. Turkey then proceeded to send further scientific expeditions to the same area escorted by warships. This action prompted Greece to submit the dispute to the ICJ in 1976.

Greece wanted not only a delimitation of the continental shelf between the two countries in the Aegean Sea, but also prevent Turkey from acquiring knowledge of the strata under Greece’s continental shelf. Turkey avoided the ICJ proceedings on jurisdictional grounds. In terms of the development of international law, it is unfortunate that the ICJ did not have jurisdiction because the court would have had to address the problem of transboundary hydrocarbon resources within the scope of this dispute.

4. Iceland/Norway Conciliation Recommendations on the Continental Shelf Area Between Iceland and Jan Mayen Island.

Jan Mayen Island belongs to Norway and lies 292 miles off the coast of Iceland. The island is of volcanic origin, and its year round population is about 30 to 40 residents. The island received little attention until Icelandic fisherman netted a large catch of fish off its shores in 1978. This raised the question of Jan Mayen’s right to an EEZ and a continental shelf as contemplated in the UNCLOS then being drafted. Although Norway’s title to Jan Mayen was by act of Parliament in 1929, Norway did not claim a 200 mile EEZ around the island when it

132. Id.
133. Id.
134. Id.
136. Id.
137. Id.
139. Id.
140. Id.
141. Id.
established one around the mainland.\textsuperscript{142} Norway’s rush to correct its oversight in 1978, drew immediate objections from Iceland.\textsuperscript{143}

The parties agreed to refer the matter to a three member conciliation commission.\textsuperscript{144} Each of the parties would appoint one member, and the third would be jointly selected.\textsuperscript{145} The commission was to recommend a dividing line taking into account Iceland’s strong economic interests in the seas in that area, and the pertinent geographical and geologic factors.\textsuperscript{146} Because of the geology, the commission disregarded the prolongation principle, proportionality, and the median line.\textsuperscript{147}

A scientific committee was assembled to determine the potential for hydrocarbon deposits in the disputed area.\textsuperscript{148} The commission ultimately suggested a detailed joint development zone comprised of the areas with the highest potential for hydrocarbons.\textsuperscript{149} The establishment of a joint venture exploitation agreement was based on the principle of unitization.\textsuperscript{150} The Court again, as in the North Sea Cases, recognized the importance and, in fact, depended on unitization for the most effective and economic recovery.\textsuperscript{151}

5. Tunisia/Libya Continental Shelf Case

Tunisia and Libya submitted its question to the ICJ to determine exactly the principles and rules of international law which may be applied in delimiting the continental shelf between them. Both nations also wanted the Court to specify precisely the practical manner in which the principles should be applied so as to be able to accomplish the delimitation without difficulty.\textsuperscript{152} In this case the Court reiterated the natural prolongation principle, but did not specify the concept of “equitable principles” or

\textsuperscript{142.} Id.
\textsuperscript{143.} Agreement on the Continental Shelf Between Iceland and Jan Mayen, 21 I.L.M. 1222 (1982).
\textsuperscript{144.} Id.
\textsuperscript{145.} Id.
\textsuperscript{146.} Id.
\textsuperscript{147.} Id.
\textsuperscript{148.} Agreement on the Continental Shelf Between Iceland and Jan Mayen, 21 I.L.M. 1222 (1982).
\textsuperscript{149.} Id.
\textsuperscript{150.} Id.
\textsuperscript{151.} Id.; see also Elliot L. Richardson, \textit{Jan Mayen in Perspective}, 82 AM. J. INT’L L. 443 (1988).
\textsuperscript{152.} Agreement to Submit Question of the Continental Shelf to the International Court of Justice (Libya v. Tunis.), 18 I.L.M. 49 (1979).
“special circumstances” and for that reason the two dissenting judges on
the Court criticized the judgment as lacking in legal principle. The
Court came to the conclusion that the existing economic status of the
parties may not be taken into consideration as part of “relevant
circumstances” when delimiting the boundary. However, “[t]he presence
of oil wells in an area to be delimited may, depending on the facts, be an
element to be taken into account in the process of weighing all relevant
factors to achieve an equitable result.”

6. United States/Gulf of Maine Case

The essence of the Gulf of Maine case was a delineation of natural
resources of both the seabed and the fisheries in the boundary area near
George’s Bank. The ICJ actually drew the boundary line once the
applicable rules and principles were determined. The United States and
Canada requested that the Court use a single line to delimit both the
continental shelf and the 200 nautical miles fisheries zone.

Historically, the jurisdiction over fisheries has been asserted on the
basis of geography, and jurisdiction over the minerals in the continental
shelf has been based on geology. The Court formulated the general
principles of equity applicable to a fair allocation of the resources between
neighbors and fashioned a solution which was basically the average of the
requests initially made by the parties.

7. Libya/Malta Case

In 1982, Libya and Malta requested the ICJ to decide the
principles and rules of international law that were applicable to the
delimitation of their respective continental shelves. Additionally, they
requested that the court outline the practical application of these principles
such that the Parties could delimit the areas without incident. This was

153. Case Concerning the Continental Shelf (Tunis. v. Libya) 1982 I.C.J. 2, (Feb. 24),
154. Id. at 255.
155. Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.),
1984 I.C.J. No. 67 (Oct. 12); Thomas J. Trendl, Maritime Delimitation and the Gulf of Maine
156. Delimitation of the Maritime Boundary in the Gulf of Maine Area, supra note 155.
157. Id.
158. Id.
159. Special Agreement for the Submission to the International Court of Justice of a
the same problem in the Tunisia/Libya case only without the prejudicial influence of natural resources.

In 1956, Malta asserted that it informed Libya of its intention to delimit its continental shelf by means of a median line. Libya’s silence was interpreted as acquiescence which Malta claimed precluded Libya in law from challenging the validity of Malta’s position. Malta also wanted the Court to take into account the relative economic position of the two states and the range of Malta’s fishing activity. The Court refused to do this, stating that such conditions are totally unrelated to the applicable rules of international law. The Court gave greater weight to distance criteria where the distance between the two opposing coasts is less than 400 nautical miles.

8. Australia/Indonesia Seabed Case

A dispute over a portion of their common continental shelf area arose between Australia and Indonesia. There was overlap of their EEZs because the shelf distance between the two countries was less than 400 nautical miles. Australia asserted jurisdiction over its shelf based on the theory of natural prolongation of its land territory, as was promulgated in the North Sea Continental Shelf Cases. Indonesia asserted jurisdiction based on the 200 nautical miles EEZ. Under the 1982 UNCLOS, the extension of the land mass in a prolongation of the shelf appears to be a primary basis for continental shelf jurisdiction on the basis of sovereign rights and not sovereignty. Also, the 200 nautical miles EEZ is based on sovereign rights so it might be argued that these two states are on about equal footing regarding their assertions of jurisdiction.

The parties chose to resolve their differences in the disputed area by adopting a temporary three part Zone of Cooperation within which joint development activities were to proceed under different legal and economic sharing regimes.

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1203.
165. *Id.*
166. *Id.*
167. *Id.* at 840.
G. Delimitation of Continental Shelf Boundaries

As we have seen, the delimitation of boundaries in the continental shelf can be rife with problems. It seems that for every scientific way that might be proposed to dissect the disputed area, exceptions can be envisioned. For example, since the EEZ establishes sovereign rights in a 200 nautical mile belt of ocean measured from the base of the territorial sea, one can easily see that nation states divided by a body of water less than 400 nautical miles will not yield each state its requisite 200 nautical mile EEZ. Islands, close to shores of another state, pose a similar problem.

States whose continental shelves extend beyond the 200 nautical mile EEZ have been given partial sovereign rights in the minerals beneath the shelf. This early attempt at designing a rudimentary set of rules actually created some conflicting situations. For example, states could each have a valid method and argument for delimiting its continental shelf. However, the application of the method proposed by each state might produce an incongruous result, as in the case of Iceland and the island of Jan Mayen. Application of Iceland’s 200 nautical miles EEZ would have encroached on the sovereign rights of Jan Mayen’s EEZ since they were only 292 nautical miles apart.

The relevant question becomes: In the face of all of the possible configurations of nation how does one arrive at a fair and equitable result in the delimitation of boundaries where hydrocarbon deposits are present? The author of this article agrees with Beauchamp’s philosophy when he states: “The division of ocean space according to political ideas of boundary-making does not always relate to logical ocean management purposes.” Rather than boundary-making being about a quest for extending a nation state’s territory, it should reflect the functional purposes for which the boundaries are being drawn.

168. See Henkin et al., supra note 30, at 1279-80.
170. See Beauchamp, supra note 83, at 656.
H. Delineation of Boundaries of Subsurface Fluid Hydrocarbon Deposits

1. Volume of Subsurface Hydrocarbons Residing within Each State

Fluid mineral deposits spanning across national boundaries cannot accurately be determined without the cooperation of all nation states involved. Geological data is needed for delimitation of the deposit boundaries which is likely available only from the individual states under which the deposit resides. The legal literature does not spend much time discussing the determination of the extent of the deposit. However, this is an important piece of information when calculating the allocation of production for each state. This is not so much an issue of technical acquisition of the data but rather an issue of the cooperation necessary from all parties involved. Cooperation is necessary in almost every facet of data acquisition, drilling, production, transportation, and processing of the hydrocarbons. Success of the project depends entirely on the level of cooperation and trust that the parties are willing to give to one another.

2. Non-Homogeneous Deposits or Processing of Commingled Hydrocarbons Originating from Separate Deposits

Although the literature consistently assumes that hydrocarbon deposits are homogeneous, this is not always the case. Different parts of a reservoir may produce hydrocarbons of different composition and, therefore, different relative value. If, for example, an equal volume of the deposit resides beneath two adjacent states and one side of the deposit contains more valuable hydrocarbons than the other, that side should be appropriately compensated in the allocation process. In structuring allocation agreements, information regarding deposit composition is critical.

Also, in the situation where offshore production platforms produce hydrocarbons from different deposits and comingle these fluids in a common pipeline for transport to a processing center and tanker loading terminal, it is critical to know both the amount of production and its composition to determine the proper allocation of value. After the hydrocarbons have been processed, a nation state’s objective should be to receive the same value of products as the value of the raw hydrocarbons they put into the pipeline less, of course, any agreed upon losses.

The legal property issues associated with commingling are nonexistent if the allocation agreement is based upon value. In the end the
parties should find that the value taken out of the system is equal to the
value put into the system, striking a value balance.

I. Maximizing Recovery of Hydrocarbons as a Function of
Exploitation Methods Used

The percentage of recovery of hydrocarbons from the deposit is
directly related to the exploitation methods used. Earlier we saw how
unitization allowed strategic placement of wells based upon geological
formation in order to maintain favorable reservoir characteristics for as
long as possible. Also, producing from the reservoir at a rate that
optimizes reservoir pressure allows maximum recovery over the life of the
reservoir. However, maximum recovery may not be the result desired by
some nation states. Sometimes developing nations are more concerned
with the rapid production of cash to pay national debts than they are with
maximizing recovery over the life of the reservoir. Prime examples of this
practice are Iraq and Iran.

The most profitable situation for nation states would be to
maximize the present value of all future income streams.\footnote{This depends on many factors such as speculation on the future price of oil and a
discount rate for calculating present value. Recognize, also, that maximizing the present value of
future income streams from the deposit may require operation outside the envelope of prescribed
operation in order to maintain other factors in line. For example, maximizing present value
based on estimated future petroleum prices may require producing from the deposit at a rate that
is not consistent with maximizing recovery nor may it even be consistent with existing legal
requirements regarding wellhead operation.} Income
streams will vary as a function of production rates. Production rates vary
as a function of well-head pressure and well-head pressure will, in turn,
affect total hydrocarbon recovery over the life of the reservoir. Thus,
there is a delicate balance of producing enough oil and gas to satisfy
current cash requirements while tempering that behavior with the
knowledge that the deposit must be operated in a manner that will continue
to supply specific future demand for cash. This disparity between the
attitudes of nation states over cash flow can be a significant source of
problems in joint ventures where each state operates its own production
centre from the common deposit.

If we are to establish a legal duty toward operations, it must
necessarily be linked with good faith efforts to conserve the resource, to
minimize adverse impact to the environment, operate safely for all
concerned, and consider the cash requirements of each state. How states
choose to weigh these attributes depends on the specific circumstances of
the situation.
J. A State’s Liability to Adjacent States for Inefficient Recovery: International Claims for Damages

Lagoni suggests that if mining operations conducted on one side of the boundary were to cause material damage on the other side, the principle of territorial integrity would be violated.\(^{172}\) The rule that material damage to the territory of another state gives rise to state responsibility developed mainly with regard to extraterritorial environmental effects, especially air and water pollution. It appears, however, to be equally applicable to the extraterritorial effects of mining or extraction operations.\(^{173}\) One possible type of resulting damage would be that other nation states would be unable to extract the minerals from their part of the deposit, even if the first state has extracted only that portion originally situated in its territory or continental shelf.\(^{174}\) Another type of damage would be inefficient or wasteful exploitation which may sometimes be determined by “mass balances” over the system.\(^{175}\) The theory behind the concept of the mass balance states that an operator should be able to account for the whereabouts of all hydrocarbons coming from the well-head on a daily basis.

IV. POLITICAL OBSTACLES TO EFFECTIVE MULTI-STATE MANAGEMENT OF TRANSBOUNDARY HYDROCARBON RESOURCES

A. Differing Perspectives on Natural Resource Management

1. Maximize Current Income or Maximize Total Value of Natural Resource Deposit?

As mentioned previously, sometimes a nation states’ operations criteria are at odds with another’s fiscal policies regarding natural resource deposits. One state may want to maximize current income and the other, with less need for current income, may want to maximize the total value of the resource. It seems the duty to conserve the resource deposit would imply a duty to maximize the total value of the deposit. Optimal recovery in a timely manner with regard for the environment and the minimization of waste would appear to play primary roles in determining the overall plan for exploiting the deposit.

172. Lagoni, supra note 1, at 217.
173. Id.
174. Id.
175. A mass balance is a mathematical engineering device which allows the engineer to ensure efficient recovery and to either predict and account for any losses.
It may be argued, however, that the degree of wealth of the nation state should play a part in the decision of how to exploit the deposit. In the Tunisia/Libya Continental Shelf case, the Court ruled that economic considerations cannot be taken into account in delimitation of the shelf and that they are extraneous circumstances and could easily change.176 However, a state’s current and future cash requirements may be valid criteria for use in proposing an equitable production plan after delimitation of the boundary is accomplished. Making a production plan requires the determination of how fast to exhibit the deposit. This will have a direct bearing on cash flow and ultimately the stability of the state’s economy and the welfare of its people. If natural resources are considered a sovereign source of wealth, should not the state decide how best to exploit that wealth to meet its needs?


In joint development of natural resources in transboundary areas, there are as many alternatives as the mind can conceive. This endless array of possibilities should be tempered by the administrative requirements and equitable principles. As in the Australia/Indonesia dispute in the Timor Gap, the parties chose a three part temporary zone of cooperation in the disputed area, each with different legal and economic regimes governing them.177 The possibilities of cooperative agreements are limited only by imagination, ingenuity, common sense, and the determination to achieve an equitable solution.

B. What Price for Development?: The Environmental Pollution Issue

The act of drilling for oil in the continental shelf necessitates considerable measures for pollution control. Upsetting the ecological and chemical balance of the region can have far reaching and serious consequences on marine life, the marine environment, and on nation states whose economies depend heavily on the fruits of the sea.

If the exploiting states through their negligence harm the marine environment, how and where will the harm manifest itself? What types of monitoring will be done to safeguard the environment and help to timely recognize changes and trends in quality of the environment? Where will

177. Willheim, supra note 74, at 828.
the monitoring be done? How often and at what cost? Using what technologies? To what degree should the pollution from marine drilling activities be abated? Will this effort be a joint effort or will each nation state be responsible for its own pollution abatement activities? How will success of the pollution abatement activities be measured? What remedies are available to states who have suffered damages from the exploitation efforts?

These questions are easy to pose but much more difficult to answer. A full discussion of these issues could be the subject of a legal treatise and will not be dealt with here. Rather, these questions are meant to be thought provoking in a way that empowers the parties to answer them in the planning stages of the development rather than administering an ad hoc approach to pollution abatement.

C. Migration of Fluid Hydrocarbons Across State Borders - Whose Property?

The migratory properties of subsurface fluid hydrocarbons give nation states an incentive to unitize the development so that the deposit is treated as a whole for exploitation purposes. Then, optimal strategic well placement will maintain favorable reservoir characteristics and maximize recovery of hydrocarbons over the life of the deposit. One project operator can then be selected for the exploitation of the deposit which will avoid duplication of drilling, production, administrative activities, and associated costs.

Unitization also avoids the problems associated with property rights in migratory hydrocarbons. A state’s share of the unitized production will be determined by the value of recoverable oil and gas in place beneath property for which that state has sovereign rights as a percentage of the value of the entire deposit. This is, by far, the best approach to take in terms of simplicity, cost effectiveness, maximization of hydrocarbon recovery from the deposit, and for the policy reason that it fosters an environment of cooperation between the parties.
V. EMERGING PRINCIPLES OF CONVENTIONAL LAW

A. New Approaches to Drawing and Making Ocean Boundaries

1. Multiple Boundary Regimes

The state practice of negotiating maritime boundary delimitation is a recent one and developing trends can be witnessed. While the traditional political rationale of drawing a hard definitive boundary line served a purpose in the past, these hard lines have outlived their usefulness in today's global society. It may be more beneficial to enter into agreements where one of the adjacent nation states is responsible for exploration and exploitation of minerals of the continental shelf because of the overriding technological advantage that one state may have. On the other hand, it may be necessary to think of shelf delimitation not in terms of drawing one line, but rather in terms of drawing several lines to accomplish different objectives in the most cost efficient and environmentally sound manner that maximizes resource recovery. For example, the shelf boundary might be different for exploitation and management of fisheries than it would be for exploitation and management of minerals.

If the overall objective in these boundary regions is to maximize wealth, minimize costs, minimize adverse effects on the environment, and maximize overall resource recovery over the life of the operation then extensive cooperation is needed between states.

2. Evolving Principles of Transboundary Hydrocarbon Resource Law and Trends in State Practice

There has been an evolution of the body of customary international law surrounding transboundary hydrocarbon resources, which is embodied in treaties. In 1979 a multinational team of experts in international law and geology met under the auspices of the School of Law and the Natural Resources Center of the University of New Mexico for the purpose of researching the international law applicable to the utilization and conservation of submarine transboundary hydrocarbon resources and to

179. Id.
180. I am speaking here of the time value of wealth. But this should be governed by any overriding concerns for minimizing costs, minimizing adverse effects to the environment, and maximizing resource recovery.
observe trends in that law.\textsuperscript{181} In preparing a draft treaty that could be used as a model for future treaties on transboundary hydrocarbon deposits they referred to numerous conventions and treaties on the subject. They put forth the following nine guiding principles in order to ensure proper coordination of these activities for the benefit and protection of the rights and interests of all concerned parties:

1. The duty of cooperation between the Parties to ensure the continued attainment of the purposes and objects of the Treaty;

2. The duty of good faith and good neighborliness of each of the Parties in the undertaking of their respective activities, in the mutual coordination of such activities and in the compliance with the guiding principles and criteria established pursuant to this Treaty;

3. The duty not to take advantage of or use their respective national laws and regulations and applicable rules of international law in such a way as would unnecessarily impede the equitable and reasonable utilization and distribution and conservation of transboundary hydrocarbon resources;

4. The duty of each of the Parties to abstain from undertaking activities within its jurisdiction or control that may cause damage to the resources or the environment of the other Party, or that may create an unreasonable risk in that respect;

5. The duty of the Parties to consult with each other on a continuing basis in order to secure the coordination of activities which is the main purpose and object of this Treaty;

6. The duty of each of the Parties to provide the other with prompt notification of its intention to undertake any activities relating to transboundary hydrocarbon deposits;

7. The duty of the Parties to exchange all information, data and publications relevant to maritime

\textsuperscript{181} See Szekely et al., \textit{supra} note 4, at 609.
transboundary hydrocarbon deposits and the purposes and objectives of this Treaty. The use of proprietary information exchanged between the Parties shall be subject to the conditions of confidentiality established by the Party providing such information;

8. The duty of the Parties to cooperate with each other in order to prevent waste of maritime transboundary hydrocarbon resources and to prevent or abate environmental pollution or damage stemming from activities relating to maritime transboundary hydrocarbon deposits; and

9. The duty of the Parties not to undertake any unilateral or bilateral activities contrary to their obligations under international law, whenever a transboundary hydrocarbon deposit extends across their common maritime boundary, or extends into the subsoil of the seabed under the jurisdiction of a third State, or in the subsoil of the seabed and ocean floor beyond the limits of national jurisdiction.182

VI. CONCLUSION

The business of producing oil and gas from the seabed floor is complicated enough without having to further confound the issue with transboundary deposits. However, as advances in technology promote a rush to explore the marine areas of the continental shelf and seabed of the high seas, we must be prepared to resolve the resulting legal, social, and economic issues. Not only must we pro-actively resolve existing disputes, we must search for consensus on how to manage the large, but ultimately limited, ocean resources.

As the socioeconomic needs of nation states evolve, so should our thinking about the payout that the act of drawing hard boundaries yields. Boundaries tend to isolate nations and individuals from the real issue of how nation states are going to inhabit this planet in meaningful way and in a spirit of trust and cooperation. If we must draw boundaries, let us draw boundaries that make sense for the function for which they were intended. For example, the boundary that makes sense for demarcation of the territorial continental shelf, may not make sense for fisheries management.

182. See Szekely et al., supra note 4, at 634-35.
We should be ready to apply sound judgment and equitable principles to address the needs of all parties concerned notwithstanding the obligation all nation states have regarding the ecology. The principles and duties of good faith, cooperation, unitization of the transboundary deposit, ecological interests, conservation of the resource, sharing of data, abstention from wasteful or uneconomic activities, and the desire to make joint efforts work will do more toward promoting a workable solution than any measure of scientific application of hard and fast rules.

However, we must recognize that we now understand some of the current and future issues of transboundary hydrocarbon deposits. We must be prepared to develop a regime of cooperation as a context for resolving disputes. Disputes happen most often because people do not listen to the needs of the other parties. States must listen for one another’s needs and use the information to negotiate on a fair and equitable basis.

Based on what we know about transboundary hydrocarbon deposits today, we can accurately predict where the conflicts of tomorrow will be. We have a duty to plan the legal regime of transboundary natural resources with this foresight as a guide.
I. INTRODUCTION

Latvia regained its independence from the former Soviet Union in August 1991. Since then, it has begun the slow and arduous path of replacing the centrally-planned, socialist system with an economic structure based on free-market principles. Latvia began this transition "in a difficult environment characterized by macroeconomic imbalances inherited from four decades of central planning and disruptions caused by a sharp contraction of trade with Russia and other states of the former Soviet Union." Further, Latvia was left with a detriment in trade terms...
"resulting from the sudden adaptation of world market prices for energy and raw materials, and the existence of many inefficient industries."\(^1\)

An economic goal of the current Latvian government is to manage a smooth transition into a market economy. Measures adopted by Latvia to achieve this goal include controlling inflation, limiting the growth of the state budget deficit, promoting foreign investment, moving forward with privatization, and building a legal and regulatory infrastructure comparable to those in advanced industrialized countries.\(^2\) Unfortunately, the slow process of privatization is a primary reason for the lack of considerable progress in implementation of these economic reforms in Latvia. The Ministry of Economics has pinpointed deep crises in the majority of state-owned enterprises, such as "delays in structural reforms, a lack of proper legislation on immovable property," and other relevant laws as reasons for the downturn in Latvia's gross domestic product.\(^3\)

This comment seeks to describe the evolution of privatization as it pertains to different sectors, small enterprises and large enterprises. Further, it analyzes current approaches that are being used to accelerate the privatization process. This comment will first outline the initial privatization legislation that was passed when Latvia regained its independence. Second, it will outline the problems that have slowed the process. Third, this comment will survey legislation that has been passed within the past year to alleviate some of the problems and difficulties that the initial legislation promoted.

II. BACKGROUND

Even with the collapse of communist rule, Latvia has been rather successful in avoiding a deterioration in government finances that often accompany significant deficits, inflation, and overall macroeconomic instability which normally result from such a revolution. Despite the fact that Latvia lacks energy, it has evolved to enjoy a standard of living superior to that of its neighbors in the former U.S.S.R., and promises an agricultural potential (particularly in lumber, textiles and agro-industry), and service potential (particularly in tourism, banking, insurance and

1. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, STATEMENT FOR THE WORLD BANK MEETING IN PARIS 1 (May 19, 1994).
transit) that is quickly reviving. Above all, it possesses well developed human resources with a conscientious quality labor force.

For most of the republics of the former U.S.S.R., and particularly Russia, Latvia remains the obvious maritime and transit route to Northern Europe and the United States. This is due to six reasons. First, Riga has the only container port between St. Petersburg and Poland. Second, newly-established ferry services linking Riga to Scandinavia and Western Europe allow overland trucking easy access to Russia, the three Baltic States, and Belarus. Third, railroads and highways from Riga to Moscow and St. Petersburg are good. Fourth, Riga has the largest airport in the region and is steadily expanding air links with Western Europe. Fifth, it is the only city in the Baltic to have regularly-scheduled direct air service to the United States. Finally, the European Bank for Reconstruction and Development has financed expansion of the main airport runway to enable B747 aircrafts to land at the airport in Riga starting in the summer of 1994. Latvia is a transit point for many goods, and the volume of transit is bound to increase once Russia succeeds, even partly, in managing its economic and political crisis. "Transit cargo already accounts for more than 90% of the cargo handled in the ports of Ventspils, Riga and Liepaja, and for 70% of the cargo transported by railways."

Latvia's medium term prospects for output recovery in the public sector appear good, even though the level of unemployment has increased due to the tremendous decrease in industrial activity. This decrease in industrial activity was caused by the closure of the Soviet market for such goods. Fortunately, private sector dynamism has often compensated for

6. Id. at 3.
7. See ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1.
8. This is stated conservatively since gross domestic product at constant prices continues to decline. By the end of 1993, it was 80.1% of the previous year's level. In examining different categories of production in comparison with 1992, the highest level of GDP (the smallest percentage decrease) was reached for services (89.5%), supply of electricity, water and gas (89.0%), but the lowest for construction (50.2%) and the mining industry (50.0%). LATVIJAS BANKA ANN. REP. 5 (1993).
9. Industrial output, in terms of constant prices, decreased by 38.1%. When one examines the growth in industrial output per month, the decline had apparently leveled out in the period from September until November, but decreased again by 6% in December compared to November. LATVIJAS BANKA ANN. REP. 6 (1993).
10. At the end of 1993, 76,700 unemployed persons were registered in Latvia, which was 5.8% of the employable population. The number of persons out of work grew approximately 2.5
this decrease by absorbing these newly laid-off workers. As a result, several thousand private enterprises have already been created chiefly in retail trade and services.

Recovery still has a long way to go. Buying capacity did not attain 1991 levels, although wage increases were above consumer price index increases. According to the World Bank Social Protection Identification/Preparation Mission statistics, the poverty level has gone up from 4-5% of the total population to 35% of the population. Furthermore, according to information provided by EC-PHARE, "direct investments per one inhabitant in Latvia between 1991 and the middle of 1993 were much less than the average for the rest of Eastern Europe."

These statistics clearly indicate that in order to remedy these problems, Latvia will need to depend on investments from the government and the private sector, as well as from abroad. The World Bank estimates that in order to "realize an annual growth rate of 4-5% in Latvia's domestic product, the share of investments in the GDP must increase by 22% in the coming years."

In furtherance of this realization, the government has decided to increase public investment expenditure from a low of 0.8% to about 3% of times. Slightly more than 25,000 (32.9% of all unemployed) have been out of work for more than 6 months. Women comprised 53.2% of all unemployed. During the first half-year, the number of unemployed grew rapidly. In the first seven months of 1993, it was on average 14.1% monthly, in August-October the number remained steady, and started growing again by 2.9% in November and by 2.3% in December. As of May 1994, 6.6% of the working age population of Latvia was registered as unemployed; the government estimates total unemployment (those registered plus the "hidden" unemployed) at 9%. Press release by American Chamber of Commerce in Latvia, July 6, 1994.

To protect vulnerable groups from the impact of the transformation of the economy, the government is taking steps for the development of an effective social safety net. Present reforms aim at establishing a system in which means-tested social benefits more specifically aimed at low income groups play a larger role. As a reflection of the government's concern for social assistance the 1994 budget includes anticipated social assistance payments equivalent to about 1.75% of GDP, up sharply from about 0.75% of GDP in 1993.

The mission occurred from October 25 to November 5, 1993.


GDP in 1995 because Latvia has low levels of debt. The government will also devote a tremendous amount of energy and resources to privatization, because it "considers privatization as the crucial element in promoting the private sector to lead in economic development and efficiency." In particular, transfers of state property are expected to result in stimulating investment activity and facilitating the reabsorption of workers.

The government will also focus on attracting foreign investment. A liberal foreign investment law has been enacted. The Latvian Development Agency has been set up to attract foreign investment and to provide "one-stop" services to foreign investors. Although foreign investment remains modest, there are signs of optimism.

Scandinavian clients are showing up in increasing numbers to benefit from distribution costs significantly lower than in the capitals of the Nordic countries. Many buyers are also coming from other republics of the former Soviet Union, (because practically everything is available in Riga, and Moscow is less than 1000 km away).

The United States, Germany, Sweden, and Switzerland continue to provide the largest investments to Latvia. Hopefully, this will continue, as foreign trade will play an essential role in the national economy and the living standards of the population.

III. ECONOMIC REFORM

In the midst of economic fury, Latvia faces the daunting task of developing a completely new legal, financial, tax, and regulatory infrastructure. "The economic reform program has been undertaken in

16. BUSINESS WITH LATVIA, LATVIAN DEVELOPMENT AGENCY, May 1994. Through November 1, 1993, the government of Latvia has borrowed USD 184.8 million from foreign creditors. Foreign credits and official credit guarantees amounting to USD 316.8 million for Latvia have been approved, including an SDR 54.9 million stand-by arrangements with the IMF. On October 1, 1993, Latvia's official foreign exchange and gold reserves were valued at USD 336.2 million. Trade Act Report Highlights - Latvia, Statement from the U.S. Embassy, Riga, at 4 (Oct. 1993).

17. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1, at 5.  
18. Id.  
19. Id. at 6.  
21. Id.  
22. THE SURVEY OF LATVIA'S ECONOMY AND PROGNOSES FOR ECONOMIC DEVELOPMENT, supra note 3, at 5.
stages." 23 Initially, "an independent tax system was established in 1990." 24 The establishment of the tax system was followed by a liberalization of prices and elimination of subsidies in 1991 and 1992. "Measures were then implemented to achieve macroeconomic stability through tight fiscal and monetary policies and currency reform." 25 "Once this was accomplished in the middle of 1993, attention has been focused on structural reforms and the promotion of economic growth." 26

The creation of a stable national currency was one of the most important achievements for the Latvian government and the Bank of Latvia in 1993. 27 Based upon International Monetary Fund guidelines, the Bank of Latvia has exercised monetary restraint that has created one of the world's strongest currencies, with the lat appreciating 44% against the United States dollar and 41% against the German mark between January and September of 1993. 28 Inflation rates dropped from 958.6% in 1992 to 34.8% in 1993, to 12.3% in the first five months of 1994, with only 0.2% growth in May and 2% growth in June. 29

Based upon foreign reserves equal to twice the value of all lats in circulation, the Bank of Latvia has guaranteed full convertibility of the lat, with no restriction on the import, export, exchange, or use of foreign currencies inside the country. 30 As a result, 1993 was characterized by a rapid inflow of convertible currencies to Latvia. The Bank of Latvia purchased 272.2 million United States dollars more than it sold, in comparison to only 20.9 million in 1992. In consideration of the possibility that the growing exchange value of lats can negatively affect exports, the Bank of Latvia exercised tight monetary policy by restraining the appreciation of the lat, thereby ensuring its stability in the currency market. 31 As a result, the strength of the lat and the inherent increase in

23. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1, at 4.
24. Id.
25. Id.
26. Id.
27. Id. at 1.
28. Id. at 2.
29. Id. at 3.
30. Id. at 4.
purchasing power has provided the foundation upon which the Latvian economy can grow.

As Latvia makes striking progress toward economic stability, the government is working to complete reforms that will lay the foundation for this modern market economy. As Vilfred Talvic, World Bank Vice President for Central and Eastern Europe, emphasized, "the main goal of Latvia's government should be to ensure the development of the infrastructure and a social production system." Lars Jeurling, chief of the World Bank Regional Mission to the Baltic Countries in Riga, Latvia, agreed, stating that improvements in the financial sector and private sector are critical to provide the necessary environment for restructuring privatized enterprises so that they can face international competition.

Talvic further emphasized, "critical to the successful development of Latvia's national economy is political unity in priority issues of property matters and privatization." This type of unity is essential to promote investments from the private sector as well as from foreign investors. Based upon these recommendations and on the fact that Latvia's privatization process has been slow-moving it has become one of the top priorities in the government's economic reform movement.

IV. PRIVATIZATION - THE BEGINNING

Property reform began in 1990 with changes to the constitution, which reintroduced guarantees against confiscation or other infringements of an individual's property rights. This was followed by legislation to transfer state-owned assets to private individuals or organizations (privatization), and to restore nationalized property to its previous owners (restitution).

The direction of Latvia's privatization program has changed frequently, yet the basic privatization principles, established with the

32. The World Bank and the Latvian Ministry of Economics organized a seminar in Riga on April 14, 1994 where Vilfred Talvic, Vice President for Central and Eastern Europe spoke. BUSINESS WITH LATVIA, LATVIAN DEVELOPMENT AGENCY, May, 1994, at 1.
34. See BUSINESS WITH LATVIA, supra note 32, at 1.
35. See Jeurling, supra note 33, at 15.
36. Sculler, supra note 4, at 2.
38. Id.
March 20, 1991 resolution, State Property and Basic Principles of its Conversion, have remained constant. This resolution stated:

1) State property privatization will be carried out according to the particular characteristics of individual industrial sectors.

2) Restitution rights will have priority over the privatization laws. Property rights for nationalized or alienated property as of June 17, 1940 can be resumed by any former owner or by his legal heir, regardless of his present citizenship.

3) Privatization of unclaimed state property or property that does not have former owners has to be carried out on the basis of the redemption of property objects for local currency of the Republic of Latvia and other means of payment in operation.

4) Permanent residents of Latvia will be able to purchase a limited share of a state-owned property using privatization certificates.

5) A special privatization fund will be formed from income gained from the privatization process, to help promote the activities of newly established private enterprises.

6) Privatization has to be carried out openly, under the supervision of authorized public representatives of the municipal privatization commissions.39

Furthermore, privatization occurred in the following two phases: privatization of buildings, and privatization of land. Land ownership in Latvia is limited exclusively to Latvian citizens. Foreign nationals may lease land upon which a building stands for a maximum of ninety-nine years. However, both citizens and foreign nationals may purchase houses, individual apartments and factories. The Civil Code of 1937, reintroduced October 1, 1992, provides that enterprises may purchase buildings from other enterprises, private persons, state or local governments.40

40. COOPERS & LYBRAND, supra note 37.
Under this system, the various ministries owned state enterprises and were the initial decision makers in the privatization of these enterprises and their property. This system was characterized by delays, confusion, overlap of various ministry responsibilities, and arbitrary decisions. Furthermore, the situation regarding land ownership proved to be unsatisfactory throughout this process. Reportedly, the government is considering new legislation regarding land ownership.

V. RESTITUTION

The regulation of land restitution was divided into those laws covering land in rural areas, and those laws covering land in urban areas. Laws covering rural areas were initially adopted on November 21, 1990 and expanded with the July 7, 1992 law, “On Land Privatization in Rural Regions.” The main purpose of this legislation was to: (1) provide a guaranteed foundation for agricultural development; (2) restore property rights to the rightful owner as of July 20, 1940 or their heirs; (3) provide citizens the opportunity to obtain property for proper compensation; (4) protect the ecological system currently existing on such lands; and (5) respect the current tenants and governmental interests. If it proved impossible to restore ownership of a certain tract of land, the owner received restitution in the form of land of equal value or financial compensation.

Laws covering urban areas, enacted on November 20, 1991, repealed all laws and decrees passed since July 21, 1940 which affected the nationalization of land. The purpose of this legislation was to: (1) provide for the systematic denationalization, conversion, privatization and restitution of urban lands; (2) reorganize the legal, social and economic aspects of urban land ownership to promote rational utilization and development of such properties for the common good; (3) provide the legal foundation for such property rights, including guaranteed respect for property borders delineated in the land registry; (4) restore property rights to the rightful owners and their heirs; and (5) protect objects of historical and national significance. Under the law, the land is transferred from the

42. See COOPERS & LYBRAND, supra note 37.
43. IRIDA TOMSONE, SERTIFIKATI UN PRIVATIZACIJA (CERTIFICATES AND PRIVATIZATION) 28 (1993).
44. Id. at 31.
45. Id. at 37.
federal level to the local municipal government, where the restoration process will be accordingly monitored and controlled.

The Law for Denationalization of Buildings was passed October 30, 1991, with an effective date of January 1, 1992. It provided former owners and their heirs, regardless of citizenship, the right to reclaim any nationalized houses. Buildings, apartment blocks and private houses exceeding 170-220 square meters were nationalized in 1940. These buildings could not be alienated, reconstructed, renovated or demolished until all restitution rights were resolved. Furthermore, if any rooms within the building have become unoccupied, no new tenant relationship, legal or otherwise, could be established until privatization had been completed. Existing tenants, upon payment of rent not to exceed that delineated by the Cabinet of Ministers, could not be evicted until after seven years from the time of the privatization, unless a replacement of comparable value was found. Aside from this hindrance, the condition that the property subjected to denationalization could not be privatized until the deadline for making claims had passed also considerably slowed the privatization process.

VI. PRIVATIZATION CERTIFICATES

To further complicate the privatization process, the legislation introduced privatization certificates on November 4, 1992. The law aimed to create a legal foundation for the participation of Latvia’s citizens in the government and municipal privatization process by developing a payment methodology with privatization certificates. These certificates are issued to Latvian citizens that reflect length of residence in Latvia, and to owners and their heirs as a form of restitution for nationalized and unlawfully occupied properties that will not be returned. Further, politically repressed individuals receive certificates as delineated by the May 13, 1992 status determination law, which defines entitlement based upon the


47. ANDRIS GRUTUPS, KA ATGUT NOLAUPITO (HOW TO REGAIN STOLEN PROPERTY - A JUDICIAL EXPOSITION ON HOW PROPERTY IS RETURNED TO LAWFUL OWNERS IN LATVIA) 5 (1991).

48. See Tomsone, supra note 43, at 44.

49. Id.

length of time spent in political confinement, exile and concentration camps.\textsuperscript{51}

The value of the certificate equates to an ownership of 0.5 square meters of an average apartment or a nominal value of 28 lats. A certificate account can be opened at the Latvian Republic Savings Bank or Latvian Republic Land Bank. Only through these accounts can certificates be inherited, bought, bequest or devised. These Banks must insure that an individual only has one certificate account. Therefore, those requesting any transaction with certificates must show a line of inheritance and ownership. The option to open such an account expires December 31, 1996.\textsuperscript{52}

A Latvian citizen will receive one certificate for every year of residence in Latvia up until December 31, 1992, irrespective of how many actual years were spent in Latvia. In addition, every person who was a Latvian citizen, as of June 17, 1940, receives fifteen certificates. Any offspring, regardless of age and citizenship, also receive fifteen certificates, as long as one parent was a citizen of Latvia on June 17, 1940. Any resident born outside of Latvia, or one who does not have Latvian citizenship will receive five certificates less than the calculated time he or she has resided in Latvia. Anyone that immigrated to Latvia after reaching retirement years, which is fifty-five for women, sixty for men, and has not been employed at least five years in Latvia will not receive any certificates. If a resident, who was not born in Latvia nor is a citizen of Latvia, has documentation that indicates he invariably resided in Latvia prior to June 17, 1940, he is entitled to certificates in a similar fashion to anyone who had Latvian citizenship as of June 17, 1940.\textsuperscript{53}

Up until recently, privatization certificates and their use have been a bit of an anomaly. As Uldis Klauss, consultant to the Latvian Bank stated,

\begin{displayquote}
I am very pessimistic about the certificate system. The government at present needs funding to develop its infrastructure and technology. State-owned property, therefore, should be sold rather than purchased with certificates. Unfortunately, the certificates will not provide anything in regards to forwarding these goals. In
\end{displayquote}

\textsuperscript{51} Id. at 9.
\textsuperscript{52} Id. at 10-11.
\textsuperscript{53} Id. at 11-12.
effect, by issuing these certificates the government is reverting back to socialism principles.\textsuperscript{54}

As of yet, no certificates have been used to acquire ownership in any private or state-owned enterprise. By April 1994, 45\% of the population had received these certificates.\textsuperscript{55}

\textbf{VII. SECTORAL PRIVATIZATION - AGRICULTURE}

Structural reform has proceeded most rapidly in agriculture and in the privatization of collective farms. The Law on Privatization of Fisheries and Collective Farms, passed on June 21, 1991, provided that agricultural enterprises be converted to entrepreneurial enterprises allocating shares in the property to members of the collective farm and former owners of the property.\textsuperscript{56} Employees received shares based upon the labor input and time worked at the farm. The members of the newly formed entrepreneurial companies would then have a chance to buy the property and tangibles of the company through shareholding. The legislation proposed a promotion of independent management by former collective farmers.\textsuperscript{57} Financial resources obtained from the privatization was used to pay off the respective liabilities of the enterprise, with the remaining monies to be transferred to a state fund that is independent of budgetary constraints.\textsuperscript{58}

Over 53,800 private farms have been established and most remaining collective farms transformed into private joint stock companies.\textsuperscript{59} However, many of Latvia's new farmers are operating at subsistence levels due to lack of financial resources and credit.\textsuperscript{60} As a result, agriculture did not attain 1992's level of production as gross domestic product reached only 85.9\% of 1992 levels. Production of the major products in the livestock and animal husbandry sector decreased by 24.2\% for meat, 17.6\% for dairy products, and 35.0\% for eggs.\textsuperscript{61} More than 260,000 hectares of farmland remained unseeded due to the

\textsuperscript{54} Interview with Uldis Klauss, U.S. Treasury Department Delegate to the Development of the Central Bank of Latvia, in Riga, Latvia (July 1994).
\textsuperscript{55} \textit{ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA}, \textit{supra} note 1, at 6.
\textsuperscript{56} \textit{See Privatization in Latvia}, \textit{supra} note 50, at 3.
\textsuperscript{57} \textit{Id.} at 4.
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{See} Trade Act Report Highlights - Latvia, \textit{supra} note 2, at 2.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{LATVIJAS BANKA} \textit{ANN. REP.} 5 (1993).
destruction of many of the collective farms. Adding to these problems is the fact that while control over urban and rural property is being returned to former owners, the legal right to urban property has not been established, and mechanisms for title registration, sale and mortgaging of real property are not yet fully developed.

Privatization of agricultural foodstuff processing, such as milk, meat and bread, was further regulated by independent laws that took into consideration the specific nuances of each enterprise. Based upon two resolutions On the Privatization of Milk Processing Plants, passed April 15, 1992, and January 27, 1993, respectively, state owned milk collecting and processing enterprises were privatized in two rounds. In the first round, a 1940’s functioning dairy cooperative society was allowed to resume operation, including the processing plants associated with such societies. During the second round, those milk processing plants that had not been claimed by these societies as of April 1, 1993, were transformed into joint-stock companies and sold on the basis of 70% of shares going to milk producers, 10% to the employees and 20% to other persons or legal persons.

Based upon the laws, On Privatization of Meat Processing Plants passed May 18, 1993 and On State Bread Producing Plants passed June 1, 1993, the Ministry of Agriculture formed separate privatization committees for bread production and meat processing plants to oversee and coordinate the privatization of these specific industries. Both types of plants were converted to state joint-stock companies and shares sold according to the order specified by the Ministry of Agriculture.

VIII. SECTORAL PRIVATIZATION - BANKING

Underlying the obvious changes to property ownership and business ownership are those of the Latvian banking system. The Latvian banking system underwent a separate privatization process of the former Bank of Latvia branches in 1993. The Bank of Latvia comprised forty-nine branches until the 1992 passing of On the Bank of Latvia law. Under the auspices of this law, the Bank Privatization Commission of Latvia and the Bank Privatization Fund of Latvia organized and implemented the
process of separation and privatization by legally ceasing commercial banking activities in 1993.

On May 10, 1993, the Bank of Latvia passed these branches to the Bank Privatization Fund of Latvia where their claims and liabilities were monitored. In 1993, eleven of these were sold in auctions to functioning commercial banks, namely, Banka Baltija, Parekss-Banka, and Olimpija. In addition, eight independent commercial banks were formed out of fifteen former branches by attracting new private capital. At the end of 1993, the recently established Rezekne Commercial Bank (formed out of five former branches) was merged with the commercial bank Banka Baltija. One of the branches was liquidated, and the privatization of one branch had not yet been completed by the end of 1993. The remaining twenty-one branches were united in a new government-owned commercial bank Latvijas Universala banka.66

The Bank Privatization Fund of Latvia received payments totalling 4.6 million lats from the privatization of the branches. Out of this amount, 2.3 million lats were applied to cover losses arising from guarantees issued by Saldus Branch, and to make provision in the Universal Bank of Latvia for the bad debts of these privatized branches. The rest of this revenue (2.3 million lats) was used to augment the statutory capital of the Universal Bank of Latvia.67

The effects of this privatization were evidenced in interest rate decreases and the creation of a more favorable environment for the extension of credit. There was a slow, though definite, reduction in interest rates charged by commercial banks on credits during 1993. With inflation falling, the Bank of Latvia cut its refinancing eight times during 1993 - from 120% at the beginning of the year to 27% in October. Commercial banks followed this reduction much more slowly, keeping interest rates high on short-term credits.68 Annual interest rates on credits to enterprises and private persons were generally above 100% at the beginning of the year; they were around 80% during the third quarter and fell to 60-70% on average toward the end of the year.69 The continued high interest rates on credits imposed by commercial banks may be

67. The share of the Universal Bank of Latvia in the national banking system was considerable; it ranked among the ten largest Latvian banks. Nevertheless, the successful performance of this bank was hindered by the bad credits in its credit portfolio alongside with other problems. As a result, the World Bank has offered assistance to rectify the situation, and to develop it further. Id. at 27.
68. Id. at 11.
69. Id. at 12.
explained by the very high levels of risk incurred due to economic instability in the commercial sector, as well as the high interest levied by already signed deposit agreements. The range of interest margins imposed by various commercial banks was extremely wide, sometimes from 6% to 360%.70 It is clearly evident such credit rates at commercial banks do not promote investment into the national economy and loans on such conditions are not acceptable for the majority of manufacturers.71

Ongoing efforts to restructure and rehabilitate the former branches of the Bank of Latvia will continue by the strengthening of bank supervision and development of a securities market. The legislative basis for securing of loans by collateral will be improved through the adoption of land property and land titling laws for legal entities.72 With these measures and the promotion of competition by opening the banking sector to foreign banks,73 the government hopes to bring down the presently high interest rates on issuance of credit.

IX. SMALL SCALE PRIVATIZATION

Small scale privatization has also helped the Latvian economy because Latvia’s growing private sector is estimated to account for as much as 25% of the country’s gross domestic product.74 In the World Bank’s experience, new private enterprises are perhaps the most dynamic force in promoting economic growth.75

Small company privatization was carried out according to the November 5, 1991, Law on Privatization of Municipally Owned Retail, Public Eating Places, Service Establishments and Small Businesses. The law denotes that municipal privatization committees organize the privatization of qualifying enterprises within their jurisdiction. Such committees select the enterprises to be privatized, analyze the operation of such enterprises, determine the initial selling price with specified criteria for the purchaser, and set the form of privatization. Businesses are sold by

70. Id.
71. THE SURVEY OF LATVIA'S ECONOMY AND PROGNOSES FOR ECONOMIC DEVELOPMENT, supra note 3, at 3.
72. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1, at 5.
73. As of July 18, 1994, Latvijas Banka has granted licenses to two foreign banks - the German Bank Dresdner Bank (agency license granted in March) and the French Bank Societe Generale (active commercial operation license granted in July). Normunds Lisovskis, Societe Generale sanemusi LB licenci darbībai Latvija (Societe Generale has been granted a license to operate in Latvia from the Latvian Bank), DIENAS BIZNESS, July 18, 1994, at 17.
75. Jeurling, supra note 33.
a range of methods including tender, auction, sale to employees or sale to another business entity. Bidders for the business are required to have resided in Latvia for a minimum of sixteen years.

Initially only very small businesses with no more than ten employees were eligible for privatization. The scope of the law was widened when this size limitation was relaxed under an amendment adopted in 1992. Although privatization began slowly during the first quarter of 1992, it accelerated during the remainder of the year and by the last quarter of 1993, an estimated 70% of all small businesses had been transferred into private ownership.

To further promote this sector, the government is in the process of setting up business support centers with the aid of EC-PHARE. This program is intended to provide training, technical expertise and financial assistance to small and medium size enterprises.

X. LARGE PRIVATIZATION

Unlike the progress in small scale businesses, the pace of privatization of large enterprises has been slow. Large privatization in Latvia began in 1991, with partial price deregulation, a liberalization of foreign trade, and the introduction of various legislation. It has proceeded, however, at a relatively slow pace, and the primary reasons for this, as stated by government officials, include non-existing central privatization authority and a general lack of precise privatization legislation.

The large scale privatization was further stalled throughout most of 1992 and 1993, by a series of political, legal, and institutional obstacles, including delay in the settlement of restitution claims because of the citizenship issue; confusion about the currency was to be used to acquire assets and uncertainty about which government ministry had responsibility for the privatization of a particular enterprise. Other obstacles included complicated procedures, poor institutional framework, poor marketability

76. COOPERS & LYBRAND, supra note 37.
77. Id.
78. Id. at 18.
79. Id.
80. Id.
81. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1, at 6.
82. Id.
of the products of many state firms, high investments to restructure these enterprises into commercially viable units, and difficulties in the settling of debts between firms and the banking system. According to the State Statistics Committee, only thirty-five large state-owned enterprises or 15% of the total earmarked enterprises for privatization had been privatized by November 1, 1993. As of April 22, 1995, eighty-five large state-owned enterprises had been privatized amounting to approximately 19.1 million lats.

The initial laws regulating large privatization, On the State and Municipal Property Privatization Commissions and On the Privatization Order of Objects of State and Municipal Property (Enterprises) were passed on March 17, 1992, and June 16, 1992, respectively. The Czechoslovakian model was used as a basis for these laws. These laws delineated the various methodologies that an enterprise can undergo to be privatized and set the informational requirements for each privatization proposal. The laws further defined the process by which approval must occur, the methods of financing for privatization, and the procedures to which penalties were not adhered.

This case by case privatization process was decentralized and could be initiated from "the bottom up" by any private entrepreneur or enterprise manager. The government compiled and accepted annual lists of enterprises and separate structural units which could or could not be privatized, based upon the proposals made by these enterprise managers or branch ministries. Of the 1,270 enterprises listed for privatization in 1993, 712 were deemed privatizable while 558 enterprises were not. Accordingly, the government had the right to add or delete enterprises to this list.

Once an enterprise was deemed privatizable, any person or legal person (even foreign) could prepare a privatization proposal based upon the enterprise's prospectus, within three months of the initial offering date. Such proposals were submitted to the branch ministry which had the oversight function for the respective enterprise. Unfortunately, such proposals often were delayed or deemed nonfeasible because they did not

85. ECONOMIC REFORM AND PUBLIC INVESTMENT IN LATVIA, supra note 1, at 5.
86. Id. at 20.
89. BUSINESS WITH LATVIA, supra note 39.
90. PRIVATIZATION IN LATVIA, supra note 50, at 6.
consider the burdens of freeing these enterprises from incompetent management, shoddy products, disputed title claims and payrolls padded with thousands of unnecessary workers.\(^9\) If the respective ministry approved the project proposal based upon the development principles of a particular ministerial branch, the project was introduced to the Ministry of Economics. Once approved by this ministry, the proposal became the official document by which the particular privatization activities had to be carried out.\(^9\) Subsequently, a privatization commission was formed to perform the valuation and oversight functions of the particular privatization method.

Based on the fact that numerous state institutions were involved, that often these institutions performed overlapping functions, and that often these institutions and ministries had differences of opinion, the privatization process continued at a snail's pace.\(^9\)

**XI. ESTABLISHMENT OF THE PRIVATIZATION AGENCY**

With the creation of the Privatization Agency (P.A.) by passage of its statutes on March 29, 1994, responsibility for the privatization of large enterprises was transferred to the P.A. Similarly, responsibility for the privatization of large municipally-owned enterprise was transferred to municipal privatization commissions (P.C.), based upon the February 26, 1994 law “On State and Municipal Privatization Commissions.” The goal of these institutions (in particular the P.A.) was to consolidate, within one institution, the privatization process. In addition, by providing a more professional centralized approach to this process, under the auspices of the new law “On Privatization of State and Municipal Enterprises” passed on February 17, 1994, the government hopes that state enterprise privatization would be accelerated.\(^9\) The new law further declares that the key objectives of the privatization of state-owned property in Latvia are to create a favorable environment for the activities of private capital, and to narrow the scope of state entrepreneurial activities.\(^9\)

The P.A. reports to the Minister of Privatization, who is directly supervised by the Ministry of Economics. Enterprises under the control of

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93. *Id.*


95. BUSINESS WITH LATVIA, *supra* note 39.
individual branch ministries are either transferred directly to the P.A. for immediate privatization or to the State Property Fund (SPF), where they are held until such time as they can be privatized. The P.A. is responsible for supervising all aspects of the privatization process including: (1) evaluating the privatization projects submitted by potential investors, (2) determining any conditions that are to be attached to the privatization of particular enterprises, including the main principles for its restructuring and development, (3) determining any claims for restitution of state-owned property, (4) organizing tenders and auctions, which include disseminating information about the company to the general public, reviewing purchase bids and negotiating sales agreements, (5) receiving privatization receipts, and (6) supervising the operation of sales contracts.

Privatization may involve an entire enterprise, or parts of an enterprise, and can be achieved through a number of different methods, including: (1) sale by tender public auction or auction to selected bidders, (2) transformation into a limited liability or joint stock company and sale of shares, (3) by contributing the assets of an enterprise to a joint venture; or (4) closure of an enterprise and liquidation of its assets. The number of state owned enterprises to be privatized amount to several hundred, of which 417 are on the list of enterprises that are not to be privatized.

The new privatization law further denotes that any physical person or registered entity, with private equity capital exceeding 25% (even foreign), can propose upon and acquire state-owned property. The buyer must prove his solvency (i.e. purchasing power), must not be indebted to the state, and the purchase agreement must specify the financing arrangements, with the proper mechanisms of investment guarantees. The P.A. will determine whether such enterprise can be bought by a deferred payment structure, or whether immediate payment is required. The law does not give priority for staff and management to buy shares in enterprises to be privatized. In turn, the buyer has the right to refuse acquisition of certain fixed assets and working capital, which he is not able to use in the further operations of the company. Transactions that are connected with privatization and transfer of the ownership to new owners are exempt from any state or municipal taxes.

96. COOPERS & LYBRAND LATVIA - A BUSINESS AND INVESTMENT GUIDE 18 (Apr. 1994). The SPF also holds those state assets that will not be privatized. Id.

97. Id.

98. Id.

99. Id. at 2.

100. Privatization of Latvia, supra note 50, at 3.

101. Id.
The P.A. will evaluate applications for the privatization of a state-owned company according to several specific criteria. These include the conditions of work, employee training, number of vacancies to be produced, the amount and purpose of the proposed investment, and environmental protection safeguards. Once certain criteria are met, the P.A. will conclude an agreement and land lease with the buyer thereby transferring ownership and liabilities of the enterprise. From the time the P.A. has been established, twenty to twenty-five enterprises will be introduced publicly for privatization every three weeks. The Cabinet adopted its first set of twenty enterprises on May 17, 1994. As of July 20, 1994, more than 200 proposals have been received at the P.A.

XII. NEW PRIVATIZATION METHODOLOGY FOR THE PRIVATIZATION AGENCY - THE SPECIFICS

With the creation of the non-profit joint stock company, the Privatization Agency, privatization procedures have been modified based upon the following procedures:

1) Approval Process - any individual or legal entity can submit a proposal for privatization of all or part of an enterprise. The P.A. registers submitted privatization projects and sends confirmations. The P.A. examines all proposals and prepares a resolution for consideration by the Cabinet of Ministers. If the Cabinet approves the resolution, the enterprise can then be privatized. The Cabinet of Ministers may add requirements to the privatization of these approved enterprises.

2) Preparation for Privatization - if approval is given, control over the enterprise is transferred from the State Property Fund or Branch Ministry to the P.A. This must occur within two weeks of the resolution using official hand-over documentation. These documents include a balance sheet of the previous quarter, an inventory list, a list of the liabilities and responsibilities of the enterprise, as well as information concerning land and its utilization rights. While under the control of the P.A., the managers of an enterprise are prohibited from taking certain actions, such as disposing of assets or accepting large liabilities, without the prior approval of the P.A. Thereafter, the P.A. provides an announcement to the mass media, known creditors, banks in which the

102. LATVIAN BUSINESS GUIDE, LATVIAN DEVELOPMENT AGENCY 58 (Apr. 1994).
103. COOPERS & LYBRAND, supra note 96, at 1.
enterprise has accounts, the Enterprise Register, and the municipality, on whose territory the state enterprise is located, about the privatization of the enterprise. The P.A. sets and publishes the deadline for receipt of privatization projects and other documents. The P.A. is required to provide potential investors with the information required to prepare a privatization project for an enterprise. The P.A. is also required to settle any restitution claims and determine whether any preemptive ownership rights exist over the assets.

3) Privatization Projects - a privatization project must be prepared for each enterprise by each potential investor and submitted to the P.A. The project must include the name and address of the enterprise that is to be privatized, the proposed method, means of payment and timetable for privatization, an indication of the future operation of the enterprise after privatization (or business plan if sold by tender or auction to selected bidders), and information about the individual or legal entity submitting the privatization project.

4) Valuation of Privatization Projects - the P.A. receives all the privatization projects and determines the conditions pertaining to the privatization. The preliminary sale price is determined by the P.A. with reference to a valuation in accordance with the Law on Procedure of Valuation of State and Municipal Enterprises passed February 26, 1994. The preliminary valuation must, upon the request of the P.A., include a valuation of all assets and liabilities, including off-balance sheet liabilities. This valuation will determine the initial offering price. If an attempt at privatization is considered unsuccessful based upon this valuation, the P.A. may adjust this valuation without prior approval of the Cabinet of Ministers.

5) Sale Procedure - if there is more than one acceptable privatization project, the enterprise is sold by tender, public auction or auction to selected bidders. If the means of sale is auction with selected participants, then the conditions of selection of participants must be attached. In order to be considered in selected participant auctions, applicants must submit a business plan to be evaluated by the P.A. and a 10% security deposit calculated on the initial offering price. If the means of sale is tender bidding, then the terms of reference must be attached. The bidder must submit a tender bid, including a business plan for the enterprise along with a draft sales contract. The decision of a tender commission is final and may not be altered or withdrawn. If there is only one acceptable privatization project, the enterprise can be sold directly to the applicant. The P.A. may set a minimum price under which the enterprise will not be sold. Payment can only be made in lats or privatization certificates. If privatization is not completed within the
timetable specified in the privatization project, the P.A. may change the conditions attached to the sale and/or extend the timetable for privatization.

6) Monitor and Management - the P.A. has the right to purchase back privatized companies in cases where the new owner does not operate the enterprise according to the sales contract. The P.A. also has repurchase rights if the new owner resells the enterprise within three years of privatization. According to regulations defined by the Cabinet of Ministers, unprivatized assets and enterprises are either managed by the P.A. until privatized, handed over to the local municipality or institution, or returned to the State Property Fund. The new enterprise owners, who are citizens of Latvia, have first right-to-buy options on state or municipal land. The new owners also have the right to lease land at rents determined by agreement between the parties, on which the enterprise is located. The owner has the obligation to sign a lease contract with rents not to exceed those delineated by the Cabinet of Ministers. Disputes in regard to these matters are settled judicially. If a land owner, who has signed a lease contract with the owner of a privatized enterprise, sells the leased land, then the enterprise owner has a pre-emptive right to buy the land.

XIII. NEW PRIVATIZATION METHODOLOGY FOR PRIVATIZATION COMMITTEES - THE SPECIFICS

Based upon the February 26, 1994, “On State and Municipal Privatization Committees,” the Municipal Privatization Committees are the highest ruling body for municipal enterprise privatization. Separate committees may be formed for individual enterprise privatization. This executive committee, which must include at least one union representative, decides which enterprises are to be privatized, adjusts enterprise valuation as necessary to expedite privatization, and approves privatization proposals. Any unresolved disputes at the committee level are decided by the Ministry of Economics.

The function of a Privatization Committee is to manage the privatization process, possibly with the assistance of experts. The division of responsibilities among the members is collegial. Voting is open with resolution adopted by simple majority. The Chairman of the Committee

105. This can include any person who is furthering a specific federal interest, which includes but is not limited to defense, healthcare, culture, or education.

106. See COOPERS & LYBRAND, supra note 37; see also BUSINESS WITH LATVIA, supra note 39; Maris Kivsons, Vaists Mantas likvidesanas kartiba, DIENAS BIZNESS, July 15, 1994, at 4.

has the right to delay the adoption of decisions and have them re-examined. The Cabinet of Ministers may halt any privatization process on the request of the Ministry of Economics within a month of the resolution by the individual privatization committee or the municipal executive committee.\textsuperscript{108}

XIV. ANALYSIS OF NEW METHODOLOGY

Although the New Law on Privatization of State and Municipal Enterprises allows for three methods of privatization: the sales method, the private capital method, and the investment method, the Cabinet of Ministers has only passed regulations for the sales method. As a result, investors looking for creative alternative financing mechanisms have, up until now, been barred from the privatization process. Furthermore, as economist Karlis Briviba states, "Unresolved customs problems, astronomical credit costs, high tax rates, high currency valuation and energy prices are not allowing either local or foreign firms to expand existing production or develop new production, and often interfering with the privatization process."\textsuperscript{109} Briviba predicts that even with the expedition of the privatization process, Latvia is coming to an economic crisis level.\textsuperscript{110}

Janis Naglis, P.A.'s general director, further states that there are other logistics problems that are currently facing the P.A. First, if privatization had been started much sooner, the continued viability of many state-owned enterprises would have been much higher. Second, although many enterprises are required to be transferred to the SPF, many have not been as of July 22, 1994. Third, for some enterprises, no one knows who is presently managing them.\textsuperscript{111} Fourth, valuation of the respective enterprises has been very tedious and time-consuming, because finding a competent expert to do such a valuation has been very difficult.\textsuperscript{112} Fifth, because of the relative ignorance of the populace in terms of knowing what a stock or dividend is and their right to participate in the privatization process, many individuals have not been involved in the privatization process. The establishment of the P.A. was based upon the premise that the economy can only recover with a private sector initiative

\textsuperscript{108} COOPER & LYBRAND, PRIVATIZATION IN LATVIA 11 (1994).

\textsuperscript{109} Karlis Briviba, (Latvian Economist), \textit{Ekonomiskas krizes ietekme (Influence of the Economic Crisis)}, DIENAS BIZNESS, July 8, 1994, at 8.

\textsuperscript{110} Id.

\textsuperscript{111} Janis Naglis, General Director of the Latvian Privatization Agency, \textit{Privatizacijas Krustceles (Privatization at the Crossroad)}, DIENAS BIZNESS, July 22, 1994, at 8.

\textsuperscript{112} In the liquidation of one firm, Elsmira, the P.A. was able to find only one firm, Invest Riga, who was able provide the expertise to valuate the radioelectronic firm. \textit{Id.}
which, in the past, had not proceeded as quickly as it should have. Therefore, in order for the agency to meet its goal to privatize 75% of state-owned enterprises by the end of year 1996, (which amounts to approximately one privatization per working day for the next three years), many of these problems will need to be resolved.

Foremost to this success will be the full utilization of certificates in at least 100 privatization projects, where approximately 50% of their value will be purchased with these securities. At present many individuals have their certificates, but are not able to use them, except to sell them for currency. Therefore, it will be critical to develop a mechanism for the realization of this goal.

It is hoped that the formation of the Riga Stock Exchange, with the help of France, will provide a network where these securities could be exchanged. If things proceed as planned, the first securities transactions will occur sometime in October. With the development of a computer network, it is hoped that each region will be able to follow such stock activity daily. The French Stock Exchange is currently working with the Riga Stock Exchange to develop the structure and regulations for adopting the continental model which is present in most European exchanges.

Naglis, along with many others, believe it may be too late for this process because companies such as Baltijas Vertspapiru Nams and Olevs - Investe are speculatively purchasing certificates for 0.5 lats or even less in the rural areas (even though nominal worth of the certificates is 28 lats) and thereby shifting the concentration of enterprise ownership to only a select few.

Privatization certificates will not be the entire solution to Latvia's economic woes. Enticement of foreign investment into the privatization process will be critical. Presently two firms Coopers & Lybrand (with funding coming from the European Bank for Reconstruction and Development and EC-PHARE programs) and Roland Berger are trying to entice foreign investment. In addition, it is hoped that with the aid of experts, this new methodology will not only allow the government the opportunity to sell the better enterprises, but those that are taxing the government budget with large debts and ecological problems. Furthermore, it is hoped that the politics of the different factions of the coalition government will not interfere with the process.

113. Mikelsons, supra note 104.
114. Id.
116. Mikelsons, supra note 104.
As a final note, one of the Privatization Agency's top priorities will need to be the fair privatization of two entities: The Latvijas Nafta (Latvian Petroleum), which is laden with an $18 million credit, and the Latvian Universal Bank whose bad credit portfolio is currently being guaranteed by the government. Furthermore, to prevent losses for seasonal enterprises, it will be critical to privatize such enterprises before the harvest. In addition, the privatization agency must further promote the use of local materials rather than imported goods in order to help the current economy. Priority should also go to partially completed construction sites. Only the future will determine whether this new privatization methodology will answer these problems.

XV. CONCLUSION

Despite these new laws, it remains to be seen whether the privatization process will be accelerated and whether economic development will be stimulated as a result. It is clear that Latvia has come a long way in the three years since gaining independence. Latvians, as well as the international community, have already recognized that their country is a gateway to the markets of the Commonwealth of Independent States countries. But Latvia's future will strongly depend on the continued development of a strong and viable economy. Latvia could become the "Hong Kong of Russia" or rather the "Switzerland of the Baltics." Like Hong Kong, Latvia is attracting attention as a stable platform for business, favorably situated next to an economically powerful, yet in many ways troubled, neighbor. In contrast to Hong Kong, Latvia sees a European future for itself, and it has taken the first step toward membership in the European Union by initialing a Free Trade Agreement with the European Union on June 20, 1994. With Latvia's entry into the European Union on the horizon, it will only be a matter of time before the completion of successful economic reform which will attractively position Latvia to become a successful competitor with respect to two major markets - Russia to the east and Europe to the west.

117. Only Parex Bank has officially submitted a privatization proposal regarding the Latvian Universal Bank. Other possible interested parties could be Latvijas kapitala banka, Ogres and Liepaja commerce banks. Mikelsons, supra note 104.

118. Id.

ABUSE OF DIPLOMATIC IMMUNITY: IS THE GOVERNMENT DOING ENOUGH?

Rina Goldenberg*

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I. INTRODUCTION

"Diplomatic immunity covers many things, but failing to pay $400,000 rent is not one of them, a federal judge said as he ordered the Zaire mission to the United Nations to be evicted from its offices."¹ However, only a few months later, the Second Circuit Court of Appeals overruled the judge by holding that diplomatic immunity does extend to this case and that the mission cannot be evicted.² In other words, the mission can lease another's land, continue its work, refuse to pay rent, and not be evicted. What remedies does a landlord have? Does our government have a remedy that would satisfy both the American citizen as well as the well-established international law of diplomatic immunity? This note will provide an overview of the development and changes in the law of diplomatic immunity, discussing its problems and possible solutions. Then, in light of this overview, a determination will be drawn stating whether our government has taken the necessary steps to balance

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the scale of diplomatic immunity that is heavily skewed in favor of the diplomat.

The landlord's dilemma is one of many unresolved problems of diplomatic immunity. Offenses by diplomatic personnel vary from parking violations, to drug smuggling, and murder. The most serious problems Americans have encountered in this arena include rape by a foreign attache's son, assault by the son of a foreign Ambassador to the United States, child abuse, and sexual assault by an emissary. The United States is host to some 37,000 diplomatic personnel who are immune to nearly all civil and criminal liability. Although abuses are the exception rather than the rule, the number of abuses is alarming and has constantly been an issue of debate in Congress. With no clear guidance from Congress, the courts are left to their own reasoning and interpretations of purposely ambiguous treaties, and the considerations of foreign affairs policy.

As courts have encountered such problems previously, they have created a limited number of precedents on certain aspects of diplomatic immunity. For example, courts have unanimously upheld diplomatic immunity in criminal prosecution and civil litigation resulting from criminal behavior. In Skeen v. Federative Republic of Brazil, the United States District Court for the District of Columbia dismissed an action for lack of jurisdiction based on defendant's status as Ambassador to the United States. In this case, the grandson of a Brazilian Ambassador assaulted and shot an American citizen without accountability for criminal or civil liability. The court hinted that it was the function of the other two branches to provide a proper solution to such incidents.

Diplomats have also been able to invoke immunity to avoid service of process. In a case representative of this precedent, a Circuit Court upheld a United States Marshal's refusal to serve compulsory process on the Ambassador of Tunisia, stating that such service would violate the Ambassador's diplomatic immunity. The court relied on the State Department's opinion that such service of process would "prejudice United States foreign relations and impair the performance of diplomatic

5. Shapiro, supra note 3, at 281.
7. Id.
8. Id.
functions." After weighing foreign relations interests against the benefit of such service, the court concluded that the former outweighed the latter and upheld diplomatic immunity.

Yet another precedent is the inability of courts to compel diplomatic officials to testify at trials. For example, the United States District Court for the District of Columbia sided with a Canadian Ambassador to the United States who refused to testify at a perjury trial, on grounds similar to service of process. Courts generally dislike limiting immunities that are provided by the Vienna Convention and routinely side with the State Department.

These instances amply justify the Second Circuit's reasoning in 767 Third Avenue Associates v. Permanent Mission of Zaire, in which the landlord could not evict his delinquent tenant. If such procedural matters as service of process or a subpoena are prohibited by the notion of diplomatic immunity, eviction would certainly not be allowed. Nonetheless, although the trial court in this case probably went too far in permitting the eviction of the mission, both the district and the appellate courts were justified in directing attention to the government and voicing their opinions that, without any revisions of diplomatic immunity law, innocent victims would continue to bear the burden of delinquent diplomats.

II. BACKGROUND OF DIPLOMATIC IMMUNITY

Acknowledged diplomatic immunity has existed since the sixteenth century when it was established in Europe as a result of the common exchange of permanent ambassadors. During this era, European countries realized that in order to assure the safety and efficacy of their work, ambassadors needed to be protected from criminal jurisdiction in the hosting country. History provides three theories for the need of such immunity. First, Hugo Grotius expressed the theory of "sacredness of

10. Id. at 980.
11. Id.
12. Shapiro, supra note 3, at 293.
13. Hellinic Lines Ltd., 345 F.2d at 980. The court held that service of a subpoena threatens a diplomat's freedom of movement, impairs his or her ability to perform necessary functions, and thus is a violation of diplomatic immunity. Id.
14. 988 F.2d at 295.
16. Id.
Ambassadors.' Grotius believed that ambassadors were protected by both "divine and human law" and violation of such law would "not only be unjust but also impious." Another theory was "exterritoriality", which suggested that an ambassador, wherever he or she might be, remains on the grounds of its sending state, and therefore is not subject to another country's laws. A third theory, that of "functional necessity", is the one most widely accepted. Functional necessity is based on the notion that diplomats cannot perform their duties and diplomatic functions without the protection of such immunity.

Rules of diplomatic immunity have remained unaltered since the time they were established. However, in time, the various and often inconsistent practices required consolidation. This occurred at the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. The Conventions codified most modern diplomatic and consular practices and were signed and ratified by over 140 countries, including the United States. The 1961 Convention on Diplomatic Relations (hereinafter Vienna Convention) provides for immunity of diplomats and the diplomatic agent's family members. The treaty addresses numerous aspects of diplomatic immunity including approval of diplomats by the host country, appointment of mission staff, and limited diplomatic immunity also extends to the administrative, technical, and service staff of the foreign mission.
and exemption from local taxes.\textsuperscript{30} In addition, the Convention offers two resolutions to problems of abuse of local laws.\textsuperscript{31} The treaty also provides for the inviolability of diplomatic missions in Article 22.\textsuperscript{32} However, although many concerns seem to be directly addressed by the Convention, inviolability of the mission, as it is described in the treaty, lends itself to various interpretations,\textsuperscript{33} thus leaving room for assorted understandings.

\section*{III. The Landlord’s Dilemma}

In May 1982, the Zaire Mission to the United Nations rented an entire floor in a modern Manhattan high-rise at $19,350 per month.\textsuperscript{34} Soon after it occupied the premises, the mission encountered problems keeping up with its rent payments.\textsuperscript{35} After two judgements in favor of the landlord and the mission’s repeated delinquency in the payment of its rent,\textsuperscript{36} the landlord proceeded to reclaim what was his by evicting the mission, only to discover that it could not be done.\textsuperscript{37} The mission, backed by the United States government, invoked diplomatic immunity.\textsuperscript{38} Following a decision in the landlord’s favor and the mission’s appeal, the Second Circuit Court of Appeals held that the mission was inviolable and could not be evicted.\textsuperscript{39} The landlord learned that he had no remedy against this delinquent and costly tenant other than to throw himself at the mercy of the United States government and hope that it would persuade the mission to either pay its debt or move out.\textsuperscript{40}

\begin{itemize}
  \item 30. \textit{Id.} art. 33.
  \item 31. \textit{Id.} art. 9 \& 32.
  \item 32. \textit{Id.} art. 22.
  \item 34. 767 Third Ave. Assoc., 988 F.2d at 296.
  \item 35. \textit{Id.}
  \item 36. \textit{Id.} After some pressure from the United States government, Zaire paid its debts to the landlord, but thereafter failed to make rent payments as they became due.
  \item 37. \textit{Id.}
  \item 38. 767 Third Ave. Assoc., 988 F.2d at 295.
  \item 39. \textit{Id.}
  \item 40. David Frum, \textit{Diplomatic Immunity}, \textit{FORBES}, Apr. 26, 1993, at 110. Zaire, whose dictator is a billionaire, is notorious for nonpayment of international debts. As a result, the United States cut its foreign aid to Zaire from $31 million in 1990 to $3.5 million in 1992.
\end{itemize}
A. District Court's Reasoning

Upon review of relevant treaties and documents, the New York District Court decided that provisions for inviolability of missions were not prompted by concerns of eviction due to failure to pay rent. Article 22 of the 1961 Vienna Convention on Diplomatic Relations, which speaks of inviolability of foreign missions, states that, with no exception, agents of the receiving State may not enter the mission's premises unless they are authorized by the head of the mission. In addition, the Article states that the receiving State has a special duty to protect the mission's premises from "any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." Read together, the judge interpreted this language to be based on two considerations: "first, a perceived need to protect the sovereign from mob violence and other harassment; and second, recognition that the premises of the sovereign are entitled to protection from unannounced seizures or other invasions of privacy." The court thought it unlikely that "the treaties intended to protect diplomats from injuries sustained from a party's lawful efforts to recover its own property." In addition, the court stated that eviction would not be an "unannounced . . . invasion", since the mission has received ample notice.

Moreover, in response to the mission's argument that eviction will hinder its function, the court replied that the mission should have looked for alternate housing if it was not able to meet its financial obligations; further, the only hinderance to the mission's function was its own inability to make the required rent payment. Finally, the court rejected the notion proffered by the Department of State that a single landlord should carry the burden of our nation's foreign policy, especially when there was no proof that American diplomats abroad would feel the consequences of such eviction. The court stated that if the State Department is concerned with

42. Vienna Convention, supra note 25.
43. Id.
44. Id.
46. Id.
47. Id.
48. Id. at 395.
49. Id. at 396.
the consequences of such action, it should have insured the landlord's rent payments, possibly by providing an escrow fund for the rent payments.\textsuperscript{51}

Reviewing the history of wrongful possession of property by diplomatic personnel and their missions, one realizes that Judge Sand, from the Southern District of New York, took a new approach to this problem. Up to this point, courts avoided speaking out on this issue and dismissed suits without looking into the merits of their arguments. For instance, in September of 1991, a Manhattan civil court dismissed an action attempting to evict a Congo mission counselor for failing to pay rent, declaring that it had no jurisdiction over diplomatic proceedings, and therefore deferred to the federal judicial system.\textsuperscript{52} In light of the rise in diplomatic personnel in this country such disputes may become more common and serious. For example, in October of 1991, a landlord sought a judgment from a federal court to evict a press attaché of the Pakistani mission from his penthouse apartment.\textsuperscript{53} The court held that, although the press attaché himself was immune to the suit,\textsuperscript{54} the mission was not.\textsuperscript{55} The court cited a Foreign Sovereign Immunities Act provision which explains that a foreign state is not immune from jurisdiction in cases where rights in immovable property located in the United States are at issue.\textsuperscript{56}

The District Court demonstrated a new approach and reasoning in the Zaire case when it interpreted the treaty not to protect the mission from a civil remedy which would secure a landlord's own property.\textsuperscript{57} There is no precedence to the court's ruling, and the Vienna Convention does not explicitly call for protection of a mission when wrongfully possessing another's property.\textsuperscript{58} The court felt that the mission purposely invoked

\textsuperscript{51} Id. at 396.


\textsuperscript{54} York River House v. Pakistan Mission to the United Nations, 820 F. Supp. 760, 762 (S.D.N.Y. 1993) (explaining that the press attaché was dismissed from the suit by a lower court on the grounds of diplomatic immunity under art. 31(a) of the Vienna Convention because he was found to be "the mission's current diplomatic agent in residence").

\textsuperscript{55} Id. at 760 (stating that the lease to the apartment was in the name of the mission, not the attaché).

\textsuperscript{56} Pines, \textit{supra} note 53 (citing Judge Leval of the New York Civil Court). This case came to an end following the Second Circuit's announcement that foreign missions cannot be evicted. Thus, the district court followed this rule expanding it to include private residences of mission personnel. \textit{Id}.

\textsuperscript{57} 767 Third Ave. Assoc., 787 F. Supp. 389.

\textsuperscript{58} Id. at 394.
diplomatic immunity while in the wrong, thus abusing its welcome and its
grant of immunity. Consequently, the court resorted to equity
considerations in an attempt to provide a remedy that would restore the
landlord to the same or similar condition he was in prior to the mission’s violations. The only remedy under the existing circumstances seemed to
be eviction, as it was dictated by the District Court. Although the court’s
interpretation may have stretched the meaning of the Vienna Convention
beyond the treaty’s intent, the court did so in the name of equity, knowing
that if the mission is to stay, the landlord’s right to its property would not
be upheld by the government.

B. Circuit Court’s Reasoning

The Second Circuit Court of Appeals interpreted Article 22 of the
Vienna Convention to include immunity from eviction. Article 22 states
that the premises of a mission are inviolable, and that receiving states
officials cannot enter the premises without explicit consent of the mission’s
head. The court held that this includes eviction. In its reasoning, the
court pointed to previous examples in which United States officials were
not permitted to enter foreign missions without explicit permission even
though its occupiers were endangered. The court feared that violation of
the Vienna Convention may have grave consequences for American
diplomats abroad.

The Circuit Court correctly pointed out the treaty’s statement of
the mission’s inviolability, and the requirement of explicit consent before
entering the mission’s premises. The Vienna Convention provides that
“[t]he premises of the mission . . . shall be immune from search, requisition, attachment, or execution.” Some commentators interpret
these provisions to unquestionably prescribe inviolability even when the

59. Id. at 390.
60. Id. at 391.
61. Id. at 396.
62. Vienna Convention, supra note 25, art. 22.
63. 767 Third Ave. Assoc., 988 F.2d at 301 (referring to an incident in 1979 when the
Soviet mission to the United States was bombed and the FBI was not allowed entry until the
mission head consented).
64. Id. at 300.
65. Vienna Convention, supra note 25, art. 1 (providing that regardless of ownership, all
ancillary land is to be part of the mission’s premises).
66. Vienna Convention, supra note 25, art. 22.
mission is involved in an unlawful act.\textsuperscript{67} Such contentions are based on the explicit refusal of the treaty's drafters to include exceptions to inviolability despite evident abuses of local laws.\textsuperscript{68} Since the treaty lists no exceptions to the consent requirement, the court interpreted the treaty to signify that no exceptions were intended. Therefore, the United States Marshall could not enter the premises to evict the mission.\textsuperscript{69} In light of other opinions on this issue, the court's rationale for such strict interpretation is not a blind adherence to a rule of law in an international treaty uncaring of justice at home, but that by upsetting existing treaty relationships, American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled. That possibility weighs so heavily on the scales of justice that it militates against enforcement of the landlord's right to obtain possession of its property for rental arrears.\textsuperscript{70}

The court thus adopts from the State Department the argument that eviction of the delinquent mission will expose diplomats abroad to harm:

The risk . . . is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law. Foreign law might be vastly different from our own, and might provide few, if any, substantive or procedural projections for American diplomatic personnel. Were the United States to adopt exceptions to the inviolability of foreign missions here, it would be stripped of its most powerful defense, that is, that international law precludes the nonconsensual entry of its missions abroad.\textsuperscript{71}

The judge explains that the only way to guarantee the protection of American diplomats abroad "is through blanket immunities and privileges without exceptions".\textsuperscript{72} Finally, the court points out that in recent years, many reforms to various diplomatic immunities have been suggested and


\textsuperscript{68} Id.

\textsuperscript{69} 767 Third Ave. Assoc., 988 F.2d at 301.

\textsuperscript{70} Id. at 296.

\textsuperscript{71} Id. at 300-01.

\textsuperscript{72} Id. The judge also discussed the fact that even after an exception to the inviolability provision was proposed, the drafters of the Vienna Convention declined to adopt it and the exception never resurfaced. Id.
implemented, but none concerning mission inviolability.\textsuperscript{73} The court agrees that reform is in order and even suggests taking a second look at the Vienna Convention, but the court is of the opinion that it is not the courts’ terrain to take a second look at the Convention.\textsuperscript{74} Instead, the court avidly points to Congress for action.\textsuperscript{75} Although the outcome of this case does not incite any enthusiasm, one must agree with the court’s position, particularly after reviewing the government’s foreign affairs policy on the issue of diplomatic immunity.

IV. DEPARTMENT OF STATE POLICY

In cases involving diplomatic immunity, judges inevitably turn to the Department of State (Department) for clarification, opinion, or solution. Whether directly or indirectly, the Department is invariably involved in every action arising out of diplomatic immunity. In 1990, the Department clarified the nature of diplomatic immunity, the Department’s practices, and future trends and practices around the world. In its opinion, “immunity protects the channels of diplomatic communication by exempting diplomats from local jurisdiction so that they can perform their duties with freedom, independence, and security.”\textsuperscript{76} Due to the large number of American diplomatic and consular personnel stationed in countries where individual rights do not enjoy the same protection as in the United States, the United States considers the Vienna Conventions to be of extraordinary importance.\textsuperscript{77} Therefore, the Department insists, a slight variation from the treaties in dealing with diplomatic immunities could lead to harsher treatment of our diplomats abroad.\textsuperscript{78}

In 1987, the Department promptly intervened in Congress’ debate on the passage of a bill that intended to limit diplomatic immunity. In light of its policy, the Department of State’s Chief of Protocol, Ambassador Selwa Roosevelt, voiced concerns and represented the Department’s position and policy on this issue before the Senate Foreign Relations Committee.\textsuperscript{79} Ambassador Roosevelt noted that diplomatic immunity

\textsuperscript{73} Id. at 302.
\textsuperscript{74} 767 Third Ave. Assoc., 988 F.2d at 302.
\textsuperscript{75} Id.
\textsuperscript{76} Diplomatic Immunity, supra note 24.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Ambassador Selwa Roosevelt’s statement, Dept. of St. Chief of Protocol, before the Senate Foreign Relations Committee in DEP’T ST. BULL., Oct. 1987, v. 87 at 29 [hereinafter Roosevelt].
existed "to assure that diplomatic representatives are able to carry out the official business of their governments without undue influence or interference from the host country. [Immunity] enables them to work in an environment of freedom, independence, and security."80 The Chief of Protocol then stated that, in light of the function of diplomatic immunity, the Department of State could not support a bill which would narrow diplomatic immunity.81 Such efforts would endanger American diplomats abroad and greatly interfere with the United States foreign affairs.82 However, Ambassador Roosevelt pointed out that steps have been taken to curb abuses of diplomatic immunity, particularly criminal offenses.83 For example, a system to bar reentry of serious offenders has been initiated. The Department circulated written guidance to police on how to handle incidents involving diplomatic and consular personnel and urged law enforcement officers to pursue possible charges.84 In addition, the Chief of Protocol promised that in particularly outrageous incidents involving juvenile offenders, the entire family would be expelled.85 The Department of State also assured the Committee that traffic offenses were closely monitored and driving while under the influence laws strictly enforced with diplomatic and consular personnel.86 Moreover, failure to comply with local firearm laws would expose a diplomat to expulsion.87 Finally, Ambassador Roosevelt announced that foreign personnel would be required to carry identification cards which list types of immunities a particular individual enjoys, and provide a 24-hour telephone number to answer questions about the particular person or issue.88 The Department of State vowed that it stands ready to take action in any situation in which a person with immunity violates American law.89

In addition to her address to the Senate Foreign Relations Committee, Ambassador Roosevelt circulated a note to the Chiefs of Mission at Washington in which she reminded them of the "serious concern of the United States Government at alleged criminal activity by

80. Id.
81. Id. at 29.
82. Id.
83. Id. at 30.
85. Id. at 31. This should promote parents' accountability for their children's conduct.
86. Id.
87. Id.
88. Id.
89. Roosevelt, supra note 79, at 32.
certain members of diplomatic missions or members of their families." The note pointed out that neither the Department of State nor the community tolerate criminal violations, and reminded the missions of the corrective measures available under international law. The Ambassador reiterated that the Department, in case of a criminal violation, requests from the mission a waiver of immunity in order to prosecute the offender. In case such waiver is not granted the Department requires expulsion of the offender. Further, the note stated that "in all cases involving injury to persons or damage to property, the Department pursues vigorously the interests of the aggrieved parties in obtaining prompt restitution by individual offenders or by their governments."

It appears that the Department of State is willing to address abuses when they are particularly grave. However, abuses that do not involve a threat to another’s life or are equally damaging seem to attract less of the Department’s attention. There may be room for a bit of optimism; a change in the State Department’s approach to less severe abuses might be occurring. In 1992, a French news agency reported the United States government’s direct involvement in rent disputes between two American landlords and two foreign missions. The agency related that the State Department threatened to expel two Zairian and two Congolese diplomats if their delinquent rent was not paid within thirty days. The report also stated that it was the first time in Department of State’s history that it threatened expulsion of diplomats due to an abuse of “privilege of residence” in either New York City or Washington D.C. Although the government later argued that eviction in this situation is not a valid solution under applicable treaties, the government at least made an effort to address the landlord’s complaint - a step the government had not been willing to take in the past. It remains to be seen whether this trend will continue into the future. Moreover, would the Department be willing to take the next step and expel the delinquent tenants upon non-payment? In

91. Id.
92. Id.
93. Id.
94. Id. at 107.
96. Id.
97. Id.
98. 767 Third Ave. Assoc., 988 F.2d at 295.
other words, will our government flex its muscle at issues that concern the economic well-being of our citizens?

V. RELATED LEGISLATION

Each time a court delivers its opinion on the issue of diplomatic immunity, it urges Congress to address the issue. In response, Congress enacted several statutes. In 1978, Congress passed the Diplomatic Relations Act ("Act") to replace a 1790 statute which was inconsistent with the diplomatic relations provisions of the 1961 Vienna Convention. In addition to codifying the necessary provisions of the Vienna Convention, Congress included in the Act, inter alia, a requirement that diplomatic personnel carry automobile liability insurance. This specific provision came as a direct response to other countries' requirement that American diplomats carry liability insurance. In 1983 Congress amended the Act to hold embassies responsible for full liability insurance coverage for their diplomats. This provision provides a plaintiff with a right to sue the insurer directly. The Act also confers power on the President of the United States to specify greater or lesser immunity protection for certain diplomats, based on reciprocity. This accords the President wide discretion for the grant of diplomatic immunity.

In 1982 Congress passed the Foreign Missions Act ("FMA"). The FMA established a duty in the government to oversee the activities of all foreign missions in the United States. This act was passed largely in response to reports that certain foreign countries placed restrictions on American missions in connection with office space and/or housing accommodations. The intent of the FMA is to ensure that our diplomatic

99. The doctrine of non-justiciability, applicable in this area of law, does not permit courts to meddle in foreign affairs. The doctrine addresses courts' authority to hear cases. Specifically, the issue addressed is whether a case involves a political or legal question. Although it is not yet completely clear what comprises a political question, most courts recognize the area of foreign relations as a political question that is non-justiciable. See Baker v. Carr, 369 U.S. 186 (1961).


101. Id.

102. Id.

103. Id.

104. Shapiro, supra note 3, at 286.


106. Odell, supra note 105, at 29.

107. Id.
missions abroad are treated the same way as their counterparts in the United States. Accordingly, the act established the Office of Foreign Mission with the responsibility of approving foreign missions’ transactions involving real estate in the United States. This creates a duty in the foreign missions to report to the Office when such a transaction is planned. Consequently, if a foreign mission fails to comply with this requirement, the Secretary of State has the authority to dispossess the mission of its premises in the United States. Although this act satisfies informational needs, it provides little protection to Americans once its requirements are met.

The Foreign Sovereign Immunities Act of 1976 (FSIA) vests authority in the judiciary to decide when a foreign state is immune from a lawsuit and when immunity does not apply. However, the act also provides that it operates “subject to existing international agreements to which the United States is a party.” The FSIA grants immunity only to public acts, but such immunity does not apply in commercial or private transactions. Thus, although the act seems to expand the basis of liability for foreign states, it parallels directly the diplomatic immunity provisions of the Vienna Convention since such immunity applies only when a diplomat acts within the scope of his or her function. Furthermore, since an act within the scope of a diplomat’s function is also a public/governmental act, it is excluded from FSIA’s applicability. Therefore, when a diplomat breaks the law and diplomatic immunity applies, the FSIA will not be able to strip it away. Accordingly, the FSIA applies mostly to private foreign undertakings, not to diplomatic personnel and missions.

Another bit of legislation on the issue of immunity is the Alien Tort Claims Act. This act provides a United States forum for civil litigation against another country’s national in cases of injury to American

108. Id.
109. Id.
110. Id.
112. Id. In its definition of “foreign state”, the FSIA includes a political subdivision or agency or instrumentality of the state. Id. at §1603.
113. Id. §1609.
114. Id. §1603.
115. 767 Third Ave. Assoc., 988 F.2d at 297.
citizens. Although only a few courts have recognized such actions,\textsuperscript{117} the Alien Tort Claims Act could eventually open the door for cases against persons with diplomatic immunity after their departure, which previously could not be litigated in the United States.

Other acts concerning administration of and arrangements with international entities have been passed, but very few apply directly to abuses of diplomatic immunity. In 1987, Senator Helms introduced a bill entitled the "Diplomatic Immunity Abuse Prevention Act" which would vastly curb abuses by foreign diplomats.\textsuperscript{118} This bill would subject "certain members of foreign diplomatic missions and consular posts in the United States . . . to the criminal jurisdiction of the United States with respect to crimes of violence."\textsuperscript{119} Upon consultation, the Department of State announced that it could not support the proposed bill because it would be detrimental to United States' interests abroad.\textsuperscript{120} The bill proposed eliminating immunity for crimes of violence, a large category of crimes, and the Department of State feared that other countries would eliminate immunity on a broader scale and thus expose American diplomatic personnel to arrest and detention without bail.\textsuperscript{121} Although the bill proposed to cover only members of the administrative, technical, and service staff, the Department explained that such team members must have full criminal immunity in order to effectively perform their work.\textsuperscript{122} The bill also proposed to lift immunity from family members of diplomats, which provoked a negative response from the Department to this provision, because a diplomat could not properly perform his or her duty knowing that a family member is being prosecuted.\textsuperscript{123} In addition, the Department argued that lifting immunity from family members might encourage false charges as a technique of intimidation.\textsuperscript{124} The bill was

\begin{itemize}
  \item \textsuperscript{118} S. Doc. No. 1437, 100th Cong., 1st Sess. (1987).
  \item \textsuperscript{119} Leich, \textit{supra} note 90, at 107.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id. at 108.
  \item \textsuperscript{122} Id. Such work includes transmitting encoded messages and preparing classified documents. \textit{Id.} Therefore, it would be unjust to afford immunity to the ambassador, the FBI or military attache, or other personnel engaged in work such as fighting terrorism, and expose those who do their clerical work and transmit classified communications to interrogation and jail by hostile authorities. \textit{Id.}
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Leich, \textit{supra} note 90, at 108.
\end{itemize}
approved in the Senate but rejected in the House of Representatives. A revised version of the bill was introduced the following year. The new proposal called for stringent enforcement of available solutions, and for mandatory liability insurance carried by foreign missions for compensation of injuries to persons or property.

Other bills to curb diplomatic immunity have been and are still introduced in Congress, but most do not pass. Such bills either demand too much modification to existing treaties, which threatens our diplomats' freedom abroad, or propose unreasonable solutions to existing problems. One such bill proposed that the United States form a claims fund for awarding full compensation to victims of diplomatic immunity abuses. This bill was rejected due to its high cost and lack of incentive to foreign diplomats to abstain from abuses of immunity. It is evident that Congress has been struggling to pass legislation that will both accommodate victims of diplomatic abuse and discourage foreign diplomats from violating American laws. However, it seems almost impossible to achieve both goals, especially if most legislation on the issue is written in response to events in other States, not as a consequence to occurrences in our own country.

VI. THE CIRCUIT COURT'S REASONING JUSTIFIED BY OTHER OCCURRENCES

The problem of diplomatic immunity abuses is common to other countries of the world, as well. The unanticipated phenomena is that other governments, like the United States at times, apply a "hands-off" policy, shying away from retaliation of diplomatic immunity abuses. This practice, although unexpected at first glance, is quite understandable in light of the policy previously voiced by the Department of State. Events in England, for example, required the British government to take a close look at the provisions of the Vienna Convention granting diplomatic immunity to decide whether some amendments or local provisions limiting immunity were necessary. This scrutiny of international law stemmed from events in 1984, when shots were fired from the Libyan Embassy, killing British

125. Shapiro, supra note 3, at 304.
127. See Shapiro, supra note 3, at 306.
128. Id.
129. See Goodman, supra note 100, at 410.
130. Id.
citizens demonstrating in front of it. When the British government petitioned Libya to vacate the premises so that police could search the Embassy for weapons, the request was refused. The United Kingdom then proposed a safe exchange of Libyan diplomatic personnel for British diplomatic personnel, and requested assurance that all weapons and explosives be removed from the Libyan Embassy. These proposals were similarly refused. Finally, following a terrorist explosion in Heathrow International airport which injured twenty five people, the United Kingdom terminated diplomatic relations with Libya and, its Embassy in London was evacuated. In response to public outrage about such blunt abuse of immunity, the British government formed a committee to look into diplomatic immunity laws and suggest proposals for ensuing actions. Specifically, it was felt that diplomats who act inconsistently with their diplomatic status should not be immune from prosecution, that suspicious diplomatic bags should be searched and that premises which are the site of unlawful acts should not be afforded inviolability. Following an investigation, the committee pointed out that a serious consideration to any amendments must be the safety of British diplomats in foreign countries - a familiar concern. The committee then stated that, in all of the three specific respects, existing remedies were sufficient, and did not recommend further action. The British government implemented the committee's advice, leaving diplomatic immunity laws unchanged. The United States Department of State pointed to the United Kingdom study while debating the downside of S. 1437, Senator Helms' proposed bill to curb diplomatic immunity. Similarly, when the Second Circuit Court examined Department of State policy and saw that the government looked to other countries for trends in coping with immunity problems, the court was encouraged to rule in favor of our foreign affairs policy, acknowledging it as a political problem common to countries with similar

132. Id. at 643.
133. Id. at 644.
134. Id.
135. Id.
136. Higgins, supra note 67, at 647.
137. Id. at 645. See Leich, supra note 90, at 109.
139. Id. at 645.
140. Id.
141. Id.
142. Leich, supra note 90, at 109.
political structure. Thus, the United States is not alone "putting down its stubborn foot" in refusing to change the law of diplomatic immunity.

What, then, are the possible remedies for abuse of diplomatic immunity? Solutions to the dilemma of diplomatic abuses are as frequently discussed as the problem itself. The Vienna Convention provides guidelines for dealing with such abuses. Article 9 of the Convention enables the receiving State to declare any member of the mission a persona non grata, upon which the sending State must either recall that person or terminate his or her function with the mission. In addition, the Convention provides in Article 32 that immunity of a diplomatic agent may be waived by the sending state. Both provisions are rarely utilized. Furthermore, the persona non grata provision does not compensate the victim of abuse and does little to deter such abuse, since diplomats know that their most threatening punishment could be expulsion. In theory, the waiver provision serves the needs of the hosting governments; in practice however, it is almost impossible to attain. It is neither required that a sending state waive its diplomat's immunity, nor does the Convention provide an enforcement mechanism to compel such waivers. Thus, although, in theory, the waiver clause provides a perfect solution to the problem of diplomatic abuses of local law, in practice it is merely another remedy to which one cannot resort, particularly for offenses of smaller magnitude, such as traffic violations or landlord-tenant disputes.

Other proposed solutions are numerous. What follows is a summary of the most prominent ones. One answer to abuse is to allow the plaintiff to bring suit in the sending state. This would provide a victim with a chance for compensation when it is not possible to sue the party in the United States. An attempt to bring suit in the sending state may appear to be a good solution; nonetheless, it is very impractical. Such an attempt would be hindered by the high costs of litigating in a foreign state, by the difference in legal systems, and by the possibility of a hostile national climate towards the United States. Another popular recommendation is an amendment of the Vienna Convention. However, the treaty does not

143. Vienna Convention, supra note 25.
144. Id. art. 9.
145. Id. art. 32.
146. Id.
147. Shapiro, supra note 3, at 297.
148. Id.
149. See Goodman, supra note 100, at 407.
provide for a formal procedure to amend its provisions. In addition, amending the Vienna Convention would require reaching an agreement among 140 countries, a task easier said than done.

Some of the more viable solutions include creating a limited federal claims fund enforced by the government. The rationale for this proposal is that it is “[t]he government and U.S. diplomats abroad [who] reap the prime benefits of diplomatic immunity, not the average citizen. Therefore . . . the burden of diplomatic immunity . . . ‘should not be borne by people who are really just innocent third parties.’” This solution seems reasonable and might even be workable. In order to facilitate this idea, a proposal has been made to establish an agency within the Department of State for administering a limited fund for the compensation of victims. Once the agency would make a decision to compensate and awards the applicable amount to the victim, the agency would be in the best position to pursue reimbursement of such an amount from the offending diplomat’s country. The key to this solution would lie in the government’s ability to compel reimbursement to the limited fund. Although this solution would not provide complete compensation, it is very workable and quite realistic.

The most popular solution to the problem is the implementation of an insurance scheme. Such plan would require embassies and missions to carry liability insurance coverage as a prerequisite to diplomatic relations in the United States, augmenting the insurance provision of the Diplomatic Relations Act of 1978 which requires foreign diplomats to carry liability automobile insurance. The beauty of this solution is that the victim can sue the insurance carrier directly, without involving the foreign party. The augmented version of the insurance scheme would place a requirement on the foreign mission to carry liability insurance for

150. *Id.* at 408.
151. *Id.*
152. *Id.* at 410.
155. *Id.*
156. *Id.*
158. *Id.*
159. Goodman, *supra* note 100, at 400.
160. *Id.*
injury to persons or property. The insurance would provide restitution to the injured party and would not discourage private citizens from further commercial transactions with foreign parties. The difficulty with such provisions is the lack of an enforcement mechanism. Maintenance of such an insurance requirement would necessitate enforcement on the level of Vienna Convention provisions, i.e. declaring a noninsured or underinsured diplomat as a persona non grata. Until the Department of State finds an efficient way to enforce the insurance requirement, such provisions and unenforceable plans will remain useless.

Numerous other solutions have been avidly recommended, but only a few were implemented by Congress. Should Congress ever decide to reform the area of diplomatic immunity in the future, it will find a vast pool of new suggestions, and even though any particular solution might not be suitable, a combination of several might prove useful and effective. Thus, it is not for the lack of ideas that the law has not been reformed.

VII. CONCLUSION

Although solutions to abuses of diplomatic immunity and their effectiveness are controversial, one matter is clear: the government sees the weaknesses of the current law, and has the ability, if not always the will, to improve the situation. Unfortunately for the landlord, in this instance, he/she is left without a remedy. The landlord can only hope that the government will pursue his/her interests and will persuade the offender to withdraw. Our government's policy is consistent with the purposes of diplomatic immunity and the practices of other nations. Therefore, although it is now understandable why courts are reluctant to act against foreign diplomats, the government should use all means in its power to assure the United States citizen's rights and fully compensate him or her. Anything short of that would only create more bad feelings towards our "guests" from abroad, and inhibit any sort of transactions among United States citizens and foreign diplomats. Since the government has once before shown a hint of improvement in demanding due compensation from delinquent diplomats, we can only hope that it will continue down this path, and that it was not a mere exception to its usually disinterested demeanor.

161. Shapiro, supra note 3, at 300.
162. Farhangi, supra note 15, at 1538.
JUSTICE ON TRIAL: THE EFFICACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Melissa Gordon

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I. INTRODUCTION

There can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance. The process of codification, adjudication and enforcement is as vital to a tranquil international community as it is to any independent national state.

-Benjamin B. Ferencz

The success of the Yugoslavian and Rwandan War Crimes Tribunals will determine the future of international criminal law. Whether the Tribunals are able to command the attention and respect of the world remains to be seen.

The situation in the former Yugoslavia has deteriorated to the point where it resembles Nazi-era Europe. The media has bombarded our living rooms with reports of “ethnic cleansing,” mass graves, torture, and reports of concentration camps virtually identical to those of World War II. As we saw the destruction, the initial public outrage was strong. However, as with most crises, the international community successfully avoided taking affirmative action for three years while the atrocities continued unhindered. When the international community finally took

** BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS, 30, 31 (1980).

1. The idiom “ethnic cleansing” has been often used to analogize the Serbian’s weapon of mass rape. Feryal Gharahi related one story to the Commission on Security and Cooperation in Europe in February of 1993. In Millivania, Serbian forces converted the local gymnasium to a rape camp. There, the women were repeatedly gang-raped in order to assure impregnation, thus ridding Bosnia of all non-Serbs. If the women resisted, their throats were slit. After impregnation, the women were kept in the camps until it was too late to terminate the pregnancy. War Crimes in the Former Yugoslavia: Hearings Before the Commission on Security and Cooperation in Europe, 103d Cong., 1st Sess. 7-8 (1993) (testimony of Feryal Gharani) [hereinafter Security In Europe]; see generally Danise Aydelott, Comment, Mass Rape During War: Prosecuting Bosnian Rapists Under International Law, 7 EMORY INT’L L. REV. 585, 596 (1993). This ethnic cleansing policy, part of the Serbian war plan, did not end there. While women were in the rape camps, men were sent to concentration camps. Several men died after being castrated in the attempt to end all non-Serbian blood-lines. Catherine Toups, Atrocity Probes Home in on Serbia; U.N. Requests Case For War Crime Trial, WASH. TIMES, Nov. 8, 1994, at A11.

2. Steve Coll, War Crimes and Punishment, WASH. POST MAG., Sept. 25, 1994, at 25 (describing the similarities between Bosnia and Nazi Germany as chilling: ethnic hatred, the old European setting, and specific acts of barbarity are indicative of the Nazi-era overtones).
action, via the International Tribunal, the next human tragedy was already underway.

The slaughter of the Tutsi minority orchestrated by the Hutus in Rwanda occurred as the Yugoslavian Tribunal was gaining momentum. The Tutsi genocide in Rwanda has been faster than any other episode in the last fifty years. In the first three months of 1994, one million Tutsis were slaughtered, as compared to Bosnia where 200,000 were killed over a period of two years. Hutu militias have been savage and barbaric in their pursuit of the Tutsi minority.

As evidence of these atrocities mounts, there exists a desire to punish those responsible. However, this seemingly logical urge is overshadowed by the practicalities of prosecuting criminals across borders. This comment contends that the anticipated Rwandan War Crimes Tribunal has been ill-conceived. With zeal that stems from the promulgation of honor, morality, and good intentions, various segments of the international community have laid the foundations for justice, while overlooking its virtual impossibility in this situation.

Part I will list a brief chronology of the War Crimes Tribunal, the United Nations' response to the Rwandan nightmare. Next, the Tribunal's basis for authority will be examined. This is followed by an analysis of the potential problems under the Tribunal's current structure. Jurisdictionally, many argue that the tribunal will conflict with state sovereignty, as well as interfere with the protection of individual liberties. Additionally, this section will discuss the administrative difficulties in gathering evidence and procuring extradition.

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4. Id.
5. Lindsey Hilsum, Settling Scores, AFR. REP., May-June, 1994, at 14 (Rwanda's radio broadcasts prior to the massacres defining the Tutsis as "cockroaches" which need to be exterminated).
6. Prior to the creation of the Tribunal, the Ambassadors representing Turkey, Denmark, Austria, and the Head of the Delegation of the Commission of the European Community all testified to the importance of forming an international tribunal, and urged the United States to support it. European Perspective on Bosnian Conflict: Hearing Before the Commission on Security and Cooperation in Europe, 103d Cong., 1st Sess. 3, 8, 16, 20 (1993) [hereinafter European Perspective].
7. Christopher L. Blakesley, Obstacles to the Creation of a Permanent War Crimes Tribunal, 18 FLETCHER F. WORLD AFF. 77, 91 (1994).
8. Francoise J. Hampson, War Crimes Fact-Finding in the Former Yugoslavia, 1 INT'L LAW & ARMED CONFLICT COMMENTARY, 28, 29 (1994). Often there is a degree of political control over the fact-finding activities of these tribunals.
Part II affirms the Rwandans' duty to prosecute these human rights violations. The model used by other emerging democracies for punishment is applied to the Rwandan situation. Ultimately, this model's utility is superseded by the need for an International Criminal Court.

Finally, Part III will show that the Tribunal's failures demonstrate the need for a permanent International Criminal Court. Various proposals for a permanent court have been recommended, but none have been adopted due to problems that exist in each model. Nevertheless, this comment concludes that the creation of a permanent criminal court, which enforces a permanent code of crimes, would benefit the international community overall. More specifically, an established court potentially could have saved countless Rwandan lives.

II. THE WESTERN IMPOSITION

A. Historical Summary

Without mechanisms for individual nations to control international crime, the need for a tribunal to prosecute serious violations of humanitarian law has emerged in various areas of the world. In response to the Yugoslavian crisis, the United Nations has created the "International Tribunal for the sole purpose of Prosecuting Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia." Since the organization of the Yugoslavian Tribunal, Richard Goldstone, the chief prosecutor for the Tribunal, has sought concurrent jurisdiction for the prosecution of crimes committed in Rwanda.

On June 28, 1994, the Commission on Human Rights of the United Nations reported on the gravity of the Rwandan situation. Two days later, the United Nations Security Council adopted Resolution 935 requesting the establishment of an impartial Commission of Experts to further examine and analyze evidence of grave violations of humanitarian law in Rwanda. By the end of July, the Secretary-General issued a report

indicted for war crimes is well recognized. In fact, sanctions against parties who refuse to cooperate with the tribunal have been proposed.

stressing that the Commission of Experts was actively gathering and documenting evidence of these violations, especially acts of genocide, in the hopes of pursuing prosecution.\(^{15}\)

The Commission’s preliminary report\(^{16}\) suggested either the creation of a new international criminal tribunal\(^{17}\) or that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia be expanded to cover Rwandan crimes.\(^{18}\) This suggestion was heeded, but without the support of Rwanda, whose government voted against the resolution.\(^{19}\)

On November 8, 1994, the Security Council established the International Tribunal for Rwanda through Resolution 955.\(^{20}\) With Rwanda as the sole dissenting vote, the Security Council established an independent tribunal whose sole objective is to “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states ....”\(^{21}\)

The final vote on the establishment of the tribunal had thirteen votes in favor, one vote against the tribunal from Rwanda and an abstention from China.\(^{22}\) Although Rwanda initially urged the United Nations to take action against the Hutus who had organized this genocide, they had several reasons for rejecting the United Nations' plan. First, the tribunal only has jurisdiction over crimes committed after January 1, 1994.\(^{23}\) Secondly, the


\(^{17}\) Id. at 31.

\(^{18}\) Id. at 32.

\(^{19}\) Julia Preston, Tribunal Set on Rwandan War Crimes; Kigali Votes No on U.N. Resolution, WASH. POST, Nov. 9, 1994, at A44.


\(^{21}\) Id.

\(^{22}\) Preston, supra note 19, at A44. But cf. U.N. Genocide Tribunal Wins Rwanda's Support, BALTIMORE SUN, Nov. 10, 1994, at A22. (Rwanda's U.N. Ambassador Manzi Bakurmuta stated that while Rwanda is not in complete agreement with the United Nations' Tribunal, they will nonetheless cooperate with all United Nations efforts.)

\(^{23}\) Raymond Bonner, Top Rwandan Criticizes U.S. Envoy, N.Y. TIMES, Nov. 8, 1994, at A11 (noting that the crimes occurred long before January 1, 1994, therefore many of the worst perpetrators will be overlooked with the proposed time limitation). See William Schabas, Atrocities and the Law, CANADIAN LAW., Aug./Sept. 1993, at 33-36. The dispute in Rwanda is not new. Rwanda has been a battlefield for two major ethnic groups, the Tutsi's and Hutu's for centuries. Id. at 34. In January of 1993, a Canadian-based organization, International Centre for Human Rights and Democratic Development, sent a 10-member fact-finding commission to Rwanda. Id. This
government strongly opposed the United Nation’s Tribunal because the procedural rules do not include the death penalty.\textsuperscript{24} To a lesser degree, the Rwandan government is also dissatisfied with the slow pace of the United Nations bureaucratic method\textsuperscript{25} and the Tribunal’s decisions not to use Rwandan judges\textsuperscript{26} nor to hold the trials in Rwanda.\textsuperscript{27}

**B. The Tribunal’s Authority?**

Noting the Rwandan opposition to the Tribunal, it is important to examine the justification for the United Nations’ authority to act in this situation. Two ground-breaking determinations were made. First, pursuant to Chapter VII of the United Nations Charter,\textsuperscript{28} the United Nations Security Council defined the humanitarian violations in Rwanda as a threat to international peace.\textsuperscript{29} Together Articles 39 and 41 of the Charter provide the Security Council with the power to decide which enforcement measures to take to maintain international peace.\textsuperscript{30} Using this discretion, the Security Council concluded the tribunal was the appropriate response to the Rwandan threat.\textsuperscript{31}
The conflict in Rwanda has both internal and international elements. Although a civil conflict originally, the flight of the Rwandans into Zaire and other neighboring countries has caused the conflict to escalate beyond Rwanda’s borders. Thus, able to define this human tragedy as international, the Security Council is free to apply the entirety of the Hague Conventions, Geneva Conventions, and Protocol I, which provides remedies only to international conflicts. The importance of this decision must not be underestimated. The ethnic tensions in Rwanda have manifested themselves primarily in the form of an internal civil conflict, as opposed to Yugoslavia which has developed into an international civil war. The United Nations Security Council has made a monumental leap reshaping future international law by defining Rwandan violations of humanitarian law as factors in determining a threat to international peace.

Secondly, if the United Nations had deemed the Rwandan conflict to be internal or civil, Article 3 of the Geneva Conventions would apply, but generally would not give rise to universal criminal jurisdiction. Recently, there has been a trend toward the international criminalization of common Article 3 offenses of the Geneva Conventions during non-international armed conflicts. For example, the 1991 Draft Code of Crimes Against the Peace and Security of Mankind expressly recognizes that penal sanctions may reach the non-international armed conflicts contemplated by Article 3. However, the Draft Code has not yet been adopted, and it is still a matter of debate whether common Article 3 violations give rise to individual penal responsibility. Therefore, the


33. *Id.* Cf. Winston P. Nagan, *Yugoslavia: A Case Study of International Consequences of Independence Movements*, AM. SOC’Y INT’L L. PROC. 205, 218-19 (1993) [hereinafter Case Study]. In Yugoslavia, even after the United Nations Commission of Experts had recognized the crisis was of an international character, reasonable minds differed on the nature of the conflict. *Id.* at 218. Many Slavs such as Nebojsa Vujovic, of the United States Embassy of the Federal Republic of Yugoslavia, claimed this was a religious, ethnic, and civil war. *Id.* This distinction between international and civil conflicts was essential to determining what body of law to apply to these criminals and was the subject of much debate. *Id.*

34. Meron, *supra* note 32, at 79-80.

35. *Id.* at 80.

36. *Id.* at 82.


38. Meron, *supra* note 31, at 82. Although common Article 3 does not follow the letter of the Hague Regulations or the Geneva Conventions, common Article 3 is part of the body of law which is identified as humanitarian law. Therefore, it is arguably covered under statute 3 of the Tribunal’s statute.
Security Council's decision to define these conflicts as international was a deliberate attempt to expand the likelihood for an international response to non-international violations of humanitarian law in order to avoid any questions of international jurisdiction over the Rwandan criminals.\(^3\)

Thus, through the creation of the Rwandan Tribunal, the United Nations has established two precedents of law. First, it defined violations of humanitarian law in a civil, ethnic conflict as threats to international peace, thus granting the Tribunal the ability to prosecute those violations. Second, the United Nations established the possibility of the international criminalization of violations of common Article 3 of the Geneva Conventions in non-international armed conflicts. Unfortunately, unless the Tribunal is able to overcome the vast number of obstacles which currently impede its success, these precedents may be quickly forgotten.

### C. Problems of the Tribunal

1. **First Problem: A Lack of Precedent**

   In the absence of an established international criminal court, or even an international criminal code, the international community has accorded little credence to the proposed prosecutions.\(^4\) Referring to both Nuremberg and the Far East Trials for guidance, the United Nations has attempted to fashion an international tribunal in their likeness.\(^4\) However, neither Nuremberg nor the Far East Tribunal provide the proper precedent. Nuremberg itself was ultimately a facade of authority stemming from the victor's right to justice\(^2\) and in reality lacked the necessary precedent to withstand serious scrutiny. Even assuming that the deficiencies of the World War II tribunals could be resolved, the situations

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39. Id. at 81.

40. Security In Europe, supra note 1, at 15. At the CSCE hearings on war crimes in February of 1993, Representative Frank McCloskey stated that the top echelon of military leaders who have been accused of committing war crimes, had already been assured amnesty. Id. He credited "high ranking military sources in Croatia and our own State Department" as relaying that information. Id. Belief in the integrity of the Tribunal is not high.


42. Blakesley, supra note 7, at 80. The victor's justice is often criticized for making biased decisions. Id. But see Elizabeth Pearl, Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victor's Justice?, 30 AM. CRIM. L. REV. 1373, 1399 (1993) (arguing that prosecution by the victors is standard because only the victors can project the moral superiority required for a war crime tribunal).
vary too dramatically for Nuremberg to be the proper legal basis for today's tribunal.

Initially legal experts waivered in classifying Nuremberg as legal precedent for the present Tribunals, a clear sign of its lacking authority. Initially legal experts waivered in classifying Nuremberg as legal precedent for the present Tribunals, a clear sign of its lacking authority. First, the timing is different. Unlike Nuremberg, the United Nations has decided not to wait until the end of the conflict before attempting to prosecute. Indeed, the victors of the conflict may be indicted while the conflict rages. This will not only complicate the outcome of the war, but also the stability of the nation after the conflict.

Secondly, the Yugoslavian and Rwandan situations are fundamentally different from that of Nazi Germany or Japan. The Germans proudly kept meticulous records of their crimes. After the war, each captured Nazi soldier and liberated building provided the evidence necessary to complete the trials. In Yugoslavia, soldiers move constantly between units and there are no simple means to gather evidence. In Rwanda, the criminals have long since fled. There is a tremendous degree of variance between the circumstances of the two situations.

Nuremberg and Tokyo are of poor precedential value not only because of the differences between World War II and today's situations, but also because Nuremberg and Tokyo were preceded by several failures. The Nuremberg Trials took place in the wake of a failed attempt to convict German officials of war crimes following World War I. International law

43. Coll, supra note 2, at 23. Lawrence Eagleburger, former Acting Secretary of State, recalled that State Department attorneys were constantly admonishing him to be cautious about Bosnia. Id. "The lawyers would say, as Eagleburger remembers, 'For God's sake, don't do it. We don't have the right legal background. Nuremberg isn't quite the right thing, as legal precedent.'" Id. (The situation in Rwanda and Yugoslavia is easily distinguishable from that following World War II.)

44. Pearl, supra note 42, at 1402.
45. Id.
46. Id. at 1413.
47. Case Study, supra note 33, at 21.
48. Coll, supra note 2, at 14. The surrender of the German buildings which housed the records of their plan of destruction was direct evidence of the atrocities committed. In many instances, the Germans had authored the evidence which was subsequently used against them.
49. Case Study, supra note 33, at 21.
52. BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS, 30-33 (1980). The Allied powers were forced to compromise Article 227 of the Treaty of Versailles which conceded that the
never addressed issues such as a nation's treatment of its citizens prior to World War I.  

Previously, human abuse was only prosecutable in the state in which the abuse took place. Furthermore, states themselves were rarely reviewed.  

Thus, the Allies quest for retribution, rather than legal precedent, provided the basis for the Nuremberg Trials.

Furthermore, both the Nuremberg, and especially the Tokyo trials, have been sternly criticized for violations of due process, judicial bias, and unconventional procedural mechanisms.  

For example, the defendants at the Nuremberg and Tokyo Trials were often found guilty of committing "crimes against the peace" and "crimes against humanity." However, these crimes were not part of international law prior to the trials.  

Thus, the Nuremberg trial's use of *ex post facto* laws violated the defendant's due process.  

Finally, at Nuremberg and Tokyo only the victorious nations took part in assigning the punishments. Neither Germany nor Japan were permitted to participate in the activities of the Tribunals.  

The potential for abuse is obvious where the victor is trying the defeated enemy.  

Citing this potential, the United Nations has chosen not to allow Rwandan judges on the Tribunal.  

Thus the United Nations' Tribunal will have the benefit of being adjudicated by impartial parties, and the decision will not be plagued by accusations of bias. However, there remains the problem of the hypocrisy associated with the Nuremberg Trials.

Kaiser would be charged with merely a political crime, thereby indirectly preserving his immunity. *Id.* at 30. In return, the rest of the accused were to be brought before military tribunals. *Id.* However, the Germans refused to recognize the provisions of the Treaty which involved foreign adjudication, and the war crimes trials were conducted in Leipzig after continuous German opposition to the Versailles mandates. *Id.* at 32. Not surprisingly, the German courts exonerated or minimized the defendants' liabilities, and reduced the number of cases from over 900 to less than 50, with only a handful being convicted. *Id.* at 33.


54. *Id.*


57. *Id.*

58. Ann M. Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 304, 328 (1992). Not only has the Yamashita case been characterized as a case of victors' justice but also of racial prejudice. The command responsibility theory employed against Yamashita was not applied at Nuremberg against the Germans. *Id.* at 305.


60. Pearl, *supra* note 42, at 1399.

Following World War II, allied actions such as the bombings of Dresden, Tokyo, Hiroshima, and Nagasaki went unreviewed. If the victor's actions are dismissed, then justice is being distributed arbitrarily. To avoid this hypocrisy, every attempt must be made to prosecute all violations of humanitarian law in this conflict. The situation in Rwanda is complicated further because many organizations, such as Amnesty International, and even the United Nations, are beginning to collect evidence of the reprisal killings by the Tutsis against the Hutus. In fact, the conditions in which the Hutu prisoners are currently being detained have been likened to concentration camps themselves, and possibly are in violation of humanitarian laws. To protect the credibility of the Tribunal, individuals on both sides of the conflict must be prosecuted.

The United Nations must remember that "the law must apply to leaders of every nation." Furthermore, the importance of universal enforcement cannot be underestimated. In order to avoid the taint of hypocrisy associated with Nuremberg and Tokyo, justice must not be distributed arbitrarily. In other words, the law must be enforced against the Rwanda Patriotic Front as well as the Hutu extremists, and Bosnians as well as Serbians. Thus, the initial hurdle for the Tribunal will be to overcome any questions of propriety to which it is subjected by virtue of its basis in Nuremberg.

62. Blakesley, supra note 7, at 80.
63. Id.
64. Bonner, supra note 23, at A11.
66. Robert Press, In Rwanda's 'Slave Ship' Prisons, Life Is Grim for Suspected Killers, CHRISTIAN SCI. MONITOR, Nov. 18, 1994 at 1. (Currently 15,000 to 20,000 Hutu prisoners, including children, are packed into tightly cramped prisons.)
67. General Kagame has assured the Tribunal authorities that it will assist the Tribunal in the prosecution of Rwandan Patriotic Front soldiers accused of breaking humanitarian laws. Bonner, supra note 23.
68. TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS 641 (1992). Telford Taylor, who took part in the Nuremberg prosecutions, is of the opinion that international criminal law will have no justification until the victorious nations' behavior is examined as well. Unlike what the proponents of victor's justice would argue, winning the battle does not place the conqueror above reproach.
69. Blakesley, supra note 7, at 80.
2. Second Problem: Jurisdictional Difficulties

a. State Sovereignty

Article 8 of the Rwandan Tribunal statute establishes the concurrent jurisdiction of the International Tribunal with the national courts in Rwanda. However, this is limited by Article 8(2) which gives the Tribunal primacy over the national courts. These provisions, which are corollaries to Articles 9 and 10 of the Yugoslavian Tribunal Statute, have been questioned for their infringement of national sovereignty. In response, countries such as the United States have asked the United Nations and the Security Council to recognize the domestic action needed before complying with the International Tribunal, and to allow extra time before compliance.

In Rwanda, the primacy of this Tribunal may cause conflict with the domestic courts anxious to prosecute all the culprits. Furthermore, the government already objects to the Tribunal's limited jurisdiction of 1994, and its prohibition of the death penalty. The Western Tribunal has not been openly accepted by the Rwandans, and the ultimate control resting with the Tribunal will not ease the strain between the competing interests.

b. Subject Matter Jurisdiction

Article 1 of the statute for the International Tribunal for Rwanda gives the tribunal jurisdiction over "serious violations of international humanitarian law." These serious violations are described in Article 2 as genocide, in Article 3 as crimes against humanity, and in Article 4 as violations of common Article 3 to the Geneva Conventions and Protocol II. While the subject matter is relatively straight-forward, defendants still may be able to challenge this jurisdiction.

71. Despite UN Tribunal, Rwanda Plans To Try Suspects for War Crimes, CHI. TRIB., Nov. 10, 1994, at A6. Ambassador Manzi Bakuramuta estimated the number of Rwandans to be prosecuted in national courts at 30,000.
72. Blakesley, supra note 7, at 79.
73. Case Study, supra note 33, at 165. The United States, for example, has several due process procedures which must be implemented before turning a person over to the Tribunal. Id. There remains a significant concern on the part of several nations that national laws will be ceded to international laws. Id.
75. S.C. Res. 955, supra note 20, at 1.
76. Id. at 3.
77. Id. at 4.
78. Id. at 5.
The Statute for the Rwandan Tribunal does not preclude defendants from challenging the Tribunal's authority. Defendants may successfully argue that they were involved in a civil war, and thus are not subject to the Geneva or Hague Conventions. The Tribunal possesses the authority to judge these potential challenges of jurisdiction. How the judges may rule remains to be determined, but the potential for problems exists.

c. Limited Temporal Jurisdiction

Article 7 of the Rwandan Statute limits temporal jurisdiction to crimes committed between January 1, 1994 and December 31, 1994. This is problematic because limiting the jurisdiction could protect those who planned the genocide. The Rwandan national courts may successfully prosecute those who carried out the genocide. However, the Tribunal's time limit does not reach those who gave the orders which would cause the Tribunal to lose credibility.

3. Administrative Problems

a. Gathering Evidence

The Commission of Experts for Rwanda and the Special Rapporteur for Rwanda have found significant violations of human rights. Still, the thorough process of gathering evidence for trial will be long and arduous. According to Article 14 of the Rwandan Tribunal Statute, the rules governing evidence and procedure are the same as those for the Yugoslav Tribunal.

79. Meron, supra note 32, at 82.
80. Id.
81. Id.
82. S.C. Res. 955, supra note 20, at 6.
83. Bonner, supra note 23.
85. Hampson, supra note 8, at 29. The crimes fact-finding will be especially complicated because of the co-mingling of war-crimes fact-finding and humanitarian fact-finding. There has been a great deal of political control over some of the formal investigations. Id. There is a strong likelihood that some of the information is likely to remain within foreign ministries. Id. It is even possible that the limited resources of the Tribunal may prevent a full investigation. Id. at 30. Although the non-governmental organizations such as Helsinki Watch and Amnesty International are depended upon by the international community, problems may exist with admitting their information into any kind of formal evidence. Id. at 28. The same principle can be extended to the Rwandan crisis.
Lacking any enforcement mechanisms, the collection of evidence in Yugoslavia has been blocked several times by Serbian forces.\(^8\) If the Serbs continue to be uncooperative, it may be impossible to obtain sufficient evidence to indict or prosecute certain suspects.\(^8\) This may foreshadow a similar problem in Rwanda. Unless the Tribunal is able to convince the Hutu forces to cooperate, the prosecutors may not be able to gather enough evidence for prosecution.\(^9\)

\(b\). Extradition

Most of the criminals in Rwanda have fled the country. The Tribunal currently lacks an enforcement mechanism to extradite persons to the Hague Tribunal.\(^9\) Rule 56 of Evidence and Procedure for the Tribunal\(^9\) requires all states to comply with an extradition order, but lacks a corresponding mechanism to enforce the rule.\(^9\) Furthermore, the tribunal does not allow for trials in abestentia.\(^9\) Accordingly, sanctions have been suggested as the method through which states should be forced to comply.\(^9\) However, as of yet, no sanctions have been imposed to bring about compliance.\(^9\)

Unfortunately, extradition problems for the Yugoslavian Tribunal have already developed. Currently, the only two cases upon which the

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87. Laber & Nizich, supra note 9, at 12.
88. Id.
89. Andrew Purvis, Collusion with Killers, TIME, Nov. 7, 1994, at 52. The massacres in Rwanda have been more of a random nature. Although evidence of a planned genocide exists, the attacks have not been planned in an attempt to gather more territory. Often the attacks are retaliatory murders, committed in the night. Id. When morning light comes, entire families are found slain in the middle of the camps. Id. There has not been a highly systematic level of record-keeping; therefore, collecting evidence will already be complicated.
90. Laber & Nizich, supra note 9, at 12.
91. International Tribunal Rules of Procedure and Evidence, supra note 86, at 30. Rule 56 states that “[t]he state to which a warrant of arrest is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof in accordance with Article 29 of the statute.”
92. Laber & Nizich, supra note 9, at 12.
93. Tribunal Charges Camp Commander, NEW ORLEANS TIMES-PICAYUNE, Nov. 8, 1994, at A10.
94. Laber & Nizich, supra note 9, at 12.
95. But see U.N. SCOR, 48th Sess., 3217th mtg., at 13, U.N. Doc. S/PV.3217 (1994). The United States Ambassador to the United Nations, Madeleine Albright, argued that sanctions may in fact be unnecessary. Because those extradited will be outlaws in their home nations, that itself is a significant punishment. Id. For the rest of their lives, their mobility will be hampered because travel would increase the risk of discovery. Id. Albright predicts that this will be sufficient deterrent to ignoring extradition orders. Id.
United Nations Tribunal has taken action have both been hampered by extradition problems with Germany and the Serbian held portion of Bosnia.\(^96\) In an attempt to prevent the same problem from occurring, Rwanda itself has asked Belgium to extradite about ten Rwandans suspected of orchestrating the genocide earlier this year.\(^97\) Provided Belgium does not forestall extradition of the Rwandan criminals for lack of an extradition agreement with the Tribunal, these ten may be brought before the Tribunal shortly.

c. Superior Orders

The Tribunal has not recognized the defense of superior orders.\(^98\) This omission is present in the Yugoslavian Tribunal, and has been criticized for excluding good faith situations where the actor did not know the deed was wrong.\(^99\) Whether the Court will allow such a defense should depend on the facts and circumstances of each case, rather than precluding its use completely.\(^100\) In both Rwanda and Yugoslavia, several defendants may be able to prove that they did know their actions were wrong. Therefore, the superior orders argument may provide these defendants with a viable defense resulting in a lighter sentence.

4. The Last Problem: Peace Over Punishment

Lastly, the success of this Tribunal is important not only for its goals of deterrence and punishment, but also for its effect on the future of international criminal law.\(^101\) An unsuccessful tribunal may have a long-

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\(^96\) Toups, supra note 1. Dusan Tadic, a Bosnian Serb held by Germany since February, may not be turned over to the Tribunal. Extradition treaties exist between countries, but not between the countries and international organizations. \(Id.\) \textit{Tribunal Charges Camp Commander, supra} note 93. Dragan Nikolic has been formally indicted by the Tribunal, but will not be handed over by the Bosnian Serbs with whom he is currently hiding. The Tribunal has no power to order his extradition. \(Id.\)

\(^97\) \textit{Exiled Dictator on Genocide Charges}, GLASGOW HERALD, Nov. 14, 1994, at 7.

\(^98\) S.C. Res. 955, supra note 20, at 6. Statute Article 6(4) - Individual Criminal Responsibility states: "The fact that an accused person acted pursuant to an order of a Government [sic] or a superior shall not relieve his or her criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

\(^99\) \textit{A.B.A. Report, supra} note 30, at 38.

\(^100\) \textit{Id.} at 40.

\(^101\) Meron, supra note 32, at 78. Scholars in the sphere of international criminal law such as Theodor Meron hope that the Tribunal's creation "gives a new lease on life to that part of international criminal law which applies to violations of humanitarian law."
term deleterious effect on the development of international criminal law. If the use of tribunals is threatened but never successfully implemented, the credibility of future attempts at an international criminal court could be jeopardized. The United Nations officially established that the first and foremost goals of the Tribunal are “deterrence, justice, and peace.” However, several times during the peace negotiations the parties have suggested foregoing the Tribunals for Rwanda, and especially Yugoslavia, in the interest of a peace settlement. Gary Bass noted that the reason the Tribunal is lacking in strength in that it has not been sufficiently extricated from the peace process: “when a Balkan peace settlement is on the table, the war crimes tribunal tends to be shunted


103. Id.


105. European Perspective, supra note 6, at 25. The situation is particularly precarious in the former Yugoslavia where the military leaders participating in the peace negotiations are also some of the Tribunal’s future indictees. Representative Steny Hoyer, acting Co-Chairman of the Commission on Security and Cooperation in Europe, has voiced concerns over the appointment of Milosevic to the peace negotiations. Id. After having been formally termed a war criminal by the United States government, Milosevic now is in a position to decide whether the Tribunal will be established. Id. Congressman Hoyer is not confident that Milosevic will act impartially. Id.

106. Linda Maguire, An Interview with Telford Taylor, 18 FLETCHER F. WORLD AFF. 1, 2 (1994). Telford Taylor, a prosecutor at Nuremberg, tells his views of the international tribunal:

TT: The Serbs have gone a long way toward getting what they want and they are not going to want to pull back and make things better for the Bosnians, so the war could drag on and make things that much worse. But at the moment, both sides seem to be endeavoring to find some solutions to these problems.

LM: So in the interest of a lasting political settlement, the idea of the former Yugoslavian Tribunal might be scuttled altogether, just so the parties can move on?

TT: I should think that it would be very difficult to come to a conclusion with the Serbs without some agreement between the parties allowing for a general amnesty, or some other solution that the Serbs would be willing to swallow.
aside; Britain and other European Community countries worry that threats of prosecution might derail a settlement."\textsuperscript{107}

The same is true of Rwanda. Experts such as Frank Cringler, a former United States Ambassador to Rwanda, have even warned against using the tribunal at all.\textsuperscript{108} Cringler claims that reuniting this society is more important than singling out one group. He asserts it may be necessary to welcome war criminals back, or at least defer prosecution, to promote the end of hostilities.\textsuperscript{109} When dealing with ethnic conflicts, there is a strong likelihood that one group could create further animosity, thereby preventing reconciliation.\textsuperscript{110} As in Yugoslavia, there is a strong contingent in Rwanda that wishes to sacrifice justice in order to re-establish peace.

Bringing an end to the hostilities in these countries is laudable. However, hopes of deterring future atrocities in Rwanda can only occur if justice is served quickly. Even now with the Tribunal looming in the near future, there is no evidence of restraint by the Rwandan criminals.\textsuperscript{111} If the Tribunal chooses to replace punishment with a settlement of hostilities, the set-back to international criminal law could be enormous.

The preceding criticisms of the Tribunal are by no means an exhaustive list. Only a few of the most obviously troublesome have been mentioned in order to illustrate the immense problems which face the current Tribunal structure.

5. The Outlook for the Tribunal

To a certain degree it is true that a successful tribunal would increase the legitimacy of international criminal law.\textsuperscript{112} Increased stability of international law would probably accompany this revitalization.\textsuperscript{113} In fact, the mere formation of the Tribunal is indicative of the international


\textsuperscript{108} Masland, \textit{supra} note 3, at 37.

\textsuperscript{109} \textit{Id.} at 37.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} Purvis, \textit{supra} note 89, at 52. Hutu militias, who fled following the Tutsi coup this summer, are now terrorizing the refugee camps established throughout neighboring Zaire. They are robbing the supplies and food which arrive daily, after being donated by the international community. \textit{Id.} The supplies are then sold to raise money to buy weapons and munitions in an elaborate effort to retake Rwanda from the Patriotic Front. \textit{Id.} These acts themselves are also criminal: the potential starvation of millions of refugees will not be taken lightly by the Tribunal.

\textsuperscript{112} Kleinberger, \textit{supra} note 10, at 106.

\textsuperscript{113} \textit{Id.}
community’s desire to end the blatant violations of humanitarian law in these situations.\footnote{See Meron, supra note 32, at 78. Theodor Meron has stated that the creation of the Yugoslav Tribunal has already made seven institutional and normative improvements to international law. First, by defining the Yugoslav crisis as a threat to international peace, the United Nations has created a strong precedent that the violation of humanitarian laws is a threat to peace. \textit{Id.} at 79. Second, the Tribunal’s statute also legitimizes various areas of humanitarian law as customary law. \textit{Id.} Next, the tribunal successfully treated the Yugoslav crisis as an international arms conflict, thus securing the application of the entirety of international humanitarian law. \textit{Id.} at 80. Fourth, although not firmly established, the Tribunal’s actions will further the movement for international criminality of offenses under common Article 3 of the Geneva Convention. \textit{Id.} at 82. Also, the due process guarantees in the Tribunal’s statute are extended in relation to those of the Nuremberg and Tokyo Charters. \textit{Id.} at 83. Sixth, rape is recognized as a crime against humanity. \textit{Id.} at 84. Finally, by discarding the requirement for a nexus of the crime to the war, the definition of “crimes against humanity” has been broadened. Thus, the prosecution of crimes related to the conflict, but not in the course of armed conflict, will be far easier. \textit{Id.} at 87.} However, the sincerity of the community’s intentions is not in question; the ability to do something about it is. The immensity of the problems facing the Tribunal make success unlikely. This is unfortunate not only for the international community, but more importantly, for the Yugoslav and Rwandan victims. Thus an alternative forum may provide the proper method for adjudication.

III. ALTERNATIVE FORUMS

A. The State’s Duty To Prosecute Prior Human Rights Violations

International criminal law does require states to punish certain human rights abuses.\footnote{Ortenlicher, supra note 53, at 2551.} Some international treaties explicitly provide for this duty.\footnote{The Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. This convention explicitly expresses the state’s duty to prosecute violations of their respective treaties. Ironically, the Genocide Convention itself offers little aid to the Rwandan genocide. The Convention ensures punishment of the crime in national courts. \textit{Id.} art. VI, 78 U.N.T.S. at 280-82, but the lack of a universal jurisdiction is particularly problematic because the Rwandans are unlikely to obtain relief from the previous regime through the Convention’s mechanism. \textit{See generally} Lori L. Brunn, Note and Comment, \textit{Beyond the 1948 Convention-Emerging Principles of Genocide in Customary International Law}, 17 MD. J. INT’L L. & TRADE 193 (1993) (Lack of universal jurisdiction is the greatest problem with this convention.). \textit{Contra} Ortenlicher, supra note 53, at 2565. As a matter of customary international law, there is universal jurisdiction over genocide, although it is not specifically mentioned within the Genocide Convention itself.} Most treaties, such as the International Convention on Civil and Political Rights, do not expressly mention a duty to punish when these
rights are violated,\textsuperscript{117} but have been interpreted to mean that a state must investigate and punish violations of these rights.\textsuperscript{118}

In the Rwanda case, the international community was concerned over the newly-established government's ability to fulfill its international obligations, and granted Rwanda's request for an international tribunal.\textsuperscript{119} Before losing its sole jurisdiction, Rwanda did have the duty to prosecute these violations. It is useful to examine the methods that other burgeoning democracies are using to deal with the human rights violations of previous regimes. Perhaps the Rwandan tragedy would have been better mitigated under such a domestic option.

1. The Chilean Model

Recently Chile and several other newly democratized nations have decided to sacrifice justice for reconciliation.\textsuperscript{120} Since 1990, Chile has offered blanket amnesty to the prior repressive regime while still instituting an investigation into the crimes of that regime.\textsuperscript{121} The reasons for this approach are basically political. Initially, seeking criminal convictions may have caused unrest, and possibly another coup.\textsuperscript{122} Furthermore, many of those who stood to benefit from the amnesty had already been murdered or had disappeared.\textsuperscript{123} Therefore Chile chose to ignore its internationally imposed obligation to prosecute the subjects of its investigation\textsuperscript{124} and freed itself to concentrate on reuniting the nation.

Chile's decision to breach its international duty to prosecute should not be advocated for Rwanda. However, the more basic and practical aspects of the Chilean model of reconstruction, with a limited degree of

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\textsuperscript{117} Ortenlicher, supra note 53, at 2551. See generally Naomi Roht-Arriaza, Comment, State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CALIF. L. REV. 449, 479, 482-83 (1990) (stating that the scope of remedy required by Human Rights violations is specifically outlined for each International Convention).

\textsuperscript{118} Id. at 2552.

\textsuperscript{119} S.C. Res. 955, supra note 20, at 2.

\textsuperscript{120} Charles Krauthammer, Truth, Not Trials: A Way for the Newly Liberated To Deal with the Crimes of the Past, WASH. POST, Sept. 9, 1994, at A27.


\textsuperscript{122} Krauthammer, supra note 120.

\textsuperscript{123} Quinn, supra note 121, at 918.

\textsuperscript{124} Id.
\end{flushleft}
amnesty, may be fruitful for Rwanda. If Rawanda follows Chile's emphasis on investigations and reparations, perhaps it might have had the opportunity to reconcile while maintaining stability. If Chile had not granted a blanket amnesty, but merely punished the most severe human rights violations, they would have been complying with their international obligation to prosecute.

Admittedly, the situation in Rwanda differs from Chile. In Chile, a single repressive regime perpetrated the human rights violations, while in Rwanda, an entire ethnic group violated human rights during a civil war for generations. Considering the magnitude of the Rwandan genocide, it is unlikely that amnesty would even be considered by the Rwandan government. However, this approach is proving successful for other emerging African democracies like South Africa and should be considered by the Rwandan authorities.

IV. THE NEED FOR AN INTERNATIONAL CRIMINAL COURT

Punishment of the massacres, "mindless violence and carnage," and genocide of Rwanda would have been most sensible in a permanently established International Criminal Court. However, despite the drawbacks of a tribunal, the United Nations has decided to prosecute criminals through an ad hoc method. This decision is indicative of not only the international community's desire for a permanent court, but also its reluctance to commit the necessary resources.

125. Id. at 960. The international community should recognize that a modification of the Chilean model would be acceptable for other transitional governments. The Chilean model provides stability, while satisfying those injured with lengthy investigations.

126. Id. at 954. President Aylwin created the National Commission on Truth and Reconciliation in order to fulfill the state's responsibility to acknowledge previous violations.

127. Id. at 955. Chilean Law No. 19,123 created the National Corporation for Reparation and Reconciliation which provides medical, educational, and monetary assistance to victims and their families.

128. Quinn, supra note 121, at 960.

129. Id.

130. Krauthammer, supra note 120.


133. SCOR Res. 955, supra note 20, at 1.

A. What Law Would Be Applied?

Undoubtedly, the need for an international criminal code and court exists. A draft code of punishable crimes has been a thorn in the side of the International Law Commission of the United Nations since Nuremberg. The inability to reach a consensus on the definition of aggression stalled the adoption of any code for virtually forty years. Fortunately, the end of the Cold War not only thawed East-West cooperation, but also revived the criminal code debate. In 1987, President Gorbachev's Perestroika policy included recognition of the jurisdiction of international courts and was a major impetus for the drafting of a new criminal code. It was this new political climate, coupled with Iraq's invasion of Kuwait in 1990, which propelled the need for a criminal code and court to the forefront of international criminal law.

135. Nagan, supra note 33, at 24. The sudden surge to create a permanent court has also been attributed to administrative and bureaucratic causes. The International Law Commission has been forced to seek extra resources from the United Nations budget in order to fulfill the investigatory duties with which it was charged in the former yugoslavia. Id. Thus, there has been a strong pressure from within the United Nations bureaucracy to create a separate tribunal with its own prosecutorial and investigatory capabilities, in the hopes of relieving the burden on the International Law Commission. Id.


138. Id. at 379.

139. Louis R. Beres, After the Gulf War: Iraq, Genocide and International Law, 69 U. DET. MERCY L. REV. 13, 14 (1991). The U.N. Security Council repeatedly condemned the Iraqi invasion of Kuwait. However, without a code or court to punish Iraqi aggressions, crimes were "carried out with essential impunity." Id. at 13. These crimes should have been addressed by international law, but politics have interfered with any real punishment. Id. at 14. See Kleinberger, supra note 10, at 72. Kleinberger effectively uses Iraq's behavior during the Persian Gulf War as evidence of the need for an international criminal court. Nevertheless, even if an adjudicative response had materialized, the lack of available adjudicative mechanisms would render such a response useless. Id. First, the doctrines upon which international criminal law exists are vague and generalized. Id. at 86. Neither the Nuremberg Charter, nor the U.N. charter, nor the Geneva Conventions have successfully defined the war crimes or provided a legal basis for punishment. Id. at 87. Although Iraq would have few viable defenses in the light of the tremendous atrocities which violated portions of all of these statutes, the lack of one cohesive code would make adjudication very difficult. Id. at 106. Under each statute, only a few of the atrocities would be crimes.

Second, the lack of a suitable forum for hearing this case is indicative of the need for a Court. Id. at 103. The International Court of Justice has jurisdiction over disputes between states to enforce international conventions, customs, and recognized principles of law. Id. at 104. However, municipal courts in Kuwait or the United States could have provided a viable forum. Id. at 103. Even an ad hoc tribunal could have tried crimes of particular individuals. Id.
The most recent and inclusive attempt at developing an international code of crimes was made by the International Law Commission in 1991. The "Draft Code of Crimes Against the Peace and Security of Mankind" was particularly noteworthy for categorizing colonialism, apartheid, serious injury to the environment, terrorism, and drug trafficking as crimes. This draft successfully highlighted the problems which needed to be addressed before any code could be adopted. However, its imperfections were too large to withstand scrutiny, and it has not been brought to a vote.

First, the Draft Code failed to specify punishments for the crimes it listed. Also, many of the provisions were vague. The terminology was ambiguously defined by attempting to create a consensus from wording which was extracted from previous international conventions. Such terminology did not achieve the specificity and legal precision required by a penal code for the fair distribution of justice. Often there

But without a single court enforcing a single code, adjudication would only be as binding as Iraq would allow it to be.

Kleinberger theorizes that it is the fundamental hierarchical differences between international and criminal law which prevents the development of an international criminal court when the need for their merger is so apparent. Id. at 104. Criminal law relies on a vertical power structure where the enforcer of law is superior to the violator of law. Id. at 105. However, international law is based on a horizontal power structure whereby all nations are equal and accession to the law is virtually voluntary. Id. at 104. International criminal law will be virtually stagnant until the two systems can be reconciled.


141. The original draft code was presented to the General Assembly in 1954 as The Draft Code of Offenses Against the Peace and Security of Mankind. 9 U.S. GAOR Supp. (No. 9) at 11, U.N. Doc. A.2693 (1954). It has yet to be adopted.

142. Ferencz, supra note 137, at 381. See generally William N. Gianaris, The New World Order and the Need for an International Criminal Court, 16 FORDHAM INT'L L.J. 88 (1992) (explaining that the increasing scope and diversity of international crime created the need for an international criminal court as no other time in history).

143. Rolph, supra note 136, at 47.

144. Ferencz, supra note 137, at 381.

145. U.N. GAOR, 46th Sess., at 205-06, U.N. Doc. A/46/10 (1991). The drafters were unable to reach a conclusion as to which kind of penal system to institute: one group sought to establish separate penalties depending on the crime; the other group desired a single penalty, with a minimum and maximum sentence depending on the circumstances of each case. The death penalty and life imprisonment were also hotly debated by the Commission. Id. at 206. Many members argued from the position that the death penalty was immoral and unnecessary, while nations who used the death penalty, lobbied for its establishment. Id. at 208-09.

146. Ferencz, supra note 137, at 381.

147. Id.

148. Id. See, e.g., M. Cherif Bassiouni, Crimes Against Humanity: The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457, 486-87 (1994). Professor Bassiouni
was no adequate description of the legal elements which constitute a particular crime. The delegates of the various nations were quick to point out the failures of the Draft. Unable to produce a penal code to satisfy all nations, the Draft Code remains in limbo.

The current stalemate of the Draft Code has directly affected the development of the International Criminal Court. The United Nations' Committee on International Criminal Jurisdiction has deferred action on the International Criminal Court until an agreement is reached as to the code of crimes. Thus, the need for a criminal code is self-evident: until a code is adopted, the Court will never be established.

B. The Future of the Court

If the International Criminal Court is to be created, now is the time. First, there is a positive aura of cooperation as evidenced by the ad hoc tribunals, and the Security Council's resolute intent to end conflicts in various areas of the world. Second, nations' increasing fears of drug trafficking and terrorism in the modern world have increased interest in an international court. Third, nations are becoming weary of expending lives and money on other nations' conflicts. Using military force against other nations in order to enforce international law is becoming burdensome.

outlines several particular problems with the portion of the draft which deals with crimes against humanity. First, there are fewer crimes listed as crimes against humanity than in the Nuremberg Charter. Furthermore, many crimes which are carried over from Article 6(c) of the Nuremberg Charter do not correspond to the definitions of the crimes in the Draft. In his legal expertise, Professor Bassiouni fails to see the nexus between some of the newly-listed crimes to the original crimes against humanity. 

149. Id.


152. Ferencz, supra note 137, at 385.

153. Id.


155. Cavicchia, supra note 102, at 231.

Despite the lack of a recognized code of crimes, or a court, many scholars have kept the goal of an International Criminal Court alive. Some of these scholars have proposed permanent methods of adjudication which, had they been created, would have provided very viable alternatives for trying the instigators of the Rwandan genocide.

1. The Current Draft

Today, in 1994, the International Law Commission (ILC) of the United Nations remains hopeful that the current draft presented to the United Nations General Assembly will be adopted. The most recent proposal has been created in accordance with several principles. First, the Court would be established by statute to which the states would sign in the form of a treaty. The Court would exercise jurisdiction over private persons, not states. Also, the Court’s jurisdiction would not be limited to the Code of Crimes Against the Peace and Security of Mankind, but would extend over specified international treaties. Additionally, the

157. M. Cherif Bassiouni has been a recognized authority on international criminal law, and a proponent of an International Criminal Court for decades. At the request of the United Nations, M. Cherif Bassiouni prepared the draft statute of an international criminal jurisdiction to implement the Apartheid Convention in 1980. See M. Cherif Bassiouni & Christopher L. Blakesley, The Need for an International Criminal Court in the New International World Order, 25 VAND. J. TRANSNAT'L L. 151, 158 (1992). The plan was submitted but lay dormant until 1990, when a revision of Bassiouni’s draft was sent to the United Nations Congress on Crime Prevention and the Treatment of Offenders.

158. Because the Rwandan crimes are being tried as violations of human rights, the laws of war are beyond the scope of this article. However it is interesting to note the possibility of a war crimes tribunal in an American military forum. In particular, it has been suggested that an American court-martial or military commission would provide a stable forum for adjudication of international violations of the laws of war. See Robinson O. Everett & Scott L. Silliman, Forums for Punishing Offenses Against the Law of Nations, 29 WAKE FOREST L. REV. 509, 510 (1994). Proponents of this approach argue that there is sufficient precedent in the Nuremberg and Tokyo Tribunals to support this method. Id. at 511. According to article I, section 8, clause 10 of the United States Constitution, Congress has the power to punish offenses against the law of nations. Id. at 512. This clause does not specify nationalities. By stretching this constitutional clause to include offenders of other nations, Congress may be able to punish foreign nationals who violate the recognized law of nations both against the United States and third parties. Id. at 514. Whether the United States would want to take on this obligation and increase its perception as the “watchdog of the world” is another question. Nevertheless, this is a seemingly viable option to consider.

159. Robert Rosenstock, The Forty-Fifth Session of the International Law Commission, 88 AM. J. INT’L L. 134 (1994). The previous draft has been revised and is being prepared for examination by the General Assembly.


161. Id.

162. Id.
Court would basically have consensual, rather than compulsory, jurisdiction. Finally, the Court would stand only when required.

2. Refutable Objections to the International Criminal Court

The objections to the International Criminal Court are easily refuted. Undoubtedly the main reason that the International Criminal Court does not exist is because nations fear losing their sovereignty. States are concerned that either their citizens will not be awarded fair adjudication, or alternatively, that they will not receive just compensation in a foreign court. However, nations must fulfill their international obligation of obedience to international law that transcends national duties. Initial concerns of sovereignty must be suppressed in order to create the International Criminal Court which will enforce human rights and other international duties.

A second major objection to the International Criminal Court is that nations foresee conflicts between their domestic courts and the international court. Admittedly, concurrent jurisdiction may cause bitter conflicts. No system is perfect, but the expected positive results of the International Criminal Court, such as improved extradition and prosecution, will greatly outweigh those instances of inconvenience when those conflicts occur.

Some critics cite the dangers in disrupting the existing system as the reason to postpone creating the Court. They claim that needed resources may be diverted from the more mundane concerns such as efforts to combat crime. However, if the Court is standing only when problems arise, there would be virtually no cost between sessions.

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163. Id.
164. Id.
165. Blakesley, supra note 7, at 78.
166. Id.
168. Id.
169. Blakesley, supra note 7, at 79.
170. Bassiouni & Blakesley, supra note 157, at 166.
171. Id. at 168.
172. Scharf, supra note 55, at 162.
173. Id.
method of mutual assistance would be no more costly than the mutual assistance currently employed by the United Nations.  

3. Conclusion

The obstacles posed by critics of the International Criminal Court, if not easily overcome, are certainly manageable. Had the International Criminal Court been established, Rwanda's adjudication may have had a higher likelihood for success. A permanent court would have had the stability which the ad hoc tribunal lacks. Secondly, the administrative problems which plague the ad hoc tribunal would have been minimized by the Court's growth and success. Finally, a permanent tribunal would not be involved in the political questions surrounding the peace process. Therefore, justice would not be sacrificed in the interest of reaching a settlement.

V. CONCLUSION

The recent tragedy in Rwanda is only one example of many human rights violations throughout the world. Unfortunately, there is no permanent forum for adjudication of these crimes. Therefore, the international community has responded arbitrarily to some of these situations with ad hoc tribunals. Yet it seems inherently unfair for some of these violations to be singled out for punishment while others are not.

Furthermore, the current Tribunal imposed upon Rwanda has several short-comings. These short-comings will have an effect not only upon the outcome of the Rwandan adjudication, but upon the future of international criminal law. For this reason it is becoming increasingly imperative for the United Nations General Assembly to create an International Criminal Court. A permanently established international tribunal with a clarified code of crimes is needed to handle the human rights violations throughout the world. The exaggerated fears and apathy of many nations have prevented the adoption of this permanent tribunal. Consequently, they have prohibited Rwanda, and other nations with similar human rights problems, from having the fair adjudication which they deserve. In 1995, the Nuremberg Trials will celebrate their 50th anniversary. This is the appropriate time to re-evaluate the ideals of Nuremberg and expand upon them with a permanent Tribunal.

175. See Bassiouni & Blakesley, supra note 157, at 178.
177. Id.