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JUS COGENS AND THE INHERENT RIGHT TO SELF-DEFENSE

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The arms embargo has deprived Bosnia-Hercegovina of the right of legitimate self-defense. It has caused the destruction of the country, deepened the war and caused genocide. It has tied the hands of the attacked and helped the aggressor. It has made the aggressor reluctant to . . . compromise. Those who maintain the arms embargo are accepting . . . the primacy of force in international negotiations. President Izetbegovic, Republic of Bosnia-Hercegovina.¹

Madeleine Albright, the United States Ambassador to the United Nations, warned . . . that the United States would undermine international sanctions . . . if Congress unilaterally lifted the arms embargo against Bosnia . . .

Members of the Congress who favor lifting the arms embargo unilaterally say Bosnia is an independent nation entitled to self-defense under article 51 of the United Nations charter until the Council has taken measures to maintain peace.

But Albright said . . . the issue is one of politics, not of law. 'The bottom line here is that this is not a legal issue, it is a political issue . . . . If any one country decides to act on its own and break down a multilateral arms embargo, we then ruin that as a tool of the international community.'²

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¹ Entreaty to the European Community to lift the arms embargo. Boris Johnson and George Jones, EC refuses to lift arms embargo ‘Ending weapons ban would lead to more Bosnia fighting,’ DAILY TELEGRAPH, June 22, 1993.

² Albright warns against unilateral action on Bosnia, REUTERS LTD. NORTH AMERICAN WIRE, May 2, 1994.
This clash highlights the tension between the United Nations Charter and the unilateral use of armed force by states. It poses a question of obvious significance to international law, order and governance: whether there might not be restrictions upon the Security Council within the realm of its enforcement authority beyond which even it is powerless to act.

Which advocate is correct? Is there an overriding legal regime that precludes Security Council intervention, suspension and obstruction of a state's efforts to engage in armed self-defense or can decisions curtailing the exercise of that right be made and enforced on the basis of political considerations? The answer is found in jus cogens, norms so fundamental to international order that their operation can effectively trump even the actions of the Security Council.

This paper will explore jus cogens and its relation to a state's unilateral use of armed force, armed self-defense and the Security Council, and will demonstrate the inability of the Security Council to preclude armed self-defense. Discussion will address the following issues:

1) What is jus cogens?
2) What are the criteria for determining that a norm is jus cogens?
3) Is the use of armed force in interstate relations jus cogens?
4) What is the specific content of the peremptory norm governing the use of armed force in interstate relations?
5) Is the United Nations Charter subject to jus cogens?
6) Is the United Nations Charter in derogation of jus cogens?
7) What is the relationship between a state's inherent right of self-defense and Security Council action?
8) What are the implications for enforcement measures imposed by the Security Council?

I. What is Jus cogens?

Presently there is little dispute that there exist certain peremptory norms within international law. The use of the term *peremptory* is to classify these norms as ones from which no state can derogate. The identification process has not arisen overnight. It has been evidenced by over forty years of thought and debate within the relevant scholarly and political communities.

A. The Scholars' Approach

Juristic efforts to classify certain rules or rights and duties on the international level as inherent have, intermittently, affected interpretations of treaties, and eminent opinions have been offered in support of the view
that certain overriding principles of international law exist, thus forming a body of jus cogens. However, it was not until the International Law Commission (ILC) began its work on drafting a treaty on treaties that the concept of jus cogens became the object of consistent attention. In his First Report to the ILC on the Law of Treaties, in his capacity as its Rapporteur, H. Lauterpact proposed “A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.”

In his view, the test for whether the object of the treaty was illegal and the treaty void for that reason is, “inconsistency with such overriding principles of international law which can be regarded as constituting international public policy.” As reported in the 1953 ILC Yearbook:

[i]n his comment to draft article 15, Lauterpacht stated that the incorporation of this article must be regarded as essential in any codification of the law of treaties, notwithstanding substantial practical and doctrinal difficulties. That unlawfulness of the object of a treaty implies the treaty’s invalidity is generally — if not universally — admitted by writers who have examined this aspect of the validity of treaties.

Lauterpacht went on to say that the test of lawfulness and validity of a treaty is not pure and simple inconsistency with customary international law, because states may by mutual treaties modify rules of customary law, but inconsistency with those overriding principles of international law which may be regarded as constituting principles of international public policy . . . .


5. SINCLAIR, supra note 4, at 209.

The third Rapporteur, Fitzmaurice, proposed the following as a draft article in the Third Report on the Law of Treaties in 1958: "[i]t is essential to the validity of a treaty that it should be in conformity with or not contravene or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of jus cogens." In commentary, Fitzmaurice pointed out that the majority of rules in international law are *jus dispositivum*. It is "only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no option) that the question of the illegality and invalidity of a treaty inconsistent with them can arise."

In its work in 1963 and 1966 on the preparation of a *treaty on treaties*, under the stewardship of its fourth Rapporteur, Waldock, the ILC undertook in depth discussions of jus cogens. As reflected in the relevant Yearbooks, there was agreement that there are rules of jus cogens in contemporary international law. Peremptory norms were viewed as norms from which states cannot contract out. They are universal and express the interest of the international community as a whole.

In his second report in 1963, Waldock proposed the following as draft article 13: "a Treaty is contrary to international law and void if its object or its execution involves the infringement on a general rule or principle of international law having the character of jus cogens." He offered the following definition of jus cogens. "[J]us cogens means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law."

Imperfect though the international legal order may be the view that in the last analysis there is no international public order — no rule from which states cannot at their own free will contract out — has become increasingly difficult to sustain. The law of the Charter concerning the use of force and the development, however tentative — of international criminal law — presupposes the existence of an international public order containing rules having the

7. SINCLAIR, supra note 4, at 209; HANNIKAINEN, supra note 4, at 158.
8. SINCLAIR, supra note 4, at 209; HANNIKAINEN, supra note 4, at 158.
11. HANNIKAINEN, supra note 4, at 158.
character of jus cogens. The Commission will therefore, it
is believed, be fully justified in taking the position in the
present articles that there are certain rules and principles
from which states cannot derogate . . . .

In its 1966 discussions, the ILC, recognizing that such
peremptory, nonderogable norms exist, provided (in its draft article 50) the
following general definition: "[a] treaty is void if it conflicts with a
peremptory norm of general international law from which no derogation is
permitted and which can be modified only by a subsequent norm of
general international law having the same character."3

There was, additionally, virtual unanimity within the ILC
regarding the existence of rules permitting no derogation in international
law and that peremptory norms express the interest of the international
community as a whole.4

Commentary in 1963 and 1966 touched on whether the emergence
of rules having the character of jus cogens was comparatively recent or
more long-standing. Several members opined that the concept of jus
cogens had originated in regard to such universal crimes as piracy and the
slave-trade as well as such principles as the freedom of the high seas and
other rules on the law of the sea.5

The majority view was that jus cogens is a more recent innovation
brought about by the fact that certain aspects of interstate relations have
become of concern to all states, such as the formation of the League of
Nations and its pioneering effort to substitute some form of constitutional
government for the blind play of physical force into international
relations.6 Those espousing the majority view did not generally attempt to
prove that the notion was an innovation but, rather, referred to jus cogens

12. Id. The ILC did identify bilateral and regional treaty arrangements. Although there
was an exception suggested providing that the article would not be applied to a general
multilateral treaty which expressly abrogated or modified a rule having the character of jus
cogens, such was rejected at the Vienna Convention. The present Convention contains no such
exclusion or exception.


14. Hannikainen, supra note 4, at 161 and note 9 (citing the comments of ILC members
Suy and Cadieux).

15. Hannikainen, supra note 4, at 161-62 (reflecting the opinions of El Erian, Yasseen,
Castren and Ago). Rosenne thought that jus cogens had existed in international law for a long
time even if in inchoate form. Id.

16. This position is attributed to member Pal, in comments made during the 1963
discussions. Id. at 162.
as an accepted fact. It was only the preparation of the Convention that had rendered the notion a concern of the international community.\textsuperscript{17}

Despite the evident agreement within the ILC on the existence of peremptory norms, it was agreed to leave the full content of the notion to be worked out in state practice and the jurisprudence of international tribunals.\textsuperscript{18} What the ILC did do was to provide "examples of the more conspicuous instances of treaties that are void by reason of inconsistencies with a jus cogens rule."\textsuperscript{19} That content cannot be worked out merely by treaty. A treaty cannot impart the character of jus cogens to a norm, even if the parties agree that there is to be no derogation therefrom. It is, rather, the particular nature of the subject matter with which a treaty deals, not the form of the provision, that gives a rule the character of jus cogens.\textsuperscript{20}

The final draft article, submitted for consideration to the state representatives at the Vienna Conference, proposed: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."\textsuperscript{21}

\textbf{B. The Vienna Conference: The View of the International Community of States}

The Conference turned its attention to draft article 50 in the 1968 session.\textsuperscript{22} The ILC draft definition was lengthened and made more specific.\textsuperscript{23} The new article, now renumbered as 53, provides that:

\begin{itemize}
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id. at 76 and 164-65. Although there was unanimous agreement on one norm, the use of force, there was disagreement as to other norms that might be categorized as peremptory. Consequently, it was determined that illustrations of jus cogens would be noted but that the field would be left for subsequent development by states and courts.
  \item \textsuperscript{19} See infra at 13-14.
  \item \textsuperscript{20} [1966] Y.B. Int'l L. Comm'n 76, U.N. Doc. A/CN.4/Ser.A/1966. Hannikainen, \textit{supra} note 4, at 163. There are a number of views on the manner in which a new or modified norm emerges. Some commentators, such as Dinstein, although rejecting the notion of \textit{instant custom}, have noted that a multilateral treaty could modify jus cogens or demark the emergence of a new norm if there was extensive recognition/acceptance to be bound to the treaty as a condition of its entry into force. Yoram Dinstein, \textit{War, Aggression, and Self-Defense} 104-06 (1994). Others, such as Sinclair suggest the logical impossibility of the idea that a treaty itself, could create such a norm. Sinclair, \textit{supra} note 4, at 225-26. From this author's perspective, it would seem inconsistent for a peremptory norm to be created by a multilateral treaty unless there had been extensive antecedent acceptance accompanied by the opinion that derogation therefrom was not permitted.
  \item \textsuperscript{21} Sinclair, \textit{supra} note 4, at 218.
  \item \textsuperscript{22} Hannikainen, \textit{supra} note 4, at 166.
\end{itemize}
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.24

The final text was arrived at in the 1968 session and was approved in a final vote of eighty seven-eight-twelve in 1969.25

The consensus at the Conference fell into three primary groups. A clear majority of states accepted that "there undeniably exist peremptory norms" in international law. Consequently, a provision to this effect was necessary. However, it was felt that, at this stage of international relations, it was not possible to arrive at a detailed definition of the notion, nor was it the task of the Convention to do so. It was, nonetheless, held that peremptory norms protect important interests of the international community.26

A smaller group of states admitted the existence of peremptory norms but expressed doubt regarding the imprecision of their identification. Even though this group admitted that certain norms clearly appeared to be peremptory, they questioned the adequacy of the criteria available to separate jus dispositivum from jus cogens. This vagueness might make misuses of the notion possible.27

Only a small group of western states were very critical of or entirely opposed to the inclusion of provisions on peremptory norms in the Convention.28 The clear upshot of this and the approval vote reflected that

23. Id.


25. United Nations Conference on the Law of Treaties (UNCLT), Official Records, Second Session (1969) at 106-07 [hereinafter UNCLT II]. The 1968 session, (UNCLT I) was attended by 103 States; the 1969 session by 110. HANNIKAINEN, supra note 4, at 166. The inclusion of the words at the time of its conclusion was voted on separately. It was adopted by a vote of 43 to 27 to 12. Id. at 167. Although this seemingly stresses the non-retroactive character of peremptory norms, the approval numbers are not overwhelming.

26. HANNIKAINEN, supra note 4, at 169.

27. Id. at 170-72.

28. France was among the most critical. HANNIKAINEN, supra note 4, at 17.
nearly all state participants agreed that there are peremptory norms in international law.\textsuperscript{29}

II. What are the Criteria for Determining that a Norm is Jus Cogens?

As article 53 makes clear, there are four criteria specified for the identification of a peremptory norm:

1) status as a norm of general international law;
2) acceptance by the international community of states as a whole;
3) immunity from derogation; and
4) modifiable only by a new norm having the same status.\textsuperscript{30}

What does this first criteria status as a norm of general international law mean? Although far from settled, it is useful to proceed from the idea that norms of general international law are of general applicability, that is they create obligations and/or rights for at least a great majority of states or other subjects of international law.\textsuperscript{32} Debate is engaged on whether the reach of such norms is universal in its obligatoriness or whether a rule of general international law requires the acceptance of nearly all as opposed to all states.\textsuperscript{33} Consequently, inclusion of a norm as part of general international law, would imply that the obligations it creates are accepted by the great majority of states, if not all states.\textsuperscript{34}

Clarification of the universality component of general international law, for jus cogens identification purposes, is provided in the second criteria specified in the Convention: that the norm be accepted and recognized by the international community of states as a whole. In explaining the meaning of the phrase \textit{as a whole}, Yasseen, the Chairman of the Drafting Committee of the Vienna Convention had stated:

By inserting the words \textit{as a whole} in article 50 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as a peremptory norm by all states. It would be enough if a very large majority did so; that would mean that, if one

\textsuperscript{29} Id. at 174.
\textsuperscript{30} Vienna Convention, \textit{supra} note 25, at art. 53; HANNIKAINEN, \textit{supra} note 4, at 3.
\textsuperscript{31} HANNIKAINEN, \textit{supra} note 4, at 208.
\textsuperscript{32} According to Hannikainen, there is quite a lot of support for this view. HANNIKAINEN, \textit{supra} note 4, at 209.
\textsuperscript{33} Id.
state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.\(^3\)

Consequently, for a norm to be recognized by the international community as a whole, it would suffice if all the essential components of the international community recognize it.\(^3\) A considerable majority of those who have commented upon this have seemed to accept the views of Yasseen.\(^3\) Additionally, most agree that the lack of acceptance or even the expression of opposition on the part of one or a few states is no obstacle to a norm having peremptory status.\(^3\)

One apparent difference in effect between general international law and customary international law is the inability of customary international law to bind those states which persistently object, whereas under general international law, if a norm has reached the necessary level of widespread acceptance, its operation can not be avoided by objection or state veto; non-recognizing states are bound nonetheless.

Obviously, no norm could realistically be considered a principle of general international law if it did not, at a minimum, meet the criteria of acceptance and adherence required for customary international law. However, whether a norm has been denominated or identified as customary international law should not frustrate, eliminate, or immunize its categorization and recognition as a norm of an even more profound nature, such as jus cogens. That inquiry requires assessment of the extent of recognition and acceptance such as would cause its elevation to the status of general international law, whereby it would bind even non-consenting states.

Determining whether a norm rises to the level at which it binds not only all states, but can not be changed by contract, disobeyed, or subject to derogation, has one final step. It is the third criteria enunciated in the

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34. UNCLT I 1968, \textit{supra} note 26, at 472. This remained the position of the ILC on the term "international community of States as a whole." HANNIKAINEN, \textit{supra} note 4, at 211.

35. \textit{Int'l L. Comm'n Report} U.N. Doc. A/31/10, p. 287 and 251 (1976), cited in HANNIKAINEN, \textit{supra} note 4, at 211. It would appear that these comments were made in connection with the ILC efforts towards a draft Convention on State Responsibility.

36. \textit{Id.}

37. \textit{Id.} The qualifier "accepted and recognized by the international community of states as a whole art. 53. . . . [A]pparently . . . means by a 'very large majority' of states, even if over dissent by a very small number of states." \textit{Restatement (Third) of Foreign Relations Law} at 102 rep. note 6 (1987) [hereinafter \textit{FRL}].
Vienna Convention, the non-derogable nature of what might otherwise be a norm of custom, that is the dividing line separating principles of general international law from those of jus cogens. Until a norm has attained widespread recognition that it is not derogable, it remains a matter of *jus dispositivum*.

In addition to setting forth these four criteria, there was an underlying policy consideration stressed by several states similar to that manifest in earlier ILC Commentaries. This factor, a social criterion, not articulated in the Convention itself, identified the purpose of peremptory norms as protecting vital interests of the international community. This concern expressed the view of the underlying rationale and place for such norms in international global governance and world public order.

Hannikainen incorporates this concern as a fifth criteria to the provisions of article 53 and suggests:

If a norm of general international law protects an overriding interest or value of the international community of states and if any derogation would jeopardize seriously that interest or value, the peremptory character of the norm may be presumed but only if the application of the criteria of peremptory norms produces no noteworthy negative evidence.

III. Is the Use of Armed Force in Interstate Relations Jus Cogens?

By the same measure of unanimity in which the very existence of jus cogens was previously accepted by both the scholarly community represented by the ILC and the political community consisting of the state

38. The inclusion of this norm in the United Nations Charter enhances its non-derogable nature, as any action in contravention thereof, is a breach of a state’s obligation under the Charter. However, as jus cogens status is not *created* by treaty, the argument really rests on the notion that what is incorporated in the Charter is the pre-existent norm, the universality and acceptance of which is evidenced by inclusion in the Charter.

39. HANNIKAINEN, *supra* note 4, at 3-5, and 176.

40. *Id.* at 176. The Mexican delegate, for example, noted that rules of jus cogens are derived from principles which the legal conscience of mankind deems absolutely essential to coexistence in the international community at a given stage of the community’s historical development. *Id.* at 4 (citing U.N. Doc. A/CONF 39/11, p. 294).

A general overview of the writings of some scholars on the origins of the notion of jus cogens from a natural law and positivist perspective can be found in SINCLAIR, *supra* note 4, at 201-09. Although some commentators analogize jus cogens proscriptions to municipal law prohibitions on the unenforceability of contracts as contravening public policy, Sinclair is not too sympathetic to this view. *Id.* at 205-06.

41. HANNIKAINEN, *supra* note 4, at 20 and 207.
representatives at the Vienna Conference, there was accord that the use of force constitutes the most conspicuous example of jus cogens.

A. The ILC Position

As early as his writings in 1953, H. Lauterpacht noted that there had never been any waiver or change from that characterization of the use of force and its status as jus cogens.\footnote{Id. at 180.} By 1958, Fitzmaurice, the third Special Rapporteur of the ILC, noted the prohibition of wars of aggression as an example of a jus cogens rule.\footnote{[1958] 2 Y.B. Int'l L. Comm'n 27-28, and 40-41.}

Subsequent commentaries of the ILC clearly accord peremptory status to the norm prohibiting the use of force, embodied in the United Nations Charter, as expressing “not merely the obligations of Members of the United Nations but the general rules of international law of today concerning the use of force.”\footnote{[1963] 2 Y.B. Int'l L. Comm'n 53. In what appears as an effort to separate the dependence of its status as jus cogens from the use of force proscription contained in the United Nations Charter, Hannikainen refers to such a prohibition as that concerning “the use of (aggressive) force,” rather than “reflected in article 2(4)” or even that “contained in the Charter.” See, e.g., HANNIKAINEN, supra note 4, at 178 and 180.}

Illustratively, Waldock’s 1963 draft article provided: “In particular, a treaty is contrary to international law and void if its object or execution involves . . . the use or threat of force in contravention of the principles of the Charter of the United Nations. . . .”\footnote{[1963] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/Ser.A/1963.} According to the Commentary this “hardly needs explanation; the principles stated in the Charter are generally accepted as expressing not merely the obligations of Members of the United Nations but the general rules of international law today concerning the use of force.”\footnote{Id. at 53.}

The prohibition of the use of force noted by the ILC as a conspicuous example of a rule of international law having the character of jus cogens was, in fact, the only rule of jus cogens about which the ILC was unanimous.\footnote{HANNIKAINEN, supra note 4, at 163. Despite this unanimity, the ILC eventually decided that no examples of jus cogens would be included in their draft. Rather such was to be left to state practice and the decisions of international tribunals. Id. at 162 (citing the 1966 Int'l L. Comm'n Report).}
B. State Criteria

Following the suggestion of the ILC to give primacy to states in the determination of the particular norms of jus cogens, the state representatives at the Vienna Conference reflected much support for the prohibition of the use of force as an example of a peremptory norm.48 Of the thirty-two states submitting examples of jus cogens, half declared that the prohibition on the use of force was clearly of such character.49 Another one fourth (eight states) listed this prohibition more generally as peremptory because it constitutes part of the leading principles of the United Nations Charter.50

The consensus of states on the criteria necessary for jus cogens status is manifest in article 53 of the Convention. Clearly, under the parameters set forth therein, the use of force meets those criteria.51 There is almost no other norm of international relations more embedded in practice and accepted as law nor with more widespread recognition as non-derogable than that concerning the use of force regime, long prohibiting certain uses of armed force in international relations.52

As if further justification were necessary for according jus cogens status to the use of force regime, it is beyond peradventure that the public policy concerns underlying the notion of a jus cogens regime; the protection of overriding interests of the international community of states are manifest.53

Additional confirmation that the use of armed force in derogation of the norms reflected in the United Nations Charter, is considered by the international community of states as a whole to violate jus cogens

48. Id. at 178.
49. Id. at 177.
50. Id. The final vote on the Vienna Convention was 79-1-9. There were eight states that voted against the draft article on jus cogens (article 50). These were Belgium, France, Switzerland, Australia, Turkey, Liechtenstein, Monaco, and Luxembourg. Among the states that abstained were: Japan, Malaysia, New Zealand, Norway, Portugal, South Africa, and the United Kingdom. HANNIKAINEN, supra note 4, at 181 and 174.
51. See id. at 9-12.
52. For an extended discussion of the extent, nature and scope of the use of force prohibition, see id. at 18-30.
53. The fundamental connection of the norm to the United Nations regime, the aim of which is to secure international pace and security, fulfills the fifth component of the jus cogens criteria: the protection of overriding interests of the international community of states. HANNIKAINEN, supra note 4, at 207.
proscriptions is reflected in the Restatement of Foreign Relations Law of the United States.\textsuperscript{54}

\textbf{C. Judicial Contribution}

The other source of input denominated by the ILC is that of international tribunals. Decisions of the International Court of Justice increasingly reflect judicial acknowledgment that jus cogens exists and that questions pertaining to the use of armed force are involved therein.\textsuperscript{55} For example, the Court's opinion in the Nicaragua case reflects majority acceptance of the arguments of both the United States and Nicaragua that there are certain underlying issues relating to the use of force that have the character of jus cogens and notes:

The principle of the prohibition of the use of force expressed in article 2, paragraph 4, of the Charter of the United Nations . . . is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens.' (citations omitted) (1966 version).\textsuperscript{56}

Notice is given to jus cogens in the separate opinions of Judges Singh and Setta-Camara as well.\textsuperscript{57}

\textsuperscript{54} FRL, \textit{supra} note 38, at 102, cmt. h and k at 237-8 and rep. note 6 at 34. The United States agreed to the inclusion of articles 53 and 64 in the Vienna Convention but has yet to ratify the treaty. \textit{Hannikainen}, \textit{supra} note 4, at 149.

\textsuperscript{55} United States federal courts have even recognized the applicability of jus cogens to human rights violations such as torture, disappearances, and arbitrary detentions under the Alien Tort Claim Act as violations of the laws of nations. \textit{Princz v. Federal Republic of Germany}, 26 F.3d 1166, 1173 (D.C. Cir. 1994); \textit{Comm. of United States Citizens in Nicaragua v. Reagan}, 859 F.2d 929, 941 (D.C. Cir. 1988); \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 715-17 (9th Cir. 1992).

\textsuperscript{56} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 190 (June 27).

\textsuperscript{57} Judge Singh underscored that "the principle of non-use of force belongs to the realm of jus cogens." \textit{Id.} at 153. Judge Sette-Camara expressed the firm view that the non-use of force can be recognized as a peremptory rule. \textit{Id.} at 199.

The Court approached the use of armed force as customary international law. To the extent that the I.C.J. statute speaks to general principles of law as evidenced by custom, the substance of
D. Scholar’s Note

Even a commentator as confessedly conservative in his investigation and analysis of jus cogens as Sinclair, notes that, applying a test for qualification of a particular rule as a norm of jus cogens by reference to the evidence for its acceptance as such by the international community as a whole, with the burden of proof resting on the party alleging the jus cogens character of the rule:

It would seem that sufficient evidence for ascribing the character of jus cogens to a rule of international law exists in relation to the rule which requires states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any other state. There is ample evidence for the proposition that, subject to the necessary exceptions for the use of force in self-defense or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, the use of armed or physical force against the territorial integrity or political independence of any state is now prohibited. This proposition is so central to the existence of any international legal order of individual nation states (however nascent that legal order may be) that it must be taken to have the character of jus cogens.54

IV. What is the Specific Content of the Peremptory Norm Governing the Use of Armed Force in Interstate Relations?

Peremptory norm status is not accorded to the use of armed force merely because there are provisions relating thereto in the Charter. That there is no necessary linkage between and dependence upon peremptory status and inclusion in a treaty was clear in the debates at the Vienna Conference.55 The ILC has clearly set forth the proposition that a treaty in

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54. SINCLAIR, supra note 4, at 222-23.

55. Of the thirty-two states offering the use of force as the prime example of jus cogens, only eight ascribed that status to its inclusion as a fundamental principle of the Charter. None
and of itself, without pre-existing state practice which it reflects, is insufficient to create a peremptory norm. Further the commentaries of the ILC do not restrict its understanding of the jus cogens character of the use of force to that which was specifically codified in the Charter. Rather, the comments reflect that the use of force regime is embedded therein, but derives its peremptory character from its identity as a general principle of law.

Logic compels this conclusion because the Charter could not create or modify a pre-existent peremptory norm without being in violation of the existent norm unless, at a minimum, there was widespread, pre-existent recognition of the new norm, confirmed, for example, by extensive state practice, coupled with evidence that the treaty was written with the intent to conform international treaty obligations to that new norm. The relevant Charter travaux clearly reflect the contrary.

A. What is the Content of the Use of Armed Force Regime that Pre-existed the Charter and Found Reflection Therein?

The norm prohibiting force in interstate relations, is widely recognized as prohibiting the threat or use of armed force against the territorial integrity and/or political independence of another state. This prohibition is not limited to wars of aggression but also extends to the use or threat of aggressive armed force. This normative regime is reflected in

seemed to specifically restrict and identify the content of this norm as reflected in the Charter alone. See HANNIKAINEN, supra note 4, at 15.

60. This result is the logical extension of the rule that would void any treaty that, at the time of its creation, is in conflict with a pre-existent peremptory norm. See id. at 7, and note 21.


62. DINSTEIN, supra note 21, at 105-06 (rejecting the notion of instant custom and highlighting that treaties effecting a modification of jus cogens could occur if, at the time of their making the modifying treaty had gained the backing of the international community as a whole). See also SINCLAIR, supra note 4, at 225-26.

63. This is more thoroughly presented infra pp. 38-59, 61-63.

64. See generally Military and Paramilitary Acitivities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 190 (June 27). See also infra pp. 18-25.

Use of the term aggression or aggressive use of force will be used as a term of art to denote the use of armed force in contravention of this general proscription. Just as the term force has been subject to definitions that range from military to non-military coercion, both direct and indirect, the almost fifty year effort, still not definitively resolved, to come to a specific definition of aggression, renders its use here more confusing than clarifying. It is, perhaps, essential to remember that at the UNCIO in 1945, the Charter drafters rejected any effort to insert a set definition of aggression although such is featured in the authority of the Security Council. See 6 UNCIO (1945), discussions of Comm. 3, Comm. III.

65. HANNIKAINEN, supra note 4, at 327.
article 2(4) of the Charter, in the charters of such regional organizations and entities as the OAS, OAU, the Arab League, NATO, and the Warsaw Pact, as well as various declarations of non-aligned countries and bilateral treaties. The prevalence of its inclusion in these numerous instruments emphasizes the universality of the prohibition, rather than marks its creation. Further evidence of this universality was stressed in 1987 by the United Nations General Assembly Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use in International Law, which was adopted unanimously.

As noted by Hannikainen, after an exhaustive review of jus cogens as applied to the use of armed force, “[a]ll states are under the peremptory obligation to refrain from the use or threat of aggressive armed force, i.e., armed force with an aggressive (including dictatorial) intention, against another state . . .”

B. What is the Relationship Between the Prohibition on the Use of Armed Force and a State’s Right to Use Such Force in its defense?

Once there was general acceptance by states of limitations on their recourse to armed force in what had, theretofore, been discretionary policy, a use of force regime developed in which distinctions were made whereby armed force was either justified or not; permissible or

66. Id. at 332.


68. HANNIKAINEN, supra note 4, at 356. His reference to aggressive intent appears as an effort to separate out those uses of force, such as the rescue of nationals and humanitarian intervention which have involved the use of force in the territory of another state undertaken in seeming violation of 2(4) yet, without any aggressive intent. While such may implicate lesser uses of force and debate rages as to whether this is unlawful under the Charter regime, such milder forms of force do not implicate jus cogens concerns. Id. at 336-37, 340.

He notes: “[E]ssentially my conclusion concurs with the view of the ILC regarding the content of the peremptory prohibition of the use of aggressive armed force.” See Int’l L. Comm’n Report 1980, U.N. Doc. A/35/10, at 90-93. HANNIKAINEN, supra note 4, at note 114. The elipsed section of Hannikainen’s comments reflects jus cogens status to aggressive force “within the territory of another state.” This concerns the question of a state’s consent to the use of such force within its territory in a variety of contexts. Though interesting, that topic is beyond the scope of the present paper.

For a listing of some of the writers who support the peremptory character of the prohibition of the use of aggressive armed force, in addition to those mentioned elsewhere in this paper, see Id. at 324, note 6.
impermissible. However, that proscription upon a state's unilateral discretion to use armed force did not apply in one situation: self-defense.

Reviewing pre-League practice and doctrine, League Covenant provisions, the Kellogg-Briand Pact era and thereafter, Brownlie asserts that after 1920, when the effective legal regulation of armed force appeared, that which became the operative international norm on armed force in interstate relations was a regime that empowered states to use such in reaction to an actual or imminent resort to armed force.

Although efforts were undertaken to put regulation into the process whereby a state had lawful recourse to engage in war under the League of Nations, that option remained. Effectively, all the League Covenant did was offer a series of procedural steps antecedent to the initiation of armed force by one state against another.

That gap was sought to be rectified with the Kellogg-Briand Pact, a multilateral effort to make explicit the prohibition on the use of war as a mode of settlement of international disputes. Consequently, the Pact constituted a legal regime declarative of the impermissible use of force.

The Pact process was, however, declarative of the permissible end of the use of force spectrum as well. Specifically, a condition precedent to the signing of the Kellogg-Briand Pact was the agreement on reservation of

69. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES chs. XII and XIII (1963); DINSTEIN, supra note 21, at ch. 3.

70. See infra at 21-29.

71. DINSTEIN, supra note 21, at ch. 3. BROWNLIE, supra note 70, at 216-52, 254-55 (reflecting the U.N.G.A. 6th Committee discussions on defining aggression). For an extended discussion of the problems surrounding and the efforts to effect a definition of aggression, see JULIUS STONE, AGGRESSION AND WORLD ORDER (1959); DINSTEIN, supra note 21, at 123-32; and THOMAS & THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW, chs. I and II (1972).


Although arguably inconsistent with the availability of war to states under the Covenant, article 10 provided:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation will be fulfilled.

Id.

Interpretations have generally affirmed the view that article 10 was intended as subordinate to provisions which allowed for recourse to war in the face of the inability of the Council to act. i.e., that such force would not constitute aggression. Id. at 21-22. This view, too, supports the notion that what is not impermissible is permissible and vice versa.

73. BROWNLIE, supra note 70, at 217-8; AREND & BECK, supra note 73, at 23.
the right of legitimate self-defense.⁷⁴ Although Kellogg's original conception had been for a complete renunciation of war, he assured the French Ambassador that the renunciation of war did not deprive the signatories of the right of legitimate defense.⁷⁵ Written expressions of the reservation of the right to self-defense were submitted by France, Great Britain, and Japan.⁷⁶

Of decisive importance was the United States' Note of June 23, 1928.⁷⁷ Concerning self-defense, it conveyed:

[t]here is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion; and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has good cause the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events with the agreed definition.⁷⁸

In their respective notifications of acceptance of a slightly revised American draft, each of the recipient's of the United States' Note expressly accepted or noted the interpretation put upon it in the United States' Note.⁷⁹ With these conditions, the treaty was signed without the reservation appearing in the text.⁸₀

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⁷⁴. BROWNLIE, supra note 70, at 235.
⁷⁵. These assurances were made on March 1, 1928. Id.
⁷⁶. Id. at 235-36.
⁷⁷. That note, explaining the United States draft of April 13, was sent to Austria, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland, and South Africa. Id. at 236.
⁷⁸. Id. (quoting Kellogg's address to the American Society of International Law).
⁷⁹. BROWNLIE, supra note 70 at 236-37.
⁸₀. Id. at 237.
In contrast to state practice before 1920 and the writings of jurists relative to that period, according to which the right of self-defense was regarded as synonymous with the right of self-preservation including the redress of wrongs, Brownlie asserts that such was not the regime that was understood as part of customary practice after the Pact. Rather, the wording of the Pact and the expressed understandings of the parties about self-defense are not reflective of such a broad scope for self-defense. By 1928, the common meaning of aggression was attack or invasion or threat thereof. In the periods immediately before and after the conclusion of the Pact the term legitimate defense appeared frequently in contexts in which it had the sense of justified reaction to attack or threat of attack. With this as foundation, Brownlie notes:

[...]he legal developments of the period of the League had the result that, while the right of self-preservation no longer existed in its classical form some of its content was preserved. This residual right was referred to as that of self-defense or legitimate defense. It was understood that this right of legitimate defense was subject to objective and legal determination and that it was confined to reacting to immediate danger to the physical integrity of the state itself . . . . Unfortunately, the acceptance of the existence of a legally defined right was not in fact accompanied by any precise definition of the content of the right.

He continues:

In the period of the League the right of self-defense commonly appeared in the context of the use of force. It was essentially a reaction by a state against the use or threat of force by the armed forces of another state . . . . The essence of the right was proportionality to the threat offered and this would create a presumption that force was only lawful as a reaction against force.

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81. Id. at 240.
82. Id.
83. Id. at 240-41.
84. Id. at 241.
85. BROWNLIE, supra note 70, at 252.
86. Id.
Additionally, he notes that, for the years 1930-1939 "[s]tate practice ... fairly consistently supports the view that resort to force in collective or self-defense is a reaction to an actual or imminent resort to force." 87

According to Brownlie, the period from 1920 through 1939 marks the end of a broad state entitlement to use force for such matters as protection of rights or a generalized claim to self-preservation, in the face of the norms whereby such uses of force exceed that which would be available to rebut impermissible uses of force against a state. 88

Moving ahead chronologically, he submits:

In state practice both before and after the Second World War resort to force by virtue of the right of self-defense is almost without exception associated with the idea of reaction against the use of force. The concept of aggression appeared as the right of self-preservation fell into disrepute and in the period of the League and the Second World War ‘aggression’ was synonymous with an armed attack, the unlawful use of force, which justified action in self-defense. 89

Consequently, self-defense had a more restricted and obvious meaning than had existed prior to these efforts at incursions into state power to use armed force.

For at least thirty years it has appeared in state practice principally, though not exclusively, as a reaction to the use of force against the territorial domain, the physical entity of a state. It is not surprising that the draftsmen of the United Nations Charter should define it in article 51 by reference to the occurrence of an armed attack. 90

The practice of states from 1929-1945 does not suggest that self-defense was “anything other than a reaction to force or threat of force against the territory of a State.” 91

It is noteworthy that in its 1949 report on the Draft Declaration on Rights and Duties of States, all members of the ILC regarded the right of

87. Id. at 250.
88. Brownlie does note, however, that protection of nationals may occupy a continuing place. Id. at 250-52.
89. Id. at 255. His comments were also directed at dispelling the notion that self-defense covers reaction to non-militarized forms of force or coercion.
90. Id. at 255-56. As his book was published in 1963, he is looking back to the early 1930s.
91. Brownlie, supra note 70, at 241, 251-52. He does note the existence of a few cases that do not fit this general pattern.
self-defense as exercisable through the medium of armed force only in case of the threat of armed attack or actual armed attack. This was offered as commentary upon draft article 12 which provided that every state has the right of individual or collective self-defense against armed attack.92

That such followed so swiftly upon and used the same armed attack wording as article 51 of the United Nations Charter could well reflect the then current understanding and intent in use of that terminology in the Charter: retention of the right to armed self-defensive responses to the threat or use of armed force as opposed to other coercive measures short of military force.

What is clearly evident is that the regulation of the use of armed force in interstate relations under international law that began in earnest under the League system and the Kellogg-Briand Pact is that which ultimately was incorporated and mostly recently codified in the United Nations Charter. Presently, it is beyond challenge that the provisions of article 2(4), prohibiting the threat or use of armed force in violation of a state's territorial integrity and/or political independence, which necessarily includes and incorporates the right to use such force in self-defense, constitute still binding rules of traditional international law.93

Not only was the normative regime on impermissible and permissible armed force established prior to its incorporation into the Charter, but the inherent nature of that regime was infused in the Charter as well. It is one predicated upon a dyadic dynamic whereby what one state is empowered to confront with armed force is that which, by definition, is impermissible to the other.


Although the I.C.J., commentators, and others may have categorized the extra-Charter use of armed force as customary international law, this author suggests that such is not dispositive of the normative rank to be accorded to that regime. Elevation to the status of jus cogens is effected regardless of any prior categorization provided the normative regime fulfills the criteria identified in article 53 of the Vienna Convention. While it is indeed unlikely that a norm could attain jus cogens status without being considered, at a minimum, under customary international law, that categorization is not determinative for jus cogens analysis. That assessment requires examination into the extent of acceptance, state practice, and derogability.

Usage of the term traditional as a modifier of international law is used throughout the original discussion presented to connote generally the extra-Charter normative regime to avoid the confusion engendered by use of the terms customary international law and general international law as articulated in article 53 of the Vienna Convention. See SINGH, supra note 94, at 10.
As this was the existent regime when diplomats and scholars referred to the impermissible use of force as the most conspicuous example of jus cogens, this author suggests that it is that regime in its entirety, not just one aspect of it, that is the non-derogable norm.94

C. The Dialectic Dyadic Dynamic

What is both apparent and key in this normative regime is the inherent complementarity of the two ends of the use of force spectrum.95

94. This does not mean that other uses of force might violate either the Charter or customary international law norms but yet may not constitute jus cogens. This is analogous to the I.C.J. comments in the Nicaragua case that there may well be impermissible uses of force that do not run afoul of the customary international law prohibition against armed attack.

95. STONE, supra note 72, at 72-76. His book is generally directed at efforts to define aggression. This sub-section, entitled The Attempted Approach to Definition through Armed Attack, concludes that, although the term armed attack might seem to be more explicit than a looser one such as aggression or even legitimate self-defense, no ground is effectively gained in defining aggression by shifting the focus to the actions of the victim’s permitted license of self-defense against armed attack. Quite simply he notes:

If States generally accepted the view that all forceful self-redress by individual Members is forbidden by the Charter exception ‘self-defense against the armed attack against a Member,’ within article 51, they should certainly have rallied immediately to the thesis that nothing more was necessary to denote ‘aggression’ than to define ‘self-defense against armed attack’. For the concept of ‘self-defense’ would then not have its vague customary law outlines but be more precisely limited by reference to ‘armed attack’ as an observable phenomenon against which it reacts. Some problems would remain . . . for instance of distinguishing what degree of violence ‘armed attack’ must involve and . . . the proportionality requirements . . . If States really accepted this view of the Charter, indeed, the question of ‘aggression’ itself would become irrelevant; the question what is ‘armed attack’ would have been substituted for it. (citations omitted).

Id. at 72-73.

Further reflecting the relation between what is permissible and what is not, Stone notes the comments of G.G. Fitzmaurice:

The whole problem is to determine when certain acts are justified and, therefore, are not aggressive, and when they are not justified and therefore are aggressive. This situation is one which can only be carried out in each particular case in the light of the facts and the situation as it exists at the time, and cannot be achieved by a prior rule laid down in advance.

Id. at 18 n.5.

An examination into the fifty-year effort to arrive at a definition of aggression, which was purposefully not done at the time of the drafting of the Charter, is, regrettably, not feasible within the constraints of this paper. However, it is to be noted that the result of that effort, the U.N.G.A.R Definition of Aggression effectively recognizes the inter-relationship of the two ends of the use of force spectrum. U.N.G.A./Agg, supra note 68. Specifically, the first use of armed force is only prima facie evidence of aggression. The obvious result is that a state can permissibly undertake a first strike presumably in anticipation of an armed attack and not be deemed to have engaged in aggression.
Evidenced in the writings of Judge Lauterpacht in 1935 and others even before him, the notion of aggression as complementary to the notion of self-defense, has a pedigree extending back into the pre-Charter/Kellogg-Briand Pact regime. Kellogg himself regarded defense as the "conjunct of aggression." According to Stone, this view is very widely acknowledged and is a correct one. Of equal vintage are the comments of G. Schelle, in whose view:

The correspondence of the questions is exact, since (matters of proportionality apart) only when aggression occurs does the right of self-defense arise. Indeed, . . . all that distinguishes self-defense from aggression is that the former takes place first. So . . . when there was no legal restraint on the license to go to war, there was also no restraint on the right of self-defense . . . . [I]ndeed that is it because "la notion de legitime defense se definit par l'agression," that this latter notion must be defined.

More contemporary recognition that complementarity between self-defense and aggression remains a vital notion is reflected in the jurisprudence of McDougal and Feliciano. Additionally, J.N. Singh has noted:

The existence of legal prohibition surely means the absence of legal permission and likewise, the existence of legal permission means the absence of legal prohibition in regard to the same subject matter. In order to judge the legality of a particular threat or use of force in a situation, the examination of legal prohibitions as well as legal permissions is necessary.


97. BROWNLIE, supra note 70, at 240.

98. STONE, supra note 72, at 75 n.182. Such a dynamic is unlikely to have been affected by the passage of 37 years since Stone's book was published.

99. STONE, supra note 72, at 75 n.182.

100. MYRES SMITH McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER ch. 3 (1961). As noted by John Norton Moore, the notion of complementarity is a refined version of the legal realists' observations that legal norms frequently travel in pairs of complementary opposites such as self-defense-aggression. John Moore, Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell, 54 VA. L. REV. 662 (1968) at 656 n.20.

101. SINGH, supra note 94, at 8.
Given this inextricable linkage of the lawful and unlawful uses of armed force, each can only be defined in relationship to one another. According to Dinstein, “[t]he evolution of the idea of self defense in international law goes hand in hand with the prohibition of aggression . . . . [S]elf defense as a legitimate recourse to force is inextricably linked to the antithesis of the employment of unlawful force by . . . its opponent.”102

What is really subject to assessment within the dynamics of the interstate use of armed force is considering where to draw the line.103 Operationally, it is only by examining the entirety of the exercise of armed force between states that the boundary between proscription and permission can be determined.

As a direct consequence, the fundamental use of force proscription, reflected in the traditional prohibition on the use or threat of armed force against another state, necessarily implicates and defines the countervailing permitted self defensive use of armed force as one which encompasses the ability to defend against the use and the threat of armed force as well.104

This interdependence not only effects the applicable substantive prohibition and entitlement, but also implicates the applicable legal status of the normative regime. Specifically, to the extent that the traditional prohibition on the use of armed force is not jus dispositivum, but rather, jus cogens, the integrity of the system, the maintenance of balance between the two components of the system, mandate that its counterpart, the permissible use of armed force be recognized as having that same normative status.105

V. Is The Charter Subject to Jus Cogens Proscriptions?

What impact does recognition of the jus cogens character of the use of armed force regime have on the Charter and the use of force regime established thereunder? Is the Charter even subject to the jus cogens regime described in the Vienna Convention? Three factors are relevant:
1) the Charter entered into force before the Vienna Convention was even drafted,
2) the Vienna Convention is not by its terms, retroactive, and

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103. DINSTEIN, supra note 21, at 177-78.
104. SINGH, supra note 94, at 14-20. Logic compels this conclusion as well.
105. It is indeed arguable that self-defense itself manifests the four criteria of peremptory norm status and might, therefore, constitute jus cogens separately from its linkage with the illegal use of force.
3) the Vienna Convention has not seen universal ratification.

The answer is, however, presaged by recognizing that what was enshrined in the United Nations Charter reflected pre-existent norms prohibiting the unilateral use or threat of armed force and the correlative right to undertake measures in self-defense.

Article 4 of the Vienna Convention limits its application to only those treaties which have been concluded after the Convention's entry into force. This is, however, without prejudice to the application of any rules set forth in the Vienna Convention to which treaties would be subject under international law independently from the Convention.106 Debate at the Vienna Conference reflected concern that the Convention provision preserve the operation of rules of customary international law as well as take into account general principles of law which are a separate source of international law.107 Article 4 was inserted to preserve the application to treaties of any pre-existent rules of customary international law and general principles of law.108 Determining whether jus cogens has application to the Charter upon an international law basis other than the Convention regime, suggests analysis on whether jus cogens constitutes a codification of customary international law or a progressive development.109

The distinction between these two categories is evinced in article 15 of the Statute of the International Law Commission. According to that statute, progressive development of international law means "the preparation of draft Conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states."110 Codification of

106. Article 4 provides:
Non-retroactivity of the Present Convention
Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states.

Vienna Convention, supra note 25.

107. SINCLAIR, supra note 4, at 8.

108. Id. at 249; I.C.J. Statute, art. 38(1)(b) (1945).

109. This approach is not meant to exclude consideration of jus cogens as a general principle of law, under the theory expressed by some that it represents, on the international level, the prohibition most legal systems recognize on the non-enforcement of contracts deemed in violation of law and/or public policy. Considerations of space preclude an in-depth presentation of this positivist theme as an underpinning of jus cogens. For a more detailed discussion see SINCLAIR, supra note 4, at 204-06.

Additionally as previously suggested, assessment of a norm as customary international law for this analysis does not preclude its promotion to jus cogens. See supra note 4, at 94.

110. SINCLAIR, supra note 4, at 11.
international law is defined to contemplate "the more precise formulation and systematization of rules of international law in fields where there already has been extensive state practice, precedent, and doctrine."\footnote{Id.}

In submitting its final set of draft articles on the law of treaties, the ILC did not specifically categorize whether its work was either progressive development or codification.\footnote{Id. at 12.} Rather, in its covering report, the commission stated:

"The Commission’s work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission’s Statute and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls.\footnote{Id. at 12.}

The ILC characterized its work on jus cogens as similarly reflecting this dichotomy. The ILC expressed the view that the draft article on peremptory norms involved partly a codification and partly a progressive development of international law.\footnote{Int’l L. Comm’n [1966] Y.B. 177; SINCLAIR, supra note 4, at 12.} It acknowledged that peremptory norms exist in international law that permit no derogation and set down a general definition of jus cogens.\footnote{HANNIKAINEN, supra note 4, at 162.} The \textit{progressive development} component would then relate to the specifics, i.e., which norms were to be accorded jus cogens status. This the ILC left to be worked out by state practice and the jurisprudence of international tribunals.\footnote{HANNIKAINEN, supra note 4, at 162.}

That the use of force regime proposed herein as jus cogens is declarative of a pre-existing normative regime supports the notion that the regime is applicable to the Charter independently of the Vienna Convention.\footnote{That definition is "[a] norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, \textit{supra} note 25, art. 53.}

To the extent that these norms were pre-existent and merely...
codified in the Charter renders the Charter subject to the operation of jus cogens even though it came into force before the promulgation of the Vienna Convention.\(^{118}\)

There are effectively two prerequisites for the retroactive application of the Vienna Convention provisions on jus cogens. The first component, establishing that peremptory norms exist in international law, is in this case, established and confirmed by that which would generally be the second and more difficult hurdle of establishing what the particular peremptory norm is.

What is at issue is the extent to which there is a regime concerning the use of armed force in interstate relations from which states are not free to derogate. To the extent that the Charter reflects and embodies the pre-existent norms regulating the use of that armed force, nothing new is being offered. The United Nations Charter regime is merely reflective of the pre-existent norms, the customary international law, to which all member states have signaled their acknowledgment of continuing allegiance and obedience to.\(^{119}\)

Furthermore, there is nothing novel or *progressive* in categorizing the use of armed force regime as non-derogable. No restrictions upon a state's recourse to such force which did not previously exist, would be imposed.\(^{120}\)

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118. Determining into which category a particular provision of the Vienna Convention falls is, Sinclair suggests, effected predominantly by implication. *Sinclair*, supra note 4, at 12. The I.C.J. in the Namibia decision, in determining whether another rule of the Vienna Convention [termination on account of material breach] would be applicable under customary international law independently of the Convention, noted the voting record at the Vienna Convention relating to its adoption as relevant. *Id.* at 20.

119. The comments of the I.C.J. in the Nicaragua case are, again, enlightening:

> [T]o deduce the existence of customary rules . . . the conduct of States should, in general be consistent with such rules . . . instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself . . . the significance of that attitude is to confirm rather than weaken the rule.


120. Returning again to the *Nicaragua* case, the I.C.J. decision made clear that a breach of this extra-Charter customary international law regime remains both cognizable and punishable. Military and Parimilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at para. 126 (June 27).
To the contrary, those who would argue that changes in the pre-existent regime under the Charter effect a diminishment of the customary principles are the true advocates of a progressive development. Consequently, it would appear clear that the traditional use of armed force regime is an independent basis for the application of the jus cogens proscription, free from the non-retroactive provision of the Vienna Convention.

VI. Is the Charter in Derogation of Jus Cogens?

The ultimate penalty of voidness only results if a treaty is in derogation of jus cogens at the time of the conclusion of the treaty or as such emerges thereafter. Consequently, the question is whether articles 2(4) and 51 of the Charter conform to the jus cogens armed force regime. This task obviously requires interpretation of the Charter. Attention, therefore, needs to be turned to interpretive modalities and materials to determine the consistency of the Charter with the jus cogens regime proposed herein as well as the absence of any newly emerged norm.

A. How is the Charter to be Interpreted?

Naturally, the Vienna Convention on the Law of Treaties provides rules for interpretation. These include:

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accord and with the ordinary meaning to be given the terms of the treaty in their context and in the light of its objects and purpose . . . .

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121. There are two simultaneous, yet independent regimes concerning the use of armed force; one under the Charter and the other under pre-existing norms. Id., at 126-34, para. 175-194. In addition to finding that the Charter itself explicitly referenced pre-existent customary international law by referring to the inherent right of self-defense in article 51, the Court referred to two pre-Charter documents in finding the opinio juris supporting the customary international law regime on the prohibition of force reflected in article 2(4). Id. at 127, para. 176 and at 130-32, para. 186-89. Consequently, assuming a different, more restrictive regime under the Charter does not mean, absent evidence of state practice and opinion juris, that such has altered customary law. As the customary regime remains, treaty based restrictions have not effected a progressive development. Although new peremptory norms can emerge (i.e. progressively develop) there is no evidence that a new normative regime, in contradistinction to the Charter regime, has deprived the traditional regime on the use of armed force of its abiding existence, applicability, and vitality.

122. The remedy for the violation differs slightly if a new norm emerges after the treaty. Vienna Convention, supra note 25, art. 53, 64, 71.
3. There shall be taken into account, together with the context: . . . .

(b) Any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

These provisions have been referred to as a general expression of the principles of customary international law of treaty interpretation. Pre-dating the Convention regime and still evident in its terms are three primary schools of thought concerning the aim and goal of treaty interpretation. As reflected in the writings of Sir Gerald Fitzmaurice:

[j]there are today three main schools of thought on the subject, which could be conveniently called the ‘intentions of the parties’ or ‘founding fathers’ school; the ‘textual’ or ‘ordinary meaning of the words’ school; and the ‘teleological’ or ‘aims and objects’ school. The ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be constructed and are indeed normally held compounded of all three.

123. SINCLAIR, supra note 4, at 153.
All three approaches, individually or as components within the Vienna Convention approach, retain import in efforts to interpret the Charter.\textsuperscript{125} What will become apparent in the subsequent analysis is that, regardless of which modality is selected, the same outcome is obtained: the Charter’s consistency with the jus cogens use of armed force regime proposed in this paper.

Equally clear is the place and import to be given to examination of the relevant travaux preparatoires in efforts to determine the meaning of the text, the intention of the parties, and the object and purpose of the United Nations Charter, notwithstanding any counterassertions predicated upon the Vienna Convention provisions.\textsuperscript{126} As Sinclair notes:

\textit{[t]he question of recourse to travaux preparatoires has often been regarded as the touchstone which serves to distinguish the adherents of the ‘textual’ approach from the adherents of the ‘intentions’ approach . . . . In any event, it is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted.}\textsuperscript{127}

Such investigative options as are provided by the travaux and other extrinsic material are not cast aside by the Vienna Convention. The rules for interpretation set forth in the Vienna Convention do not, according to Sinclair, establish a fixed, inflexible hierarchy between the general rule set forth in article 31 and supplementary means of interpretation provided for in article 32.\textsuperscript{128} Rather, the would-be interpreter is still expected to have

\textsuperscript{125} INTERNATIONAL LAW I (1951), cited in DAN CIOBANU, IMPACT OF THE CHARACTERISTICS OF THE CHARTER UPON ITS INTERPRETATION 31, in CURRENT PROBLEMS OF INTERNATIONAL LAW (Antonio Cassese ed. 1975); SINCLAIR, \textit{supra} note 4, at 115.

\textsuperscript{126} According to Sinclair, the Vienna Convention’s rules on interpretation constitute an economical code of principles which nonetheless have their value.

By placing emphasis on the key elements of treaty interpretation, and on the relationship between these elements, the Convention rules establish a set of guidelines which are not only firmly grounded in antecedent state practice and international case law but which serve to indicate to the would-be interpreter the relative weight which . . . would be attribute\textsuperscript{ed} to each of those elements.

\textsuperscript{127} SINCLAIR, \textit{supra} note 4, at 153-54.

\textsuperscript{128} \textit{Id.} at 115-16.

\textsuperscript{129} \textit{Id.} at 116.

\textsuperscript{128} \textit{Id.} at 117.
recourse to all the materials that will provide evidence relative to the meaning of the text when confronted with a question concerning treaty interpretation which *ex hypothesi*, involves an argument as to the meaning of the text.\(^\text{129}\)

Most enlightening and indicative of the synthetic approach to be taken in interpretative efforts concerning the United Nations Charter and the continuing relevance of the travaux, are the comments of Goodrich and Hambro on the then new Charter.

In interpreting the Charter, we encounter one very special problem of treaty interpretation, namely, that of the weight to be attached to preparatory work (travaux preparatoires). The general principle to be followed seems reasonably clear. In the words of the Permanent Court of International Justice 'there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.' But the practice of the Permanent Court seems clearly to support the view that preparatory work should be consulted with a view to determining the true intent of the parties where there is any doubt as to the meaning of the words used. We would thus seem to be justified in making extensive and fairly detailed reference to the discussions that took place in UNCIO, not only to give some understanding of the play of forces that occurred, but also to throw light on the actual meaning of the Charter.\(^\text{130}\)

Given the extent and virulence of the debate on such issues as the meaning of article 2(4) and that of the terms *armed attack* and the *inherent right of self-defense* articulated in article 51 of the United Nations Charter, significant questions of interpretation remain. Even under the arguably more strictly defined and structured Vienna Convention interpretation regime, this obviously implicates recourse to the travaux in an effort to interpret both articles 2(4) and 51.

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129. *Id.*

B. What Limitations Are There in the Charter on the Legitimate Right of Self Defense?

Before beginning that specific inquiry, it seems appropriate to be mindful of the comments of the Rapporteurs of Subcommittee 1/1/A and Committee I of Commission I:

The provisions of the Charter, being in this case indivisible as in any other legal instrument, are equally valid and operative. The rights, duties, privileges, and obligations of the Organization and its members match with one another and complement one another to make a whole. Each of them is construed to be understood and applied in function to the others. 131

Turning first to the Charter restriction on a state's unilateral recourse to force ultimately contained in article 2(4), the reports of the subcommittee and committee on its content clearly show that no interference was intended or anticipated in a state's inherent right to engage in legitimate self-defense.

The original proposal in the Dumbarton Oaks proposal made no mention of either territorial integrity or political independence.132 However, the subcommittee unanimously approved an Australian amendment which added this phraseology and passed the resulting article on to the committee as a new paragraph.133 That amendment effectively wrote the article as it would appear in the Charter.134

131. Subcommittee 1/1/A and Committee I of Commission I were responsible for drafting the Preamble, Principles and Purposes of the Charter. Id. at 12. Their reports are published in volume 6 of the official multivolume series entitled, UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS. Doc. 723, I/1/A/19, 6 U.N.C.I.O. Docs. 696 (1945) [hereinafter Subcommittee I/1/A].

132. Chapter II. Principles: (4) "All members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organization." Doc. 1, G/1, 3 U.N.C.I.O. Docs. 3 (1945).

133. Commission I, Committee I, Report of Rapporteur Subcommittee I/1/A to Committee I/1, Doc. 739, 6 U.N.C.I.O. Docs. 720 (1945) [hereinafter Doc. 739].

134. Committee I/1, Appendix to Rapporteur's Report, Doc. 908, I/1/34(a), 6 U.N.C.I.O. Docs. 404 (1945). As adopted by the subcommittee and approved by the Committee, the provision read that "all members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state or in any other manner inconsistent with the purposes of the United Nations." Id.

The differences between this draft and the final provision are merely editing variations deleting the words in brackets.
Although other amendments had been proposed and rejected by the subcommittee, one by the Norwegian Government had proposed that no force should be used if not approved by the Security Council. As discussion of this amendment helped to "clarify the Australian amendment itself," and "helps to explain the present text," the Subcommittee Rappporteur offered the following few words in his report to the committee:

The sense of approval was considered ambiguous because it might mean that approval before or after the use of force. It might thus curtail the right of states to use force in legitimate self-defense, while it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished. It was on these understandings that the subcommittee voted the text submitted to you.  

At the subsequent meeting of the committee, attention was focused on the proposed new paragraph 4 including the words of the Australian amendment which had been accepted by the drafting subcommittee.  This amendment provoked considerable discussion. That discussion reflects the following:

The Delegate of New Zealand said that though he would vote for the text including the Australian amendment . . . his Delegation did not regard this text as an adequate substitute for the original suggestion by New Zealand . . . relating to a collective undertaking to resist aggression.

The Delegate of Brazil said that the change, made in the text to incorporate the Australian amendment, had not removed the element of ambiguity . . . and he suggested

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136. Id. at 721. These understandings also included a note that "there will be no legitimate wars in any sense." Id. (emphasis added).
137. Summary Report of Eleventh Meeting of Committee I/1, Doc. 784, 1/1/27, 6 U.N.C.I.O. Docs. 331 (1945) [hereinafter Committee I/1].
138. Id. at 334.
139. New Zealand had submitted an amendment, reflecting a "notion found in many other amendments" that read: "[A]ll members of the Organization undertake collectively to resist every act of aggression against any member." That amendment was rejected by a majority not reaching two-thirds primarily because: "(1) The key-note for collectivity is found in the opening words of this Chapter . . . (2) The amendment limits itself to the collective resistance of every act of aggression, aggression not being defined." Doc. 739, supra note 134, at 721.
that, apart from the use of legitimate self-defense, the text as it stood at present might well be interpreted as authorizing the use of force unilaterally by a state, claiming that such action was in accordance with the purposes of the Organization. He suggested that it was essential to clarify this by some wording as “all members of the Organization shall refrain . . . from the threat or use of force unless such action was being taken according to procedures established by the Organization and in accordance with its decisions.”

The Delegate of Norway said that the committee should reconsider the present language which did not seem to reflect satisfactorily its intention, and thought that in any case it should be made very clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense. He was himself in favor of omitting the specific phrase relating to “territorial integrity and political independence” since this was, on the one hand, a permanent obligation under international law and, on the other hand, could be said to be covered by the phrase sovereign equality, as suggested in the commentary by the Rapporteur.

The Delegate of the United Kingdom said that he did not dissent from the reasoning of the Norwegian Delegate, but he thought that the wording of the text had been carefully considered so as to preclude interference with the enforcement clauses of chapter VIII of the Charter.

The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the

140 Id.

phrase or in any other manner was designed to insure that there should be no loopholes.142

In recommendations to the commission, the committee Rapporteur noted the subcommittee's preliminary report had "received in full committee an adequate general acceptance which allows it to remain an element of the preparatory work that led to the committee's final recommendations."143

Concerning this new paragraph 4, the committee report reflects:

The committee decided to include the Australian amendment so that the paragraph comes before you under a new text.

The committee likes it to be stated in view of the Norwegian amendment to the same paragraph that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired.144

In connection with paragraph 4, a motion was considered which the committee wishes to see mentioned in this report. It was to add after paragraph 4 the following text: "[A]ll members of the Organization undertake collectively to resist any act of aggression against any member."

That motion, the committee wishes to state, had twenty six votes in favor and eighteen against.145

Clearly, there was every indication that the delegates recognized such a prohibition as that contemplated in new paragraph 4 could impact on self-defense and thus specifically rejected the notion that the proposed regime was intended to interfere, interrupt, or compromise legitimate self-

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142. Committee I/1, supra note 138, at 334-35. (Emphasis added).

What is noteworthy in the recorded debate is the absence of any opposition to the comments stating that the right to legitimate self-defense was clearly excluded from the use of force proscription. Given such explicit acceptance and lack of challenge, it was clear that such were to remain intact.

143. Report of the Rapporteur of Committee 1 to Commission I, Doc.885, 6 U.N.C.I.O. Docs. 387 (1945) [hereinafter Committee 1, Doc. 885].

144. The Norwegian amendment, which was not approved by the subcommittee had sought to prohibit the use of force if not approved by the Security Council. See supra note 39.

145. Thus the motion failed to meet the two-third majority required for passage. Discussion appears at Committee 1, Doc. 885, supra note 144, at 400.
defense in any way. Nor was there any notation or intimation that this self-defense entitlement was not to apply to a threat of force as well. As is evident, article 2(4) was intended to reflect the dialectic dynamic in the use of force regime: On the one hand, the threat or use of force against the territorial integrity, political independence of another state is not permitted while, on the other, the protective response mechanism, self-defense, remains inviolate.

Obviously, the content of that right was that which was existent at the time of the drafting efforts, otherwise the use of the word that remains in the discussions would have been nonsensical. However, more in-depth corroboration for that conclusion lies in an examination of the travaux for what has become article 51, the only article in the Charter that specifically refers to self-defense.

The discussion of self-defense arose in conjunction with the concerns of the Latin American countries to insure the freedom of action of their regional arrangement, most recently expressed and envisioned in the Act of Chapultepec, to provide collective self-defense yet remain within the United Nations framework. 146

The principal debate upon this provision at the UN CIO occurred in commission III, committee 4 and subcommittee III/4/A. 147 Provisions for regional arrangements had appeared in the Dumbarton Oaks proposals as section C of chapter VIII, but made no reference or provision for general collective self-defense efforts by such entities. 148

146. GOODRICH & HAMBRO, supra note 131, at 175-83.
148. The Dumbarton Oaks proposal read as follows:
Section C. Regional Arrangements. 1. Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council.
2. The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council.
3. The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under the regional arrangements or by regional agencies for the maintenance of international peace and security.

The provision reflecting self-defense was a new paragraph recommended for inclusion by the unanimous vote of subcommittee III/4/A to committee III/4.¹⁴⁹ That new paragraph read as follows:

Nothing in this Charter (shall) impair(s) the inherent right of individual or collective self-defense if an armed attack occurs against a member (of the United Nations) state, until the Security Council has taken (the) measures necessary to maintain international peace and security. Measures taken in the exercise of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Chapter to take such action as it (may) deem(s) necessary in order to maintain or restore international peace and security.¹⁵⁰

The subcommittee was unanimous in recommending this text to the committee.¹⁵¹ At its fourth meeting committee III/4 considered the recommendations of the subcommittee.¹⁵² The new paragraph was approved unanimously.¹⁵³

Debate, as there was on this provision, is instructive for what it did not reflect: there was no evident intent to change the pre-existent self-defensive regime notwithstanding the usage of the term armed attack nor any indication that a state's right to self-defense was extinguished at any time prior to the existence of a peace available to be maintained by the Security Council.

As the discussion below reflects, however, there was provision for the use of force by the European states against the enemy states outside the Security Council context, which precipitated much of the debate.


¹⁵⁰. Id. at 849. The words in parenthesis reflect changes, either additions or deletions, that were made in the proposal and reflected in the final article. The only modification that would appear to have substantive implications is the deletion of the word from its place immediately preceding measures necessary in the first sentence.

¹⁵¹. Id., at 849. Issue was joined concerning the proper placement of the article within the Dumbarton Oaks proposal. Id. This debate was more heated and extensive than that concerning the text of the article itself. **See Summary Report of Fourth Meeting of Committee III/4**, Doc. 576, 12 U.N.C.I.O. Docs. 682-84 (1945) [hereinafter Committee III/4, Doc. 576]; **Draft Report of Dr. V.K. Wellington Koo**, Rapporteur of Committee III/4, to Commission III, Doc. 891, 12 U.N.C.I.O. Doc. 724 (1945) [hereinafter Committee III/4, Doc. 891].

¹⁵². Committee III/4, Doc. 576, supra note 152, at 679.

¹⁵³. Id. at 680.
The discussion reflects, in pertinent part, the following:

In connection with this decision, the Chairman, speaking as the Delegate of Columbia, made the following statement:

The Latin American Countries understood, as Senator Vandenberg had said that the origin of the term 'collective self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. The Charter, in general terms, is a constitution, and it legitimizes the right of collective self-defense to be carried out in accord with the regional pacts so long as they are not opposed to the purposes and principles of the Organization as expressed in the Charter. If a group of countries with regional ties declare their solidarity for their mutual defense, as in the case of the American states, they will undertake such defense jointly if and when one of them is attacked. And the right of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity, through regional arrangements, with the country directly attacked. This is the typical case of the American system. The Act of Chapultepec provides for the collective defense of the hemisphere and established that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.

The Delegates of Mexico, Costa Rica, Paraguay, Venezuela, Chile, Ecuador, Bolivia, Panama, Uruguay, Peru, Guatemala, El Salvador, Brazil, Honduras, and Cuba associated themselves with this statement...
The Delegate of Argentina associated himself with the statement of the Chairman.

The Delegate of France expressed his desire to give utterance to the voice of Europe amidst the general concert of the Latin American nations. In his opinion, the formula approved by the Committee extended in general to cases of mutual assistance against aggression.

The Delegate of Czechoslovakia expressed his satisfaction that the text approved effectively reconciled the right of self-defense, individual, and collective, with the maintenance of a central authority capable of dealing with the problems of security as they arose.

The Delegate of Egypt observed that the principle involved in the new text should certainly extend to the League of Arab States. The delegate for Australia said that, in supporting the amendment, the phrase "individual or collective security" was regarded by the Australian Delegation as sufficiently wide to cover that part of the Australian amendment referring to the right of the parties, in certain circumstances, to adopt necessary measures to maintain international peace and security in accordance with any arrangements consistent with the Charter. 154

The Delegate of New Zealand expressed apprehension lest regional arrangements tend to produce conflict between regional groups. His delegation attached primary importance to the supremacy of the world Organization. 155

During the discussion on the operation and interaction between the provisions concerning pacific settlement of disputes, regional arrangements and the Security Council, the Chairman of Committee III/4 stated:

[I]f at any time an armed attack should ensue, that is, an aggression against a state which is a member of a regional group, self-defense, whether individual or collective,

154. Reference to security was subject to a subsequent Corrigendum noted at 12 U.N.C.I.O. Doc. 689 (1945).
exercised as an inherent right, shall operate automatically within the provisions of the Charter, until such time as the Security Council may take appropriate punitive measures against the aggressor state.

In the case of the American states, an aggression against one American state constitutes an aggression against all the American states, and all of them exercise their right of legitimate defense by giving support to the state attacked, in order to repel such aggression. This is what is meant by the right of collective self-defense.¹⁵⁶

No challenge, repudiation or objection was noted in the travaux to this view.¹⁵⁷ There is, consequently, no evidence in these recorded discussions of any debate on or intent to include norms in the Charter to compromise, change or impact upon the pre-existent prohibition on the use of armed force and the correlative right to self-defense.

There is, however, additional documentation reflecting discussion during the San Francisco Conference amongst members of the United States delegation, the other sponsoring states and France, as well as other national representatives, outside the reported subcommittee and committee meetings that are crucial to an understanding of events and decisions that occurred during the Conference and are, thus, highly relevant to assessing the content, definition and intent behind article 2(4), the self-defense entitlement in article 51 and the role of the Security Council.

For the United States delegation, discussion on self-defense arose early, in connection with consideration of that provision of the Dumbarton Oaks proposals that would find final form as article 2(4). On April 26, 1945, discussion at the 18th meeting of the United States Delegation reflects concern over a proposed amendment to chapter II, 4 of the Dumbarton Oaks proposals.¹⁵⁸ That proposed amendment read: “[a]ll members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the Organization and the provisions of the Charter.”¹⁵⁹

¹⁵⁶. *Id.* at 685-87 (emphasis added).

¹⁵⁷. *Id.* at 684-88.


¹⁵⁹. Foreign Relations of the United States, *supra* note 159, at 426. The delegation decided against supporting this amendment, preferring the original language. *Id.* at 427.
Senator Vandenberg said he "was nervous about the problem of self-defense in view of the long arguments that had occurred in the Senate when the Kellogg-Briand Pact came up. The Foreign Relations Committee of the Senate had never been willing to yield until a reservation on the subject of self-defense was made."\(^{160}\)

The question was posed why it would not be advisable to include the qualification about self-defense in the Charter, as there was concern that if no mention was made in the Charter, the Senate would make a reservation. Mr. Stassen specifically asked what would be the disadvantage of including an explicit statement in the Charter that "nothing in the Charter takes away the right of self-defense."\(^{161}\)

As ultimately approved, article 2(4) contained no explicit reference to self-defense. The Committee of five recommended that the Dumbarton Oaks proposal be amended by the inclusion of an Australian amendment adding the language "against the territorial integrity or political independence of any member or state."\(^{162}\) Described as a statement regarding the preservation against external aggression of the territorial integrity and political independence of members, Dean Gildersleeve, the United States delegate to the relevant Committee, pointed out the importance of this provision to the smaller nations who wanted this specification to make them feel more secure. Additionally, approval of this amendment needed to be considered against a New Zealand amendment seeking to guarantee territorial integrity that was receiving considerable backing.\(^{163}\)

Although an explicit reference to self-defense was not inserted into article 2(4), the issue was far from dead. It resurfaced in the course of the extended debates on regional arrangements and the use of armed force from which article 51 ultimately resulted. In fact, the central figures in the process by which self-defense became the means to resolve the problem of regional arrangement authority, were those who had earlier suggested including a specific reservation of the right to self-defense in the Charter itself.

Extensive documentation exists on the drafting history of article 51 in the United States Foreign Relations documents. Recourse to these materials has a special significance in this particular area, as it was the

\(^{160}\) Foreign Relations of the United States, *supra* note 159, at 426-27. Vandenberg repeatedly voiced concern about Senate ratification were no express reservation of the right of self-defense was included in the Charter. *Id.* at 594.

\(^{161}\) *Id.* at 428.

\(^{162}\) *Id.* at 747.

\(^{163}\) *Id.* at 726.
United States that bore the task of accommodating the desires of the Latin American States to the demands of the other sponsoring powers and participating states. As events reflect that what became article 51 was adopted by the Subcommittee and Committee without amendment in the form presented to them by Senator Vandenberg, the drafting efforts and negotiations that preceded the submission of the proposal offer invaluable insight.

On May 4, 1945, the United States delegates met and discussed the problem concerning the relationship of the security provisions of the general organization to hemispheric defense, particularly in relation to Chapter VIII, Section C, of the Dumbarton Oaks proposals dealing with regional arrangements. According to these provisions, no enforcement action could be undertaken by a regional organization without the authorization of the Security Council. The Dumbarton Oaks proposals contained no agreement on voting arrangements. That agreement, subsequently reached at Yalta, provided for the veto power. Such, it was feared, could render regional action subject to the veto of any one state. In commentary, Senator Vandenberg noted that the proposals “spelled the end of the Monroe Doctrine.” As French and Soviet proposals provided that action in Europe could be taken under bilateral treaty without any intervention or authorization by the Security Council it was, therefore, considered “extremely important to protect our concept of preclusive rights in this hemisphere.”

Delegate Stassen was noted to comment:

[i]t was essential to permit the Security Council to authorize enforcement action . . . . On the other hand, we retained the essential right of self-defense. We could act if we were attacked, but we then would have to begin immediately presenting to the Security Council what we were doing in our own defense.

Senator Vandenberg, again recalling the debates on self-defense that occurred in connection with the Kellogg-Briand Pact, asked whether there was any way to express the right to self-defense which was claimed

164. Id. at 588-97. The initial Dumbarton Oaks Proposal appears supra note 148.
165. Foreign Relations of the United States, supra note 159, at 591.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id. at 592.
as inherent, yet not *throw the door open* to individual action. In response, Mr. Stassen noted that there should be no effort to define the right of self-defense because "to define it simply raised the question as to what constitutes self-defense."\(^1\)

Excerpts of a report from the Acting United States Secretary of State to Diplomatic Representatives in the American Republics provide a brief overview of events during the San Francisco Conference through mid-May 1945, concerning the evolving regional organization conundrum. The question of the relation of regional arrangements to the international organization passed through two phases at the San Francisco Conference.

In the first phase it was raised by the Russians, with the strong support of the French and the tacit support of the British, in relation to the bilateral pacts negotiated among European states and directed against enemy states in the present war. To this [a Soviet amendment to Chapter VIII, Section C, of the Dumbarton Oaks Proposal] the United States presented a counterproposal to which the Soviets, after considerable debate, finally agreed. That counterproposal read as follows:

No enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council with the exception of measures against enemy states in this war provided for pursuant to Chapter XII, Paragraph 2, or, in regional arrangements directed against renewal of aggressive policy on the part of such states, until such time as the organization may, by consent of the governments concerned, be charged with the responsibility for preventing further aggression by a state now at war with the United Nations . . . .

An indirect result of the presentation of this four power amendment was unfortunately to open the second phase of the problem of regional arrangements at the conference by giving a considerable number of the Latin American delegations the impression that European regional arrangements were being removed from the control of the Security Council whereas the much older and better-established regional system of the Western Hemisphere would be subjected to the domination of the Council. They were particularly fearful that, in view of the veto

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171. *Foreign Relations of the United States*, *supra* note 159, at 593.
power exercised by each of the permanent members of the Council, a non-American state would be able to prevent enforcement action of any kind under the Act of Chapultepec . . . .

The United States delegation found itself faced by most difficult alternatives . . . .

Various compromises were discussed. The Australians and the French suggested that it might be possible to authorize enforcement action under regional arrangements if the Security Council in a particular case did not find itself able to agree upon effective action on its own account.172

. . . [t]he American delegation finally came to the conclusion that the best solution lay in an explicit statement in the charter of that inherent right of individual or collective self-defense . . . .173

Credit for re-framing the issue from one of exempting the Western Hemispheric regional arrangement to that of self-defense would apparently go to Mr. Stassen who had, in connection with article 2(4), previously suggested the advisability of an explicit reference to self-defense in the Charter.

Stassen's idea was presented at the 35th meeting of the United States delegates on May 10, 1945. Notes of that meeting reflect:

Mr. Stassen stated that he had another idea in connection with the regional question . . . .

[He] pointed out that he had heard over and over again that the basic objection to the present plan was the inability of a regional organization to act in the event of an arbitrary veto of one of the major powers. He said that he had come to the conclusion that it might be best to spell

172. A French amendment to the Dumbarton Oaks Proposals that received much support read: "Should the Council not succeed in reaching a decision, the members of the organization reserve to themselves the right to act as they may consider necessary in the interests of peace, right and justice." U.N.C.I.O., supra note 133, at 385. It is important to note that this approach, which would hinge a state's self-defensive actions to Security Council inaction, was ultimately rejected.

173. Foreign Relations of the United States, supra note 159, at 831-34.
out in the Charter the right of self-defense, in order to meet the recurrent criticism on this question.

Mr. Stassen then read the following memorandum:

'Memorandum to U.S. Delegates and Advisors'

On the basis of suggestions and discussions these past few days with a number of our delegates and advisors it appears to me that the following would be the best answer to our regional problems and it would at the same time meet other problems . . . .

VI-E Self-Defense

1. Nothing in this Charter shall be construed as abrogating the inherent right of self-defense against a violator of this Charter . . . . 174

By 2:30 p.m. the next afternoon, a new draft article was presented for discussion at the United States delegation meeting. 175 The draft to be added was a new paragraph 12 to Chapter VIII, Section B. It provided:

In the event of an attack by any state against any member state, such member possesses the right to take measures of self-defense. The right to take measures of self-defense against armed attack shall apply to arrangements, like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall not affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security. 176

During discussion on that draft within the United States delegation, Senator Connally asked whether the Security Council could take cognizance of a situation in which there had been an attack followed by a counterattack by other states acting in self-defense. After receiving an affirmative answer, Mr. Dulles noted that states were, however, not

174. Id. at 658-60.
175. Id. at 663-64.
176. Id. at 664, 674.
obligated to discontinue their countermeasures taken in self-defense. Rather, there was "concurrent power."  

Senator Vandenberg pointed out a bit of potential confusion with the use of and distinction between the term *attack* in the first sentence and the term *armed attack* in the second. Mr. Dulles explained it was done deliberately to maintain consistency with the usage of the Monroe Doctrine which covers two situations, *overt attack* and "political efforts from outside the continent to effect the overthrow of the political institutions of the American Republics."  

A drafting change was suggested by Mr. Pasvolsky (State Department) to insert the word *inherent* before the phrase *right to self-defense.* Additionally, the words "be reported immediately to the Security Council" and "shall not in any way" were to be added before the phrase "affect the authority and responsibility of the Security Council." According to Senator Connally, "it was clear that this addition did not mean that the attacked states should stop fighting before the necessary countermeasures were taken by the world organization."  

The British and French objected to the draft as written. The United States delegation worked out a compromise reflecting an earlier French draft that hinged unilateral action upon the lack of a decision by the Security Council. That draft read:

> should the Security Council not succeed in preventing aggression, and should aggression occur by any state against any member state, such member state possesses the inherent right to take necessary measures for self-defense. The right to take such measures for self-defense against armed attack shall also apply to understandings or arrangements like those embodied in the Act of Chapultepec, under which all members of a group of states agree to consider an attack against any one of them as an attack against all of them. The taking of such measures shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility

177. Id. at 666.

178. Id. at 677.

179. Foreign Relations of the United States, supra note 159, at 670. The word was added without any apparent debate on the connotation, intent, meaning, or implication of the insertion.

180. Id.

181. Id.

182. Id. at 683. See also supra note 172.
of the Security Council under this charter to take at any
time such action as it may deem necessary in order to
maintain or restore international peace and security.183

When this draft was presented at the third Five-Power Informal
Consultative Meeting on May 12, 1945, the British reacted very
unfavorably.184 Representatives of the United Kingdom and the United
States met to attempt to resolve differences. In the course of that effort,
Mr. Dulles noted that "the United States proposal attempted to define
aggression in terms of 'armed attack' and in this way it was hoped to avoid
the problem of trying to define aggression as such."185 In reply, Sir
Alexander Cadogen repeated his belief that "the Security Council should
have the opportunity to determine the circumstances of an armed attack
without trying to write any such close definition into the provisions."186

183. Foreign Relations of the United States, supra note 159, at 834. Nowhere in the
discussion of the United States delegation was there any particular attention paid to the use of and
any necessary distinctions to be made between the terms aggression, armed attack, or attack even
though all three were included in the draft. One intriguing question that went unanswered was
that of Mr. Bloom who inquired whether the intent was to include the threat of aggression or
merely actual aggression. Id. at 679.

184. Id. at 691-98. Mr. Eden's challenge was not on the question of what armed attack
meant, but his fear of regionalism impairing the effectiveness of an international organization.
Id. at 695-96. In expressing his intense dislike, Eden did note that no one had been able to define
aggression in 30 years. Id. at 692. The only discussion of armed attack arose when Mr. Stassen,
explaining sentence two of the draft, said "the right of collective or group action comes into
operation in the event of an armed attack." Within the context, the obvious implication is an
effort to clarify that armed force was to be available to confront armed not unarmed force.

To Eden's protestations that the proposal empowered regional organization action outside
the sway of the Security Council, Senator Connally noted:

The United States proposal was not greatly at variance with the Anglo-Soviet and the
Franco-Soviet treaties. Under these treaties, as in the case of the Act of Chapultepec,
an attack against one is treated as an attack against all parties to the agreement. In both
cases the treaties were aimed at resistance to armed aggression. The United States
draft enlarges the scope but not the principle of the exception already agreed upon with
respect to Chapter VIII, Section C, Paragraph 2.

Id. at 694.

Stassen went on to note:

[The] United States draft would not give the regional organization freedom of action.
It was not as broad as . . . Chapter VIII, Section C, Paragraph 2 [directed against the
renewal of aggression by the enemy states]. Under that formula the parties to the
treaties could take enforcement action against enemy states. Under the United States'
draft there is no right of enforcement. There is only the right of action in self-defense
against armed attack.

Foreign Relations of the United States, supra note 159, at 695.

185. Id. at 700.
186. Id.
According to Dulles, it was not merely a question of an option for Security Council action, rather it was a question of:

[T]he United States carrying forward within the world organization its traditional policy of the Monroe Doctrine as expanded and further defined in modern times; that the United States now regards an attack on any of the American Republic as an attack upon the United States and in that event, the United States wished to exercise collectively, its right to self-defense.\(^{187}\)

An alternate text was agreed upon and subsequently presented to the Five Powers at another informal consultative meeting.\(^ {188}\) It read:

nothing in this Charter impairs the inherent right of self-defense, either individual or collective, in the event that the Security Council has failed to maintain international peace and security and an armed attack against a member state has occurred. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.\(^ {189}\)

Initially, all but the British seemed generally comfortable with the proposal. Mr. Eden subsequently accepted the draft as it appears in the main text. Ambassador Gromyko indicated this draft came closer to his understanding of the principles and purposes of the organization, but additional time to study it was necessary. The Chinese Ambassador (Koo), reacted favorably, noting “out of this draft . . . we might be able to get something . . . acceptable.” Mr. Bidault, the French representative, noted “the draft said something that was self-evident. In case of aggression any state has the right of self-defense.”\(^ {190}\)

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187. Id. The discussants recalled Eden’s point that “self-defense in modern Europe was a difficult term to define, and that attempts to specify in the Charter those conditions under which such self-defensive measures could be taken would raise many difficult issues.” Id. at 703.

188. Id. at 705-07.

189. Foreign Relations of the United States, supra note 159, at 705.

190. Id. at 706.
On May 14, the matter was taken up with the chiefs of the principal Latin American delegates.\textsuperscript{191} Discussion focused on the apparent deletion of any reference to the Act of Chapultepec in the proposed drafts. None of the discussion related to the content of the inherent right nor to the intended purpose or meaning of the term \textit{armed attack}. Rather, it was to assure the Latin American representatives that the Act of Chapultepec and the regional organization would be viewed as consistent with the Charter and, therefore, not subjected to prior approval by the Security Council.\textsuperscript{192}

At the next Five Power Informal Consultative Meeting only one minor change was made to proposed paragraph 12, the deletion of the word \textit{fail} in connection with Security Council action.\textsuperscript{193} The remainder of the discussion dealt with other proposed changes concerning the operation of the regional organizations themselves.\textsuperscript{194}

At an executive session of the United States delegation held at noon on Sunday, May 20, 1945, discussion turned to a new Russian draft of paragraph 12.\textsuperscript{195} It read:

\begin{quote}
[n]othing in this Charter impairs the inherent right of self-defense, either individual or collective, if prior to undertaking the measures for the maintenance of international peace and security by the Security Council an armed attack against a member state occurs. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council.
\end{quote}

\textsuperscript{191} Id. at 835.

\textsuperscript{192} Id. at 712-18. The attendees at that First Informal Consultative Meeting With Chairman of Delegations of Certain American Republics, included the United States, Brazilian, Chilean, Cuban, Colombian, Mexican, Peruvian, and Venezuelan delegations. This was the first of three such informal consultative meetings with the Latin American diplomats held between May 14-20, 1945. Id. at 712.

Their second meeting focused entirely on the questions concerning the Act of Chapultepec, relating to a draft article under chapter VIII, section A, paragraph 3, not the provision relating to self-defense which was denominated new paragraph 12, under chapter VIII, section B. Id. at 730-36.

\textsuperscript{193} Foreign Relations of the United States, \textit{supra} note 159, at 737.

\textsuperscript{194} Id. at 737-39. Under discussion was the proposals on chapter VIII, section A, paragraph 3, and section C. Id. The Russians were apparently concerned that collective action could be taken on the basis of previous agreements. At the 44th meeting of the United States delegation on May 17, 1945, Mr. Pasvolsky noted that to quell these concerns he “gave an explanation of the Monroe Doctrine and the right of collective measures in defense.” Id. at 778, 781-82.

\textsuperscript{195} Id. at 813-20.
Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.196

Following additional discussion amongst members of the executive group, a new draft was circulated.197 It read:

[n]othing in this Charter impairs the inherent right of self-defense, either individual or collective, if an armed attack occurs against a member state before the Security Council has taken adequate measures to maintain international peace and security. Measures taken in the exercise of this right shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.198

Finally, a question was directed to the term armed attack. Delegate Hackworth expressed the view that the draft greatly qualified the right of self-defense by limiting it to the occasion of an armed attack. Mr. Stassen replied that “this was intentional . . . we did not want exercised the right of self-defense before an armed attack had occurred.”199

196. Id. at 813.
197. See Foreign Relations of the United States, supra note 159, at 824.
198. Id. at 817.
199. Id. at 818. This comment was made in an executive session of the United States delegation. Even assuming that the clear intent was to limit any armed response until after a first strike, there is no reflection that this view was shared with and by any other state delegation. Debate in the Subcommittee and Committee on this draft, which was ultimately approved and included in the Charter, reflects no discussion on this question. Such a non-event can hardly support the proposition that inclusion of the term constituted a new norm inserted with the intent to create a new regime.

It still remains questionable whether Stassen’s comment was not intended to differentiate between an attack as referenced under the Monroe Doctrine and Act of Chapultepec. This could well contemplate non-military attacks from military (armed) attacks rather than confining self-defense to an armed response to a first strike which would, effectively, repudiate the pre-existing regime under the Caroline Doctrine. To the contrary, the interchangeable reference to armed attack and aggression in the Subcommittee and Committee discussions as well as the use of aggression armée in the equally authoritative French version of the Charter, strongly evidence a focus on armed force in contradistinction to non-armed force rather than a first strike regime.

That no such new bright line test was intended is supported by the decision not to include a definition of aggression in the Charter itself and the 50 year struggle to arrive at a definition of aggression. For additional comments see STONE, supra note 72, at 72-73.
In response to another question by the Subcommittee of Five, a slightly modified draft was produced. At 6:00 p.m. that evening, it was presented at the seventh Five-Power Informal Consultative Meeting on Proposed Amendments. As then formulated, the proposal read:

[n]othing in this Charter impairs the inherent right of individual or collective self-defense if an armed attack occurs against a member state, until the Security Council has taken the measures necessary to maintain (or restore) international peace and security. Measures taken in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under this Charter to take at any time such action as it may deem necessary in order to maintain or restore international peace and security.20

Subsequent discussion by the Five Powers reflected no discussion on the term armed attack.

At 9:00 p.m. the next evening, this proposal was presented to the Ambassadors of Certain American Republics. "The Latin American Ambassadors expressed enthusiastic support for these drafts and indicated their appreciation of the efforts made by the United States delegation in reaching these agreements. No dissent from the drafts was expressed."202 As discussed above, the record of discussion and passage in the subcommittee or committee reflected no changes to this draft prior to approval.203

From this record is there evidence that a new norm was intended or had emerged? Specifically, does it appear to have been the widespread understanding and intent that inclusion of the term armed attack in the Charter was to effect a limitation or modification of the pre-existent norm of self-defense by rendering impermissible an armed response until a state had suffered a first strike?

200. Foreign Relations of the United States, supra note 159, at 818, 823-26. The reasons for the modification concern use of the words "maintain or restore international peace and security."
201. Id. at 823-24.
202. Id. at 825-26.
203. Id. at 826.
204. HANNIKAINEN, supra note 4, at 42-47.
Hardly. The record of proceedings in Subcommittee III/4/A and Committee 4 clearly reflect no evident intent to do that.\textsuperscript{205} In fact, throughout the discussion on article 51, in which armed attack is mentioned, the delegates use of the term \textit{attack}, \textit{armed attack}, and \textit{aggression} interchangeably.\textsuperscript{206}

The traditional self-defense right continues to exist outside what may be a more restrictive standard under the Charter and contemplates more than a response to a first strike appears recognized by the I.C.J. in its Nicaragua decision.\textsuperscript{207} As noted by Schachter, "in my view it is not clear that article 51 was intended to eliminate the customary law right of self-defense and should not be given the effect."\textsuperscript{208}

As there has been little apparent effective change in the states’ unilateral recourse to force, it would appear to be problematic to assume that state practice manifests widespread recognition and acceptance of such a normative change, reducing the sphere within which they can act in armed self-defense.\textsuperscript{209} The change has been more linguistic than substantive.\textsuperscript{210}

If anything, the failure of the anticipated collective machinery envisioned in the United Nations system and the evolving practice of member state authorizations has reinforced the import and necessity of individual and collective self-defense.\textsuperscript{211} As Dinstein suggests,

\begin{quote}
[a]s long as the Charter's scheme of collective security fails to function adequately, states are left to their own devices when confronted with an unlawful use of force.

Again and again, they invoke the right of (individual or
\end{quote}

\textsuperscript{205} Foreign Relations of the United States, \textit{supra} note 159, at 826. There was, however, one statement by Mr. Stassen to Mr. Bloom, another United States delegate, during an executive session, stating that it was the intent to have \textit{armed attack} restricted to an attack that had occurred. Assuming for the moment that it meant to eliminate the traditional content of self-defense, which does not require the completion of a first strike, rather than narrowing the broad sway of the Monroe Doctrine and the attack language of the Act of Chapultepec which could be understood to contemplate unarmed as well as armed attack. The absence of any record of multilateral discussion and agreement that such a restricted meaning of \textit{armed attack} should hardly support the notion of widespread understanding and acceptance that the term was intended to limit self-defense.

\textsuperscript{206} HANNIKAINEN, \textit{supra} note 4, at 44-47.

\textsuperscript{207} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 134, paras. 175-90, 193-94 (June 27). \textit{See also supra} note 58.


\textsuperscript{209} Dinstein, \textit{supra} note 21, at 310.

\textsuperscript{210} \textit{Id}.

\textsuperscript{211} \textit{Id}.
collective) self-defense in response to an armed attack. Thus, instead of being a provisional interlude pending the exercise of collective security, self-defense . . . has virtually taken the place of collective security. The very 'centre of gravity in the United Nations has swung from article 39 to article 51.'\textsuperscript{212}

Schacter, too, notes: "[w]e are bound to conclude that the collective security system of the United Nations Charter has now been largely replaced by the fragmented collective defense actions and alliances founded on article 51."\textsuperscript{213}

VII. What is the Relationship Between a State's Inherent Right of Self-Defense and Security Council Action?

What was the intended relationship between the authority of states to engage in armed self-defense and the authority of the Security Council to undertake measures in the case of such occurrences?

The Charter scheme for this interplay reflects and confirms the jus cogens status of the regime. This result obtains as the Charter clearly reflects that the exercise of this right is immune from derogation or interference by the Security Council. The focus here is on that portion of article 51 whereby a state's inherent right to self-defense continues "until the Security Council takes measures necessary to maintain international peace and security."\textsuperscript{214}

That a state's right to engage in self-defense is not dependent upon the action or inaction of the Security Council is clear from an examination of the evolution of article 51. No consideration of this question appears in the reported subcommittee or committee discussions on article 51 published in the multi-volume UNCIO report.\textsuperscript{215} However, as with the other aspects of article 51, there was discussion of this question by the Five Powers prior to the finalization of article 51 in the form in which it

\textsuperscript{212} Id.

\textsuperscript{213} Schachter, supra note 209, at 1639.

\textsuperscript{214} There is a second component to Security Council authority in article 51 which reads: Measures taken by Members in the exercise of this right of self-defence . . . shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

As discussed below, this applies concurrently with, not instead of, the exercise of self-defense.

\textsuperscript{215} See generally supra notes 42-47 and 147.
was submitted to and unanimously approved by Subcommittee III/4/A and Committee 4.\footnote{216}

A Russian draft, examined in an executive session of the United States delegation on May 20, 1945, was understood to preclude interference with a state’s exercise of self-defense "during the period elapsing between the attack and the time the Security Council takes adequate measures to restore international peace and security."\footnote{217}

A question arose amongst the Committee of five whether the phrase maintain or restore and maintain international peace and security was more appropriate, given that an attack constituted a breach of the peace.\footnote{218} During discussion, the view was expressed and agreed upon that the right of self-defense continued until such time as the Security Council took effective action.\footnote{219} That discussion, resulted in the production of the draft presented at the seventh Five-Power Informal Consultative Meeting on Proposed Amendments.\footnote{220}

Discussion on this draft by the five delegations focused on only one issue: whether to include the term restore. The British urged retention of the term to reflect that the right of self-defense should continue during the period of restoration as well as up to the point at which the Security Council was taking action to restore the peace.\footnote{221} The United States accepted the elimination of the term although it was quite willing to have it retained.\footnote{222} The Soviet delegation thought the term maintain encompassed the term restore rendering it unnecessary.\footnote{223} To this Lord Halifax replied, "you can’t maintain what isn’t there."\footnote{224} The Chinese delegation preferred retaining the term.\footnote{225} Ultimately, the British ceded their concern in the interests of not splitting the delegation, although it was

\footnote{216. As indicated above, the drafting of article 51 was effected by the Five Powers in consultation with representatives of some Latin American Republics. Once the language was agreed upon, the article which was submitted for consideration by the subcommittee and committee, was approved without amendment or modification. See generally supra notes 47-59. Consequently, this drafting history is especially illuminating and relevant.}

\footnote{217. \textit{Id.} at 816-17.}

\footnote{218. Foreign Relations of the United States, supra note 159, at 818.}

\footnote{219. \textit{Id.} at 817.}

\footnote{220. \textit{Id.} at 823-26.}

\footnote{221. \textit{Id.} at 824.}

\footnote{222. \textit{Id.}}

\footnote{223. \textit{Id.}}

\footnote{224. Foreign Relations of the United States, supra note 159, at 824.}

\footnote{225. \textit{Id.}}
more logical to retain the term. All agreed to the term *maintain.* The plan was for the text to go to Committee the next day without the term *restore.* The Soviet Government was to be informed of the three to five agreement on the utility of including the term. However, if the Soviet government did not agree on its inclusion, Lord Halifax would not press the issue. No discussion is reflected at that meeting on the term *armed attack.*

There was no discord, question or comment made on this language by the ambassadors of the American Republics or the members of the Subcommittee and Committee who reviewed it prior to its unanimous approval.

The travaux, then, confirm the place for unilateral armed self-defense within the Charter system; the right was to remain unimpaired during the restoration phase. There are no contrary or countervailing indications in the reported discussions of the subcommittee or committee that even suggested any other intent or interpretation.

The structure intended under article 51 contemplated two responses in the event of an armed conflict between states. The Security Council is empowered to take any measures against the aggressor state(s) in order to maintain or restore international peace and security. Simultaneously, the victim state retains its right to engage in armed force for self-defense. Presumably, had the United Nations available to it the intended police force, the actions of the victim state in self-defense and the United Nations in collective security would be consistent, complementary, and co-existent.

The drafting history reflects the clear de-linkage between self-defense and actions by the Security Council. To avoid the suggestion that the Security Council remained completely disempowered to act while a state was engaged in armed self-defense, the second sentence of article

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226. Id.
227. Id.
228. Id.
229. Id.
232. This obviously puts the obligation upon the Security Council to make a determination of aggression and responsibility. That it may refuse or be unable to do so, given the veto system and the political dynamic, was the impetus for the concern of the Latin American states that found eventual resolution through explicit reservation of the right to self-defense. *See supra* notes 51-52.
233. *See supra* notes 57-58, 172. concerning the French proposal and other drafts pegging unilateral action to Security Council inaction. All these were jettisoned in the drafting process.
51 was added. Clearly, the Security Council must remain fully empowered to act against an aggressor.

The second phase would begin once peace had been restored, when the focus would shift to its maintenance. At that point, there would no longer be any necessity for self-defense. Unilateral armed efforts in self-defense would not be permissible and would be subject to Security Council mandate as there would be no existent threat or use of force.

Reflecting on the relationship between a state's self-defensive rights and the legitimacy, propriety, and authority of Security Council action, Dinstein, notes:

[the] modes of action open to the Council are manifold. Inter alia, the Council can . . . insist on the cessation of the unilateral action of the defending state, supplanting it with measures of collective security . . . or . . . decide that the state engaged in a so-called self-defense is in reality the aggressor.\[^{235}\]

Eugene Rostow states the situation even more explicitly:

[w]hat the Charter prescribes . . . [is] that the aggrieved state and its friends and allies may decide for themselves when to exercise their rights of individual and collective defense until peace is restored or the Security Council, by its own affirmative vote, decides that self-defense has gone too far and has become a threat to the peace.\[^{236}\]

VIII. What are the Implications for Enforcement Actions Imposed by the Security Council?

Effectuating the Charter goal of preventing international armed conflict was not, then, to have been at the expense of a state's pre-existent

\[^{234}\] SCHOCHTER, supra note 214.

\[^{235}\] Emphasis added. DINSTEIN, supra note 21, at 207. The absence of such collective security capability would obviously eliminate the basis for such interference by the Security Council in the unilateral action by the defending state. Theoretically, the Security Council could announce a multilateral cease-fire. If enforceable and enforced to end hostilities between opposing states, this would not necessarily interfere with self-defense.

right to engage in armed self-defense. No interference with a state’s inherent right to defend itself was intended because Security Council action is not authorized until there is a peace to be maintained.

What implications does this regime have upon the authority of the Security Council to undertake binding measures against states engaged in armed self-defense? Is the Security Council empowered to undertake any measures it deems appropriate in efforts to resolve an ongoing armed conflict? Dinstein suggests:

Apparently it is not enough (under article 51) for the Security Council to adopt just any resolution, in order to divest member states of the right to continue to resort to force in self-defense against an armed attack. The only resolution that will engender that result is a legally binding decision, whereby the cessation of the (real or imagined) defensive action becomes imperative. Short of such a measure, the member state engaged in self-defense is not obligated to desist from the use of force. However, the defending state still acts at its own risk, perhaps more so than before. Continued hostilities may precipitate a decision by the Council against a self-proclaimed victim of an armed attack. 237

This author suggests that if such action interferes with a state’s inherent right of armed self-defense, it implicates jus cogens. Consequently, not even the Security Council can institute measures that prevent a state from availing itself of that right as the state sees fit. 238

The strictures of jus cogens and its effect is not limited solely to conflict between a peremptory norm and the prohibition or invalidation of a treaty. 239 Rather, as clearly expressed by the ILC in its 1966 commentary: “a rule of jus cogens is an overriding rule depriving any act

237. Dinstein, supra note 21, at 208-09. The earlier version of his book had the following as the concluding portion of that sentence: “[T]hat a breach of international peace has been committed, thus laying the ground for the introduction of enforcement action.” Id. at 196-97.

For the one qualification, imperative, Dinstein cites to C.H.M.Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 R.C.C.D.I. 451, 495-96 (1952).

238. A state’s unilateral decision to engage in self-defense remains, however, subject to review by the international community through, for example, the political or legal branches of the United Nations organization and application of the traditional requirements: necessity and proportionality.

239. Hannikainen, supra note 4, at 6.
or situation which is in conflict with it of legality." The effect of a jus cogens violation extends to acts and renders them unlawful. The outcome of a jus cogens regime, then, is the comprehensive prohibition of all acts contrary to the peremptory norm implicated.

Additionally, pertinent evidence exists in state practice, international jurisprudence and doctrine that the prohibition of derogation which is a component of the article 53 definition of jus cogens, is to be understood to prohibit any acts conflicting with a given norm.

The clear import of the preceding analysis is to suggest that binding measures imposed by the Security Council that interfere with a victim state's inherent right to engage in armed self-defense, even if such are equally imposed upon the aggressor state, violates jus cogens. Such measures are nullities which no state can be compelled to comply with, without itself engaging in an agreement and acts that violate the most widely recognized and fundamental peremptory norm for the maintenance of world order.

To the extent that this inherent right of self-defense is a peremptory norm, not even the Security Council can institute mandatory measures such as an arms embargo, imposed on all the reputed parties to an ongoing armed conflict, as such effectively undermines the ability of a


241. Id.

242. Id. The logic is clear. Without this expansive coverage, peremptory norms would be rendered meaningless as states need only avoid including problematic provisions in treaty form to remain empowered to act in derogation of jus cogens. Id. Allowing such an end run around jus cogens would undermine the fundamental policy for such norms: ensuring that certain norms, considered essential for world public order, that protect vital interests and values of the international community of states, not merely the interests of some, remain inviolate. HANNIKAINEN, supra note 4.

243. HANNIKAINEN, supra note 4, at 7. He notes that this interpretation is consistent with the presumed purpose of international jus cogens: to protect the international community from all acts contrary to peremptory norms. Id.

Because peremptory norms protect overriding interests and values of the international community, states owe peremptory obligations to that community not to individual states. One such obligation erga omnes, in the protection of which all states can be held to have a legal interest, as such is necessary for the maintenance of international peace and security, is the prohibition of the use of aggressive force between states. Barcelona Traction, supra note 58, at 32. See also HANNIKAINEN, supra note 4, at 5.

244. Even were there evidence in the Charter travaux that states intended to surrender their otherwise more extensive rights to engage in self-defense to the international organization, anticipating a global police force to confront aggression in their stead, the failure of the bargain or arrangement to have occurred would render such self-defensive entitlements necessary. STONE, supra note 72, at 96, 100-01.
victim state to engage in self-defense and, thereby, prevents a state from availing itself of that right. While any state remains free to choose not to supply arms, a mandatory prohibition violates jus cogens.

While some may suggest that this implicates a regime whereby the use of force is unrestrained and, therefore, antithetical to the intended United Nations Charter regime, that is not quite the scenario. Other legal requirements still remain relevant. For example, states remain obligated to pursue pacific settlement before using force, to support the claimed necessity for engaging in self-defense and comply with Charter obligations. Ultimately, if the determination is made that a state, claiming to be acting in self-defense is found not to be by the Security Council, it remains empowered to call such continuing actions threats to the peace or aggression and institute enforcement measures accordingly. These same options exist if a state’s reputed self-defensive measures fail to comply with the customary restrictions in that they are neither necessary or proportionate. In the final analysis, recognition of the peremptory status of a states right to engage in armed self-defense does not signal the end of the Charter system for the regulation of the interstate use of armed force. Rather, recognition of the status which self-defense was to hold from the outset, merely returns to the original framework.

That the envisioned Security Council force has not come to pass, necessitates recognition that unilateral self-defense remains essential to confront the threat to world welfare posed by armed aggressors. This social concern in preventing and confronting aggression is the final justification to confirm the jus cogens status of the traditional self-defense regime. Given the incapacity of the United Nations to field its multilateral force, the only remaining option is that of a state victim, and others responding to its call, to confront that armed aggression by armed force.

The use of force regime proposed herein, which includes the right to engage in armed self-defense, protects an overriding interest or value in the international community of states. That community would be seriously jeopardized by derogation therefrom. Rather than producing any negative evidence, this regime remains, however regrettable, affirmatively

245. While it must be noted that pacific measures can not be imposed in derogation of a state’s jus cogens entitlement to use self-defense, whether or not recourse has been had thereto may be highly relevant to a determination that such self-defensive measures were not necessary.

246. While a sanction, such as an arms embargo might be imposed at this juncture, that does not legitimize doing so earlier, while a victim state is engaged in self-defense. As demonstrated by the Nicaragua litigation, the I.C.J. may have a place in this regulatory process as well.
necessary. Consequently, the peremptory status of the norm may be presumed.\textsuperscript{247}

\textsuperscript{247} This is the fifth criteria suggested by Hannikainen. HANNIKAINEN, supra note 4, at 12-13.
CHALLENGES FACING INTER-GOVERNMENTAL POLITICAL NEGOTIATIONS WHICH ARE COMMON TO INTERNATIONAL BUSINESS NEGOTIATORS: AN ANALYSIS OF SHARED CONCERNS

Dr. Yassin El-Ayouty *

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I. TWO PROVERBS AND INTRODUCTION

The thesis of this article is that the commonality of challenges facing both inter-governmental negotiators and international business negotiators is more predominant than the differences in these two situations. The importance of recognition of this commonality is due to the prevalent interchangeability between diplomats and actors in the business world, the closer identification between international politics and international economics, and the need for formulating courses in negotiation from which both the diplomat and the business person would draw nearly equal benefits.

In the course of the research, two proverbs were discovered which are used here as a prologue to the body of this article. The wisdom conveyed by these proverbs, which underlie the entire purpose of negotiation, is of equal benefit to both the governmental negotiator and the private intercontinental transactional negotiator. The first of the two proverbs is a Kikuyu (African) adage which states: "To be hard does not mean to be hard as a stone, and to be soft does not mean to be soft as

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water.'"1 The other is a common Chinese proverb which is highly applicable to the two different contexts of negotiation, however, it is non-attributable. This proverb states: From listening comes wisdom, and from speaking, repentance.

Before proceeding to the presentation and analysis of the shared concerns of both the inter-governmental negotiator and the transnational business negotiator, reference should be made to the main differences between the contexts within which these two actors operate. For case of reference, this article uses the shorthand of diplomat (D) and business person (B) within the arena of international negotiations. One of the essential differences between D and B is that the former, as a representative of sovereignty, has a pressure tool which is unavailable to B as a negotiator.2 That tool is the "mobilization of domestic political support."3 However, B is endowed with an advantage that D does not have in most negotiating situations, B can proceed with negotiations without having to let the public in on it. B's secrecy cannot, under most circumstances, be called into question, while D, especially in democratic societies, "cannot develop a negotiating position on a major issue without letting the public in on some of the internal controversies."4 Nonetheless, an advantage accrues to D, which generally is either irrelevant or unavailable to B, the availability of international force and institutions for settling of controversies. The United States, for example, can resort to the United Nations Security Council as a means of putting pressure on the Haitian military government; but a United States business person cannot use this instrumentality in negotiations with a Haitian counterpart.

The pendulum of advantages swings again in the direction of B over D in a very important respect in the analysis of differences between these two international actors. When B enters in negotiation with his/her counterpart, the intent is certainly to reach a mutually-agreed settlement if at all possible. This certainty of intent, however, is at times lacking in the case of D. Sometimes a government "enters negotiations simply to deflect domestic opposition to its militant policy or to forestall domestic pressures to make a unilateral conciliatory move."5 President Nixon's first trip to

3. Id.
4. Id. at 226.
China falls within this category. In addition, D is sometimes faced with inherently unsolvable disputes, such as those “involving ethnic issues, minorities, [and] ideology. . . .”6 In spite of these differences, the challenges which are common to D and B as negotiators predominate.

II. NATIONAL CHARACTERISTICS AND NEGOTIATION STYLES

The above two elements are intertwined and represent the core of the commonality of challenges facing both D and B within the international negotiators context. Both D and B, in negotiating with their American or Soviet counterparts, have to be aware of a major difference in negotiating styles which is attributable to the difference in national characteristics. Whereas the American negotiator looks upon negotiation as a hurdle to be overcome, the Soviet negotiator looks upon it as a power play. President Carter expressed this crucial difference aptly when he said:

[t]o Americans, a negotiation is most often looked upon as an obstacle to be overcome in order to reach a desired goal. For the Soviets . . . the same negotiation was almost an end in itself X a ritual that demonstrated to the world that they were equal in status to the United States.7

The Soviet’s perception of negotiation as primarily a power tool, not a means to conflict resolution on the basis of shared interests, is articulated as “preoccupation with authority, avoidance of risk, [and an] imperative need to assert control.”8

Thus it is of primary importance for both D and B to bear the symbiosis between national characteristics and negotiation styles in mind. In fact, when we look further into the scope of this common challenge facing both D and B equally, we discern an interesting variance. National negotiating styles vary for the same national group depending on whom is facing that national group in negotiations. Taking Egypt as an example, former United States Ambassador to Israel, Samuel Lewis observed the following: “Egyptian negotiation behavior varies from region to region . . . .”9

The same relationship between nationality and negotiation style confronts B in a more direct way than in the case of D. While treaties and

9. Id.
other international inter-state instruments vary between general and detailed, depending on the issues and circumstances, business agreements drafted by Americans give the impression of being over-negotiated. In drafting contracts, which an American B is likely to propose to a foreign B, the drafter “often attempt[s] to deal with every possible contingency.” This is in contrast to the practice of most foreign Bs who “generally tend to prefer more broadly framed agreements and to deal with the details of implementation as they arise.”

Returning to the broad characteristic of nationality as an indicator of negotiation style, irrespective of whether the negotiators are Ds or Bs, we find that the French tend to be “prone to elaborate historical-philosophical themes,” while the Germans, like the Americans, place “greater emphasis on legal aspects.” The relationship between nationality and style is quite understandable in terms of the impact of culture on negotiation as a means of conflict resolution. Culture and national background influences differing negotiating styles and should therefore rank high among the common challenges facing both D and B as they consider their best alternative to negotiated agreements and how to prepare their pre-negotiation steps.

III. THE PRE-NEGOTIATION STAGE

Another important challenge which is common to both D and B as negotiators is the preparation for the pre-negotiation stage. The importance of this stage, described sometimes as “the diagnostic phase” stems from the fact that it is largely subjective. Here the parties, each for themselves, determine whether the issue is negotiable. Therefore, “if the opponent refuses even to consider that a mutually agreeable solution may be possible, of course it is not possible.” The Asian-Pacific Economic Cooperation (APEC) forum held in Seattle, Washington, in late November 1993 offers an example. At that summit, it was clear to President Clinton, before he held his meeting with the Chinese Prime Minister, that the issue of China’s respect for human rights within its borders was non-

10. GRIFFIN & DAGGATT, supra note 1, at 109.
11. Id.
12. IKLE, supra note 2, at 225.
14. Id. at 42.
15. Id.
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negotiable. This was a pre-negotiation determination. Though it is presumed that the President raised it, the Prime Minister skirted the issue by talking about the virtues of “non-interference in the internal affairs of other [states].”

Thus it could be seen from the APEC example that among the benefits of the pre-negotiation stage to both D and B are: a) to hear “the other party’s point of view[,]” and b) to signal a change in the relationship between the two parties which may bring about “a reassessment of alternatives and add negotiation to the strategies of conflict management that are seriously considered.” However, there is an additional advantage to the pre-negotiation stage for both D and B, namely, crisis avoidance. In this regard, the pre-negotiation stage has a tendency to take the opposing parties to the edge of the precipice which generally triggers an inclination in favor of conflict resolution. The phase of Egyptian-Israeli relationship which preceded Camp David negotiations in 1978 is instructive. The United States felt that “the status quo was inherently dangerous; the Egyptian authorities perceived the gathering of a storm if progress was not made before the expiration of the second disengagement agreement;” and the leaders of Israel “faced an intensifying domestic crisis.”

The perception on the part of D or B of what Professor Zartman describes as “the conjunction of threat and opportunity” not only enhances the attractiveness of the negotiation option, it also helps the parties in the collection of relevant information about their adversary’s position, enables leaders to prepare for what Harold Saunders calls “arranging the negotiation,” and sets or delimits “the agenda for negotiation.”

In combining these benefits of the pre-negotiation phase, benefits which are common to D and B as international negotiators, (especially the benefit of early information gathering), another advantage emerges in lowering what Professor Scardilli aptly describes as a “premium on

17. Id.
18. ZARTMAN & BERMAN, supra note 13, at 85.
20. Id. at 243.
21. Id. at 245.
22. Id. at 248.
23. Id. at 254.
In this connection, the pre-negotiation phase which constitutes a common challenge to both $D$ and $B$, contributes to the betterment of fact-finding and lowers the cost of "our confrontational adversary system of trials." Once negotiations are entered into, other challenges emerge of a practical nature which confront either the intergovernmental diplomatic negotiator ($D$) or the international business negotiator ($B$) and are presented in the balance of this article.

IV. THE CULTURAL GAP AND ITS IMPACT

By their adoption of the North American Free Trade Agreement (NAFTA) in November 1993, the United States House of Representatives, and later the Senate, seems to have given a green light to the Executive Branch to globally pursue the liberalization of trade through the lowering of tariff barriers. Hence it was not surprising that the momentum seemed to propel United States negotiators, including President Clinton, at the APEC forum (discussed in Section III above) as well as at the General Agreement on Trade and Tariffs (GATT) negotiations. The global character of these negotiations brings forth the challenge of the cultural gap which confronts both $D$ and $B$ negotiators. This cultural gap, although an aspect of national characteristics discussed in Section II above, is distinct from those characteristics as it has to do with the creation of a chasm between two multinational sets of negotiators.

In taking five nationalities as examples of producing cultural gaps in international business negotiations $X$ equally applicable to diplomatic negotiators $X$ the case of the commonality of the challenge of the cultural gap between negotiators is made. Examples of these are the Chinese, the Soviets, the Japanese, the French, and the Egyptians. In this sense, culture has to be understood in its larger framework which includes: civilization, history, values, political systems, and the national perception of the nation's place in the world. Keeping this in mind, the Chinese, as negotiators "tend to stress at the outset their commitments to abstract principles and will make concessions at the eleventh hour after they have fully assessed the limits of their interlocutor's flexibility." Unlike the Chinese, the Soviet negotiator makes concessions slice by slice much like salami-slicing tactics. A quid pro quo is expected for each concession.

25. Id.
27. Id.
The Japanese look upon negotiations as "a form of social conflict" where the personal relationship with the opposite negotiator is emphasized. These relationships are "of value to the Japanese negotiator for informal, frank discussions where social conflict is minimal and progress can be made on a pragmatic basis."²⁸

In contrast to the Chinese, Soviet, and Japanese negotiators, the French and the Egyptians are described as suspicious of international negotiations, but for different reasons. This is, in part, reflected in French negotiators reliance on "highly rational abstract logic and general principles,"²⁹ and Egyptian negotiators historic fear of "collusion and intervention of external powers" through the process of negotiation.³⁰

Exemplifying the role of the cultural gap in international negotiations is the attitude adopted by a Japanese firm in negotiating a joint venture with a United States firm.³¹ Progress was being made until the arbitration clause was reached and resulted in an impasse.³² The Japanese, for reasons of national pride and convenience, wanted the arbitration to take place in Japan; the United States firm wanted it to be located outside Japan.³³ The stalemate persisted until the Japanese asked their American counterparts whether they had ever participated in arbitration.³⁴ Upon receiving the American response in the negative, the Japanese sensed that neither side would ever resort to it, and quickly proposed that arbitration would take place in Hawaii.³⁵

Now with NAFTA promising to bring American and Mexican business negotiators together more frequently in the future, it is worth examining the cultural gap in such business situations which are akin to those faced by diplomats. In their seminal article on inter-cultural communication, Hall and Whyte³⁶ outline a number of cultural variables, among which the following may be noted as important in international negotiations:

a) punctuality is interpreted differently;

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²⁸. Id. at vi-viii.
²⁹. Id. at vii-viii.
³⁰. Id.
³¹. GRIFFIN & DAGGATT, supra note 1, at 18.
³². Id.
³³. Id.
³⁴. Id.
³⁵. Id. at 19.
b) Latin Americans “don’t usually schedule appointments to the exclusion of other appointments;”\(^{37}\)

c) whereas in the United States, discussion “is a means to an end,”\(^{38}\) in Latin America, “discussion is a part of the spice of life;”\(^{39}\) and

d) the phrase *come any time* to a Latin American really means what it says; to an American, it is “just an expression of friendliness. You are not really expected to show up unless your host proposes a specific time.”\(^{40}\)

These are only but a few of the many examples which highlight the impact of different national customs on the outcome of negotiations. With this in view, one could expect discrepancies between a negotiations matrix drawn up by a non-American \(D\) or \(B\) and one outlined by an American \(D\) or \(B\) with regards to the shared, independent, or conflicting needs of the respective parties on the famous scale of “essential, important and desirable.”\(^{41}\) Nonetheless, the cultural gap still faces both \(D\) and \(B\), from a common culture, in their negotiations with their \(D\) and \(B\) counterparts from a different cultural environment.

V. THE ROLE OF LANGUAGE

In spite of the presumed growth of what may be termed a *universal language of negotiation*, the direct role of language in influencing the outcome of negotiations should be recognized as a challenge to the international negotiator, regardless of whether he/she is a \(D\) or a \(B\). Quoting Lorand Szalay, Raymond Cohen reiterates that:

the idea itself does not really travel, only the code, the words, [and] the patterns of sound or print [travel]. The meaning that a person attaches to the words received will come from his mind. His interpretation is determined by

\(^{37}\) *Id.*  
\(^{38}\) *Id.*  
\(^{39}\) *Id.*  
\(^{40}\) *Id.*  
\(^{41}\) Videotape: Primer on Negotiation (Barbara Britzke and Joseph D. Harbaugh 1988) (on file with the law library at Nova Southeastern University, Shepard Broad Law Center).
his own frame of reference, his ideas, interests, past experiences, etc. . . . .”\(^\text{42}\)

On that basis, the international negotiator, who is the product of a culture different from that of his counterpart, is faced not only with a cultural gap but with a linguistic gap which reflects an “inter-cultural dissonance.”\(^\text{43}\) In that context, the role of language in negotiation is not only the transmission of information from one negotiator to another, but it is also “a social instrument — a device for preserving and promoting social interests.”\(^\text{44}\)

The inter-cultural dissonance represented by inter-cultural and cross-linguistic communication is further magnified by the needs of \(D\) and \(B\) negotiators to rely on interpretation. Experience in multi-lingual organizations, such as the United Nations, where negotiations involve a large number of parties hearing one another in one of six official languages (Arabic, Chinese, English, French, Russian, and Spanish) demonstrate the magnitude of this problem. The same dissonance may apply even when the negotiator is using, not his/her, but a second language which is the mother tongue of his/her counterpart. The import of this is that “negotiators not only have to question whether their meaning will be transmitted through interpretation and translation, but also whether it will be communicated when the respondent is speaking the negotiator’s own language as a second language.”\(^\text{45}\)

Both \(D\) and \(B\) face the linguistic challenge from another perspective: “[w]hat will happen in interpretation if an idea or concept does not exist in the other culture?”\(^\text{46}\) When Japan was exposed to the West, there was no word for democracy. The Anglo-Saxon notion of fair play has no precise equivalent in either French or Spanish. Obviously in these circumstances, the interpreters “supply their own assumed meaning[s],”\(^\text{47}\) despite the possible damage which may be inflicted on communications. In fact, it is reported that Edmund Glenn, former chief of the Language Services Division at the United States Department of

\(^{42}\) Cohen, supra note 8, at 19-20.

\(^{43}\) Id. at 19.

\(^{44}\) Id.


\(^{46}\) Id.

\(^{47}\) Id. at 63.
State, insists that "interpreters often do have difficulty in transmitting the logical thrust of key statements."48

In certain situations, reliance by the negotiators on interpreters may blunt the edge of confrontations. But by the same token, it could produce a very different and negotiable result. The interpretation dilemma, which some negotiators try to mitigate by speaking slowly, providing a text to the interpreter, writing out the figures for the other party to see, and/or by briefing the interpreter in advance of the subject of negotiation, is compounded when the speaker uses idioms that have no equivalents in the other language. This may have given rise to the statement by James Evans that "[t]o work through an interpreter is like hacking one's way through a forest with a feather."49 On the humorous side of this linguistic dilemma, it is reported that the phrase 'out of sight, out of mind' was once translated into Russian and back to English as 'invisible maniac.'50 Even Presidents are not immune to interpretation mishaps. When President Carter visited Poland in 1977, the President's phrase "desires for the future" was translated as his "lusts for the future."51

VI. INTERESTS, NOT POSITIONS, AS FOCUS

As negotiators, successful diplomats, like successful businessmen and businesswomen, are constantly challenged by the notion that "behind opposed positions lie shared and compatible interests."52 The intergovernmental, as well as the transnational business negotiators, need to find shared interests with their counterparts. In order for them to succeed they have to explain, not coerce or argue. Both D and B have to be attentive to the adage pronounced by Oliver Wendell Holmes: "Deep-seated preferences cannot be argued about — you cannot argue a man into liking a glass of beer."53 D and B's goal identical: "to create a solution that is acceptable from two different perspectives by reconciling interests."54 This is the reason why successful negotiators, in their attempt to increase the flow of information from the other side and to "keep the relationship mutually beneficial,"55 use questions "beginning with 'what'
rather than 'why.''' Such well-formulated and conciliatory questions, not only increase the informational flow, they help uncover shared interests.

In an article in *Forbes*, the game theory, as applied to successful business negotiations, was revisited. Under the heading *How To Succeed In Business by Being Nice To Your Competitors*, the author cites several examples of big United States businesses that discovered that self-interest does not lie in killing the competition. The strategy used by Philip Morris in its price war against RJR Nabisco was to "inflict pain on RJR, not to destroy RJR, but to persuade it to stop cutting prices on discount cigarettes." This approach is analyzed in the article under the heading of *Evolutionary Economics*. The article expounds on the evolution of this "altruistic behavior," which "can be used to craft optional business strategies," using recent examples of Wal-Mart, Japanese car manufacturers' use of voluntary export restraints, IBM, Merck & Co., United States West, and Time Warner. The article's main conclusion is that "in cooperation lies survival." The article justifies this conclusion on the basis of a novel merger of biology and economics. The author states: "Both disciplines are concluding that nature is not entirely tooth and claw and that the ability to cooperate may be one of mankind's tools for evolutionary survival X and business survival, too."

From the above, it becomes clear that the tenet of modern negotiation, that interests, not positions, should be the central focus, has much in common with *Evolutionary Economics*. Here it should be recognized that B has a better advantage over D who may be under strict instructions from his diplomatic superiors that sovereignty, for example, cannot be subject to negotiation. One may safely presume that the Syrian negotiators in their current dialogue with the Israelis in Washington, D.C., and elsewhere, regarding the Israeli-occupied Golan Heights, could not bargain away Syria's claimed sovereignty over that territory. B negotiator, in most instances, would not face this dilemma of non-negotiable issues as would D in certain circumstances.

56. *Id.* at 120.
58 *Id.*
59. *Id.* at 112.
60. *Id.* at 111.
61. *Id.*
62. *Id.* at 114.
64. *Id.* at 110.
However, both $D$ and $B$ share in their common concern for establishing and maintaining good personal relations with the other interlocutors. Fostering good personal relations in the course of negotiations may be accomplished through a variety of means: arguing for interests not positions; debating some aspects of positions, not personalities; “setting the opening negotiating position to support a mutually acceptable agreement and concessions at an appropriate rate[;]”66 “putting aside difficult items for later trading[;]”66 and, promoting agreement through the creation of “timely deadlines for completing negotiations.”67

Regardless of the tactics used by either $D$ or $B$, the over-arching strategy for successful international negotiations is to focus on shared interests with the other party.

VII. CONCLUDING COMMENTS

The thesis of this article is that in spite of obvious differences between the position of an inter-governmental political or diplomatic negotiator and that of a transnational business negotiator, there is a great deal of commonality among the challenges facing both of them. The interchangeability of personnel between the worlds of international business and international diplomacy, and the accelerating identification of international business with the political affairs of states, heighten the need for recognition of these common challenges. Since the basic skills of the negotiator, whether a $D$ or a $B$, are primarily the same, such skills and strategies will have to be employed in the context of national characteristics dictating negotiation styles.

This article’s selection of a few, though important, common challenges is meant to support the theme of the existence of a commonality of challenges. It goes without saying that a resourceful $D$ or a resourceful $B$ would quickly recognize that the options available within the diplomatic context may vary from those present in the context of international business. As an example, the options available to Americans negotiating on behalf of GM for a joint venture with Toyota Japanese negotiators may perceive a broader spectrum of options available to them, as compared to the options available to Russian diplomats negotiating with the Japanese foreign ministry for an aid package for Moscow. Nonetheless “bargaining

65. KRIESBERG, supra note 5, at 124.
66. Id.
67. Id.
success is contingent on resourcefulness” in either of these two scenarios. From the pre-negotiation stage to the eventual successful conclusion of negotiations, transcending the cultural gap and the linguistic interpretation gaps, the most critical question which either D or B should keep in mind is: “What can help craft cooperative solutions that create a continuing incentive to maintain and enhance the relationship.”

68. CHARLES LOCKHART, BARGAINING IN INTERNATIONAL CONFLICTS 133 (1979).

69. GRIFFIN & DAGGATT, supra note 1, at 21.
CONCERNS OVER THE RULE OF LAW AND THE COURT OF FINAL APPEAL IN HONG KONG

Jared Leung *

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I. INTRODUCTION

On Wednesday, July 12, 1995, for the first time in the 150-year colonial history of Hong Kong, the Hong Kong Legislative Council (Legco) voted on a motion of no-confidence against its British-appointed Governor, Chris Patten. "If passed in a conventional parliament, such a motion would bring down the government." However, the no-confidence motion had no binding effect on the Governor. Nonetheless, the Democratic Party, chaired by Martin Lee made the motion to indicate its stern disapproval over the agreement of the Court of Final Appeal (CFA) reached between Britain and the People's Republic of China (China) in June 1995. The motion was defeated by a two-to-one margin.

Formal negotiations between Britain and China over the reversion of Hong Kong in 1997 from Britain to China began in the early 1980s. Criticism against the motivations, procedures, and outcomes of these negotiations has been abundant, but none has amounted to a formal objection as severe as a vote of no-confidence on the Hong Kong Governor himself. What is in the CFA agreement that triggered such a hostile response? Lee called the agreement a "landmark sellout, a landmark betrayal." Was it? Or did the agreement provide sufficient safeguards to ensure an independent judicial system and the continuation of rule of law in Hong Kong after 1997, as claimed by Barrie Wiggham, the Commissioner of Hong Kong Economic and Trade Affairs?

The first part of this paper gives a brief background of Hong Kong as a British colony and its judicial system. Next, the sources and the events leading up to the CFA agreement is examined. Following this, is a description of the CFA agreement and three major controversial issues regarding the CFA. Next, a prediction about the independence and operation of the CFA is presented and finally, a summary is presented of the CFA issue in Hong Kong.

2. Id.
4. Id.
5. Id.
II. BRIEF BACKGROUND OF HONG KONG AS A BRITISH COLONY AND ITS JUDICIAL SYSTEM

Hong Kong can be divided into three areas geographically: Hong Kong Island, the Kowloon Peninsula and the Stonecutters Island, and the New Territories which border mainland China. These three areas became British colonies at different times. When Britain defeated China at the end of the Opium War in 1842, China ceded Hong Kong Island in perpetuity to Britain in the Treaty of Nanking. Eighteen years later in 1860, more conflicts between Britain and China led to the signing of the Convention of Pekin in which the Kowloon Peninsula and the Stonecutters Island were ceded to Britain, again in perpetuity. Nearly four decades later, based on the Convention of 1898, China agreed to lease the New Territories to Britain for a period of ninety-nine years, commencing on July 1, 1898. Therefore, the reversion of Hong Kong to China in 1997 technically concerns only the New Territories. However, the three areas, "collectively referred to as 'Hong Kong,'" have since 1898 functioned "so interdependently as one economic unit that any partition would threaten the viability of the colony itself. Therefore, the transfer must include the entire territory." Consequently, Hong Kong is used in this paper to refer to all three areas.

After colonizing Hong Kong in 1842, Britain simply imported the bulk of the common law of England into Hong Kong. Hong Kong received its constitution, including primarily the Letters Patent and the


9. Id.

10. Id.

11. China basically considers all the three treaties mentioned above invalid because they are all "unequal treaties" signed when China was helpless against western aggression. Therefore, it can be said that China's position was that there was no need to terminate the treaties because they were never in effect. The negotiation with Britain was political rather than legal. Lawrence A. Castle, Comment, The Reversion of Hong Kong to China: Legal and Practical Questions, 21 WILLAMETTE L. REV. 327, 328-33 (1985).


Royal Instructions, from the British Government. Further, Hong Kong obtained a ready-made judicial system with all cases going to the Privy Council in London for final appeals. However, the Privy Council is a court of limited jurisdiction over Hong Kong, and it only hears cases from Hong Kong which raise new points of law. The Hong Kong Supreme Court retains final jurisdiction over all other cases. Government figures show that in the last three years the Privy Council spent seven to nine weeks each year hearing cases from Hong Kong.

III. THE COURT OF FINAL APPEAL

A. Sources

When China resumes sovereignty over Hong Kong on July 1, 1997, Hong Kong will become a Special Administrative Region of the People's Republic of China (HKSAR) pursuant to article 31 of the Constitution of China. For obvious reasons, the Privy Council will no longer be able to serve as the place of final adjudication for Hong Kong cases. Another body is needed to take this role.

Britain and China issued the Joint Declaration, the first formal agreement between Britain and China concerning the future of Hong Kong, in 1984. The Joint Declaration states that the HKSAR will be vested with "executive, legislative and independent judicial power, including that of final adjudication." Further, the Joint Declaration states that "[t]he power of final judgment of the [HKSAR] shall be vested in the

16. Id.; Frankie Fook-Lun Leung, Hong Kong's Transition: Some Noticeable Changes, 12 LOY. L.A. INT'L & COMP. L.J. 51, 53 (1989). The courts in the colonial era in America were also "set up by the same British colonial authorities who set up the Hong Kong Supreme Court, and colonies' final appeals went to the same Privy Council in London from the beginning in 1683 until the American Revolution in 1776." Paul Kerson, Grounds for Appeal in China, S. CHINA MORNING POST, Apr. 25, 1995, at 19.
18. Id.
21. Id.
23. Id. at ¶ 3(3); see id. at annex 1, § III.
court of final appeal in the [HKSAR]. . . .” 24 Hence, a Court of Final Appeal is to be established to replace the Privy Council.

The Joint Declaration promised that the National People’s Congress of the People’s Republic of China (NPC) would enact a Basic Law for the HKSAR. 25 The Basic Law intends to reflect the policies adopted by the Joint Declaration 26 and serve as a miniconstitution for the HKSAR. 27 Accordingly, the Basic Law, which was adopted by the Seventh NPC at its third session on April 4, 1990, also provided for the establishment of the CFA. 28 Similarly, the CFA is to be vested with the “power of final adjudication.” 29

B. Events Leading to the CFA Agreement

A Sino-British Joint Liaison Group (Joint Liaison Group) was set up pursuant to and to implement the Joint Declaration. 30 The Joint Liaison Group presented a proposal on the CFA to China for the first time in 1988. 31 Before an agreement was reached, the demonstration of Chinese students in Tinnamen Square took place which climaxed with the massacre on June 4, 1989. 32 The massacre substantially increased the mistrust of the people in Hong Kong towards China. 33 This feeling was, however, mutual with the Chinese Government. Alarmed by Hong Kong’s open support of the student demonstration in Tinnamen Square and severe criticism against the June 4th massacre and the defection of China’s own people to Hong Kong following the massacre, China became “apprehensive about Hong Kong becoming a subversive base against China . . . .” 34 Since the massacre in 1989, the “Chinese population of Hong Kong have been apathetic toward the Draft Basic Law, or anything proposed by the Beijing

24. Id. at annex I, § III, & 4.
25. Id. at ¶ 3(12) and annex I, § I, ¶ 1.
26. Id.
27. Abrahamson, supra note 14, at 1226.
29. Id. at § 4, art. 82.
30. Joint Declaration, supra note 20, at annex III.
32. HSIN-ChI KUAN, HONG KONG AFTER THE BASIC LAW 16 (1990).
33. Id.
34. Id.
government." This attitude certainly did not facilitate any cooperation between Britain, China, and Hong Kong. In fact, in October 1989 the NPC expelled two Hong Kong residents, Lee and Szeto Wah, from the Drafting Committee for the Basic Law because of their leading roles in supporting the democratic movement in China. The mistrustful atmosphere continued, and it is easy to understand that the Legco would flatly reject the first draft of the CFA Bill in 1991. The rejection was grounded mainly on the Bill's allowance for only one foreign judge on the five-member CFA bench.

Legco's rejection of the first CFA agreement in 1991 brought an abrupt end to any further negotiation on the CFA issue. Indeed, in 1992 the focus of Britain and China was on the electoral reform package introduced by Governor Patten, which broadened Hong Kong's democratic system by extending the franchise of functional constituencies to 2.7 million. China responded to the legislative reform violently, accusing Patten of breaching the Joint Declaration and the Basic Law and threatening to disband the legislature elected under the reform. Talks broke down between Britain and China on Hong Kong's electoral reform in July 1993, which was followed by NPC's passing a resolution to disband the three tiers of government after the handover in 1994. Despite China's threat, Hong Kong's electoral reform became law the same year. In other words, the relationship between China and Britain had been antagonistic since 1992. As a result, virtually nothing took place on the CFA negotiation from 1991 through 1994.

36. Id.
42. *Chronology, supra* note 40.
43. Id.
The CFA agreement was so crucial to Hong Kong’s future that Britain could no longer merely react to China’s threat. The CFA had to be in place. Therefore, in April 1995 Britain forced China to reopen the negotiation on the CFA by threatening to act unilaterally in the formation of the CFA. The negotiation finished on May 30th, and the current CFA agreement was reached in June 1995. Although the CFA agreement was heavily criticized, Legco passed it thirty-eight to seventeen, with five abstentions.

C. The Agreement

The CFA Bill is long and complex, but the agreement reached in June 1995 on the CFA consisted of only five paragraphs, which aimed to clarify ambiguous or undecided points from the past. The most important aspects of the agreement are found in paragraph 3: The British side agrees to amend the Court of Final Appeal Bill to include the formulation of acts of state in article 19 of the Basic Law and to provide that the Court of Final Appeal Ordinance shall not come into operation before June 30, 1997. In other words, the CFA will not operate until China resumes its sovereignty of Hong Kong on July 1, 1997. Further, the CFA will be precluded from hearing cases concerning acts of state. The full text of the June agreement can be found in Appendix A. Although not contained in the June agreement, China’s insistence on allowing only one foreign judge on the CFA was also incorporated into the CFA Bill. In conjunction with this agreement, Governor Patten presented it to Legco for consideration.
The transcript of his official statement with respect to the CFA Bill and agreement is available in Appendix B.4

IV. CONCERNS OVER THE CFA AGREEMENT

A. The Significance of the CFA in Hong Kong's Future

The Basic Law guarantees that HKSAR will "exercise a high degree of autonomy . . . and independent judicial power."55 The legal system of HKSAR will, to a large extent, decide the degree of autonomy HKSAR will enjoy as a part of China.56 The CFA is the center of the legal system in Hong Kong. Whether Hong Kong will truly be vested with the final adjudication power as stated in the Basic Law will depend on the independence and jurisdiction of the CFA.57 In addition, the independence of the CFA is paramount to the continuation of the rule of law in HKSAR.58 Hong Kong's success has been based on its fair, efficient, and independent legal system under which businesses flourish.59 Business has come to Hong Kong because of its legal system and the rule of law.60 Indeed, Senator Craig Thomas warned that if the rule of law were to give way to "family or party connections," businesses will become "skittish and pull out."61 If Hong Kong were to remain as a world's leading financial center, the rule of law must continue to exist because:

business people must be able to rely on the courts' upholding the sanctity of contracts and on the impartial enforcement of commercial laws and regulations. In this connection, the establishment of a court of final appeal

54. Governor Patten's statement contains succinct accounts of the difficulties on reaching the CFA agreement and the official views and explanatory notes with respect to the CFA agreement.


56. Jackson, supra note 8, at 381.


59. Johannes Chan, A Bill of Rights for Hong Kong, in CIVIL LIBERTIES IN HONG KONG 72, 87 (Raymond Wacks ed., 1988); see Louis Kraar, The Death of Hong Kong, FORTUNE, June 26, 1995, at 118.

60. Editorial, Courting Disaster: Britain and China Agree on Court of Not-Quite-Final Appeal, FAR E. ECON. REV., June 22, 1995, at 5.


before 1997 would be a crucial step in maintaining confidence in Hong Kong's ability to operate an effective legal system after the transition and to avoid damaging legal gaps.\

Even the public at large is concerned with the continuation of the rule of law. People . . . must feel secure about the protection of their basic rights. People who look over their shoulder for fear of arbitrary arrest or detention, or who fear they cannot get a fair trial in the event they are charged with an offense, are not the kind of people who built Hong Kong.\

Therefore, unlike other issues relating to the reversion of Hong Kong in 1997, the CFA issue directly affects the future existence of the rule of law in Hong Kong, which is determinative of Hong Kong's continued prosperity after 1997.

Since so much is at stake on the CFA, its formation is closely scrutinized by anyone who has interests in Hong Kong's future. The concerns over the CFA agreement are primarily in three areas:
1) the exclusion of the CFA's jurisdiction over acts of state and the ambiguity of what constitutes acts of state;
2) the scheduled date of the opening of the CFA on July 1, 1997, the date on which China assumes sovereignty over Hong Kong;
3) the permission of only one foreign judge sitting on the five-member CFA bench.

B. Acts of State

The June agreement on the CFA explicitly precludes the CFA from hearing cases concerning acts of state by incorporating article 19 of the Basic Law. Article 19 consists of three arguably inconsistent paragraphs. The first paragraph grants HKSAR the power of final

63. Id.
64. Id.
65. Fitzsimons, supra note 38.
66. See infra, Appendix A.
67. The full text of art. 19 of the BASIC LAW is:
The [HKSAR] shall be vested with independent judicial power, including that of final adjudication.
The courts of the [HKSAR] shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.
The courts of the [HKSAR] shall have no jurisdiction over acts of state such as defense and foreign affairs. The courts of the Region shall obtain a certificate from the Chief
adjudication. The second paragraph authorizes HKSAR to hear "all cases in the Region." However, HKSAR courts, including the CFA, cannot hear cases for which they have not had jurisdiction under the British rule. Conceptually, such limitation could take away the HKSAR's final adjudication power after 1997 because the Privy Council in London possesses the power of final adjudication for Hong Kong cases. Further, all cases does not really mean all cases. Paragraph 3 explains that HKSAR "shall have no jurisdiction over acts of state such as defense and foreign affairs." 69

The Joint Declaration contains a similar phrase: "[the [HKSAR] will enjoy a high degree of autonomy except in foreign and defense affairs which are the responsibilities of the Central People's Government." However, the Joint Declaration does not qualify the meaning of final adjudication when mentioning the CFA in the HKSAR. In this respect, the Basic Law is not true to the spirit manifested in the Joint Declaration. Conversely, it could be argued that the provision in the Basic Law on limiting the CFA's jurisdiction outside acts of state is consistent with the Joint Declaration because the phrase "foreign and defense affairs" in the Joint Declaration modifies the entire administration of the HKSAR, thus including the CFA. These two polar interpretations on whether the CFA agreement is in harmony with the Joint Declaration and the Basic Law are evident in the attitudes of the supporters and opposers of the CFA agreement.

Entrusting China with the responsibilities of handling defense and foreign affairs of Hong Kong is actually common in autonomous

Executive on questions of fact concerning acts of state such as defense and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.


68. Id.
69. Id.
70. Joint Declaration, supra note 20, ¶ 3(2).
71. Hong Kong Attorney General Jeremy Matthews claimed that the CFA's jurisdictional limitations on acts of state should not be considered a concession because the CFA agreement merely reflects what is already in the Basic Law, noting: "It is strange that when we propose to align the court on this point with the Basic Law, we are accused of kowtowing. But when others propose to amend the bill to align it with the Joint Declaration and the Basic Law then that becomes a matter of principle." Matthews Strikes at Opposition, S. CHINA MORNING POST, June 15, 1995, at 6.
arrangements. However, excluding the CFA from hearing cases concerning acts of states without clearly defining the scope of acts of state is disturbing. Act of state is not defined in the Basic Law. The words defense and foreign affairs do not define acts of state but merely give examples to what may be acts of state. But what else may be considered acts of state by the Chinese government? Acts of state in common law "typically relate to the making of treaties with foreign countries, declarations of war, and the seizure of land or goods in right of conquest." Attempts to amend the CFA Bill to restrict acts of state to its common law definition were unsuccessful. Therefore, the bottom line is that CFA cannot hear cases on acts of state, but no one is sure what that means.

The potential problems with a loose definition of acts of state are alarming. The United Nations recently warned that the ambiguity of acts of state may give China the chance to curtail the CFA's power. In fact, the entire judiciary of HKSAR will be affected. Acts of state could mean different things on any given occasion. Even worse is that the power of interpretation of the Basic Law, including the meaning of acts of state, ostensibly rests in the hands of the Standing Committee of the NPC. Will China deem the following events acts of state:

76. Bruce Gilley, Hold your Ground: Colony Protests at China's Efforts to Trim Bill of Rights, FAR E. ECON. REV., Nov. 16, 1995 at 36.
77. Mushkat, supra note 73, at 138.

The Chinese Constitution of 1982 does not subscribe to the concept of separation of powers. Instead, all powers are unified in the NPC. The Central People's Government and the Judiciary are formed by and accountable to the NPC. The NPC, however, meets only once a year for a few days and its great size makes it unwieldy. Thus, its Standing Committee has assumed all practical importance. It enjoys exclusive right to interpret the Constitution and the laws and shares with the NPC the right to supervise the implementation of the constitution. It can also enact laws not specifically reserved for the NPC. When the NPC is not in session, the Standing Committee approves plans and government budgets, appoints and removes ministerial personnel and decides on the composition of the National Military Commission, upon the recommendation of its chairman. KUAN, supra note 32, at 4.
1) The suppression of protest or the arrest of dissidents;
2) a commercial dispute involving a state-owned enterprise such as the Bank of China;
3) any allegedly unlawful acts committed by China's State Security Ministry officials in HKSAR;
4) taking of land by the People's Liberation Army?

The list can go on. In fact, it has been suggested that the meaning of acts of state is simply going to be a variable after 1997; China's attitudes and interpretations towards acts of state "will depend on the political situation in Hong Kong at the time, the degree of confidence Beijing has in the Chief Executive, and the nature of cases coming before the courts." These uncertainties, however, are unacceptable in the rule of law system because, "the legal system which exemplifies or proclaims the Rule of Law as an ideal is characterized by its neutrality, rationality, formality, impartiality, and impersonality: a government of laws, not of men, of rules rather than discretion, of preordained result in preference to intuitive justice." Further, the role of the Chief Executive in the interpretation of acts of state is questionable. Article 19 directs the HKSAR courts to obtain a binding certificate from the Chief Executive on questions of fact concerning acts of state such as defense and foreign affairs whenever such questions arise in the adjudication of cases. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Chinese Government. Why will the future HKSAR courts need to obtain a questions of fact certificate from the Chief Executive where the current judicial practice is for the courts themselves to decide whether they have

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79. Holberston, supra note 74, at 36.
81. Holbertson, supra note 74.
82. Id.
83. Holberton, supra note 74, at 3.
84. Peter Wesley-Smith, Protecting Human Rights in Hong Kong, in HUMAN RIGHTS IN HONG KONG 17, 19 (Raymond Wacks ed., 1992). Professor Smith qualifies the meaning of the rule of law in terms of six overlapping principles, which are reprinted in full text in Appendix C.
85. The Chief Executive will be the head of the HKSAR. Appointed by the Chinese Government, the Chief Executive will serve in a similar capacity like the British Governor today. The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China, Adopted by the Seventh National People's Congress at its Third Session, Apr. 4, 1990, ch. IV, § 1, art. 43-58. (Apr. 1, 1997) <http://www.cityu.edu.hk/BasicLaw/cp4-1.htm>.
86. See supra note 66.
subject matter jurisdiction? And what is the function of this questions of fact certificate which the Chief Executive cannot issue without first consulting with the Chinese Government? Responding to the accusations that such a certificate will subject the CFA’s jurisdiction under the arbitrary decisions of the Chief Executive, the Hong Kong Attorney General explains that this certificate “relates only to facts, not the interpretation of what is or is not an act of state.”

This argument is unpersuasive for two reasons. First, the effects for the Chief Executive to issue a certificate on purely questions of facts may well be the same as one on questions of law with respect to the jurisdiction of the CFA. This is because the statement of facts of a case can be so phrased that it will lead itself into a conclusion of the law. For example, if the Bank of China is sued for breach of contract, it is within the Chief Executive’s power to issue a certificate of facts stating that the Bank of China acts in this particular case strictly as an agent of China, thus rendering the action an act of state. Similarly,

it is not difficult to imagine that many cases touching the powers of the post-1997 Hong Kong Government will be said to concern its relationship with the central authorities in Peking. If that were claimed, no one could dispute it; for it is a question of fact on which . . . the CFA must obtain a certificate from the Chief Executive.

Secondly, the only place where the Basic Law addresses the scope of the acts of state is in article 19. If the Chief Executive does not decide what acts of state are, who does? It cannot be the CFA itself because its decisions are not final since the court is bound by the question of fact certificate. Therefore, the most logical reading of article 19 is that it gives the decision of what constitutes acts of state to the Chief Executive, whose decisions are contingent upon China’s approval, noting again that the NPC has the ultimate power to interpret the Basic Law. Therefore, it seems apparent that by agreeing to incorporate article 19 into the CFA agreement, Britain has given to the Chief Executive and China control over the jurisdiction of the CFA.

87. Mushkat, supra note 73.


Encircled by these limitations, is the CFA really a misnomer? More importantly, has the rule of law been lost in the future HKSAR over the CFA agreement? Lee believes it has. He considers that "Britain has handed China a more effective and less obvious tool for manipulating [Hong Kong's] legal system before the verdict, when political authorities . . . [NPC] may decide which cases involve acts of state and are thus out of judicial bounds."92

Perhaps it is not this uncommon at all for the central government to have final jurisdiction on certain issues over its autonomous entities.93 "When appropriately constrained, this jurisdiction does not inevitably threaten the judiciary's right of final adjudication."94 However, as noted above, the language of the CFA agreement certainly does not appropriately constrain China in its exercise over the meanings of acts of state. Will China voluntarily constrain itself and not abuse its power? Lee does not count on it.95 If the CFA were to begin hearing cases prior to the transition, it may help shape the interpretation of acts of state under British rule and set up some precedents. However, this is out of the question now as the CFA is scheduled to begin operation on July 1, 1997.

C. CFA to Start on July 1, 1997

The CFA is scheduled to begin operation on the first day China resumes sovereignty over Hong Kong. However, the target date for the establishment of the CFA was at one time in 1992.96 Although this proved to be impossible when Legco rejected the first CFA agreement in 1991,97 at the time Britain and China reached the CFA agreement in June 1995, they could have arguably scheduled to open the CFA before the reversion. Why did they not?

The judicial development in Hong Kong before China resumes sovereignty is vital to the "successful maintenance of the common law judicial system."98 Establishing the CFA before July 1, 1997, would have allowed the court to gain precious experience and avoid any potential

92. Lee, supra note 1.
94. Id.
95. Lee, supra note 1.
96. Leung, supra note 16.
97. Noakes, supra note 17.
98. Hsu and Baker, supra note 35, at 308.
problem for legal vacuum. More importantly, the early establishment of the CFA could ensure a strong legal framework ready to take Hong Kong through the transition and minimize China's opportunity to meddle with the CFA.99 Hong Kong government officials' desire to set up the CFA before 1997 was nearly unanimous even days before reaching the CFA agreement with China.100 The CFA agreement thus evidences an important compromise on Britain's part.

The choice of setting up the court in July 1997 is poor. Even over the controversial issue concerning acts of state, one can still find positive reviews of the issue. However, not a single article or comment exists which compliments the choice of July 1, 1997, as the date on which the CFA will start hearing cases. To the contrary, some consider "Britain's biggest failure in the talks was its inability to convince China to allow the court to be set up before 1997."101 Some criticize that if Britain were to make concession after concession over the CFA issue, it should have at least insisted on setting up the CFA while it is still in power, thus ensuring its proper formation.102

It has been reported that China requested the CFA be set up after it has regained sovereignty over Hong Kong.103 China wants to be seen as the party who bestows judicial independence on the HKSAR.104 As much as Britain wanted to set up the CFA prior to 1997 so that it would have time to observe its operation or even mold its shape to its liking, China, probably for the same reasons, resisted an early establishment of the CFA.105 "From Beijing's point of view, it did not design a way of keeping Hong Kong's court system on a tight leash only to let Mr. Patten -- not their favorite governor -- introduce some slack into the system just before the handover of sovereignty."106

It is not difficult to imagine that China might have deliberately delayed the establishment of the CFA in order to increase its control over it. China spent 1993 getting upset at the electoral reform introduced by
Governor Patten and refused to consider the CFA issue in most of 1994. July 1, 1997, can arguably be a logical date for the CFA to start operating since the Privy Council will stop hearing cases from Hong Kong on June 30, 1997. However, if there are aspects of the CFA which are inconsistent with the agreement and the Basic Law, could one rely solely on the good faith of China to make any needed correction? It is anybody's guess now.

D. The Four To One Formula

Both the Joint Declaration and the Basic Law allow the CFA to invite "judges from other common law jurisdictions to sit on the [CFA]." Legco rejected the 1991 CFA agreement largely because it allowed only one foreign judge to be on the CFA bench. However, the June 1995 CFA agreement mirrored that of 1991 in the ratio of judges for the CFA: "[The CFA] would consist in each sitting of the Chief Justice, three permanent Hong Kong judges and one non-permanent judge, who could be from Hong Kong or from another common law jurisdiction. The permanent and non-permanent Hong Kong judges could be either local or expatriate." The Chief Justice of the CFA must be a Chinese citizen who is a permanent HKSAR resident with no right of abode in any foreign country.

There are primarily three concerns over allowing only one foreign judge in the CFA. First, the Joint Declaration and the Basic Law allow the invitation of judges to sit on the bench. The plural form is indicative of more than just one. Therefore, the CFA agreement's limitation of only one judge is allegedly in violation of the Joint Declaration and the Basic Law. Secondly, the reason for appointing a foreign judge in the CFA is to increase CFA's independence. The more foreign judges on the bench,

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107. Fitzsimons, supra note 38.
110. Fitzsimons, supra note 38.
111. See infra Appendix B.
the more resistant the CFA will be against China’s influence.” Thirdly, limiting the bench to only one foreign judge also means that four judges must be chosen from a limited pool of judges “potentially susceptible to Chinese government influence” and thereby compromising the independence and efficiency of the CFA. Some worry that Hong Kong does not “have enough legal talent available to give the court the stature it needs to win the confidence of international investors.” In addition, despite the criteria listed in the Joint Declaration which states that “judges shall be chosen by reference to their judicial qualities,” China has already expressed its desire to pick judges “for their political reliability rather than their knowledge of colonial laws.”

It is important to note that only the Chief Justice needs to be Hong Kong Chinese. The three other permanent judges may be of any nationality. Further, article 92 of the Basic Law authorizes recruiting of even permanent judges from other common law jurisdiction. Consequently, it is possible to have a CFA bench consisting of only one Hong Kong Chinese (the Chief Justice), three British expatriate permanent judges, and a foreign non-permanent judge. On the other hand, all five members of the bench may be of Chinese ancestry. Therefore, the combination of the CFA is actually quite flexible. It is somewhat remarkable that China would let any foreign judge be on the bench at all because “China believes allowing the court to be transposed from London to Hong Kong rather than to Beijing, and allowing any foreigner at all to sit on the bench, are major concessions of Chinese sovereignty.” Given these considerations, the limitation of only one foreign judge on the CFA bench is perhaps not unreasonable.

It is beyond dispute that the quality of the CFA bench controls the independence of the CFA. The permission to allow expatriates to be permanent judges in the CFA offers reasonable safeguards to their qualities

119. Gilley, supra note 76, at 36.
120. Noakes, supra note 17, at 48.
122. Fitzsimons, supra note 38.
and impartiality. On the five-member bench, unless there are three or more foreign justices coming from other jurisdictions not susceptible to China's influence, there is a potential that the CFA is under, even indirectly, the influence of China. In this limited sense, the CFA is never sure to be totally neutral. China obviously will not allow more than one foreign judge to be in the CFA, let alone three. Since the HKSAR will after all be a part of China, and the CFA will be the highest court in the region, China's concession of allowing one foreign judge on the CFA bench is not entirely unjustified. Arguing in favor of the combination of the CFA, Commissioner Wiggham of Hong Kong Economic & Trade Affairs questioned: "[c]an you imagine a law requiring a foreigner on the U.S. Supreme Court?" Although the analogy is not completely correct, the argument may be applicable with respect to the CFA.

E. China Dropped Demand on Post-Verdict Remedial Mechanism

Britain claimed that China also made compromises on the CFA agreement. China had insisted on the CFA agreement giving the Chief Executive the power to overturn CFA decisions, although this would have been in violation of both the letter and spirit of the Joint Declaration and the Basic Law. China had wanted this *post verdict remedial mechanism* based on the fear that the CFA might render *erroneous* decisions which would leave it with no recourse.

The June CFA agreement addressed this issue in paragraph 2, which reads:

[t]he Chinese side agrees to the British side amending the Court of Final Appeal Bill to make it clear that Section 83P of the Criminal Procedure Ordinance applies in a case where an appeal has been heard and determined by the Court of Final Appeal, and that there is therefore no need for further legislative or other provisions in relation to the power to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms.

Applying section 83P of the Criminal Procedure Ordinance to the CFA means that the Chief Executive may direct the CFA to retry a case upon

126. See *infra*, Appendix A.
receiving new and relevant evidence.\textsuperscript{127} This provision is a lesser evil than granting the Chief Executive an outright power to overturn CFA cases, but it nonetheless leaves the door ajar for interference from the Chief Executive.\textsuperscript{128} The comforting thoughts are that the Chief Executive's power to reopen cases under this provision is limited to only criminal cases and contingent upon the discovery of new and relevant evidence. Lee did not consider the dropping of the post-verdict remedial mechanism as a concession for China because such mechanism was unnecessary in light of the CFA agreement; China has already gained the power to remove any cases from the jurisdiction of the CFA before the verdict under the acts of state clause.\textsuperscript{129} Lee's positions may be extreme but are valid interpretations of the CFA agreement.

V. THE DEGREE OF INDEPENDENCE OF THE CFA AND THE SURVIVAL OF RULE OF LAW IN HONG KONG

The CFA agreement has concluded, and Britain and China are on their way to organizing the court. Will the CFA be able to ensure the continuation of rule of law in Hong Kong? Will China refrain from interfering with the decisions of the CFA given the holes in the CFA agreement? The author proposes to answer these questions by examining China's internal and external restraints on exercising controls over the CFA.

A. China's Internal Restraint – its Respect for Rule of Law

Rule of law, as the contemporary world knows it, was not a prominent part of Chinese history. In fact, "part of China's tradition includes a hostility to law and to lawyers."\textsuperscript{130} The Confucians believed that people ought to govern themselves "in a general code of morality and ritual and strongly opposed publicly promulgated laws."\textsuperscript{131} In conjunction with this sentiment towards law, China was, for a long time, ruled by emperors. The emperors and their officials, without exception, had "an absolute right to rule and the people were under an absolute obligation to obey. There was no conception of government powers being limited by

\textsuperscript{127} No Kwai-Yan & Quinton Chan, Jurisdiction, S. CHINA MORNING POST, June 10, 1995, at 3.
\textsuperscript{128} Id.
\textsuperscript{129} Lee, supra note 1, at 10.
\textsuperscript{131} Id.
law . . . .”\textsuperscript{132} Law was only viewed as the means of “dealing with crime and punishment . . . .”\textsuperscript{133}

Today’s Communist Chinese attitudes concerning the rule of law do not deviate substantially from its Confucian tradition. The Central Government controls all phases of the country’s operation, and every person and organization must obey the centralized leadership of the Communist Party.\textsuperscript{134} Appointed government officials often assume both the executive and judicial roles.\textsuperscript{135} The law, including the Chinese Constitution, is malleable by the leaders and subject to change at any given time.\textsuperscript{136} Important policies can be made in China absent any statutory authorities.\textsuperscript{137} Although the development of the Chinese legal system has been remarkable and rapid,\textsuperscript{138} the legal system is still only developing.\textsuperscript{139} Some judges in China can still be bought.\textsuperscript{140} Chinese courts that are supposedly independent are not really independent because of the “complete and well-entrenched executive bureaucracy” and “an incomplete and tentative legal system.”\textsuperscript{141} Additionally, there are those who stand to lose under rule of law because the current state of law in China allows them to “punish political dissenters, intimidate critics, take care of their friends and enrich their families without fear of lawsuits.”\textsuperscript{142} Rule of law, therefore, is not a concept commonly practiced in China.


\textsuperscript{133} \textit{Id.} at 109.

\textsuperscript{134} \textit{A BASIC UNDERSTANDING OF THE COMMUNIST PARTY OF CHINA} 71 (Norman Bethne Institute trans., 1976).

\textsuperscript{135} Armacost, \textit{supra} note 130, at 158.


\textsuperscript{137} For example: [t]he fact that Deng Xiaoping is the highest decision-maker in China today cannot be derived from the constitution of the PRC. And the crucial decision to suppress the students’ prodemocracy movement of April-June 1989 was not in reality made by any of the state organs provided for in the constitution.


\textsuperscript{139} Jamie P. Horsley, \textit{Comments on Laws and Legal Developments Affecting Foreign Investment in China}, 3 \textit{CHINA L. REP.} 175, 176 (1986).

\textsuperscript{140} Noakes, \textit{supra} note 17, at 48.


\textsuperscript{142} Jones, \textit{supra} note 136, at A18.
What do all these mean to the CFA and the rule of law in HKSAR? First, it is very unusual for the centralized Chinese Government to grant so much autonomous power to a region, as Hong Kong will soon enjoy. "One country, two systems" is a novel idea that poses a certain degree of threats to some leaders in China. Not everyone in China was happy about the Joint Declaration and how the reversion of Hong Kong would take place. Ji Pengfei understood these China's concerns. When he presented the Draft Basic Law to the NPC in 1990, he carefully explained the decision of vesting the HKSAR with the power of final adjudication;

[t]he draft vests the courts of the [HKSAR] with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practice social and legal systems different from the mainland's, this provision is necessary.

Will China be content with the power that it has given to Hong Kong? Keeping in mind that the Chinese government can easily bypass its own law to achieve its objectives in China, one could imagine it must be tempting for China, after 1997, to exert its power over the HKSAR and taint the rule of law system so carefully preserved by the Basic Law.

Secondly, it is natural to equate the Basic Law as Hong Kong's mini-constitution. However, it is a bad idea if China does so. China views its constitutions differently from the West. Instead of treating its constitutions as the "embodiments of unchanging principles binding on the government," China has changed its constitutions frequently since the PRC was formed. Therefore, it is more accurate to characterize these

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144. Jones, supra note 136, at A18.
146. Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.
148. See Abrahamson, supra note 14.
documents as "descriptions of prevailing policy aspirations." China’s cavalier attitude towards its constitutions is reflective of its treatment to rule of law. Therefore, as the CFA agreement has incorporated article 19 of the Basic Law, the CFA agreement can be modified by amending the Basic Law, which is within the power of the NPC. Although the Basic Law states that "[n]o amendment to this Law shall contravene the established basic policies of the [PRC] regarding Hong Kong," this is really not much of a safeguard given that the Standing Committee of the NPC has the power to interpret the Basic Law. For these reasons, China’s internal restraint, which is its respect to rule of law, may not be sufficient to prevent it from interfering with the CFA.

B. China’s External Restraint – Reactions of Business in Hong Kong and the World Towards an Ineffective CFA

China’s interests in the continued prosperity of Hong Kong are substantial. Despite Shanghai’s development, Hong Kong will remain China’s most important financial center after 1997. Hong Kong serves as a gateway for foreign investment in China, and China has no rational reasons to tamper with that. In fact, the success of China’s rapid economic development depends on the support of Hong Kong. Consequently, “[e]ven the pessimists . . . in Hong Kong don’t express the fear that China will suddenly impose an iron hand on Hong Kong or seek to punish it for its success.”

Business thrives under the current Hong Kong legal system. The business world responded favorably to the CFA agreement because the agreement eliminated a lot of uncertainties with respect to the post-1997

150. Id.


152. Id.


156. Id.


158. House, supra note 155.
judicial system in Hong Kong. Hong Kong’s credit rating raised as a result of the agreement.

However, it is evident that investors are cautious about the agreement. Since the negotiation between Britain and China began over a decade ago, 261 of the 529 listed companies in Hong Kong have shifted their legal domiciles to Bermuda and another fifty to the Cayman Islands. Both places’ courts of final appeal are the Privy Council in London. These companies have not relocated back to Hong Kong because of the CFA agreement. Further, some companies have even attempted to bypass Hong Kong’s legal system by either putting arbitration clauses in their contracts or by stipulating the governing law of their contracts not be Hong Kong’s nor China’s. Some believe that these companies have not lost faith in Hong Kong’s future but are merely handling uncertainty in a harmless way. However, the measures taken by these companies clearly demonstrate that they are willing and prepared to pull out of Hong Kong if it becomes necessary.

Investors are not the only group whose interests are at stake on the CFA issue. Taiwan also watches the situation closely. The way China handles Hong Kong will set a precedent for its ability to respect the rule of law and the one country, two systems idea.

In short, Hong Kong’s prosperity and status as a financial center are crucial to China’s economy. Investment may stop if investors believe that the Hong Kong legal system has become a lottery after 1997. China knows it. In today’s electronic age, money that flows into a region or country overnight can leave just as quickly. Further, if China is serious about attracting Taiwan for reunification, its treatment towards Hong Kong will speak louder than any treaties than can be conceived. These are the external restraints faced by China in how it will handle the CFA. They are strong and very real.

159. Rosario, supra note 53.
160. Id. Kennedy, supra note 154.
161. Steinberger, supra note 117.
162. Id.
163. Gilley, supra note 76.
164. Steinberger, supra note 117.
165. Id.
166. Jones, supra note 136, at 264; Kennedy, supra note 154.
168. Id.
VI. CONCLUSION

The CFA agreement reflects two competing interests. The Basic Law guarantees that "the socialist system and policies shall not be practiced in the [HKSAR], and the previous capitalist system and way of life shall remain unchanged for fifty years." Therefore, it is in the interest of Hong Kong to carve out a specific and explicit CFA agreement that establishes the precise jurisdiction and power of the CFA. On the other hand, the last thing that China wants is a CFA agreement that is too restrictive, leaving no wiggle room at all for China. China needs flexibility and the ability to interfere with the operation of the CFA "without violating its international obligations."

Britain considered the CFA agreement to be the best it could be under the circumstances. It was either the June agreement or no agreement at all. The CFA agreement has its weak points, but it did remove some uncertainty about Hong Kong's future judicial system and revealed how much control China really wants over the CFA. Blatant violation of the CFA agreement and the rule of law by China is unlikely because of the potential reactions from the business community and its possible far-reaching repercussions on China's own economy and the Taiwan issue.

The CFA agreement is a compromise. China has obtained the control that it needed to remove important cases from the jurisdiction of the CFA under the acts of state clause. It is uncertain, however, how frequently, and under what circumstances, China will exercise this power. Excess exercise of this power will render CFA's final adjudication power a nullity. However, discretion over acts of state on China's part also means there is room for negotiations and restraints. Therefore, mature and skilled diplomatic relationships and negotiation with China, ironically, may better ensure Hong Kong's continuation of rule of law. A statement made by Alice Tai, Hong Kong Judiciary Administrator, about the CFA agreement and the future rule of law of the HKSAR:

171. Id.
172. Id.
173. Rosario, supra note 53.
174. Id.
175. Armacost, supra note 130, at 158.
Predictions of a doomsday scenario after 1997 did nothing but damage. There were bound to be teething problems as the Judiciary adapted to changing circumstances and the setting up of the Court of Final Appeal. During these years we may well be gritting our teeth. But so long as we are confident, then our courts will mature and we will have a conduit for success. A certain amount of skepticism among Hong Kong people was understandable because they had the most to lose. But if there was only criticism and talk of the system of justice not working, it would lead to people becoming disheartened.

When Lee moved for the no-confidence vote against Governor Patten, was he really making a no-confidence vote on the future of Hong Kong? When Legco defeated the no-confidence vote and supported Governor Patten, did the Legco at the same time indirectly cast a confidence vote on the CFA and the future rule of law in Hong Kong? The author has confidence in Hong Kong's future rule of law and the CFA, not because of the CFA agreement, but because of the ability of the people in Hong Kong to turn a bad situation around and make the best out of it.

APPENDIX A


THIS is the full text signed between the senior British and Chinese representatives of the [Joint Liaison Group]:

AFTER full consultations, the two sides of the Sino-British Joint Liaison Group have reached the following agreement on the question of the Court of Final Appeal in Hong Kong:

1. The British side agrees to amend the Court of Final Appeal Bill on the basis of the eight suggestions published by the Political Affairs Sub-group of the Preliminary Working Committee of the Preparatory Committee of the Hong Kong Special Administrative Region on May 16, 1995.

2. The Chinese side agrees to the British side amending the Court of Final Appeal Bill to make it clear that Section 83P of the Criminal

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Procedure Ordinance applies in a case where an appeal has been heard and determined by the Court of Final Appeal, and that there is therefore no need for further legislative or other provisions in relation to the power to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms.

3. The British side agrees to amend the Court of Final Appeal Bill to include the formulation of acts of state in Article 19 of the Basic Law and to provide that the Court of Final Appeal Ordinance shall not come into operation before 30 June, 1997.

4. The Chinese side agrees that, after the Chinese and British sides reach this agreement, the legislative procedures for the Court of Final Appeal Bill, on which the two sides have reached a consensus through consultation, will be taken forward immediately to enable them to be completed as soon as possible before the end of July 1995. The Chinese side will adopt a positive attitude in this regard.

5. The Chinese and British sides agree that the team designate of the Hong Kong Special Administrative Region shall, with the British side (including relevant Hong Kong Government departments) participating in the process and providing its assistance, be responsible for the preparation for the establishment of the Court of Final Appeal on 1 July, 1997 in accordance with the Basic Law and consistent with the provisions of the Court of Final Appeal Ordinance.

APPENDIX B

Statement about the Court of Final Appeal in the Legislative Council on June 9, 1995

The following is the transcript of the Governor, the Right Honorable Christopher Patten's statement about the Court of Final Appeal in the Legislative Council on June 9, 1995:

Mr. President, I would like to make a statement about the Court of Final Appeal.

Late last night, the British and Chinese experts in the Joint Liaison Group reached agreement on the establishment of the Court of Final Appeal. The agreement was signed by the Senior Representatives to the [Joint Liaison Group] at 2:30 p.m. this afternoon, following endorsement of its terms by the Executive Council this morning.

Members have before them the text of the agreement, which we are of course publishing in full. It is an agreement which I am entirely satisfied is in the interests of Hong Kong. It carries the full support of the
British, Chinese and Hong Kong Governments and I recommend it to this Council.

Accordingly, we are getting the draft Bill on the Court of Final Appeal this afternoon, and will introduce it into this Council on June 14.

Before coming to the terms of the agreement itself, let me remind Honorable Members briefly of the history of the Court of Final Appeal issue.

Both the Joint Declaration and the Basic Law provide for Hong Kong to have its own Court of Final Appeal to fill the role now performed by the Judicial Committee the Privy Council after the transfer of sovereignty on June 30, 1997. In September 1991, Britain and China reached agreement in the [Joint Liaison Group] on the early establishment of the CFA, and on its composition. It would consist in each sitting of the Chief Justice, three permanent Hong Kong judges and one non-permanent judge, who could be from Hong Kong or from another common law jurisdiction. The permanent and non-permanent Hong Kong judges could be either local or expatriate.

In December 1991, however, this Council passed a motion seeking greater flexibility in the appointment of overseas judges than was provided for in the 1991 agreement. Subsequently, the Chinese side made it clear that they were not prepared to re-negotiate the agreement or allow a CFA set up on any other basis to survive 1997. So the only effect of the Legco vote was to oblige the Hong Kong Government to delay the introduction of the CFA Bill into Legco.

We nevertheless began to draft the Bill, which Members will soon see is a long and complex one. In May 1994, we handed the draft Bill to the Chinese side for comments. The Chinese asked for expert talks in late March this year, and since then there have been four rounds, which culminated in the agreement we reached last night.

The agreement means that we can now be certain that the CFA to be set up on July 1, 1997 will be a proper Court of Final Appeal that will, subject to the Basic Law, have the same function and jurisdiction as the Judicial Committee of the Privy Council. It also means that our CFA Bill will provide the legislative basis for establishing the Court in Hong Kong on July 1, 1997. Our aim is to enact the Bill before the end of the current legislative session.

Let me now take Honorable Members through the five key points of the agreement in slightly more detail.

Point one sets out our agreement to amend the CFA Bill on the basis of the eight suggestions made by the PWC Political Affairs Sub-Group on May 16. As Honorable Members will know, we have previously agreed to incorporate most of these points into the CFA Bill.
We sought clarification from the Chinese side on the two points about which we had reservations. These were related to the procedure for appointing the Chief Justice and the question of the extension of the term of judges beyond retirement age. We are now satisfied that they are consistent with the Joint Declaration and the Basic Law.

On the first point, the Chinese side clarified that the independent Commission referred to in Article 88 of the Basic Law will be chaired by the Chief Justice after the first SAR Chief Justice has been appointed. The recommendation in respect of the appointment of the first Chief Justice will be made by the other members of the Commission. The Chief Executive will conduct this meeting of the Commission, but will take no part in making the recommendation. There is therefore no question of the independence of the Commission being undermined; and once the first Chief Justice has been appointed, the Chief Executive will have no further role in the conduct of Commission meetings.

On the second point we were concerned that the PWC suggestion that extensions of service beyond retirement age should be made by the Chief Executive in accordance with the recommendations of the Chief Justice was inconsistent with the provision in Article 88 of the Basic Law that judges should be appointed by the Chief Executive in accordance with the recommendation of the independent Commission. However, the Chinese side pointed out that there is no specific reference in the Basic Law to the procedure for extending the term of judges beyond retirement age. The fact that at present the JSC advises on these extensions is a procedure, rather than a legal requirement. So we agree that this suggestion would not be a violation of the Basic Law. The Chief Justice, in making recommendations to the Chief Executive, would of course not be precluded from seeking advice from the Commission.

Point 2 of the Agreement sets out our agreement to make a consequential amendment to the CFA Bill to put beyond doubt that section 83P of the Criminal Procedure Ordinance will also apply to an appeal which has been heard and determined by the CFA. This section provides that the Governor may refer a case to the Court of Appeal when, for example, new evidence comes to light which shows that a conviction was unsafe. It applies at present to a Hong Kong appeal which has been heard and determined by the Judicial Committee of the Privy Council.

The latter part of Point 2 of the Agreement sets out the Chinese side’s agreement that there is no need for any further legislative or other provisions in relation to the power of the courts to inquire into the constitutionality of laws or to provide for post-verdict remedial mechanisms. We consider this an extremely important point, as it will ensure that the jurisdiction of the CFA will, subject to the provisions of the
Basic Law, be the same as that of the Judicial Committee of the Privy Council.

Point 3 of the agreement contains our agreement that the CFA Ordinance shall not come into operation before June 30, 1997. On this basis, we have agreed to include in the CFA Bill the formulation of acts of state in Article 19 of the [Basic Law], which will in any case apply as from July 1, 1997.

Point 4 is important in that it makes clear that China agrees with the CFA Bill and is content that it should be taken forward immediately. The early enactment of the CFA Bill will ensure that the CFA to be set up on July 1, 1997 will be based on the principles and practices of the Judicial Committee of the Privy Council and that it will be a genuine Court of Final Appeal.

The preparations for the setting up of the CFA on July 1, 1997 are set out in Point 5 of the Agreement. This will be undertaken by the team designated for the SAR, with the participation and assistance of the British side, including the relevant Hong Kong Government departments. The Chinese side have told us that the term team designate refers to the Chief Executive (designate) and the principal officers (designate) of the SAR Government, together with others qualified to take part in the establishment of the SAR. Once the CFA Bill has been enacted, we will be discussing with the Chinese side the modalities of this cooperation.

Honorable Members and the business community have understandably been concerned about the possibility of a judicial vacuum in the hiatus between the end of the role of the Judicial Committee of the Privy Council and the establishment of the Court of Final Appeal. This agreement will avoid any question of a judicial vacuum in 1997. It will not occur before July 1, 1997, because the Judicial Committee of the Privy Council will keep its jurisdiction to hear appeals from Hong Kong courts until June 30, 1997. We have obtained the British Government's assurance that the Privy Council will continue to hear appeals from Hong Kong up until the last possible date, and will make every effort to ensure that outstanding business from Hong Kong is dealt with before July 1, 1997. And there will not be a vacuum after July 1, 1997, because the CFA will be operational on that date, all the necessary preparations having been made beforehand. The CFA Bill contains sensible transitional provisions for any outstanding cases to be transferred from the Privy Council to the CFA. We will be discussing with the Privy Council and the team designate practical arrangements for putting these provisions into effect.

As Honorable Members know, in 1991 our aim was to establish the Court as soon as possible to give it time to build up experience before
the transfer of sovereignty. In my view it would plainly have been better
had we been able to set the Court up earlier than 1997. That has always
been my preference. But Members made it clear in 1991 that they did not
wish to proceed on the basis of the 1991 agreement.

Until very recently, we were facing the unenviable choice of either
introducing the CFA Bill into Legco without Chinese agreement and no
guarantee that any Court set up as a result would survive 1997, or leaving
the establishment of the Court to the [HKSAR] after July 1, 1997. The
agreement we have now concluded gives us, gives this Council, the means
by which we can guarantee the nature of the CFA to be set up on July 1,
1997, guarantee its establishment in accordance with a Bill passed by this
Council this year, and guarantee that it will endure.

For too long there has been uncertainty about the CFA. As
Honorable Members know, the people of Hong Kong and international
investors want to know now how the Court will be set up, when it will be
set up and what sort of Court it will be. By enacting the Bill that we will
introduce next Wednesday, this Council can answer these questions.

You have before you what I believe to be a good agreement. It is
an agreement which provides for a Court to be set up entirely in
accordance with the Joint Declaration and the Basic Law, ready to start
work on July 1, 1997. It offers the prospect of a Court that will, subject to
the Basic Law, have precisely the same function and jurisdiction as the
Judicial Committee of the Privy Council. It offers the certainty of
continuity because the Court will be set up with unequivocal Chinese
support. It offers certainty about the terms of the Court because this
Council will be able to pass the necessary legislation to set those terms in
concrete before the end of July. I recommend this agreement to the
Council and I very much hope that Honorable Members will support the
Bill when it is introduced into the Council.

APPENDIX C

Rule of Law Defined. Peter Wesley-Smith, Protecting Human Rights in
Hong Kong, in HUMAN RIGHTS IN HONG KONG 17, 18-19 (Raymond

The Rule of Law can be explained in terms of six overlapping
principles. First legal doctrine is a formal and rational system: its
precepts are self-consistent and generalized, made by persons with
acknowledged lawmaking competence in accordance with a regular, open
procedure. This means that the law can be described and known and acted
upon independently of its political and economic context; its institutions,
its methodology, and its personnel are autonomous vis-à-vis other areas of social life. Law can be ascertained in an impartial manner by anyone trained in its techniques. This requires that all law is published and available and that the relationship between different types of law is settled. Judges, who ultimately identify and apply law, have very little discretion, and thus they dispense a kind of justice which can be described as formal—resulting from the regular application of pre-existing doctrine to neutrality ascertained facts—rather than substantive or intuitive. The law is therefore certain and predictable and applied equally to all persons.

Secondly, law is the antithesis of arbitrary power. It does not depend on whim or caprice but on fixed rules existing prior to conduct which is subject to their standards; it is prospective in operation, not retrospective. No person ought to be condemned by the legal system except for a breach of established law ascertained by the law's impartial tribunals, whereas the exercise of arbitrary power (that is, behavior which is indifferent to the law) can be prevented or subsequently condemned by agents of the legal system.

Thirdly, the law applies equally to all persons, whatever their social status, rank, class, political influence, physical strength, wealth, ideological commitment, race, nationality, or sex. Even government officials, lawmakers, and judges are subject to the general law in the same manner as ordinary citizens. The law is no respecter of persons; it is capable of being applied impartially by independent judges and officials acting in obedience to judicial and legislative commands.

Fourthly, judges are independent of political and personal pressure; their duty is to make findings of fact and to ascertain and apply the law in a neutral manner without regard to the wishes of the executive arm of government. They are experts (in the “artificial reason of the law”) whose independence is institutionally guaranteed and who may review the legality of all behavior, including the fashioning of law and its execution. They may not, however, have a personal interest in proceedings; they are bound to decide in accordance with law, not personal preference. Lawyers, too, are obliged to present cases to the best of their ability, regardless of their own views as to the moral or political worth of their clients. All citizens are entitled to equal access to the legal system through remedies which relate to their rights, and to be heard, to know the allegations against them, and to have their conduct assessed by impartial judges.

Fifthly, law is capable of guiding an individual’s behavior. Its purpose is to provide a measure for the conduct of human affairs, and thus it is general rather than particular, and it is published, prospective,
comprehensible, consistent, constant, fairly administered, and able to be obeyed.

Finally, law is advantageous to the individual: it stabilizes social relationships, providing a settled framework for social intercourse; it promotes order and personal security and an environment conducive to economic welfare; it respects human dignity and individual autonomy; and it ensures a reliable, predictable kind of justice. Without these virtues the systematic provision and maintenance of civil liberties would be impossible.
TO THE SUBURBS OF BAGHDAD: CLINTON'S EXTENSION OF THE SOUTHERN IRAQI NO-FLY ZONE

Alain E. Boileau *

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In the early morning hours of September 3, 1996, the United States conducted military strikes against an old foe.1 Once again United States guns were discharging upon the nation of Iraq and its obstinate leader, Saddam Hussein. In addition to striking at Hussein's defenses, President Bill Clinton extended the already existing no-fly zone south of the thirty-second parallel to the thirty-third parallel.2 The strikes were not only to punish Hussein for his incursion into the northern Kurdish conflict plaguing Iraq since the end of the Gulf War, but to, "protect the safety of our aircraft enforcing this [extended] no fly zone."3

The United States' military strikes were unquestionably unilateral and stirred unprecedented wavering responses from the international community, especially, the Gulf War Coalition [hereinafter the Coalition]. Many question the legality of President Clinton's extension of the no-fly. This comment will examine the illegality of the extension of the southern no-fly zone in light of United Nations Security Council Resolutions

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2. Id.

[hereinafter Resolutions] as well as offer some counter-arguments that may provide satisfactory justification for this United States unilateral response to Hussein’s intervention in the northern Kurdish conflict. The first part of this comment shall address Saddam Hussein’s actions after the Gulf War and the incessant testing of the United States, the United Nations, and the Coalition’s resolve to enforce Resolutions, as well as international law and recognized international behavior.

The second part will examine at the United States unilateral response to the Iraqi intervention in the Kurdish civil disturbances in northern Iraq and the Clinton Administration’s reasoning for the extension of the thirty-second parallel. The third portion will examine the original creation and imposition of the Iraqi no-fly zones and their probable illegality, as well as its legal relationship to the current extension by the Clinton administration. The final portion of the comment will establish the probable illegality of the current extension, but will present some viable arguments for its necessity in light of the unprecedented international legal quandary offered by the current Iraqi conflict.

I. THE ROAD TO THE PRESENT CONFLICT

Since the end of hostilities in the Gulf War, Iraq has tested the resolve of both the United Nations and the Coalition. The situation in the Middle East and Iraq following the cease fire was “far from peaceful.”

One example is the conflict which arose between the International Atomic Energy Agency [hereinafter IAEA] and Iraq over nuclear inspections mandated by Resolution 687. Iraq has repeatedly hindered nuclear weapons inspections conducted by the IAEA. Following the Gulf War, the IAEA was aware of Iraq’s possession of nuclear material that was in a “readily nuclear-weapons-usable form,” or “direct-use material.” Due to the presence of these volatile materials, the United Nations mandated inspections to ensure that Iraq would not develop weapons of mass destruction. From the very beginning, Iraq’s compliance was unsatisfactory. Iraq repeatedly concealed evidence on uranium enrichment and nuclear weapons development. It denied access to agency teams and

6. As of December 17, 1991, 400 grams of unirradiated high-enriched uranium remained in Iraq. Id. at 368.
7. Id. at 367.
8. Id.
even detained them on one occasion, confiscating their documents. In addition, Iraq occasionally denied aerial inspections of its territory as required by the IAEA and Resolution 687.

By 1992, the Security Council acknowledged Iraq’s “lack of indication of how the government of Iraq intends to comply with the resolutions of the Council.” In fact, Iraq had frustrated the Security Council with “baseless threats, allegations, and attacks launched against the Security Council by the Deputy Prime Minister of Iraq.” As late as November 1993, Iraq’s declarations regarding nuclear materials in its possession were still incomplete. Iraq’s relationship with the IAEA since the inspections began was characterized as a “rocky road of cooperation.”

In June 1993, the United States, acting unilaterally, bombed an Iraqi Intelligence building in Baghdad in retaliation for an alleged assassination plot against former President George Bush. United States Intelligence officials had informed President Clinton about the plot, which allegedly had been masterminded by Saddam Hussein. Some, including Great Britain, found this assassination plot to be a violation of Resolution 687, where Iraq promised an end to Iraqi-sponsored terrorism. In addition to such alleged terrorism, Iraq has been evasive in cooperating with the United Nations Commission on Human Rights in providing information on the location of missing Kuwaiti nationals resulting from the invasion of Kuwait and the Gulf War itself. In fact, as recently as December 1995, the General Assembly expressed its concern with major human rights violations in Iraq by condemning the torture, mutilation, execution, and disappearances of its own citizens.

9. Id.
10. Id.
12. Id.
13. Id. at 667.
14. Iraq offered an ultimatum at one point. Early in August 1995, Iraq stated that “cooperation would cease if no progress was made in the Security Council in the direction of easing or lifting sanctions and the oil embargo.” Id. at 773.
16. Id.
17. Surchin, supra note 4, at 467.
18. U.N. DEP’T OF PUB. INFO., supra note 5, at 793.
19. Id. at 821.
Saddam Hussein also challenged the world's military nerves following the war. In October of 1994, Iraq conducted military deployments in the direction of the Kuwait border in violation of paragraph 2 of Resolution 678. The United Nations Security Council officially condemned this action, demanding that Iraq not redeploy troops to the South or take any other action to enhance its military capacity in southern Iraq. This official condemnation of Hussein's troop movements demonstrated the Council's belief Iraq could still pose a threat to the region.

The initial concern following the end of hostilities which lead to the original formation of the no-fly zones was the safety of Iraqi nationals whom had opposed Saddam Hussein, namely the Kurdish in northern and southern Iraq. Saddam Hussein began repressing those whom opposed him during the war which led to a United Nations demand through Security Council Resolution 688 that the repression end. The United States still contends Saddam Hussein, "shows no signs of complying with United Nations Security Council Resolution 688." This type of non-compliance led the United States and its Coalition partners to establish the original no-fly zones in June 1991, and in August 1992. This type of non-compliance has also prevented the United Nations from lifting the embargoes levied against Iraq by Resolution 661.

The underlying threat Saddam Hussein presented to the United States, and at varying times to the Coalition, was Iraq's threat to its neighbors in the South and consequently, their oil interests. The United States believes Hussein's "aggressive military action" constitutes a viable threat to the flow of oil and the national security of Israel, Jordan, Kuwait, and Saudi Arabia. These interests are the primary reason why the United

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20. Id. at 694.
21. Id.
22. Id.
24. Id.
29. Id.
States remains and maintains its presence in the Gulf region. Nevertheless, Hussein's actions in the North have been sufficient to demand, according to the White House, a strong response.30

On August 31, 1996, Saddam Hussein sent thirty-thousand Iraqi troops to assist the Kurdistan Democratic Party (KDP) with the Patriotic Union of Kurdistan in the Kurdish enclave of Irbil.31 Consequently, the KDP overran their rivals in northern Iraq.32 This Iraqi attack, as the White House called it, "adds fuel to the factional fire and threatens to spark instability throughout the region."33 This action resulted in the military strikes against southern Iraqi defense installations and President Clinton's extension of the southern no-fly zone from the thirty-second to the thirty-third parallel.34

II. THE UNITED STATES' UNILATERAL RESPONSE

United States officials conceded that the purpose of the September 3rd attacks on the southern defense radar installations was not to "forcibly evict the Iraqi army from the north," but to "make it safe for American and other jets to enforce the new restrictions [no-fly zone]."35 Any type of military attacks in the north would have posed too many risks and dangers.36 The terrain is more mountainous than in the South and would have prevented a quick and effective strike.37 By all indications, the true punishment to Hussein for his incursion into the Kurdish conflict was the extension of the southern no-fly zone. The action was a broad stroke attempt to restrict and monitor Hussein in his own territory.

As President Clinton stated in his letter to the United Nations, "[w]e are extending the no-fly zone in southern Iraq airspace from the Kuwaiti border to the southern suburbs of Baghdad and significantly restrict Iraq's ability to conduct offensive operations in the region."38 The letter makes no reference to restricting Hussein in the North in a similar

32. Id.
33. Id.
34. Graham, supra note 1.
37. Id.
manner and indicates that the Clinton Administration was more concerned with southern security than protective measures for the Kurdish settlements in the North.

The extension increases the no-fly zone northward by approximately 110 kilometers (seventy miles)\(^9\) and curtails Hussein’s military capability in defending Baghdad, advancing towards the South, and using two major training areas.\(^{40}\) In fact, the United States had even considered extending a similar restricted zone towards the West, making it safer for allied aircraft to maneuver between Turkey and Saudi Arabia.\(^{41}\) This plan was abandoned because, as one official said, “one problem with it was the difficulty we would have explaining it to the public and the allies. The decision to expand the southern zone was complicated enough to explain.”\(^{42}\)

The extension, although denounced by the Iraqi government as a “flagrant aggression against Iraq’s sovereignty and the safety of its political independence in contravention of United Nations Charter and norms of international law,” abided by the new additional seventy miles of restricted airspace.\(^{43}\) Although the current United States action has served to control Saddam Hussein further in his quest to reestablish himself militarily in the South, some argue that the no-fly restrictions imposed after the Gulf War are most likely illegal\(^{44}\) and consequently, so is the recent extension of the southern zone.

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40. By expanding the southern no-fly zone one degree X from the 32nd to the 33rd parallel, a distance of about seventy miles X officials said Saddam will be deprived of two major air force training areas and use of about forty percent of the air defense capability that existed in the greater Baghdad area. The huge banned area, over half of Iraq, includes a couple of air bases where the planes have either been moved north or are presumably grounded.

41. Harris & Graham, supra note 36.
42. Id.
43. Iraqi helicopters accompanying UN weapons inspectors are providing concrete proof that Iraq is respecting an expanded no-fly zone which now extends almost to the Baghdad suburbs, a top UN official said Friday. Rolf Ekeus, the chairman of the UN Special Commission, told AFP that on Thursday, when he instructed a UN team in Baghdad to fly for the first time into the new no-fly zone, two Iraqi helicopters accompanying a UN helicopter had turned sharply to avoid entering the zone.

III. THE ORIGINAL CREATION AND IMPOSITION OF THE NO FLY-ZONES

In June 1991, the Coalition forces, led by the United States, created a no-fly zone north of the thirty-sixth parallel in Iraq.\textsuperscript{45} In August 1992, a southern no-fly zone was established from the Kuwaiti Border to the thirty-second parallel.\textsuperscript{46} According to the United States Department of Defense, the "UN authorized the United States to organize a coalition to conduct Operation Provide Comfort, which enforced a no-fly zone north of 36 degrees, and later authorized Operation Southern Watch, which enforced a no-fly zone south of 32 degrees."\textsuperscript{47} However, no United Nations Security Council Resolution specifically authorized or mandated any member state to take such actions.\textsuperscript{48} In fact, the United Nations acknowledges the restricted zones only by stating that, "some of the coalition countries, in what they stated was an effort to enforce and monitor compliance with resolution 688 (1991), created two no-fly zones"(emphasis added).\textsuperscript{49} The report goes on to say that, "[a]ccording to these coalition countries, the cease fire agreement ending the war empowered them to impose such controls over Iraqi military flights."\textsuperscript{50} Although this demonstrates that the Coalition members are acting on their own initiative, this language hardly condemns the imposition of the zones.

Alan D. Surchin states in his article titled, \textit{Terror and the Law: The Unilateral use of Force and the June 1993 Bombing of Baghdad}, that "it is essential that explanations for controversial uses of force be grounded in law, not expediency."\textsuperscript{51} The explanations provided by the Gulf War Coalition for the creation of the no-fly zones are based on their interpretation of several Security Council Resolutions, including Resolutions 678, 688, 686, and 687.\textsuperscript{52} However, the justification provided for the recent United States action seems limited to the enforcement of Resolution 688.\textsuperscript{53}

\begin{itemize}
\item[45.] U.N. DEP'T OF PUB. INFO., \textit{supra} note 5, at 41.
\item[46.] \textit{Id}.
\item[47.] Perry & Ralston, \textit{supra} note 28.
\item[48.] McIlmail, \textit{supra} note 44, at 49-83.
\item[49.] U.N. DEP’T OF PUB. INFO., \textit{supra} note 5, at 41.
\item[50.] \textit{Id}.
\item[51.] Surchin, \textit{supra} note 4, at 457.
\item[52.] McIlmail, \textit{supra} note 44, at 50-53.
\item[53.] "Saddam Hussein shows no signs of complying with UNSCOR 688, which demands that Iraq cease the repression of its own people." \textit{U.S. NEWSWIRE}, \textit{supra} note 25.
\end{itemize}
Article 39 of the United Nation's Charter mandates that the Security Council, "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security." This serves as a statement by the international community on an event or situation, "thereby focusing international attention on the event and encouraging the relevant parties to seek an expeditious resolution." This also, "triggers" the Security Council's ability to, "pursue enforcement powers under Chapter VII of the Charter," namely articles 40, 41 and 42. Once such a determination is made, as it was with Iraq's actions against Kuwait, article 42 permits the Security Council to take adequate actions, "by air, sea, or land forces as may be necessary to maintain or restore international peace and security." A member nation, such as the United States, attains its powers for enforcement of Security Council resolutions from article 49, which provides that, "[t]he members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." It seems apparent that the only time a member state may act unilaterally is under article 51 which states, "[n]othing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace." In this current situation, as with the conditions following the Gulf War, the United States has not been attacked, nor has the Security Council mandated a response by member states.

Resolution 688 was adopted to address and abate a "vast humanitarian calamity" occurring with approximately 1.5 million Iraqi citizens, mostly Kurds, "fleeing towards and across bleak mountain borders with Turkey and the Islamic Republic of Iran." The Security Council, by the powers of the United Nations Charter under article 2, paragraph VII, identified this problem as a threat to "international peace

54. CENTER FOR RESEARCH AND STUDIES ON KUWAIT, UNITED NATIONS ROLE IN MAINTAINING INTERNATIONAL PEACE AND SECURITY 80, 84 (1995).
56. Id.
57. CENTER FOR RESEARCH AND STUDIES ON KUWAIT, supra note 54, at 85.
58. Id. at 87.
59. U.N. CHARTER art. 51.
60. U.N. DEP’T OF PUB. INFO., supra note 5, at 40.
and security in the region." Although this resolution exhibits the United Nation's resolve to condemn and rectify the deteriorating humanitarian situation in Iraq, it did not create any no-fly zones, nor did it authorize the United States or any of its Coalition partners to "enforce the demand that Iraq cease its repression of civilians." In its call for action, this resolution only appeals to the "Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts."

If the Security Council had intended for the Coalition to directly enforce its resolution, the Council would have surely used its typical procedures by including in the resolution a "specific invocation of Chapter VII authority, an authorization of Member State's action, and the use of the term all necessary means to indicate authority to use force," as it had in Resolution 678. Although the Security Council's authorization to use force has been granted infrequently, there are examples of the Council's use of specific and unambiguous language. In 1950, the Security Council permitted member states to "furnish such assistance to South Korea as may be necessary to repel the attack and restore international peace and security in the area." The Council here allows the "necessary" nature of the actions to be determined by member states, but limits such action to "repelling the attack" and restoring of peace and security. When the Security Council passed Resolution 665, it specifically allowed necessary measures to be taken to enforce the maritime embargo against Iraq, but limited the permissible action to the enforcement of the embargo, nothing else.

The Security Council has also used such empowering language in Resolution 836, stating that member states could take, "all necessary measures, through the use of air power" in the safe havens of Bosnia-Herzegovina. Here, the language is specific and unambiguous because it allows measures to be taken, but limits such measures to air power. If the

62. McIlmail, supra note 44, at 50.
63. S.C. Res. 688, supra note 61.
64. McIlmail, supra note 44, at 50.
66. Id.
Security Council wished for such force to be used to enforce Resolution 688, there is no reasonable explanation why no specific language was used to that effect. Therefore, from this narrow interpretation, Resolution 688 does not justify the imposition of the no-fly zones either in northern or southern Iraq.69

The Coalition, when originally imposing these zones, also relied on Resolution 678 to justify their actions.70 Resolution 678 demanded that Iraq “comply fully with Resolution 660 and all subsequent relevant resolutions” and authorized member states “co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”71 (emphasis added). This resolution addresses the restoring of international peace, not the maintenance of international peace.72 Resolution 660, in addition to condemning the Iraqi invasion of Kuwait, demands that, “Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990.”73 It can be argued that once the Iraqis had withdrawn back beyond their own borders, and the threat to Kuwait was terminated, the objective had been achieved, no further measures need have been taken within Iraqi territory.

Alternatively, the American government may maintain, and perhaps legitimately, that the language of Resolution 678, namely, “and all subsequent relevant resolutions” includes Resolution 688.74 By this interpretation, Resolution 678 would allow the Coalition, to “use all necessary means to uphold” Resolution 688.75 At first blush, this seems a viable reading of the resolutions, but an argument presented by Timothy P. McIlmail, suggests that “subsequent relevant resolutions” only pertain to Resolutions adopted “after the invasion of Kuwait” but “prior to the authorization of force to liberate Kuwait.”76 This would clearly limit the Coalition’s reach in imposing any type of multilateral or, as in the recent extension of the no-fly zone, unilateral measures to control Saddam

69. McIlmail, supra note 44, at 50.
70. Id. at 54.
72. McIlmail, supra note 44, at 52.
74. McIlmail, supra note 44, at 51-2.
75. Id.
76. Id.
Hussein’s future actions, unrelated to the invasion and liberation of Kuwait. A contrary interpretation of the Resolutions would allow the Coalition to indefinitely impinge upon the sovereignty of a nation merely based upon their national interests and political motivations.

This is contrary to the Security Council’s intent stated in Resolution 686 as affirming,

> the commitment of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and noting the intention expressed by the Member States cooperating under paragraph 2 of Security Council 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with achieving the objectives of the resolution (emphasis added).”  

It may also be argued that the objectives of the resolution include, as it states, “a definitive end to the hostilities,” as well as “the need to be assured of Iraq’s peaceful intentions, and the objective in Resolution 678 (1990) of restoring international peace and security in the region.” The integrity of this argument rests heavily upon the question of whether hostilities in Iraq have truly ended and whether international peace and security in the region have been restored. Hussein’s incessant violation of certain resolutions may contribute to the theory that security in the region still has not been established. Therefore, such an argument would contend that a continued military presence by the United States and the Coalition forces is not only prudent and justifiable, but within the authority provided by the United Nations Security Council.

Another possible justification originates from Resolutions 686 and 687.” Resolution 686 recognized the “suspension of offensive combat operations,” and demanded that Iraq, “implement all 12 relevant Security Council Resolutions.” In actuality, this Resolution set the terms for a formal cease fire and “in effect,” created a no-fly zone around Coalition aircraft while over Iraqi territory.” But such language cannot be read too broadly since it is specific as to its purpose.

Another argument of illegality is that “Resolution 686 contemplates the presence of Coalition aircraft in Iraqi airspace,” but that

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78. Id.
79. McIlmail, supra note 44, at 54.
80. U.N. DEP’T OF PUB. INFO., supra note 5, at 182.
81. McIlmail, supra note 44, at 53.
this same resolution, "contemplated an end to these activities by offering Iraq cease fire terms."\(^8\) Therefore, as the formal hostilities ended, so should the restriction on Iraqi aircraft over its own territory.\(^9\) But, again a valid counter argument is that Resolution 686 authorizes a use by member states, through its invocation of paragraph 2 of Resolution 678, of "all necessary means to uphold and implement . . . all subsequent relevant resolutions and to restore international peace and security in the area."\(^8\) Resolution 686, in Paragraph 3, Section d (4), recognizes that, "during the period required for Iraq to comply with paragraphs 2 and 3 . . . the provisions of paragraph 2 of resolution 678 remain valid."\(^8\) Resolution 687 formalizes Resolution 686's terms and could be argued to allow member states to use military force to implement the cease-fire terms.\(^6\) Resolution 686, therefore, applies Resolution 678's use of force clause until Iraq complies with Resolution 686. Logically, if the United States believes that Iraq has yet to comply with both Resolutions 686 and 687, Resolution 678 would still allow the use of force. Therefore, one could conclude that as long as Iraq does not comply with any provision of Resolution 686, Coalition forces may implement all necessary measures to enforce compliance, as per Resolution 678, which would include no-fly zones to protect Coalition aircraft.\(^8\)

As noted by the United Nations, the Coalition countries believed that the cease fire agreement ending the war empowered them to impose no-fly zones over Iraqi military flights to enforce Resolution 688.\(^8\) The purpose of Resolution 688 was to address the Kurdish repression in Iraq and to demand the allowance of humanitarian relief to enter Iraq.\(^8\) The cease fire resolutions did not address all necessary means to "protect Iraqi civilians," only the conditions set forth in Resolution 686 and 687.

Although, if one argues that "all relevant subsequent resolutions" includes Resolution 688, contrary to Timothy P. McIlmail's analysis,\(^6\) the Coalition forces could have the authority under Resolution 678 to impose the no-fly zones to protect the Kurds. But as Resolution 686 seems to indicate under Section d(4), paragraph 2 of Resolution 678 is then limited

\(^8\) Id. at 52-53.
\(^9\) Id.
\(^8\) S.C. Res. 686, supra note 77.
\(^8\) Id.
\(^6\) McIlmail, supra note 44, at 54.
\(^8\) Id. at 53-54.
\(^8\) U.N. DEP'T OF PUB. INFO., supra note 5, at 41.
\(^8\) S.C. Res. 688, supra note 61.
\(^6\) McIlmail, supra note 44, at 51-52.
to the time, "during the period required for Iraq to comply with paragraph 2 and 3" of Resolution 686.\textsuperscript{91} This argument of legality seems to fail because, as noted above, the end of the repression of the Kurds was not a factor in the cease fire agreements and would not be a condition to its enforcement.\textsuperscript{92} Iraq's repression of the Kurds does not violate the cease-fire agreements.

By this interpretation, the Coalition forces did not have authority to impose the no-fly zones to protect Iraqi civilians.\textsuperscript{93} The only justification allowed would have been the enforcement of the cease fire agreement resolutions.\textsuperscript{94} Resolution 688 only directs member states to provide humanitarian assistance to the repressed people of Iraq, not use military intervention or impose restrictions on Iraqi airspace.\textsuperscript{95} Resolution 688 alone would not justify the impositions, and the argument that Resolution 678 allows a blanket use of force and military presence to enforce Resolution 688 does not seem credible under the language of Resolution 686. Essentially, as Timothy P. McIlmail states, "[i]f the Security Council wished to establish a no-fly zone to protect the Kurds, it could have drafted language to reflect that intent."\textsuperscript{96} Essentially, there is very little doubt that the no-fly zones, "had no explicit basis in the resolutions of the Security Council."\textsuperscript{97}

The original imposition of the no-fly zones could be legal under article 106 of the United Nations Charter.\textsuperscript{98} Article 106 allows permanent members of the Security Council, such as the United States, France, and Great Britain to enforce Security Council decisions if acting in coalition.\textsuperscript{99} Therefore, once the Security Council determines that a threat to international peace exists, under article 106, permanent members, "have independent authority to act and may use armed forces."\textsuperscript{100} The article seems to demand that action under its authority must be joint and only after consultation with other permanent members.\textsuperscript{101} The problem and

\textsuperscript{91} S.C. Res. 686, \textit{supra} note 77.
\textsuperscript{93} McIlmail, \textit{supra} note 44, at 54-55.
\textsuperscript{94} \textit{Id}.
\textsuperscript{95} S.C. Res. 688, \textit{supra} note 61.
\textsuperscript{96} McIlmail, \textit{supra} note 44, at 59.
\textsuperscript{97} Murphy, \textit{supra} note 55, at 234.
\textsuperscript{98} McIlmail, \textit{supra} note 44, at 60-62.
\textsuperscript{99} \textit{Id}. at 59.
\textsuperscript{100} \textit{Id}. at 60.
\textsuperscript{101} \textit{Id}. at 61.
uncertainty about this article 106 argument is that "precise rules governing the application of article 106 do not yet exist." Consequently, although states have never invoked or rejected article 106, it seems probable its use would only be permissible if the Security Council was incapable of enforcing its own resolutions under article 42. Conversely, since no rules have been applied it can be argued the article, "permits action without strict unanimity of purpose among permanent members." By this latter conclusion, the Coalition can argue that they could impose its own no-fly zones to enforce Resolution 688, and to "oversee the maintenance of international peace."

IV. THE PROBABLE ILLEGALITY OF THE EXTENSION

The White House claims the extension of the no-fly zone is permissible to enforce Resolution 688, which calls for the protection of the Kurdish areas north and south of Baghdad. By its own admission, the extension of the no-fly zone was not for the protection of the Kurds, but for a more stable and sure-footed hold on Saddam Hussein's ability to strike out at its neighbors. As President Clinton stated,

America's vital interests in the Persian Gulf are constant and clear: to help protect our friends in the region against aggression, to work with others in the fight against terrorism, to preserve the free flow of oil and to build support for a comprehensive Middle East peace. We must reduce Iraq's ability to strike out at its neighbors and we must increase America's ability to contain Iraq over the long run.

Therefore one could conclude that the recent action by the Clinton Administration is not in pursuance of the enforcement of Resolution 688 and is purely a unilateral action without United Nations support or mandate. If such action was permissible for the enforcement of the resolution, Resolution 688 would have contained the words, "all necessary

102. Id. at 62.
103. Id. at 60.
104. McIlmail, supra note 44, at 62.
105. Id.
106. Graham, supra note 1.
means, as is customary for United Nations resolutions calling for the use of force."

It is clear that the Kurds were merely a catalyst for military prudence and strategy in a political feud between the United States and Saddam Hussein. As Clinton stated, "[n]ow, we control the skies over Iraq from the border of Kuwait to the southern suburbs of Baghdad. This action tightened the strategic straightjacket on Hussein, making it harder for him to threaten Saudi Arabia and Kuwait and easier for us to stop him if he does." The United States took the opportunity to place themselves in a more strategic position to deter future actions by Hussein and consequently placing themselves in a more favorable position if such action occurs. The extension was never designed to protect or even address the Kurds, it was merely designed to keep closer tabs on Hussein. In fact, "administration members who deal regularly with Iraq had been looking for an opportunity to implement just such measures." As one United States official stated, "[t]he U.S. is no longer willing to act just around the periphery of Iraq X in the Kurdish north or the Shiite south . . . . We are now prepared to respond with attacks to the center." This is clearly a strategic action which has no United Nations mandate. It deals with Hussein's "control of his own turf," which to date, no United Nations Security Council Resolution has directly addressed. Most importantly, the no-fly zones are created and extended in this case to protect the oil fields of Kuwait and Saudi Arabia.

The Clinton administration does have some legitimate concerns for the region. Clinton has stated that Hussein is, "in better shape than he was the day after the Gulf War in 1991." Hussein has maintained a military presence in the south which consistently poses a threat to Saudi Arabia as well as Kuwait.

In response to questions at a Pentagon press conference, Defense Secretary William J. Perry admitted that within the last six months or year,

113. *Id.*
the area between the thirty-second and thirty-third parallel had shown, "significant training activity." 117 In the same news conference, he stated that, "[e]ven after their defeat in Desert Storm, the Iraqis still have the largest and most powerful military force in the region." 118 With evidence of heavy training and troop movement around Iraq, the United States wishes to contain a "theoretical threat" from becoming a "real threat." 119

The President, in his letter to Congress regarding this latest incident presents perhaps a better attempt at justifying the military presence in southern Iraq. 120 Clinton cites Security Council Resolution 949, passed in 1994, which "demands that Iraq not threaten its neighbors or UN operations in Iraq and that it not redeploy or enhance its military capacity in southern Iraq." 121 Although the Security Council expressly recognizes that any action by Iraq against its neighbors "constitutes a threat to peace and security in the region," it does not provide authority to the permanent members to enforce this resolution. 122 One argument is, since the Security Council is recognizing Iraqi military activity near the Kuwaiti border, 123 and since Resolution 949 specifically refers back to Resolution 687, such action breaches Resolution 687 and subsequently, the conditions of the cease fire. The United States could have authority under Resolution 686, by its reference to Resolution 678, to use all means necessary to enforce the breached cease-fire agreement, which would justify the extension of a no-fly zone to ensure compliance and abate the ever growing threat in southern Iraq. This would be a more credible justification of the extension than the stated reason of enforcing Resolution 688, primarily because Resolution 688 only addresses the repression of Kurds and does not mandate enforcement of the resolution by member states.

It should not be mistaken, that although a theoretical threat exists, the threat is felt most by the United States, as evidenced by the Coalition response to the extension of the no-fly zone and the military attacks on defense installations. Great Britain, Germany, Canada, and Japan were the only Security Council members to offer general support for the United

117. Id.
118. Id.
119. Id.
121. Id.
123. Id.
States' action. Russia denounced the action while France and Spain felt the United States "acted too hastily" or "should have sought a political solution." Russian Foreign Minister Yevgeny Primakov said the unilateral use of force by any country is absolutely impermissible. France in fact refused to fly into the new expanded zone and would only do so within the old zone, up to the thirty-second parallel. French Foreign Ministry Officials said, "Saddam may have been within his rights to send troops to the North. He did nothing illegal." However, it is important to note that France has its own interests in mind, since it stands to gain a great deal of trade, namely oil, once the limited embargo on Iraqi oil shipments is lifted.

The wavering support by Coalition members, including Saudi Arabia, does prove problematic since most initiatives by the United Nations seem to require concerted action. This lack of support indicates that even if the United States would have attempted to attain approval from the Security Council, permanent members such as Russia and China could have prevented such action to be mandated. Therefore, the only way in which the United States and certain Arab interests could be protected, was for the United States to act unilaterally and forego the arguable costs of delay that preceded the Gulf War.


125. Id.


127. Graham, supra note 1.

128. Id.

129. "France hopes to restore long-standing commercial ties with Iraq when United Nations sanctions eventually are lifted. And Chirac . . . has domestic political considerations -- a large and sometimes restive Muslim population that might make trouble if it saw a disproportionate or unjustified attack against a Muslim Arab state." Thomas W. Lippman, *France Refuses Christopher Bid for Aid in Expanded Iraqi ‘No-Fly’ Zone*, WASH. POST, Sept. 6, 1996, at A32.

[T]hey also saw in France's refusal to support America an attempt by Paris to establish a strong French presence in the Middle East, and a long-term calculation that this would put France in a good position to win Iraqi oil and trade contracts once the U.N. sanctions were lifted. With millions of pounds worth of potential deals at stake when sanctions end, France has emphasized its concern for the territorial integrity of Iraq.


130. An initial attack plan that called for having jet fighters take off from air bases in Saudi Arabia and Jordan was abandoned, U.S. officials said, after leaders of those countries made clear to Joint Chiefs Chairman Gen. John Shalikashvili and Assistant Secretary of State Robert Pelletreau . . . that such an operation would cause them political problems at home.

Graham, supra note 1.
Essentially, the United States is worried that Hussein will once again, as recent actions seem to indicate, establish himself militarily and pose a greater threat to the stability in the Middle East region, and the crucial supply of oil. In accordance with international law, a nation should not act unilaterally unless it is defending itself, as proscribed by the United Nations Charter. However, a power such as the United States must at times consider its own national interests and forgo the costs of delay that a United Nations response may procure. The lack of response by the Security Council may be an indication that its purpose of ensuring international peace and security is failing. A nation, with the resources of the United States should not jeopardize its national security and overall interest by waiting without reason for the Security Council to act. As one commentator stated, “a legal system which merely prohibits the use of force and does not make adequate provision for the peaceful settlement of disputes invites failure.” The United States financed the brunt of the Gulf War and has a consequential interest in preventing a recurrence, even if it requires the unilateral violation of Iraqi sovereignty in order to contain this incessant agitator of international peace and civility. United Nations’ actions of “issuing declarations” and the placing of economic sanctions, “by themselves” have not resolved crisis.

This may indicate a legitimate concern by the Clinton Administration that waiting would serve little purpose, but the political purposes of others, such as the situation with France. It is also important to note that the United Nations has not condemned the Coalition no-fly zones, originally, and in response to this latest extension of the no-fly zones by the Clinton Administration. As President Clinton noted, “historically, the United States takes the lead in such matters.” As one commentator stated,

[t]he Iraq-Kuwait situation provided the United Nations and the United States with an opportunity to posture on and strengthen the virtues of international law and world
order. The seemingly congenial relationship developing between the United States and the Soviet Union, as well as the unsavory nature of Hussein and his actions, presented the United States with a prime situation in which to legitimize international law.\textsuperscript{137}

Such an approach may not only be prudent, but necessary to abate future threats to international peace in regions such as the Middle East.

V. CONCLUSION

The extension of the southern no-fly zone in Iraq from the thirty-second to the thirty-third parallel finds little, if any, support in Security Council Resolutions, especially Resolution 688, which is claimed by the Clinton Administration to be a justification for the extension. Resolution 688 was drafted and passed to address the treatment of Kurds in Iraq, but never mandated force or no-fly zones to be used to enforce its demands. No resolutions expressly address or allows the United States to unilaterally extend the zones to satisfy its political and military purposes. In fact, many questions remain as to the legality of the original imposition of the zones in 1991 and 1992.

Actions pursuant to a lack of direct adherence to United Nations Resolutions should not be dispositive of the validity of those actions. Although the extension is seemingly illegal due to its lack of United Nations authority, policy reasons may justify the original imposition and the recent extension. Saddam Hussein has proven to be an unpredictable foe of international peace, and requires treatment more severe than current international procedures allow. Despite this departure from strict adherence to Security Council resolutions, the Security Council and General Assembly still have not formally condemned the zones and consequently have indirectly condoned its imposition and enforcement,\textsuperscript{138} as well as its recent extension.

The necessity of containing Saddam Hussein's military action is readily apparent and the unilateral actions of a world leader, such as the United States, may be necessary to effectuate the international peace and security demanded by the Security Council. Hussein's behavior since the Gulf War has been provocative and incendiary, demanding unique responses. The United Nations must be flexible to address these unprecedented challenges to the world community. In doing so, it must


\textsuperscript{138} McIlmail, \textit{supra} note 44, at 58.
allow a broad reading of its resolutions, to allow its permanent members, either collectively, or individually, to follow through and enforce what the Council and the member states have defined to be a threat to international peace and security. President Clinton’s extension of the southern no-fly zone in September of 1996 was technically illegal, but its validity and necessity is apparent in light of Saddam Hussein’s incessant testing of an international resolve to maintain peace in the Middle East.
A DEFENSE OF UNILATERAL OR MULTI-LATERAL INTERVENTION WHERE A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW BY A STATE CONSTITUTES AN IMPLIED WAIVER OF SOVEREIGNTY

Mitchell A. Meyers

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I. INTRODUCTION

This paper seeks to defend United States intervention in states that violate international human rights law. To explain the modern framework behind the legal justifications for intervention, it is necessary to review the historical development of international human rights law, the concept of sovereignty, and the continuing conflict between the two principles.

II. INTERNATIONAL HUMAN RIGHTS LAW

A. Definition

It has been customary to call humanitarian law that considerable portion of international public law that owes its inspiration to a feeling for humanity and that is centered on the protection of the individual.¹ The concept of an international law of human rights reflects a general acceptance that how a state treats individual human beings is not always the state’s business alone and, therefore, not exclusively within its domestic jurisdiction, but is a matter of international concern.²

B. Origins

The development of human rights law emanates from the ancient distinction between the morality of the decision to instigate war and the morality of the means of waging that war.³ The concept has evolved from centuries of warfare in which combatants (states) have increasingly turned against civilian populations as a means of waging war or of countering internal conflicts. As the “staggering cruelty practiced in the wars of the last 150 years continually prodded the human conscience, the law has been evolved to improve its protection for civilians and combatants.”⁴ The evolution of this concept derives from a split in the perception of the

². See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. a (1987).
⁴. Id. at 918. See also, JUDITH G. GARDAN, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 124 (1993).
underlying activity of conflict. The term *jus ad bellum* refers to the threshold question of whether the reasons for fighting a war in the first place are just, while *jus in bello* refers to whether the war is being fought justly or unjustly. International human rights law disregards the sovereign state's prerogative to engage in warfare and focuses mainly on the *jus in bello*. As will be discussed, the essential parameters of human rights law are sometimes allegedly breached when the promotion of *jus in bello* necessarily encroaches upon the state's claim of sovereignty in its *jus ad bellum*.

C. Codification of International Human Rights Law

The intentional systematic employment of genocide, both within and without the borders of Nazi Germany, generally awakened states and jurists to the need for a more concrete establishment of international human rights law. The experience of World War II resulted in the expansion and codification of the laws of war in the four Geneva Conventions of 1949. The Conventions provide for treatment of the sick and wounded (both in the armed forces and at sea); for treatment of prisoners of war; and for protection of civilian persons in time of war. Despite the broad application of these Conventions, there remained a strong impediment to the protection of international human rights within the domestic jurisdiction of individual states since almost all of the provisions applied only to international wars. Regardless of the growing idea that international human rights law should permeate beyond the borders of sovereign states, the traditional notion of state sovereignty was still powerful at the drafting in 1949. Hence, protection of the sovereignty concept still dominated this codification of international human rights law, and prevented a more substantially enforceable protection of domestic human rights abuses.

6. *Id.*
7. *Id.*
8. *Id.* at 921.
10. Lopez, *supra* note 3, at 924 (stating that the Geneva Convention describes *international war* as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.") *Id.*
Another codification attempt occurred following World War II in the form of the International Military Tribunal at Nuremberg, Germany.\textsuperscript{11} As a result of the proceedings, the Geneva Conventions of 1949 incorporated criminal prosecution as an essential enforcement mechanism of both domestic and international human rights abuses. Violations of the Protocols of the Geneva Conventions during international conflicts were designated as \textit{grave breaches}, which signatory states were required to punish.\textsuperscript{12} Again, the problem in applying the Nuremberg Charter through the Geneva Conventions, is that article 2 of each of the four Conventions applies the provisions only to "all cases of declared war . . . between two or more of the High Contracting Parties."\textsuperscript{13}

A further codification of international human rights, with subsequently much greater enforcement capability than found in the Geneva Conventions, is in the United Nations Charter (U.N. Charter) which states that "[t]he purposes of the United Nations is [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . . ."\textsuperscript{14} Unlike the failed Covenant of the League of Nations, human rights were woven in as an important, indeed a guiding thread, throughout the fabric of the U.N. Charter.\textsuperscript{15} The enforcement of applicable U.N. Charter provisions and the prior codifications of international human rights law will be addressed following discussion of the concept of sovereignty and its conflict with international human rights law. A review of this continuing legal dialectic is essential before demonstrating how sovereignty is steadily losing its status as the bedrock of public international law to international human rights.

\textbf{III. SOVEREIGNTY}

\textit{A. Definition}

Sovereignty is the principle that "except as limited by international law or treaty, each state is the master of its own territory . . . ." and that

\begin{itemize}
  \item \textsuperscript{11} See \textsc{Charter of the International Military Tribunal}, The London Agreement, Aug. 8, 1945, \textit{reprinted in Report of Robert H. Jackson, United States Representative to the International Conference on Military Tribunals} 420-28 (1949) [hereinafter \textsc{Nuremberg Charter}].
  \item \textsuperscript{12} Lopez, \textit{supra} note 3, at 922.
  \item \textsuperscript{13} \textsc{Geneva Conventions} \textit{supra} note 9, at 23.
  \item \textsuperscript{14} U.N. Charter art. 1, para. 3.
  \item \textsuperscript{15} Jan Martenson, \textit{The Universal Declaration of Human Rights, A Commentary} 18 (Asbjorn Eide et al. eds. 1992).
\end{itemize}
“[e]ach sovereign state can only be legally bound by those commitments it willingly makes to other sovereign states, and by those few principles which are viewed as binding on all states.”¹⁶ Sovereignty has traditionally been viewed as an absolute power that may be wielded by the sovereign, within its own territorial jurisdiction. Until modern times,¹⁷ the sovereignty principle has implied that a state is answerable to no other entity but itself when dispensing authority within its own borders or when engaging in warfare with other sovereign states.¹⁸

B. The Historical Development of the Sovereignty Principle

Despite the role that sovereignty has traditionally played in preserving the notion of unaccountability for a state’s internal affairs, there is another side to the sovereignty coin. States have always been limited in the legitimacy of their sovereign status by their reciprocal respect for the concept.¹⁹ In other words, an act by a state in contravention of a legitimate agreement or treaty, could result in other states’ collective retaliatory disregard of that outlaw state’s sovereign status.²⁰ Such retaliatory disregard historically resulted in effects ranging from disenchaunted states becoming reluctant to enter trade agreements and treaties with the outlaw state, to sanctions, and to outright hostility.

The notion that a state’s sovereignty is dependent upon its respect for the sovereignty of other states has customarily included the

¹⁷. Here the phrase modern times refers generally to the period following World War II, with the subsequent creation of international human rights treaties such as the Geneva Conventions of 1949, the Universal Declaration of Human Rights, and the United Nations Charter.
¹⁸. See generally, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206(b) (1987).
¹⁹. Early in 1988, the United States Defense Department became aware of a ship approaching the Gulf with a load of Chinese-made Silkworm missiles en route to Iran . . . the Defense Department . . . argued for permission to interdict the delivery. The State Department, however, countered that such a seizure on the high seas, under universally recognized rules of war and neutrality, would constitute . . . an act of war against Iran . . . the delivery ship with its cargo of missiles was allowed to pass. Deference to systemic rules had won out over tactical advantage.
maintenance of respect for agreements entered into with other sovereign states. Whether the agreement is a trade pact or a military alliance, is a voluntary cession by the contracting states of a portion of absolute authority to determine its own actions. Thus, while a sovereign state has the customary ability to act as it will, it may also agree to waive its absolute ability to exercise that will. The notion of a state's ability to waive sovereignty and to be bound by that waiver has been a pervading theme throughout the attempts to codify the sovereignty principle in modern times.

C. Recognition of Sovereignty in the Codification of International Human Rights Law

Even in modern times, the codification of human rights law would not have been possible without the incorporation of the sovereignty principle into provisions of the various treaties and conventions following World War II. Without this inclusion, states would have been extremely reluctant to enter into binding agreements, since there would be no definable boundary as to how much of a state's sovereignty could be ceded to the tenets of the agreement. Independent states that were subject to colonialization in the past have been particularly fearful of entering into international agreements that even hint at restrictions upon their sovereignty.

The four Geneva Conventions attempted to cut through the sovereignty barrier. Article 3, which is common to all four Conventions, applies in the case of an armed conflict not of "an international character." It prohibits "violence to life and person, the taking of hostages, outrages upon personal dignity, and the denial of judicial guarantees . . . ." On its surface, this indicates an intention by the drafters, and subsequent compliance by the state signatories, to bypass sovereignty in applying the Geneva Convention's humanitarian provisions within the sovereign states themselves. However, interest in the protection


22. During the first few decades after World War II, the movement away from sovereignty often was not perceptible. Indeed, in the wake of decolonization, the role of sovereignty in international law appeared strengthened by . . . their aggressive assertion of . . . [sovereignty by new nation-states]. These developments, however, masked a slow but steady diminution in the realities of sovereign power . . . .


23. Geneva Conventions, supra note 9, art. 3 at 24, 52, 75, 154 (1949).

of sovereignty has permeated the codification. As a result, no specific enforcement procedure was included. Concern for the preservation of sovereignty seems to have prevailed over internal application of international human rights law in the initial drafting of the Geneva Conventions.

The U.N. Charter does not contain a specific definition of sovereignty, but does continue to adhere to the historical principle of sovereignty. There is, however, an important caveat to the U.N. Charter's recognition of this principle. Article 2, paragraph 7 of the Charter refers to the U.N.'s lack of authority to intervene in a state's domestic affairs, but also reads that "this principle shall not prejudice the application of enforcement measures under Chapter VII." By becoming signatories adhering to the Charter's provisions, member states have demonstrated a commitment to waive sovereignty under the purview of Chapter VII. For the first time, state parties to an organization or treaty, are denied the sovereignty cloak as a defense to nonconformity with an agreement's provisions.

IV. VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW CREATES AN IMPLIED WAIVER OF SOVEREIGNTY BY THE VIOLATING STATE

A. Modern Examples of Sovereignty Prevailing Over International Human Rights Law

There now seems to exist a paradigm that the once impregnable barrier of sovereignty can now become quite malleable in the face of persistent international human rights law violations. Historic examples of scenarios where nations such as the United States have foregone intervention, despite what could be argued as an implied waiver of

25. Id. "Although the Geneva Conventions generally contain extensive provisions for the enforcement and implementation of their norms in an international context, in an internal conflict article 3 provides only that the ICRC may offer its services to the parties, an offer that may be refused." Id.

26. (4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations . . .

(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII U.N. Charter.

U.N. CHARTER art. 2, §§ 4, 7 (emphasis added).

27. Id. at art. 2, § 7.

sovereignty, help to convey the importance in acting when a violating state's veil of sovereignty can be pierced.

A glaring example of a foregone but necessary intervention, occurred during the Khmer Rouge seizure of Cambodia. The rampant massacres did not cease until actual intervention in 1979 by the unlikely savior of the occupying forces from Vietnam. Despite international condemnation of Cambodias human rights abuses, the United States lacked the means or political will to intervene. China supported the regime in Cambodia, and the United States likely felt itself in no position to become embroiled in another conflict in Southeast Asia. However, the fact that intervention by other states did not occur prior to Vietnam's role is even less dubious than the tragic reality that subsequent accountability has not been forthcoming.

Although international politics and lack of military means played roles in denying United States intervention, the tragedy of Cambodia demonstrates two undeniable developments. First, that intervention, even by a brutal totalitarian power, brought the Khmer Rouge genocide to a near halt. Second, Vietnam's use of the Pol Pot regime's human rights violations (even as an unsuccessful pretextual argument for intervention) demonstrates the growing recognition by states that the sovereignty barrier can potentially be pierced by way of claiming persistent international human rights violations.

Another example of sovereignty prevailing over intervention, despite an implied waiver of sovereignty based on human rights abuses, is the Castro regime in Cuba. Since Fidel Castro seized power in 1959, his regime has maintained authority through politically-motivated


30. See generally 1979 U.N.Y.B. 271, 272, U.N. Sales No. E.82.I.1. (regarding how Vietnam dubiously claimed the intervention was initiated on behalf of persistent human rights violations).

31. Crossette, supra note 29, at 5 (stating that "[t]he International Criminal Tribunal system is already overstretched and underfinanced in the former Yugoslavia and Rwanda"). Id.

32. See Questions Concerning Asia; Democratic Kampuchea and Vietnam, 1979 U.N.Y.B. 271, 272, U.N. Sales No. E.82.I.1. "[V]ietnam transmitted a declaration . . . [t]hese documents charged that . . . Pol Pot . . . had usurped power, transformed the revolutionary forces into mercenaries for the Chinese authorities, and threatened the Kampuchean people with extermination . . . and called for support . . . from all governments and national and international organizations." Id.
imprisonment, torture, execution, and through repression of emigration, the media, and any political dissent. The United Nations General Assembly (U.N.G.A.), in addition to its broad condemnation of the type of violations orchestrated by the Castro regime, has specifically singled out Cuba's flagrant disregard for international human rights law.

The U.N.'s condemnation of Cuba's human rights violations provides a likely basis for arguing an implied waiver of sovereignty since Cuba is a signatory to the U.N. Charter. Although the Security Council has not authorized such an intervention, Cuba's violations render its sovereignty an incapable defense were the United States to intervene unilaterally on behalf of international human rights law. Despite the possibility of claiming Cuba's implied waiver of sovereignty, political and economic factors commit the United States to a policy of continued recognition of Cuba's sovereignty.

Two political factors have smothered past arguments and efforts at intervention. First, in 1962, the United States promised never to invade Cuba in exchange for removal of Soviet Intercontinental Ballistic Missiles (ICBMs) during the Cuban Missile Crisis. It is now debatable whether this foreign policy obligation was inherited by Russia following the demise of the Soviet Union. Second, diplomatic and trade tension would likely result from certain Organization of American States (OAS) member states that fear potential future intervention based on their own international human rights violations. However, recent criminal acts of this outlaw regime, such as the shooting down of civilian aircraft in international airspace,


34. Id.

35. (20) The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba and has taken the extraordinary step of appointing a Special Rapporteur . . . .

(21) The Government of Cuba has consistently refused access to the Special Rapporteur and formally expressed its decision not to implement so much as one comma of the United Nations Resolutions appointing the Rapporteur . . . .


have finally begun to task the patience of United States lawmakers reluctance at some form of intervention."

From the end of World War II through the collapse of the Soviet Union in 1991, the prolonged proxy wars of the struggle between the democratic and communist blocs often masked gross human rights violations. Even when atrocities received international attention and subsequent condemnation, intervention often carried with it the threat of potential escalation among the major powers. The geo-political consequences inherent in this Cold War paradigm prevented intervention even when the United States possessed sufficient military capability and could have argued that the violating state had impliedly waived its sovereign status on the basis of international human rights violations.

The Cold War and its bloody proxy battles, such as Nicaragua and others, now seem a past period. With the strategic and political restraints of the Cold War, no longer a near total albatross, a new paradigm of foreign policy is foreseeable. For instance, the United States can now intervene in more places where it perceives there has been an implied waiver of sovereignty, without fearing retaliation from a now non-existent Communist bloc. A necessary first step, however, is for other states to recognize that the sovereignty principle is no longer a viable cloak for international human rights abuses. This new interpretation is significantly aided by the modern transformation of the very meaning of the phrase, sovereignty.

B. The Traditional Meaning of Sovereignty is No Longer Viable

The traditional notion of sovereignty as an inviolable, impenetrable barrier that neatly defines a nation's physical and political boundaries is now an outdated concept. One author states that:

[T]he Second World War provided members of the international community with a powerful and tragic lesson in the dangers inherent in an international legal order based on a notion of absolute sovereignty. The

37. H.R. 927, 104th Cong., 1st Sess. § 2 (1995). The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995. "A Bill to seek international sanctions against the Castro government in Cuba, to plan support of a transition government leading to a democratically elected government in Cuba . . . and for other purposes." Id. This controversial Bill penalizes foreign companies that do business with Cuba. Following the downing of Brothers to the Rescue aircraft on February 24, 1996, the Bill sailed through Congress, and was subsequently signed into law by President Clinton. See George Rodrique, House Oks Tighter Cuba Sanctions; Clinton Expected to Sign Bill, WASH. BUREAU OF THE DALLAS MORNING NEWS, Mar. 7, 1996, at 11A.

contemporary international order severely limited the ability of the international community to intervene in the internal affairs of sovereign states. This lesson provided the impetus for the creation of international organizations. . . given some ability to compel member states to comply with their rules and decisions.39

In addition to the voluntary cession of a portion of a state's sovereignty to international organizations, treaties, and agreements, there has been a de facto demographic alteration in the historical definition of sovereignty. Borders are becoming less rigid. Technology is leading to a new international consciousness,40 and modern United States military capability, as well as that of other states, is becoming more efficiently designed for rapid intervention and nation-building missions.

Borders between states can no longer simply be maintained at just physical checkpoints. Communications technology has led to the rapid dissemination of information in an almost uncontrollable torrent throughout the globe.41 The ability of individual states to control the spread of information, and effectively regulate communication between individuals or organizations within and without their borders, significantly undermines the previously established parameters of a state's authority. In addition, the limitless dissemination and communication to all points on the globe creates a sense of international community that did not exist during the formative centuries of the sovereignty principle.42

Besides the limits imposed on sovereignty by communications technology, economic interdependence has also served to erode the sovereignty principle. The Maastricht Treaty, signed by the member states of the European Community, was designed to form a super state out of a once solely economic union.43 Of all the post-World War II treaties, this has been the most ambitious with its near complete cession of sovereignty by its member states, both in foreign and domestic affairs.44 In response to the potential trading juggernaut of the European Union, the United States Congress passed the North American Free Trade Agreement (NAFTA) in...
Despite domestic pressure against the treaty for fear of an exodus of United States industry and jobs to Mexico, the Congress recognized that economic strength cannot be sustained from within a state's own borders alone.46 As a result of NAFTA, the level of trade has increased throughout Canada, the United States, and Mexico. In fact, Congress is now considering an expansion of NAFTA to other states in the western hemisphere.47 Comprehensive trade agreements have often been historical predecessors to the loosening of borders and stronger political ties between states.48

Sovereignty as a feasible defense to legitimate intervention should not be limited by the reality that the majority of current conflicts are civil in nature.49 If a state is violating the international human rights of its citizens, and the facts are known to the outside world, it seems a fallacy for the violating government to claim that its sovereignty has been violated upon legitimate intervention.50 These factors demonstrate that the sovereignty principle, embedded even in modern codifications,51 is no longer viable as a defense to legitimate intervention based on that state's international human rights.
violations. If a state commits human rights violations on a persistent basis, these acts are not likely to go unnoticed by the general population of that state. Unlike the time of Nazi Germany, human rights violations committed virtually anywhere in the post-Cold War world cannot go unnoticed for long, even if witnessed by only a few. Communications technology and the reach of the global media are simply too pervasive and unregulated to be thoroughly silenced by any single state. This spread of global awareness, coupled with the proliferation of massive trade pacts and voluntary cessions of sovereignty, are indicative of a new international consciousness that has reduced the once formidable principle of sovereignty into a more malleable concept.

C. A State's Implied Waiver of Sovereignty

A state has impliedly waived its sovereignty when it is no longer in compliance with international human rights law. International human rights law applies to all states as a universal principle of *jus cogens*, regardless of whether a particular state is a non-signatory to such treaties and agreements.

When a state commits human rights abuses against nationals of another state, or against its own population, it has waived its sovereignty specifically under the Nuremberg Charter and the United Nations Genocide Convention. The Nuremberg proceedings were begun to bring the Nazi leaders and their subordinates to justice. Nuremberg was key in


54. Nowrojee, *supra* note 49, at 129. “The slow, but evident, erosion of an absolute position on sovereignty is leading to an emerging right, and perhaps even duty, for states to intervene on humanitarian grounds.” *Id.*

55. *See* MARTENSON, *supra* note 15, at 20. “The spirit and philosophy of the UDHR [Universal Declaration of Human Rights] . . . not exclusive of one group or another but aims at the protection of the human rights of every person.” *Id.* U.N. CHARTER art. 2, para. 6. “The organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.” *Id.*

56. *See NUREMBERG CHARTER, supra* note 11.


that it was designed to recognize that human rights abuses committed even within a sovereign's domestic arena, were nonetheless criminal acts. Seizing upon the invaluable precedent of Nuremberg as a tool to penetrate the sovereignty veil, the U.N.G.A. adopted the fundamental principles of Nuremberg in the United Nations Genocide Convention of 1948.\(^6\) The Convention is but one important, specific example of the codification of this modern legal philosophy of accountability. It has come full circle from its inception at Nuremberg to the recently created International Criminal Tribunal for crimes against humanity in the former Yugoslavia.\(^6\)

The U.N. Genocide Convention and the principles established at Nuremberg do not provide for a specific preemptive enforcement provision. However, they do lay a framework for establishing the illegitimacy of a violating state’s sovereignty defense, and the legitimacy of another state’s preemptive intervention. If the community of nations provides for international military tribunals to punish offenders within a violating state, it is reasonable to infer that preemptive action is even more legitimate and desirable to prevent the offenses. The question remaining should be not whether actual enforcement should occur, but how will it occur?

V. AUTHORIZATION OF THE UNITED STATES TO ENFORCE INTERNATIONAL HUMAN RIGHTS LAW

A. United States Multilateral Enforcement of International Human Rights Law

Following the inception of the U.N., Congress committed the United States to its multilateral goals and service through enactment of the United Nations Participation Act (UNPA) of 1945.\(^6\) As a significant portion of its commitment, the United States has provided massive funding and military support, in accordance with Article 43 of the U.N. Charter.\(^6\)


62. Id.
Congress authorized the President to commit armed forces, facilities, or assistance, but subject to congressional approval of a special agreement with the U.N. This was probably an attempt by Congress to limit the President's ability to commit forces under a U.N. mandate without congressional approval. As subsequently observed during the Cold War, congressional power to restrict executive deployment of armed forces atrophied due to the rapidity in which conflicts erupted versus the slow process of congressional hearings and votes.

The effectiveness of congressional control of the President's deployment power under UNPA eroded significantly by the Korean conflict in 1950. After the U.N. Security Council authorized U.N. member states to counter North Korean aggression, President Truman deployed United States troops without waiting for Congress to approve a special agreement with the U.N. President Truman merely sidestepped the constitutional question of executive action requiring congressional approval by "not referring to the conflict as a war." Today, a debate continues in Congress over whether the United States military should continue to play a role in peacekeeping operations. House and Senate Republicans argue that the United States spends a disproportionate amount on peacekeeping; that American peacekeepers are prominent targets for extremist groups abroad; and that generally the United States is better off withdrawing into the quiet nest of isolationism.

However, it is vital for international human rights law that the United States remain the military backbone of U.N. peacekeeping operations. Withdrawal of United States military and financial support would set back enforcement of international human rights law to its nonexistent position prior to Nuremberg. Although Congress may choose to abrogate its obligations under the U.N. Charter, the international obligation would continue based on its original adherence to the Charter. Outlaw regimes and fanatical extremist groups could interpret United

63. U.N. CHARTER art. 43. "All members . . . undertake to make available to the Security Council, . . . in accordance with a special agreement . . . armed forces, assistance, and facilities . . . ." Id.

64. Naarden, supra note 61, at 236-7.


67. See U.N. CHARTER art. 43.
States intransigence as meaning they have free reign to commit unaccountable acts of terrorism and genocide.

Congressional Republicans may claim there is no need to provide troops and military aid to U.N. peacekeeping operations, and that other nations troops are more expendable. However, with the end of the Cold War, the role played by U.N. authorized deployments has changed from a primarily peacekeeping role, to one of peacemaking. Rampant human rights abuses now tend to occur within states embroiled in civil wars (the former Yugoslavia); in territories where government has simply ceased to exist (Somalia); and where juntas have seized power illegally (Haiti). The function of all committed U.N. member states armed forces is no longer just peacekeeping. They must be ready to meet the need for rapid deployment and potentially prolonged nation-building missions, in what is essentially a restorative occupation of peacemaking.

The U.N. itself lacks the military, intelligence, and communications technology necessary for low-risk, rapid intervention. Instead, the U.N. must rely on the military contribution from its member states. The United States has the most efficient capability for complex, rapid intervention designed to minimize bloodshed and maximize success. Since the end of the Cold War, the United States military has been ordered to steadily refocus strategy towards smaller scale, regional conflicts.

68. Naarden, supra note 61, at 242. See also Wedgewood, supra note 66, at 635 (stating that "[i]n Somalia, and in elements of the Yugoslav operation, the Security Council authorized peace keepers to operate even without the consent of the parties, under Chapter VII enforcement authority").

69. Wedgewood, supra note 66, at 636. The United Nations lacks real-time intelligence . . . and lacks satellite phones to communicate straight to the field. For example, in the Rwanda emergency, Secretary Boutros-Ghali had no direct link to the head of UNAMIR troops. The U.N. Department of Peacekeeping Operations was never set up to be a military command center. Id.

70. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T ST. DISPATCH. Vol. 6, No. 5, (Aug. 28, 1995). Absolute cost to the United States remains a small portion of its national security expenses, a far cheaper choice than taking an isolationist stand until forced to confront crises after they have spread to directly threaten United States interests. See Wedgewood, supra note 66, at 636. "There is now a sense that intervention . . . must be contracted out to a coalition . . . who are militarily able." Id.

71. TIM RIPLEY, MODERN UNITED STATES ARMY 6 (1992). "United States military planners now work on the basis of a forward presence to be reinforced in a crisis by rapidly deployed forces from the continental United States." Id.

72. Id. at 13. "United States army chiefs have stated that small, mobile and highly trained light forces will be of increasing importance in a world where low-level regional conflicts are likely to be the most prevalent form of warfare." Id.
This effort at United States military adjustment has already borne results for the enforcement of international human rights law. Where the U.N. Security Council has recognized the need for intervention, sovereignty has been pierced, and the initial rapid deployment of United States peacemaking forces has resulted in mostly successful transitions to the U.N.'s peacekeeping authority.\textsuperscript{3}

One notable failure, however, occurred in Somalia. The problem resulted not from a flaw in the goals of intervention, but in the confused chain of command.\textsuperscript{4} In fact, the initial success of the Somalia intervention in providing food, relief, and protecting the population against factional violence, demonstrates the need for the United States armed forces to be the spearhead of any multilateral intervention, and for the maintenance of a unified chain of command.

Congressional budget trimming on future intervention and funding for human rights operations can only harm the growing trend of multilateral action in dealing with international human rights abuses. If multilateral consensus dwindles, customary international law could revert back to the old pure sovereignty defense. Then, international human rights law could potentially evaporate into an extinct legal concept.

\section*{B. United States Unilateral Enforcement of International Human Rights Law}

Multilateral intervention is not always feasible in certain circumstances. Despite a desire by the United States to take collective action,\textsuperscript{73} it is sometimes necessary for the United States, or other states, to act unilaterally to enforce international human rights law. The most succinct example of the need for unilateral action can occur when a Permanent Security Council member state vetoes a resolution for

\begin{itemize}
\item \textsuperscript{73} See BUREAU OF PUBLIC AFFAIRS, U.S. DEP’T. ST. DISPATCH, supra note 70, at 662. Recent peacekeeping successes include Mozambique, El Salvador, Cambodia, and Namibia, all countries where the U.N. helped bring long, bloody conflicts to an end and then assisted in the establishment of more democratic and stable governments. Id.
\end{itemize}
intervention. In the wake of the Cold War, the threat of the veto power used against United States interests has been minimized since Russia is for the moment more willing to accommodate United States interests in its quest to maintain loan guarantees. China frequently abjures in what may be an effort to ensure continuation of its most favored-nation trading status with the United States. However, the current geo-political situation is not frozen indefinitely. Elections, coups, and changes in strategic interests, all can play a role in the unpredictable future of global politics and subsequently U.N. Security Council voting.

Since the United States favors multilateral action, if unilateral intervention is deemed necessary for whatever reason, the United States can attempt a subsequent ratification by the U.N. The Somalia intervention demonstrates United States eagerness to obtain subsequent ratification for unilateral action. The United States, however, has not always been dissuaded from unilateral action in its enforcement of international human rights law when it perceives its interests as paramount to international obligations.

One argument supporting unilateral action is that, despite a bias towards the maintenance of sovereignty (except at the behest of the U.N. Security Council under Chapter VII), the U.N. Charter, itself, supports unilateral action when necessary. Article 2(4) of the Charter requires member states to refrain from infringement on another state's sovereignty, yet "[a]rticles 55 and 56... [require] each U.N. member to take joint and separate action to insure the 'universal respect for, and observance of, human rights and fundamental freedoms.'" Thus, under the UNPA, enacted by Congress to bind the United States to the U.N. Charter, the United States, and other states, have a treaty obligation to intervene unilaterally when violations of international human rights law occur. Not only is this argument a defense for United States unilateral intervention, it also presents such intervention as a binding obligation.

76. U.N. CHARTER art. 27, § 3 (stating that, "[d]ecisions of the Security Council... shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.") Id.

77. Byron F. Burmester, On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights, 1994 UTAH L. REV. 269, 270 (1994) (Inferring that "[a] state that employs force against another state will attempt to define its acts as being justified under the Charter.")

78. Id. at 269 (claiming that the United States entered Somalia not at the request of the U.N., but rather, after unilaterally volunteering, the U.N. quickly ratified the United States offer, authorizing the newly formed multilateral force to use all means necessary.)

A second strong defense for unilateral intervention arises from what could be interpreted as a violating state's implied waiver of sovereignty. If a state forfeits its sovereignty through human rights abuses, and an intervening state is merely trying to eliminate the violations, then the intervening state has not violated international law. Critics may charge that this justification can be used by any aggressor state trying to cloak the illegality of its intervention. Yet, subsequent actions taken by the intervening state can demonstrate for itself the true nature of the intervention. International organizations, such as the U.N., can choose to ratify the action or request that member states use multilateral force to eject the intervening state. It is more practical to support swift unilateral intervention to halt human rights violations, than to favor an endless dialogue over motives, funding, and consequences.

VI. CONCLUSION

The codifications and precedents of the last fifty years have provided strong authority that a state forfeits its sovereignty when committing human rights abuses. Through international organizations, treaties, and growing customary international law, states are learning that sovereignty is no protective barrier for torture, rape, political imprisonment, enslavement, and murder. The U.N. can provide a powerful legitimacy in its authorization of intervention. However, the United States remains the predominant enforcement power of both Security Council Resolutions and of its own interest in preserving international human rights. Elements in the United States Congress and elsewhere should understand that the funding, military backing, and general support of the United States in peacemaking operations is a vital deterrent against international chaos. Indeed, preservation of international human rights law is a more important United States interest than is the harm to international stability that would ensue in a decline of respect for international human rights law.

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80. Id. at 284. "[I]t is not relevant that the United States justified intervention in Panama by claims that General Noriega violated international drug laws. To the contrary, the United States returned the lawfully elected government to office, thus demonstrating its altruistic motives by its actions." Id.
INFANCY AND MATURITY: A COMPARISON OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE UNITED STATES CONSTITUTION

Bruce E. Shemrock

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The Canadian Charter of Rights and Freedoms' (Charter) was Canada's first foray into constitutional governance. It represents Canada's first specific guarantees of individual liberty on a constitutional level. It also expanded the role of the Canadian judiciary by explicitly charging courts with interpreting the Charter's provisions and with developing analytical applications when evaluating constitutional issues.¹

This paper discusses some interesting facets of Canada's new constitution, judicial holdings since the constitution's inception, and compares it to the more-developed constitutional jurisprudence in the United States. The Introduction section briefly discusses Canada's constitutional history, and then outlines some considerations necessary for the subsequent discussion. The Introduction also gives an overview of the

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² CANADIAN CHARTER § 24.
structure of the Canadian Charter of Rights and Freedoms. The Comparison section offers a discussion of the differences between Canadian and American judicial review theories and tests, and then contrasts individual rights litigation jurisprudence under the two constitutions. The Comparison section then discusses the issues of: 1) standing, 2) search and seizure, and 3) the exclusionary sanction, by contrasting the two constitutional models. The paper then concludes that considerable differences exist between the two constitutions, notwithstanding the similarities in both cultures. It also concludes that the Canadian Charter has many advantages over the United States Constitution, but that Canadian courts are handicapped by the temptation to blindly follow United States constitutional jurisprudence.

I. INTRODUCTION

A. History

Canada was formed through the British North America Act (hereinafter B.N.A.) executed in 1867 by the British Parliament. The B.N.A., also known as the Constitution Act of 1867, defined the basic element of Canada's judicial system. It did not, however, define the powers of the federal or provincial governments, and provided no way to transcend government actions which infringed on individual rights. Contrary to the United States system, which relies heavily on the Federal Constitution as the primary source of legal protection against governmental interference upon individual rights, the Canadian system followed the British convention of parliamentary supremacy whereby the Supreme Court served in a purely advisory capacity.

While individual liberties were not addressed in the B.N.A., they were guaranteed by the Canadian Bill of Rights. The Bill did, however, not have constitutional status, and the Canadian Supreme Court historically

6. Id.
7. Canadian Bill of Rights, 1960, 8 & 9 Eliz. 2, ch. 44 (Can.). While labeled Bill of Rights, the legislation was merely a statute, able to be repealed at any time. Further, the Bill probably was not binding on the provinces. William C. Hodge, Patriation of the Canadian Constitution: Comparative Federalism in a New Context, 60 WASH. L. REV. 585 n. 110 (June 1985).
hesitated to employ the Bill to invalidate government actions. This changed in 1982 when the British Parliament enacted the Canada Act of 1982.

B. The Charter

The Charter essentially changed the structure of Canada's government. The Canada Act removed all of the United Kingdom's authority in governance over Canada and, along with the Constitution Act, formulated the central law of Canada. Already, a primary contrast between the Charter and the United States Constitution is evident: the Canadian Charter was enacted by the British Parliament, while the United States Constitution came from the people which it was meant to protect and emancipate from the British. However, the Canadian people were involved to some extent in creating the Charter. The Canadian Charter required ratification via the Canadian Parliament in essentially the same way as the United States Constitution was ratified by the states.

Before entering into an analysis of the constitutions of the two nations, it is necessary to understand some fundamental differences between the Canadian and American systems of government. First, in the judicial scope, Canada basically has a unitary judicial system with no separate division of federal and provincial courts. The United States, in contrast, has a dual system which provides for the power of both state and federal courts. Contrary to the American judicial system, the Canadian Supreme Court, the nation's highest court of appeal, has authority to decide any federal or local question raised in a case. However, while jurisdiction may remain in theory, appeals to the Canadian Supreme Court as of right were abolished in 1975, and the Court now rarely grants leave

9. Canada Act, 1982, ch. 11, sched B (Eng.).
10. Prior to 1982, Canada was controlled by a parliamentary system of government, with a Prime Minister as leader and the Monarch of England as the supreme head of state. Under this model, there is not a separation of power but a fusion of power between the legislative and executive branches of government. Parliament both creates the executive branch and regulates the judicial branch. Arthur M. Schlesinger, Jr., The Constitutional and Presidential Leadership, 47 MD. L. REV. 54, 55 (Fall 1987).
12. CANADIAN CHARTER §§ 52, 60.
13. Sedler, supra note 5, at 1194 n.10.
14. Id.
15. Id.
to hear questions of provincial law.\textsuperscript{16} The constitutional process in Canada concerns the association between the courts and the government, while in the United States it concerns the federal courts and the branches of both the federal and state governments.\textsuperscript{17} Additionally, the Canadian Charter expressly provides that the courts are responsible for defining the Charter's provisions and for making decisions regarding governmental actions in light of the Charter.\textsuperscript{18} Such responsibility is not so explicitly mandated in the United States Constitution.

There is another difference in the relationship between the judiciary and the government in each country. In the United States, judicial review is perceived as being confrontational. The United States Supreme Court strikes down laws or actions, appearing to be directly in conflict with the legislative branch of the system.\textsuperscript{19} In Canada, the Supreme Court judicial review process most often takes the form of a procedure called \textit{references} where the interested party, usually the government, voluntarily requests the Court to determine the constitutionality of a government action or legislation.\textsuperscript{20} The interested parties do not ask the Court to strike down a law, and the Court in Canada takes on a more advisory role. Such a role is impossible under the United States constitutional jurisprudence.\textsuperscript{21} In Canada, the \textit{reference} procedure and review by the Court is a matter of right,\textsuperscript{22} and the courts' role in defining the Charter was explicitly provided for in the body of the Charter.\textsuperscript{23} Rather than a confrontational process as in the United States, Canadian Supreme Court judicial review of government action appears to be a more cooperative effort between the judiciary and legislative bodies.\textsuperscript{24}

Secondly, the way powers are allocated to the provinces and to the federal government differs from the governmental hierarchy system in the United States. The Constitution Act of 1867 explicitly defines the Canadian federal government's exclusive powers\textsuperscript{25} and the powers of the

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 1231.
\item \textsuperscript{18} CANADIAN CHARTER § 52.
\item \textsuperscript{19} Sedler, supra note 5, at 1232.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Herb v. Pitcairn, 324 U.S. 117, 125-26, (1945) (holding that the United States Supreme Court was not permitted to render advisory opinions).
\item \textsuperscript{22} Sedler, supra note 5, at 1233 (citing Attorney-General of Ont. v. Attorney-General of Can., [1912] A.C. 571 (Can.)).
\item \textsuperscript{23} CANADIAN CHARTER § 52.
\item \textsuperscript{24} Sedler, supra note 5, at 1233.
\item \textsuperscript{25} B.N.A., supra note 3, § 91
\end{itemize}
provincial legislatures.26 These powers do not overlap, but in case of
direct conflict over an activity, the federal power prevails.27 The only
amendment in the 1982 Act which affected allocation of power was the
expansion of provincial powers over non-renewable natural resources.
Conversely, a prominent feature of American allocation of power is
concurrency: states have power to govern in the interests of the health and
welfare of their citizens except when the Constitution explicitly prohibits
the states from exercising such powers.29 Furthermore, any power not
guaranteed to the federal government is left to the states.30 States do not
derive their sovereignty from the Constitution, as the Canadian provinces
do, rather the United States Constitution limits the extent of state powers.

Before a proper analysis of the Canadian Charter and comparison
with the American Constitution can be performed, it is necessary to first
gain an albeit cursory familiarity with the provisions of the Canadian
Charter of Rights and Freedoms.

C. Structural Overview

The structures of the provisions of the Canadian Charter differ
significantly from those of the United States Constitution. One reason for
this is that the Charter was written at a time when Canada had over a
century to develop its jurisprudence,11 while the American Constitution was
developed at the inception of the country. In fact, many provisions of the
United States Constitution were designed to prohibit colonial practices
which the framers found particularly repugnant.32 Another contrast
between the two constitutional systems is thus evident: since the Canadian
Charter is a contemporary document, it was drafted with experience
relevant to modern contemporary life, allowing for provisions relevant to
twentieth-century rights protection. The United States Constitution rarely
directly addresses modern rights issues, and the Supreme Court has had to
develop rights protections relevant to contemporary American society by
creating penumbra rights.33

27. Sedler, supra note 5, at 1196.
28. CANADIAN CHARTER § 50.
29. U.S. CONST. amend. X.
30. Id.
31. Sedler, supra note 5, at 1212.
32. Id.
33. Id. at 1212-13.
The *limiting provision* of section 1 of the Charter outlines the consideration required when analyzing alleged infringements on individual rights.\(^{34}\) According to this section, the rights and freedoms guaranteed by the body of the Charter are subject only to reasonable limits prescribed by law as can be justified in a democratic society. As discussed above, this section, taken along with section 24, has been regarded as the Canadian courts' mandate to interpret the Charter's provisions.

Section 2 proclaims the explicit guarantees of freedom of religion, opinion, expression, peaceful assemble, and association.\(^{35}\) They are enumerated as explicit declarations of rights, as opposed to the provisions of the American Bill of Rights and the Fourteenth Amendment. Sections 3, 4, and 5 outline the federal parliamentary election system and the system for the legislative assembly.\(^{36}\) Section 6 discusses mobility rights, while sections 7 through 14 cover the legal rights of life and liberty, freedom from arbitrary detention, unreasonable search and seizure, and prohibition of cruel punishment.\(^{37}\) This area, subtitled *Legal Rights*, also addresses criminal procedure provisions such as: double jeopardy, rights to speedy trial, and the presumption of innocence until proven guilty.\(^{38}\)

Particularly unique to the Charter is the guarantee of language rights.\(^{39}\) The section first grants unequivocal equal status to both French and English as official languages of the country. This section guarantees citizens the right to engage in debate in parliament, to receive public services, and to be tried in court in either language. This section also guarantees the right to be educated in either language through the secondary school level.\(^{40}\)

As mentioned above, section 24 is particularly important from the judicial perspective, as it mandates the courts' role in interpreting the Charter's provisions.\(^{41}\) This section commands the courts to hear complaints of those whose rights have been allegedly infringed or denied, and orders the courts to consider the complaints and apply appropriate remedial measures.

Another unique provision which warrants special consideration is section 33. Called the *section 33 override*, its provisions are all but

\(^{34}\) *Canadian Charter* § 1.  
\(^{35}\) *Id.* § 2.  
\(^{36}\) *Id.* §§ 3, 4, 5.  
\(^{37}\) *Id.* §§ 6-14.  
\(^{38}\) *Id.* §§ 7-14.  
\(^{39}\) *Id.* §§ 16-23.  
\(^{40}\) *Id.* § 23.  
\(^{41}\) *Id.* § 24.
prohibited in the American constitutional system. The section permits, with qualification, a province to decide that certain provisions of the Charter will not apply to them and enables the provincial legislatures to enact provisions which completely contradict their Charter counterparts.42

II. COMPARISON WITH THE UNITED STATES CONSTITUTION

A. Judicial Review

The United States has had well over 200 years to develop its constitutional jurisprudence. In contrast, Canada has had only fourteen. The Canadian judiciary must constantly battle with the temptation to follow United States constitutional case law. Such borrowing could lead to illogical analysis and the creation of a legal framework and structure that is inconsistent with the differing Charter. Consequently, Canadian courts risk developing tests which apply incorrect logic to issues and exceptions inherent in a Charter with differing provisions.

Contrary to the American view of courts, judicial review in Canada is seen as supportive of the legislature rather than being in conflict with it.44 The Charter expressly legitimizes judicial review of government actions, and the right to review such actions did not need to evolve as it did in the United States, through Marbury v. Madison.44 Since the Charter expressly mandated the right to review its provisions to the courts, no such evolution was required in Canada.44

42. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

43. Sedler, supra note 5, at 1198-99.

44. Marbury v. Madison, 5 U.S. 137 (1803). The United States Supreme Court in this landmark case observed that it is implicit in a written constitution that it cannot be changed at will. Further, the Court mandated the task of interpreting the laws of the land, "[i]t is the province and duty [of the court] to say what the law is." Id.

B. Infringement of Protected Rights

In individual liberty litigation, section 1 of the Charter has been a central feature. The section acknowledges that the government may limit freedoms guaranteed elsewhere in the Charter. It also creates a framework for analysis when an alleged infringement occurs: the claimant must first establish that the government's action has infringed some right protected by the Charter. Such infringement can then still be declared constitutional if it falls within the reasonableness of parameters of governmental action as defined in section 1. Contrasted with American constitutional analysis, government interests do not enter into the formula as they do in the United States system. The Canadian test does not limit the extent of individual rights with an evaluation of government interests.

The first prong of the test, government action, was defined in Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery, Ltd. The Canadian Supreme Court's threshold definition of government action, developed in this case, has since come to be known as the Dolphin Delivery Government Action Requirement. In the case, the plaintiff-union contended that a court-imposed injunction against picketing constituted an infringement of the Charter's section 2(b) freedom of expression. The Court held that the injunction constituted judicial enforcement of common law and did not rise to the level of government action for individual liberty litigation purposes.

The Court then went on to limit government action to legislative, executive, or administrative action by a government body which is alleged to have infringed on a right enumerated in the Charter. Charter right infringement litigation was held to be inappropriate in cases such as Dolphin Delivery, where the cause of action is between two private parties and no government action is relied upon as the basis for the litigation. Contrast this with American cases such as Shelley v. Kraemer in which the United States Supreme Court held that judicial enforcement of covenants in a private agreement constituted government action for Fourteenth Amendment purposes.

46. CANADIAN CHARTER § 1.
47. Liss, supra note 8, at 1284.
49. Id. at 600.
50. Id. at 598-99.
51. Id. at 603.
Once government action has been established, a plaintiff must demonstrate an infringement of individual rights as defined in the Charter. The degree of infringement was defined in *Operation Dismantle Inc. v. The Queen.* The plaintiffs alleged that the Canadian Cabinet's permission, allowing the United States to test missiles in Canadian territory, violated their guarantee of life and security of person because it increased the probability of nuclear war. The Canadian Supreme Court denied the claim as speculative and hypothetical, and in its holding defined *infringement* as an actual or probable deprivation of a guaranteed right which can surely result directly from the government action. The Court further held that, while allegations should be taken as true for litigation purposes, such allegations must be capable of proof.

Once the plaintiff has established the *prima facie* infringement case, the government has the burden of showing that its action was reasonable as outlined in section 1 in order to prevail. As discussed above, unlike American constitutional analysis, the government interest is of no importance and takes no part of the analytical framework. Thus, in Canada an infringement of the rights outlined in the Charter may be saved by a showing of reasonableness as provided by section 1.

When government action takes the form of legislation, the Canadian Supreme Court now employs the *Oakes* three-prong test developed in *Regina v. Oakes.* In *Oakes,* a federal narcotic statute required that defendants proven to be in possession of narcotics were required to prove that they were not in possession for purpose of trafficking. The Court in *Oakes* determined that this statute infringed upon Charter section 11(d) which provides that those accused of offenses are presumed innocent until proven guilty. Having determined the infringement, the Court then decided whether the government action could be saved under section 1. After analyzing the legislative objective, the

53. CANADIAN CHARTER § 1.
55. *Id.*
56. *Id.* at 456.
57. *Id.*
60. *Id.* at 114.
61. The Court held that, to maintain the reasonableness of the government infringement, the government's legislative objective must be "of sufficient importance to warrant a
Court used a three-prong analysis to test the means used by the legislature to achieve its objective: 1) the means must be rationally connected to the objective; 2) there must be minimal impairment of the right in question; and 3) the effects of the measures impairing the right must be in proportion to the legislative objective. The Court held that the legislative objective of protecting society from drug traffickers as sufficiently warranted, but it held that the statute failed the first prong of the three-prong test because the statute was applied to those arrested with minimal amounts of narcotics who could not possibly be found to be traffickers. While the third prong of the Oakes test may seem to implicate a government interest analysis, the Canadian Court has yet to employ this prong to a large extent. Justices have stuck to the first two prongs of the test to invalidate government actions, and in doing so have appeared more deferential to the legislature. Further, the Court has yet to define the requirements and applications of prong three.

There are several advantages to the Canadian constitutional analysis framework over its American counterpart. Because of the contemporary nature of the Charter, the drafters were able to resolve many constitutional questions that United States courts have had to resolve through extensive litigation and interpretation of the Constitution. Many constitutional issues which had been previously litigated in the United States are addressed and remedied by the text of the Charter. One advantage of the Charter, removing analysis of the government's interest, may be appealing. In his article A Mandate to Balance, Franklin Liss illustrates through the following example, the contrast between the two analytical systems. A and B wish to engage in the same act under differing factual circumstances which appears to fall under the protection of the Canadian Charter. The government desires to regulate the conduct in the same way with respect to both A and B. Because of differences in facts, the government action takes the form of

constitutionally protected right or freedom” and such objective must “relate to concerns which are pressing and substantial in a free and democratic society.” Id. at 138-39.

62. Id. at 139.
63. Id. at 142.
64. Liss, supra note 8, at 1312.
65. Id. at 1311.
66. Id. at 1312.
67. Sedler, supra note 5, at 1223.
68. Liss, supra note 8, at 1312.
69. Id. at 1312-13.
two different statutes. The government’s legislative objective in regulating within A’s case is far superior to its objective in B’s.

Assume the government’s regulation in A’s case is upheld under a section 1 reasonableness analysis. This result would not prejudice, and may assist B’s constitutional challenge. B could use A’s unsuccessful challenge to show the infringement and establish his prima facie case. B could then use A’s case to show that the legislation in B’s case must fail under a section 1 analysis because the legislation in A was held to be reasonable.

In the United States, a court upholding the legislation in A’s case, after balancing the competing interests of A and the government, could structure its analysis so that the conduct in both A and B’s cases would not be constitutionally protected. In the United States the conduct could be broadly regulated if A loses his case, while in Canada, each case is differently, and the legislation in B’s case may be found unreasonable, partly due to the government prevailing in A’s case. Therefore, when government interests are analyzed, as in the United States, litigants are precluded from bringing cases subsequent to a holding detrimental to their argument. When no government interest is analyzed, as in Canada more litigants may have their day in court.

Another advantage is the probable consistency in Canadian Charter analysis. The section 1 reasonableness of government infringement on guarantees of freedoms framework is independent of the Charter guarantee infringed. Holdings subsequent to Dolphin Delivery and Oakes appear to use the same analysis despite the nature of the transgressed right. In American constitutional jurisprudence, the tests and analyses employed depend on the right infringed. There are no textual provisions in the United States Constitution to guide the courts, and the Supreme Court has been left to develop its own mode of analysis. The consistency enjoyed in Canada is impossible under the United States model.

70. Id.
71. Id. at 1313.
72. Id.
73. Id., citing Devine v. Quebec, [1985] S.C.R. 790 (Can.) (holding language provisions infringed on Charter section 2(b) but were justified under section 1 analysis); and Regina v. Paul Magder Furs, 60 O.R.2d 172 (Ont. Ct. App. 1989) (holding that analysis by the Supreme Court in another case was equally applicable to a challenge to the same legislation alleging infringement of a different Charter provision).
C. Standing

The United States and Canadian courts have addressed the issue of standing in different manners. The Supreme Court of Canada has taken the opposite approach of its American counterpart regarding standing issues. The Canadian Court permits third parties to apply for constitutional remedies. This has lead to a substantial difference between American and Canadian standing holdings in constitutional-challenge cases.

Section 24 of the Canadian Charter grants remedy only to persons "whose rights or freedoms . . . have been infringed." Standing often depends on the scope of the right or freedom as defined by the provision guaranteeing it. The Canadian Supreme Court has also permitted third parties to assert the constitutional rights of others. Further, anyone charged with a criminal offense has standing to challenge the constitutionality of the law under which they were charged even if their own rights had not been violated. This was the holding in Big M Drug Mart, a landmark case regarding standing in Canadian constitutional jurisprudence. This holding has been cited favorably in subsequent cases, and third-party standing status still prevails in Canada. By contrast, the United States Supreme Court has held that complainants must demonstrate a violation of their own constitutional rights before they can claim standing to challenge the constitutionality of legislation.

The issue of personal standing in search and seizure cases has not been conclusively defined by the Canadian Supreme Court. Section 8 of the Charter proclaims the right to be secure against unreasonable search and seizure, and the Court had the opportunity to address the section in Hunter v. Southam. In Hunter, the Court referred to an American case, Katz v. United States, to interpret the provision of section 8 as based on privacy interests and not property interest. The Court cited the much-

74. CANADIAN CHARTER § 24.
77. Id.
78. See e.g., Regina v. McDonough, 44 C.C.C.3d 370 (Ont. D.C. 1988)(holding the defendant had standing to constitutionally challenge search of third person's car).
used *Katz* standard approvingly, and has imposed the standard of this case as useful when construing section 8 protection.83

In most instances, standing issues represent another contrast between the provisions of the American constitution and Canadian Charter. They also present another example of why Canadian courts should resist the temptation to blindly apply American rules to Canadian constitutional challenges.

**D. Search and Seizure and the Exclusionary Sanction**

When issues involve search and seizure, and admissibility of evidence obtained in an illegal search and seizure, the two countries' systems also differ. As mentioned above, the Canadian Court, in its limited experience construing section 8, seems to believe that the section is similar to the rights protected by the Fourth Amendment of the United States Constitution. However, the two provisions are not identical. The crux of the contrast between the two lies in the remedial provisions of the two constitutions.

The remedy in illegal search and seizure situations in Canada is expressly contained in section 52 of the Canadian Charter.84 This theory was confirmed in *Regina v. Collins*85 in which the Court held that evidence illegally obtained should be excluded, and that such exclusion is expressly provided for by section 24 of the Charter.86 Exclusion of such evidence in the United States stems from judge-made law, and no express remedial provision is present in the United States Constitution. Further, in Canada, exclusionary sanctions are seen as protection of the integrity of the justice system, while in the United States the theory is that exclusion is used as a deterrence to police misconduct.87

Section 24 prescribes a discretionary exclusionary rule under which a court may exclude evidence if its admission “would bring the administration of justice into disrepute.”88 *Collins*, the definitive case in this area, breathed life into the remedial provision of section 24.89 It set up a three part balancing test of factors to which American courts give little

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83. *Id.*
84. CANADIAN CHARTER § 52.
86. *Id.* at 266.
88. CANADIAN CHARTER § 24(2).
or no weight.\textsuperscript{90} Under the \textit{Collins} test, the Canadian courts weigh the nature of the evidence, the prejudice of the forced contribution of the evidence against the accused, and the seriousness of the rights violation.\textsuperscript{91} This test also requires that after evidence is shown to be illegally obtained, the defendant must show that admitting the evidence will bring the administration of justice into disrepute. Judges in Canada can also use this balancing test to factor in such elements as probative value and need for evidence.\textsuperscript{92} This is contrary to the American position on excluding evidence obtained in violation of the Fourth Amendment.

The Canadian approach has advantages over the American approach. While the Fourth Amendment addresses individual rights, remedies are societal. The Supreme Court must therefore apply inconsistent Fourth Amendment theories to rights and remedies.\textsuperscript{93} Such inconsistency theoretically will not exist in Canadian exclusionary cases. This position is furthered because of the express provision and the Court’s subsequent interpretation in \textit{Collins}. Further, because of the express nature of the remedy, there seems to be no danger that the exclusionary sanction will disappear in Canada. However, in the United States, because the sanction is judicially fabricated, it is possible that the remedy can be eroded by an anti-crime Supreme Court which may not be as willing to liberally read the exclusionary sanction into the United States Constitution.\textsuperscript{94} A second advantage is the flexibility of the balancing test enunciated in \textit{Collins}, but this advantage may be overshadowed by the American system which assigns definitive weight to factors like inevitable discovery.\textsuperscript{95} Courts in Canada, while enjoying their flexibility, may be sacrificing the consistency of the American model.\textsuperscript{96}

\section*{III. CONCLUSION}

The Canadian Charter of Rights and Freedoms is an infant compared to the two-hundred-year-old United States Constitution. While many of the provisions appear to be based on its American counterpart, there exist many differences. Because of the difference in the nature of the

\begin{enumerate}
\item Id.
\item Id.
\item Godin, \textit{supra} note 73.
\item Donald L. Doernberg, "\textit{The Right of the People}": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259, 283 (May 1983).
\item Godin, \textit{supra} note 73.
\item Id.
\item Id.
\end{enumerate}
Canadian Charter and the United States Constitution and because of differences in the two countries’ theories regarding the relationship between the judiciary and government, constitutional jurisprudence must naturally develop differently in Canada than in the United States, notwithstanding the similarities in the two countries’ culture and democratic governance.

In the domain of individual rights protection, the provisions in the Charter are more explicit than in the Constitution, and the infringement test is more concrete and more consistently applicable. Standing to challenge government action is awarded more liberally in Canada. Additionally, the exclusionary rule has different theories and systems in the two countries.

Canadian courts have the burden of developing constitutional guidelines to analyze their Charter’s provisions while evading the added temptation of importing American theories into their decisions. However, Canadian courts have the advantage of interpreting a constitution which was drafted in modern contemporary times with contemporary considerations. In addition, important provisions are explicitly provided for in the Charter. These same provisions required two centuries of judicial development in the United States Supreme Court.
RAPE OF MUSLIM WOMEN IN WARTIME BOSNIA

Adriana Kovalovska *

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Sofija, a thirty-year-old Muslim woman, was raped some 900 times by Serbian soldiers during the six months she was detained in a prison camp. After her release, Sofija was hiding from her family in humiliation while expecting an unwanted Serbian baby.¹

I. INTRODUCTION

For almost four years, former Yugoslavia was ravaged by a war in which acts of incomprehensible and shocking cruelty were carried out on an enormous magnitude. Among the atrocities were the rapes of an estimated 30,000 to 50,000 Bosnian women by the Serbian military.²

After World War II, several international documents were created to prevent the recurrence of such cruelty and bloodshed.³ These treaties address rape specifically but do not provide sufficient enforceable remedies for their violations.⁴ The atrocities committed in former Yugoslavia, however, have prompted the United Nations Security Council to institute an International War Crimes Tribunal (Tribunal) to prosecute the responsible individuals for the horrors committed in former Yugoslavia since 1991.⁵

This article discusses the key international documents currently in place which could be used to prosecute Serbs for the mass rapes and focuses on the prosecution of rape in the Tribunal. Although the Tribunal has demonstrated its willingness to prosecute rape as a war crime, it remains to be seen whether the Tribunal and the international community will bring the suspects to justice.

¹ Tom Post et al., A Pattern of Rape, NEWSWEEK, Jan. 4, 1993, at 32. Under Muslim culture, a baby takes its father's ethnicity. See infra note 23.
² Post et al., supra note 1. See also AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES 3-5 (1993) (stating that all sides to the conflict have committed rape, and Serbs also used rape as an instrument of war).
⁴ Compliance with international law is usually only ensured by the state's desire to maintain good world relations which may lead it to recognize international jurisdiction. See generally Theodor Meron, The Case for War Crimes Trials in Yugoslavia, FOREIGN AFF., Summer 1993, at 122.
⁵ The Tribunal was established under Chapter VII of the United Nations Charter which requires that before a tribunal can be created, the situation must constitute a threat to international peace. UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, U.N. S/25704 (1993) [hereinafter Secretary-General's Report].
II. BOSNIAN SERB ETHNIC CLEANSING STRATEGY

The historical ethnic division and animosity between Serbs and Muslims dates back over 600 years. At that time, the Ottoman Turks dominated the region comprised of southern Slavic minorities: Serbs, Croats, and Muslims. Strong Serbian nationalistic feelings surfaced during the Turkish dominion, and their intensity grew over the years.

In 1991, the former Yugoslavia started to disintegrate. After Bosnia declared its independence from the former Yugoslavia in 1992, the Serbs who lived in Bosnia feared they would be persecuted by the Muslim majority. Supported by the government of neighboring Serbia, Bosnian Serbs began a strategy of expelling Muslims from Bosnia. Serb leaders use the term ethnic cleansing as a cynical euphemism to characterize their vicious campaign to create a homogeneous Serbia.

Mass rape was an instrument of the Bosnian Serbs' ethnic cleansing campaign. The Serbian strategy was to eliminate the Muslim

7. Id.
8. Id.
9. See generally VLADIMIR DEDIJER ET AL., HISTORY OF YUGOSLAVIA (1974) (discussing the history of the internal conflicts during Ottoman and Hapsburg Empires). For additional analysis of civil conflicts during the 20th century, see Mead, supra note 6.
11. For a discussion of history of the ethnic conflicts in Yugoslavia, see ALEX N. DRAGNICH, SERBS AND CROATS: THE STRUGGLE IN YUGOSLAVIA (1992). See also infra note 12.
13. Before the present war, Muslims made up 44% of Bosnia's population while the Serbs, who are Eastern Orthodox Christian, accounted for 33% and Croats, who are Roman Catholic, constituted 17% of the population, U.S. Seeks Support, supra note 12.
15. The term is deceiving because Bosnian Muslims, Serbs, and Croats, all have a Slavic ethnicity and are split more by their religious identity. For a historical background of ethnic cleansing generally, see Andrew Bell-Fialkoff, A Brief History of Ethnic Cleansing, FOREIGN AFF., Summer 1993, at 110.
17. Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights,
population of Bosnia through an attack on Muslim women.\textsuperscript{18} Subsequently, the body of a woman was "used to send a message to the woman and her community that she and it are conquered,"\textsuperscript{19} since rape wounds not only the individual woman but also the \textit{morale and identity} of her society.\textsuperscript{20}

III. \textbf{THE RAPE OF MUSLIM WOMEN IN WARTIME BOSNIA}

\textbf{A. Reports of Mass Rape in Bosnia}

To accomplish their mission, Serbian soldiers raped Muslim women in a typical pattern.\textsuperscript{21} Serbs transformed villages into rape camps for the convenience of their soldiers and for easy access to women.\textsuperscript{22} The rapes were committed particularly to impregnate Muslim women and to keep them captive past the period for obtaining a safe abortion so that they would "give birth to unwanted Serbian babies."\textsuperscript{23}

Shocking reports reveal information of gang rapes during which victims died — systematic rapes of girls as young as six years old, some performed in front of their fathers, mothers, and siblings and as many as two hundred witnesses.\textsuperscript{24} In one instance, a twenty-eight-year-old woman

\begin{itemize}
\item\textsuperscript{19} \textit{Rape Was Weapon of Serbs, U.N. Says}, N.Y. TIMES, Oct. 20, 1993, at A1. Although the reported rape cases involve female victims, ranging from children to elderly women, there is evidence that Bosnian men have also been subjected to rape. \textit{See} Louise Branson, \textit{Sexual Abuse of POWs Widespread in Yugoslav War}, STRAITS TIMES, Aug. 2, 1993, at 13.
\item\textsuperscript{19} Laurel Fletcher et al., \textit{Human Rights Violations Against Women}, 15 WHITTIER L. REV. 319, 321 (1994) (discussing that the lower social status of women makes them targets for rape, and that such an injury to a woman is a reflection on the community in which women are passive and protected by men).
\item\textsuperscript{22} Roy Gutman, \textit{Ethnic Cleansing, 'Rape' Camps: Bosnian War Is Savage as Ever}, ST. LOUIS POST DISPATCH, Sept. 30, 1993, at A4. Once a village is taken over, the male population is sent to prison camps while women are taken to facilities where they are repeatedly raped in front of numerous witnesses. \textit{See} Fletcher et al., \textit{supra} note 19, at 320.
\item\textsuperscript{23} Post et al., \textit{supra} note 1. Muslims will consider the babies Serbs because under Muslim culture and Islamic law, a child assumes its father's ethnicity. Rebecca O. Bresnick, \textit{Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee}, 21 SYRACUSE J. INT'L L. & COM. 121, 127 (1995) (citing Mary Elizabeth Mayer, \textit{Law and Religion in the Muslim Middle East}, 35 AM. J. COMP. L. 127 (1987)).
\item\textsuperscript{24} Post et al., \textit{supra} note 1.
was raped by twenty-eight soldiers before she lost consciousness.\(^{25}\) Countless women have experienced a fate similar to one nineteen-year-old woman who was detained four-and-one-half months in a Serb facility where she was raped five or six times daily.\(^{26}\)

**B. Consequences of Rape**

Forcible rapes produce numerous harmful consequences, such as impregnation, ostracism of rape victims by their families, and psychological harm. Many rape victims who become pregnant choose abortion if possible.\(^{27}\) However, many of the women in Bosnia could not have a safe abortion and were therefore forced to bear the Serbian offspring toward whom they felt disgust and repugnance.\(^{28}\) Conceived during savage Serbian rapes, the children born of these rapes are the youngest victims of the war. Numerous children all have been abandoned by their mothers and are left to live in woeful conditions in hospitals and orphanages.\(^{29}\)

Rape victims are often ostracized by their husbands, families, and communities if they reveal that they have been raped\(^ {30}\) because the Muslim culture, "views rape victims as particularly shameful."\(^{31}\) Women face family rejection if they speak publicly about their rapes\(^ {32}\) because if "they have been defiled, their family has been defiled, and by extension their community has been defiled."\(^{33}\)

Rape is a humiliating experience which creates enduring social trauma. When a woman is raped, not only does she suffer physically, she

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\(^{26}\) Fletcher et al., *supra* note 19, at 368.

\(^{27}\) Women in Bosnia can obtain legal abortions within the first six months of pregnancy. Fletcher et al., *supra* note 19, at 377-78 (discussing the legal requirements for obtaining abortion: after the 10th week of pregnancy, women must obtain a certificate from an ethics committee in order to legally abort). *See also* Post et al., *supra* note 1.

\(^{28}\) Fletcher et al., *supra* note 19.

\(^{29}\) Id. at 378; *see* Louise Branson, *Balkan “Rape Babies” Face Dark Future*, STRAITS TIMES, July 5, 1993, at 12.

\(^{30}\) Fletcher et al., *supra* note 19, at 321.

\(^{31}\) Bresnick, *supra* note 23, at 126. For a detailed analysis of women’s chastity in Muslim cultures, where virginity is considered the greatest gift a woman can give to her husband, *see generally* NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD* (Sherif Hetata trans., 1980).

\(^{32}\) The family shame brought on by rape was so great that rape victims were killed by their own relatives. *See* Associated Press, *Shamed Muslims Killing Rape Victims*, CHI. TRIB., Feb. 10, 1993, at 5N.

\(^{33}\) Fletcher et al., *supra* note 19, at 321.
also experiences profound shame and internalizes a sense of guilt.\textsuperscript{34} Rape victims may also suffer serious psychological disorders, such as depression, phobia, suicidal impulses, or severe psychosis.\textsuperscript{35} A part of the healing process for some victims would be for the international community to recognize what has happened to them by punishing their tormentors.\textsuperscript{36}

IV. TREATMENT OF WARTIME RAPE BY THE INTERNATIONAL COMMUNITY

A. Rape Historically Unenforced

Rape has been prohibited by international law, but historically, the rape of women in wartime has been deemed not as serious as other abuses and has often been forgotten.\textsuperscript{37} For example, mass rapes by the Russians, Germans, and Japanese during World War II received limited attention.\textsuperscript{38} Similarly, the rapes by soldiers during the Vietnam war,\textsuperscript{39} and by the Pakistanis against Bangladeshi women in 1971 were also ignored.\textsuperscript{40}

The Nuremberg war crimes trials after World War II,\textsuperscript{41} which set an example for future tribunals, did not indict any suspects for rape.\textsuperscript{42} The only reference to rape after World War II was in the Tokyo Tribunal; however, these rapes were given only an ephemeral attention.\textsuperscript{43}

\begin{enumerate}
\item Id. at 367.
\item Id. at 378. Many victims are left gynecologically scarred. Clare Dyer, \textit{Law: Bringing Barbarians to the Bar; Bosnian Rapists are in Danger of Getting Off Scot-free}, GUARDIAN, Sept. 24, 1996, at 17.
\item Robert Marquand, \textit{A Dogged UN Hudge Propels “the Real Trial of the Century,”} CHRISTIAN SCI. MONITOR, Oct. 23, 1995, at 7.
\item BROWNMILLER, \textit{supra} note 38, at 87-118.
\item Id. at 78-87.
\item The International Military Tribunal at Nuremberg was empowered to punish individuals who committed war crimes, crimes against humanity, and crimes against peace. Rape was not explicitly listed in any of these crime categories, but was probably encompassed within the definitions in the Nuremberg Charter. \textit{See} Nuremberg Charter, annexed to the London Agreement on War Criminals, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279.
\item Atlas, \textit{supra} note 25.
\item Id.
\end{enumerate}
Historically, women have been considered a prize of the war, seized by the conquerors as their well deserved reward.44

B. International Documents Addressing Rape

In the aftermath of World War II, several international documents were created to prevent the recurrence of similar tragedies. Serbians could be prosecuted for the mass rapes they committed under the following treaties.

1. Genocide Convention

One of the most significant documents which emerged after World War II was the Genocide Convention designed to recognize genocide as a crime under international law.45 The Genocide Convention defines the crime of genocide46 and makes any party liable, regardless of the defense of respondent superior.47

The mass rapes of Muslim women in Bosnia fit the definition of genocide under the Genocide Convention because they were committed as part of the Serbs’ campaign to exterminate a national, religious, or ethnic group.48 This determination has been recognized by the International Court of Justice which issued a provisional ruling prohibiting various Serbian acts in Bosnia.49 The ruling declared that Bosnian Serbs were committing acts in

44. Susan Brownmiller, Making Female Bodies the Battlefield, NEWSWEEK, Jan. 4, 1993, at 37.
46. The crime of genocide is defined as follows: Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
   a. Killing members of the group;
   b. Causing serious bodily or mental harm to members of the group;
   c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d. Imposing measures intended to prevent births within the group;
   e. Forcibly transferring children of the group to another group.
   Id. at art. 2.
47. Article 4 of the Genocide Convention states: “Persons committing genocide or any other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” Genocide Convention, supra note 45.
48. See Fletcher et al., supra note 19, at 355-56.
49. Id.
violation of the Genocide Convention by virtue of their ethnic cleansing in Bosnia.50

2. Geneva Conventions and Protocols

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War51 (Civilian Convention) is highly applicable to the treatment of Muslim women in Bosnia. Rape is explicitly prohibited under article 27 of the Civilian Convention: “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."52 Although rape is not listed as a grave breach of the Civilian Convention, the International Committee of the Red Cross (ICRC) interpreted rape as a grave breach under article 147 of the Civilian Convention.53 Thus, the Civilian Convention is another potential medium for prosecuting rapes of Bosnian women.54 However, whether rape can be prosecuted as a grave breach and as such be subject to universal jurisdiction also depends on whether the conflict in Bosnia is considered international or civil because the grave breaches provision of the Civilian Convention applies only to international conflicts.55

50. Id. (citing the International Court of Justice: [T]he Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should . . . ensure that any military, paramilitary or irregular armed units . . . do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethical, racial or religious group . . . .).


52. Civilian Convention, supra note 51, at art. 27.

53. Id. at art. 147; See Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 AM. J. INT'L L. 424, 426 (1993) (stating that the ICRC recognized rape as grave breach because it is torture or inhumane treatment “willfully causing great suffering or serious injury to body or health”).

54. Meron, supra note 53, at 427.

55. Healey, supra note 21, at 341. The division of former Yugoslavia into independent republics has complicated the analysis, because the status of the conflict is not clearly defined. On one side, Bosnia’s declaration of independence suggests that the rapes by Bosnian Serbs constitute part of a civil conflict. On the other side, Bosnia’s independence may imply that the conflict is international, especially due to the Serbia’s intervention on behalf of the Bosnian Serbs in Bosnia. Id. at 343. Most countries recognized Bosnia as an independent state. Also, a number of United Nations. Security Council resolutions have apparently assumed that the conflict is to be governed by the standard of international armed conflict. See, e.g., S.C. Res. 771, U.N.
Similarly, Protocol I to the Geneva Conventions, developed to clarify those Conventions, does not list rape as a crime constituting grave breach. However, article 76(1) of Protocol I explicitly provides that women “shall be protected in particular against rape.” In addition, Article 4(2)(e) of Protocol II to the Geneva Conventions expressly prohibits rape. While Protocol I applies to international armed conflicts, Protocol II pertains to non-international armed conflicts. Both Protocols specifically refer to rape as a crime under international law regardless of whether the conflict in Bosnia is ultimately considered international or civil.

3. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) prescribes to states a duty to guard civil and political rights of its citizens. Article 17 applies to women specifically as a prohibition against unlawful attacks on honor. Article 7 prohibits “torture and other cruel, inhuman or degrading treatment.” Since rape can be considered such a treatment under both the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), these provisions are violated by the Serbian rapes.

There is some question, however, whether these treaties are binding on the states of the former Yugoslavia. Because the former Yugoslavia was a party to both the ICCPR and the Torture Convention, the succession to this obligation by Bosnia is arguable. Moreover, even if


57. Id.


60. Id. at art 17.

61. Id. at art. 7.

62. See supra note 53.


64. Fletcher et al., supra note 19, at 356.
not bound by these treaties *per se*, wartime rape can be also regarded as a violation of customary international law since "the major conventional humanitarian law has become part of customary international law." 65

**C. No Enforceable Remedy Against Non-Complying States**

The international treaties discussed above are applicable to the prosecution of the mass rapes in Bosnia. However, despite the fact that these treaties contain prohibitions against the rape of women, the question remains whether these documents have any concrete effect on the protection of women during wartime.

United Nations authorities have considered these treaties applicable to the present situation in Bosnia,64 and the Serbs' actions have generally been punished through diplomatic and economic channels.67 Yet, this did not stop the rapes.

The stimulus behind creating these treaties was condemnation of the atrocities of World War II to prevent them from recurring. But, not even fifty years later, they occurred again and the world appeared to fight the brutality with a noble principle alone.68 One must conclude that while the international community is efficient in constructing documents of condemnation, it has no ability to implement its aspirations and to protect women's human rights during armed conflict.69 The newly founded War Crime Tribunal may be viewed as partial protection of women's rights.

**V. CURRENT PROGRESS TO HALT THE MASS RAPES IN BOSNIA**

**A. Creation of War Crimes Tribunal**

In May 1993, the United Nations Security Council established a war crimes tribunal70 and adopted a statute proposed by the United Nations

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65. *Secretary-General Report*, supra note 5, at Annex, art. 1; *see also* Healey, *supra* note 21, at 331-32 (stating that violations of customary international law provide a basis for prosecuting rape in the Tribunal).


Secretary-General which gave the Tribunal universal jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." The statute grants the Tribunal subject matter jurisdiction over the following crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. These categories of crimes constitute "beyond doubt . . . part of international customary law . . . applicable in armed conflict."

B. Prosecuting Rape Under the Tribunal's Statute

The rape of women in Bosnia could be prosecuted under the statute of the Tribunal as a grave breach of the Geneva Conventions and as genocide under the Genocide Convention. In addition, rape constitutes a crime against humanity. Since the Tribunal's statute explicitly recognizes rape as crime against humanity, it can be prosecuted in the Tribunal as such.

Moreover, the rape of Bosnian women can be prosecuted in the Tribunal as a violation of the laws or customs of war. Article 3 of the statute is based on the Charter of the Nuremberg Tribunal and the 1907 Conventions will ever implement the legal norms of the treaties. Robert Marquand, A Dogged UN Judge Propels 'The Real Trial of the Century,' CHRISTIAN SCI. MONITOR, Oct. 23, 1995, at 7. Others claim that the Tribunal's creation is a reflection of the international community's inability to solve conflicts such as the one in Bosnia. Healey, supra note 21, at 377.

71. SECRETARY-GENERAL'S REPORT, supra note 5, at Annex, art. 1. The international humanitarian law exists in two forms: conventional law and customary law. Although some of the customary international law is not listed in the conventions, "the major conventional . . . law has become part of customary international law." Id. at § 33.

72. Id. at Annex, art. 2.
73. Id. at art. 3.
74. Id. at art. 4.
75. Id. at art. 5.
76. Id. at art 1, § 35. See also Meron, supra note 53, at 425.
77. See supra prior analysis in Parts IV.B.1-2.
79. SECRETARY-GENERAL'S REPORT, supra note 5, art. 5(g), at 13. Crimes against humanity are more difficult to prove than grave breaches. See Oren Gross, The Grave Breaches System and the Armed Conflict in the Former Yugoslavia, 16 MICH. J. INT'L L. 783, 823 (1995) (contending that if the Tribunal decides to label rape as grave breach, that will put a seal on the historical intolerance on violence against women).
80. Healey, supra note 21, at 350.
81. SECRETARY-GENERAL'S REPORT, supra note 5, § 34, at 9.
Convention Respecting the Laws and Customs of War on Land. Rape may be covered in article 46 of the Hague Regulations which states that "[f]amily honor . . . must be respected." This indicates that the mass rapes committed in front of many witnesses, deliberately dehumanizing not only the victim but also her family, could be included as attacks on family honor and as such be prosecuted under the statute of the Tribunal as violations of customs of war.

Finally, as the first body in history, the Tribunal recognized rape as a war crime when it indicted eight Bosnian Serbs on charges of rapes of Muslim women in Bosnia. Thus, the Tribunal has sufficient legal basis for the prosecution of the mass rapes.

C. Collecting Evidence for Prosecution

How the prosecution in the Tribunal will proceed depends on the quality of collected evidence. However, since vital documentation is in the hands of the persons responsible for the violations, and many victims and witnesses of the atrocities have widely scattered, the collection of evidence is problematic.

In addition, the Tribunal cannot try suspects in absentia; thus, unless the suspected war criminals are arrested by their government, consent to trial, are captured outside their own country or are arrested by NATO forces, it is doubtful that justice will be served.

84. Id. at art. 46.
85. Healey, supra note 21, at 350.
86. See discussion supra Part II.B., stating that the Muslim culture views rape victims especially shameful and that when the rape victim is defiled, her family is defiled as well.
87. Marlise Simons, U.N. Court, for First Time, Defines Rape as War Crime, N.Y. TIMES, June 28, 1996, at A1. However, the suspects are at large. Id.
89. Fletcher et al., supra note 19, at 360.
90. SECRETARY-GENERAL'S REPORT, supra note 5, at art. 1. A trial in absentia would conflict with article 14 of ICCPR. See ICCPR, supra note 59.
91. Article 29 of the Tribunal's statute pronounces that states shall assist the Tribunal in the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law," and lists the instances in which states shall provide assistance to the Tribunal, such as identification of persons, service of documents, or arrest. SECRETARY-GENERAL'S REPORT, supra note 5, art. 29, at 47.
One of the major obstacles in collecting evidence for rape prosecution is that the women are ashamed to come forward and testify publicly about the torture they endured. As a result, the acts of rape are under-reported.93 Despite the estimated 30,000 to 50,000 rapes in Bosnia, the United Nations Commission has examined about 3,000 accounts of rape94 and has named about 800 victims.95 An important role in identification of evidence rests with non-governmental organizations and special commissions.96

Another reason why rape victims are disinclined to testify is that "they fear retaliation either from their families or from their perpetrators."97 However, this barrier could be viewed as partially resolved by the statute's provision for in camera proceedings to protect the victim's identity.98

As Mrs. Albright, United States Ambassador to United Nations, states, once the indictments are issued, the suspects become "international pariahs." Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. SCOR, 3217th mtg. at 13, U.N. Doc. S/PV.3217 (1993).

92. The Dayton peace agreement directs the former parties to the conflict and the NATO forces to apprehend the suspects indicted by the Tribunal. 8 Serbs Are Indicted in Mass Rapes, NEWSDAY, June 28, 1996, at A17, available in LEXIS, Nexis Library, News File. However, NATO troops will arrest the suspects "only if they are noticed by their soldiers in the course of their normal duties and if the soldiers feel that circumstances permit." Stacy Sullivan, Bosnia's Most Wanted Mostly Accessible; War Crimes Suspects Maintain High profile in Croat-Run Town, But Police Pay No Mind, WASH. POST, Nov. 27, 1996, at A21. See also Yugoslavia War Crimes Court to Begin Trials in April, REUTERS, Nov. 27, 1993, available in LEXIS, Nexis Library, News File.

93. DIANA E. H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE 62 (1975); see also Brownmiller, supra note 44. Due to the victims' fragile emotional state, interviews should be conducted only by women and only those victims who wish to speak should be questioned since silence is a part of their ability to cope with the recent trauma. See Fletcher et al., supra note 19, at 360-62.

94. The reports were compiled by the International Human Rights Law Institute of DePaul University in Chicago based on the information received from several nongovernmental organizations. See Rape Was Weapon of Serbs, supra note 18.

95. Id.

96. So far 17,000 war criminals are incriminated by the evidence collected in Bosnia by the Bosnian State Commission for Gathering Evidence on War Crimes in Bosnia-Hercegovina. The British Broadcasting Corporation, supra note 88. The Commission has prepared about 7,100 cases supported with documents and eyewitnesses. The criminals are responsible for 50 mass graves, 352 concentration camps, 450 villages burnt to the ground, and about 25,000 rape cases. Id.

97. Fletcher et al., supra note 19, at 361.

98. SECRETARY-GENERAL'S REPORT, supra note 5, Annex, at art. 22.
D. Current Progress in the Prosecution of Rapes

1. First Trials in the Tribunal

So far, the Tribunal has issued warrants for the arrest of seventy-four suspected war criminals, including the Bosnian Serb leader, Radovan Karadzic, and Bosnian Serb military commander, Ratko Mladic; however, only seven are in custody in the Hague.99 The first international war crimes trial since Nuremberg in 1945 was the prosecution of Dusan Tadic accused of murder and torture.100 The verdict against Tadic is anticipated in the spring.101 Recently, the Tribunal handed down its first decision, sentencing a Croat soldier to ten years in prison for killing about seventy Bosnian Muslims.102 In January 1997, the Tribunal prosecuted four suspects charged with rape, murder, and torture.103

Some indicted suspects live quite freely and work daily, even though they could be arrested by the 50,000-strong NATO forces in Bosnia.104 Moreover, until now the international community has failed to arrest the two most wanted suspects, the orchestrators of the mindless sea of destruction, Karadzic and Mladic.

2. Recognition of Rape in National Courts of Former Yugoslavia

A court in Sarajevo convicted two Serbian soldiers for committing several rapes and murders of Bosnian Muslims and sentenced the soldiers to death.105 But, the United Nations military chief, Phillipe Morillon, criticized the trial and claimed that Bosnian's should have turned those two Serbs over to the Tribunal.106

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100. Ed Vulliamy, Sketch: Bosnian 'Butcher' Faces Accusers, GUARDIAN, Oct. 25, 1995, at 2. Tadic was accused of rape as well; however, the rape charges were dropped after the alleged victim refused to testify. Clare Dyer, Law: Bringing Barbarians to the Bar; Bosnian Rapists Are in Danger of Getting Off Scot-free, GUARDIAN, Sept. 24 1996, at 17.


102. One Killer Down, 73 to Go, supra note 99. The soldier argued that he committed the crimes only because he was threatened with being a victim himself. Id.


104. Sullivan, supra note 92. One Killer Down, 73 to Go, supra note 99.

105. One defendant, Borislav Herak, confessed to killing 35 people and raping 16 women, 12 of whom he subsequently murdered. See John F. Burns, 2 Serbs to Be Shot for Killings and Rapes, N.Y. TIMES, Mar. 31, 1993, at A6.

106. Healey, supra note 21, at 378.
3. Civil Lawsuits Filed in the United States

In the United States, two lawsuits have been filed on behalf of Bosnian rape survivors under the Alien Tort Act, a federal statute which provides jurisdiction when an alien sues for torts committed in violation of the law of nations. The plaintiffs allege that Radovan Karadzic is responsible for the rapes of Muslim women in Bosnia and seek damages and an injunction which would order Karadzic to stop the rapes. A lower court refused to confer subject matter jurisdiction, but the United States Court of Appeals for the Second Circuit unanimously ruled that victims can sue Karadzic in the United States "for genocide, war crimes, and crimes against humanity." However, the court cannot compel Karadzic to come to the United States and collecting damages will be quite difficult.

VI. CONCLUSION

It has been fifty years since the end of World War II, and barbarian war crimes have emerged again. All the international documents have proven to be of no worth in this situation. Although the Tribunal took the opportunity to recognize rape for the first time as a war crime, the Tribunal and the international community have an obligation to arrest and convict the criminals guilty of rape and other sexual abuses.

111. This court has decided that under the Alien Tort Act, a relative of a Paraguayan citizen could sue the torturer for money damages in a United States court. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).