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1998 PHILLIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION BRIEFS

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I. INTRODUCTION
Since the late 1970's, Islamic fundamentalism and violence has spread from the Middle East to as far away as Algeria in West Africa and Mindanao, an island in the Philippines. If a government falls to the fundamentalists, some form of Islamic law (Shari'a) is always imposed, completely erasing Western law. Although it may be difficult for a Westerner to understand, in an Islamic state, the government, religion, and law are inseparable.

In an Islamic state, all law is based on the Qu’ran and any laws contrary to the express word of the Qu’ran are void. In a Western country such as the United States, government and law are separated from the Christian religion, although many of our most basic laws are drawn from the Bible. In fact, the First Amendment to the Constitution requires that there shall be no established religion. In an Islamic state however, Islam and the Qu’ran are inseparable from law and government. For example, in many of the most conservative Islamic countries, religious leaders are often

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the most powerful political leaders as well. In fact, virtually every Muslim country, no matter how liberal, has established Islam as the state religion. In a legal context, perhaps the *Qu'ran* could be seen as the equivalent of the United States Constitution in that both are the highest laws of the land in their respective spheres and thus, both negate any other laws contrary to their meaning.

In the world today, it appears that all states with Muslim majorities can be categorized into four groups based on their legal systems. The first is the secular state, in which religion is separated from law in virtually all areas. A good example is Turkey, where despite some recent inroads, there has been almost a complete separation of law and religion since the 1920's.

A second group of Muslim states are those that apply Western law in all areas with only a few limited exceptions. In these states, Islamic courts exist but generally only have jurisdiction over consenting Muslims who have family or inheritance law disputes. Examples include Malaysia, Indonesia, Jordan, Oman, Ethiopia (except in the Oromo region), Tunisia, and Morocco. Djibouti was once in this category but now appears to be moving toward a stricter form of Islamic law due to their crackdown on alcohol in order to gain favor with the money-rich Saudi Arabians. Somalia was once in this category as well (at least in the Somalian cities)¹ but now has moved to the strictest form of Islamic law.

A third group, are those states that apply Islamic law universally except in one or more specific areas, such as certain forms of capital punishment and/or certain areas of the Shari'a that regulate business activities. Examples include Pakistan, Kuwait, The United Arab Emirates (UAE), Qatar, Yemen, and Libya. Iraq was once in category two, relegating Islamic law to family law matters; but should now be considered part of this group due to Iraq's amputations for thievery in accordance with strict Islamic law.²

The fourth and final group are those states that apply strict Islamic law with no exceptions. States in this category include Iran (although there are hints of a possible future moderation), Saudi Arabia, and more recently, the Sudan, Afghanistan, and Somalia.

The purpose of this note is to determine how extensive the application of Islamic law has become in the Sudan, in relation to other states that apply Islamic law.

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II. A BRIEF HISTORY OF SUDAN

In order to understand the legal system of the Sudan, it is imperative to understand the history of the Sudan. However, history that has little or no legal implications will be omitted.

In 1877, Charles George Gordon, a British officer, took control of most of the Sudan, weakened the slave trade there, and became Governor General of the Sudan.\(^3\) In 1881, Islamic fundamentalists, led by the Mahdi, began to unify the tribes of northern Sudan and by 1885, they captured Khartoum and killed Charles Gordon.\(^4\) Shari’a courts were immediately established and full-fledged Islamic law was practiced throughout the area.\(^5\) In 1896, Lord Kitchener launched a campaign to reconquer the Sudan and by 1898, Khartoum and most of the rest of the country was again part of the British Empire.\(^6\)

Fearful of another Islamic uprising in northern Sudan, the British wrote the Sudan Mohammedan Law Courts Ordinance of 1902 which allowed Sudanese Muslims to use the Shari’a courts in matters dealing with family law, gifts, and inheritances.\(^7\) In southern Sudan, most of the inhabitants practiced tribal religions unrelated to Islam. In that part of the country the British closed off the region from the Islamic north, encouraged Christian missionary education, and denied any development which was reserved to the North. “In 1947, only eight years before independence, the separatist policy was officially reversed.”\(^8\) Despite the vast differences between the two regions in terms of both human and physical geography, the British forced the regions together and granted independence to a unified Sudan on January 1, 1956. The Christian and animist South immediately revolted from the Islamic North due to southern resentment of northern domination. The war continued until 1972, with the signing of the Addis Ababa Accords.\(^9\)

Since independence, the basic structure of the legal system remained the same.\(^10\) Family, gift, and inheritance law disputes between Muslims were covered by the Shari’a courts while all other matters were resolved through the English common law.

All of this changed in 1983 when Sudan’s dictator, Colonel Jaafar Nimeiri, imposed full-fledged Islamic law (the Shari’a) and declared an

\(^3\) RESEARCH DIV., LIBRARY OF CONGRESS, SUDAN: A COUNTRY STUDY 17 (Helen Chapinmetz ed. 1992).
\(^5\) LIBRARY OF CONGRESS, supra note 3, at 21.
\(^6\) Id. at 23.
\(^7\) MODERN LEGAL SYSTEMS CYCLOPEDIA, 100.33, 100.51 (Kenneth Redden ed., 1984).
\(^8\) FRANCIS M. DENG, WAR OF VISIONS (1995).
\(^9\) Id.
Islamic state. The vast majority of those who live in southern Sudan are Christians or Animists, consequently they once again took up arms against the government due to their fear of the harsh punishments which always accompany violations of Islamic law. Indeed, the imposition of Islamic law was the main reason for the resumption of the war, which continues to this day. In addition, Southerners felt discriminated against because Shari’a court proceedings are conducted in Arabic, a language most southern Sudanese do not understand.

On April 6, 1985 a group of military officers, led by Lieutenant General Abd ar Rahman Siwar adh Dhahab overthrew Nimeiri. Despite the change in leadership, the civil war continued because Dhahab refused to repeal the institution of Islamic law.

In 1986, a general election was held in all regions of Sudan except for thirty-seven southern districts afflicted by the civil war. A series of fragile coalition governments were formed and dissolved during the next three years. Various members of these coalition governments attempted to abolish the imposition of Islamic law but were unable to do so due to the opposition of the National Islamic Front (NIF) Party, led by Hassan al-Turabi who, as Attorney General of the Sudan in 1983, convinced Nimeiri to impose Islamic law which was not done since the nineteenth century. Thus, in 1989 the civil war continued to drag on and it was observed that “[t]he main obstacle [to ending the war] for the past three years has been the refusal of the civilian government to back down from the imposition of Islamic law.” Finally, the existing coalition government expelled the NIF from the coalition, replacing it with several other smaller parties whose platforms included making peace with the Southerners. The resulting coalition government was weaker than it had been previously and before a peace treaty could be signed to end the civil war, a coup brought the NIF and Doctor Turabi back into power. Turabi’s partner, Colonel Umar Hassan Ahmad al Bashir led the coup against the coalition government on June 30, 1989 and established the Revolutionary Command Council for


14. LIBRARY OF CONGRESS, supra note 3, at 50.

15. Id. at 52-3.


National Salvation which was committed to imposing Islamic law on the non-Muslim South through military conquest.\(^{18}\)

It has become evident that the coup was fully backed and perhaps inspired by the political organization of the Sudanese Islamic Fundamentalists, the National Islamic Front (NIF). The NIF wants an Islamic state in Sudan and full implementation of Shari'a, or Islamic law. The NIF has pushed other parties to take public stands in favor of implementing Shari'a, and labels those who call for a secular government 'athiests' or 'anti-Islamic.'\(^{19}\)

The leader of the NIF is Hassan al-Turabi, who, almost all Sudanese and diplomats agree, is the real president of Sudan.\(^{20}\) Turabi, who has a master's degree in law from the University of London and a Doctorate in law from the Sorbonne, wants to spread Islamic fundamentalism, and thus Islamic law throughout East Africa.

'Islam is on the march,' he said proudly. 'There is a collapse of socialism and the bankruptcy of Western liberal and socialistic regimes.' He is confident that Islam will emerge as the world's major political force. '...whatever the West does, Islam will still overcome it' he said. 'I feel very confident that Islam cannot be stopped.' Eventually, Turabi foresees much of the Horn of Africa will be one Islamic community—Sudan, Somalia, Ethiopia, and Eritrea...It will happen naturally, Turabi is sure, because a devotion to Islam will unite the people...Turabi wants a revival, or resurgence, of Islam—a return to the glory of the Islamic Empire.\(^{21}\)

In late 1991, former President Jimmy Carter went to Sudan to try to broker a peace accord between the Islamic government and the Christian/Animist rebels but "Again the issue of Shari'a led to the collapse of the meeting."\(^{22}\) "The regime's claim to exempt the South from Islamic laws cannot be taken seriously: in the event of conflict between national and regional laws, the supreme law of the land, Shari'a, would prevail."\(^{23}\)

\(^{18}\) LIBRARY OF CONGRESS, supra note 3, at 53.
\(^{21}\) Id. at 73-4.
\(^{22}\) Benaiah Yong-Bure, Sudan's Deepening Crisis, MIDDLE EAST REP., Sept.-Oct. 1991, at 8, 12.
\(^{23}\) Id. at 12.
As one might expect, the NIF traditionally has had strong ties to the Iranian theocratic leadership. "The party is funded by wealthy local businessmen, Saudi interests opposed to leftist tendencies, and the Iranian government." It has unusually close connections with the Iranian-inspired El Jihad el Islami movement, whose leader, Hassan Haj Ali, is actually a NIF member.\(^4\) In December of 1991, Iran and Sudan signed a mutual defense pact and according to CIA analysts, Iran has built and operated bases throughout Sudan in order to facilitate the training of Islamic militants for "terrorist" actions throughout Africa.\(^5\)

In January of 1992, the Sudanese government declared a jihad (holy war) against the Christian/Animist rebels.\(^6\) One scholar defines jihad as a form of political struggle designed "...to disarm the enemy so that Islam is allowed to apply its shari'a unhindered by the oppressive power of idolatrous tyrannies."\(^7\)

Sudan is also attempting to export its Islamic revolution (and thus Islamic law) to Egypt, Algeria, Eritrea, Ethiopia, and Uganda.\(^8\) Perhaps most vulnerable to Sudan's efforts is Ethiopia's Oromo region; which, if it secedes from the rest of Ethiopia, "...fits in with Turabi's vision of a chain of Islamic states across Africa."\(^9\) Already, secessionist tendencies are starting to appear in Ethiopia's Oromo region:

One evening last year, officials in the Muslim-controlled Oromo region of southern Ethiopia raided the area's largest evangelical Christian church and arrested most of its congregants. Many churchgoers died in jail and denied proper burial and left to be scavenged by nearby wildlife. Saving special treatment for the church's minister, the authorities permitted him to live as an ironically visible symbol, but only after torturing him and plucking out his eyes.\(^0\)

Sudan is even spreading its tendrils as far as the Islamic Republic of the Comoros Islands in the Indian Ocean where weekly flights have been landing from Khartoum\textsuperscript{31} with possible shipments of military hardware. Even General Aideed, the infamous late Somali warlord has flown to Khartoum, seeking aid from Turabi. Finally, on August 12, 1993, Secretary of State Warren Christopher, in accordance with section 6(j) of the Export Administration Act, 50 U.S.C. App. 2405(j), put Sudan on the international terrorism list.

By 1995, the civil war was into its thirteenth year with over 1.3 million southern Sudanese killed.\textsuperscript{32} By October of 1995, the rebels made their largest advance since 1991 and in 1997 it began to appear that the Sudanese rebels, like their brethren in the former Zaire, might take over the whole country.\textsuperscript{33} However in the winter dry season, the Sudanese government will be able to utilize their Soviet tanks and probably retake some of the captured territory. The chances of peace are not great.

III. CRIMINAL LAW IN SUDAN

There are three categories of crimes in Islamic law: Hudud, Quesas, and Ta‘azir crimes. Except for the Hudud crime of fornification, all other Hudud crimes and all Quesas crimes require that there be two male witnesses who have witnessed the crime in order for there to be a conviction.\textsuperscript{34} One of the major differences between the three categories of crimes is that punishment by the State for Hudud crimes is mandatory, punishment by the State for Ta‘azir crimes is discretionary, and the type of punishment for Quesas crimes is largely left up to the victim or the victim’s family.\textsuperscript{35}

A. Hudud Crimes

Hudud crimes are punishable by a Hadd, a penalty fixed by the \textit{Qu’ran}. Because Hadd penalties are quite drastic, how strictly a state enforces the Hudud crimes is perhaps the best indicator in determining whether a state follows a strict interpretation of Islamic law or a watered-down, more moderate version. As we shall see, Sudan punishes all Hudud crimes exactly as the \textit{Qu’ran} outlines. This puts Sudan in company with only a few other states/areas: Saudi Arabia, Afghanistan, and Somalia. Other conservative Islamic states either substitute jail terms for all Hadd

\textsuperscript{31.} \textit{Sudan Airways in Moroni}, \textit{The Indian Ocean Newsletter}, May 6, 1995, at 7.
\textsuperscript{35.} A. Maududi, \textit{Islamic Law and Constitution} 24 (1967).
penalties or only carry out some of the Hadd penalties while refusing to carry out others.

Examples abound throughout the Islamic world. In 1979, the Pakistani government promulgated the Hadood Ordinances which provide Hadd penalties in accordance with the Qu’ran, including stoning to death for adultery. However, these penalties have never been carried out, because prison terms were given instead. In Libya, General Qadhafi “criticized the leniency of judicial punishments, recommending legislation to mandate amputation for thievery and public whipping for adulterers.” There was no evidence that these recommendations were enacted into law. Even if they were, Libya would still not be using some of the more drastic Hadd penalties as required by the Qu’ran. In Qatar, the death penalty is used in accordance with Islamic law but amputations are prohibited by the government. In another Persian Gulf state, the United Arab Emirates (U.A.E.), the “Federal Supreme Court ruled in 1993 that Shari’a punishment may not be imposed on non-Muslims.” In addition, no amputation sentences have ever been known to be carried out, even on Muslims. Finally, even in the increasingly conservative country of Yemen, the Yemeni Supreme Court has refused to confirm order by the lower courts requiring amputations and has ordered jail sentences instead.

There are six Hudud crimes. They are: 1) fornication and false accusation of fornication; 2) drinking alcoholic beverages; 3) theft; 4) brigandage or highway robbery; 5) apostasy; and 6) rebellion or transgression against the legitimate authority.

1. Fornication and False Accusation of Fornication

The Qu’ran provides that fornication by an unmarried person is punishable by 100 lashes, “flog each of them with a hundred stripes. Let not compassion move you in their case; in a matter prescribed by God, if ye believe in God and the last day, and let a party of the believers witness their punishment.” As for fornication of a married person (adultery), “During his life the Prophet [Mohammad] ordered the stoning to death of a man and a woman found guilty of adultery” and stated “As for a woman and a man guilty of adultery, flog them with 100 stripes and stone them.”

37. Id. at 1245.
38. Id. at 1270.
39. Id. at 1302.
40. Id.
41. Id. at 1308.
42. Surat al-Tur LII:2.
In strict accordance with the Qu’ran, Sudan’s 1991 Criminal Act requires death by stoning for adulterers. However, convictions of fornication between unmarried persons are rare for three reasons. First, it is physically impossible for the average unmarried woman in northern Sudan to commit fornication due to operations performed on over 90% of adolescent northern Sudanese girls. Upon marriage, the operation is reversed and thus, fornication (adultery) is more common among married women in Sudan. As a result, there have been convictions for adultery in Sudan.

Second, in order to convict a person of fornication, there must be four male witnesses to the act which is an extremely difficult burden to pass. Third, people rarely bring accusations of fornication because if the accuser does not bring forth four male witnesses, the accuser himself is guilty of the second Hudud crime, false accusation of fornication, and is subjected to eighty lashes. The Qu’ran states, “[a]nd those who accuse honorable women but bring not four witnesses, scourge them with eighty stripes.”

Most other Muslim states do not punish adulterers, but as mentioned earlier, General Qadhafi recommended legislation requiring public whippings for adulterers. In Saudi Arabia, adultery is punished by execution through stoning which is the same punishment required by the Pakistani Hadood Ordinances of 1979 although this punishment has never been carried out in Pakistan. Finally, in Hargeisa, Somalia, “[f]ive women suspected of prostitution were stoned to death, after having been buried up to the neck.”

2. The Drinking of Alcoholic Beverages

The second Hudud crime is the drinking of alcoholic beverages. Mohammed said, “He who drinks wine, whip him.” Sudan’s 1991

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44. UNITED STATES ST. DEP’T., supra note 36, at 278.
45. Professor Bret Wallach, Lecture at the University of Oklahoma (Fall 1991).
46. UNITED STATES ST. DEP’T., supra note 36, at 284.
47. Wallach, supra note 45.
51. UNITED STATES ST. DEP’T., supra note 36, at 1245.
52. Id. at 1275.
53. Id. at 1372.
Criminal Act requires that persons who consume or brew alcohol shall be subjected to forty lashes and the Sudanese government has enforced this law by routinely lashing persons convicted of brewing or consuming alcohol. In mid-1994, Khartoum authorities charged 657 people, many of whom were later flogged, with alcohol-related offenses; among those charged were poor women who were brewing a mild, local alcoholic drink in order to make a living.

Most other Muslim states allow their citizens to drink alcohol although the tide is slowly turning. For example, in Djibouti the government closed down more than eighty alcohol-related establishments. However, it is thought that this action was not due to religious fervor, but rather a ploy to acquire more financial aid from Saudi Arabia. It is quite probable that part of the reason for the spread of Islamic Law is the desire of destitute Muslim countries to please wealthy Islamic states such as Saudi Arabia, in the hope of garnering more aid from their oil-rich coffers. “Many Sudanese openly admit that the higher profile given to the Arab identity has been influenced by Sudan’s need for Arab financial support, which has enhanced by a combination of the Arab petrodollar boom of the 1970’s and the increasing poverty of Sudan and of Africa.”

In Saudi Arabia, drunkenness is punishable by flogging with a cane. The Saudi Arabian religious police (Mutawwa), without a warrant, regularly force their way into homes looking for alcohol and other evidence of non-Islamic behavior. In 1987, Saudi Arabia’s ulema (Islamic theologians) decided to extend the punishment of beheading to drug smugglers. In 1993, Saudi Arabian authorities beheaded eighty-five people, many of whom were convicted of drug smuggling. All beheadings are performed in public town squares in order to serve as a deterrent to others. Beheadings for drug smugglers continued into 1995. Unlike Pakistan’s coastal plain, Islamic law is more strictly applied in Pakistan’s northern interior, where “[e]ven foreigners are not allowed to drink alcohol.”

58. DENG, supra note 8, at 741.
59. UNITED STATES ST. DEP’T., supra note 36, at 1275.
62. UNITED STATES ST. DEP’T., supra note 36, at 1275.
63. Caryle Murphy, In Saudi Arabia, No News Isn’t Necessarily Good News, WASH. POST NAT’L WEEKLY, Jan. 4-10, 1993, at 19
Amazingly, in brutally conservative Somalia, most males are stoned on "khat, a leaf with narcotic qualities that when chewed gives a marijuana-like high."66 Likewise, in Yemen's 1994 civil war, conservative northern Yemenese troops destroyed Yemen's only brewery67 despite the fact that khat is chewed in Sana (North Yemen's capital) by women and men twice a day, one third of Yemen's purchases are khat, and (for such an impoverished country) "the fields are planted with khat, not corn."68

3. Theft

The fourth Hudud crime is theft. The Qu'ran states, "[a]s for the thief, both male and female, cut off their hands; it is the reward for their own deeds, an exemplary punishment from Allah."69 Like all Hudud crimes, the actus reus and the mens rea of the crime must be proved beyond a reasonable doubt through the testimony of at least two reasonable male witnesses and the penalty must be carried out in public in order for the penalty to serve as an example.70 In Sudan, "Sudanese courts handed down several sentences involving amputations in 1994, of which at least one was carried out."71

Again, although most Muslim states do not amputate limbs for theft, the list of states/areas that use the punishment is growing. In Somalia, which has ceased to exist as a state since 1991, popular new Islamic courts have sprung up which have carried out cross-amputation (amputation of the right hand and left foot) on petty thieves.72 However, according to a United States State Department official, the amputations are not carried out on thieves who have connections or influence.73 In Iraq, in an effort to combat that country's soaring crime rate, Saddam Hussein has ordered that first offender thieves will lose a hand and second-time offenders will lose their left foot while thieves found carrying a weapon will be executed.74 In Libya, General Qadhafi recommended legislation requiring amputation for theft but there is no way of knowing if these recommendations have been carried out because the United States does not maintain an embassy in Libya "...and because the regime strictly limits access to information."75

68. Legendary Trails (PBS television broadcast, Dec. 20, 1994).
70. Kamel, supra note 34, at 164.
71. UNITED STATES ST. DEP'T., supra note 56, at 5.
72. ABC News with Peter Jennings (ABC television broadcast, Mar. 1, 1995).
74. Iraqi Leader Orders Amputation for Theft, supra note 2.
75. UNITED STATES ST. DEP'T., supra note 36, at 1244-45.
The small Persian Gulf states are generally more liberal than their neighbors. For example, Qatar does not allow amputation while in the U.A.E.; higher authorities have pardoned all amputation sentences imposed by lower U.A.E. courts. As one might expect, Saudi Arabia rigorously observes the Qu'ranic requirements of amputation for theft. It appears that in Saudi Arabia, amputations as well as beheadings are carried out on a weekly basis. Finally, Pakistan's 1979 Hadood Ordinances require amputation of limbs for theft but these punishments have never been carried out in Pakistan.

4. Brigandage

The fifth Hudud crime is brigandage, otherwise known as highway robbery. The Qu'ran states that the "...reward for those who wage war upon Allah and His Messenger, and strive after corruption in the land, will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land." As with other Hudud crimes, the Sudan carries out the Qu'ranic prescription for the punishment of brigandage. In late January of 1992, "[a] court in Darfur, the country's westernmost province, sentenced four men who had been found guilty of killing four villagers during an armed robbery to be hanged and then crucified." The only other country in the world that crucifies death criminals is Saudi Arabia. However, the Sudan goes even further by prescribing death by crucifixion. Sudan's 1991 Criminal Code requires amputations, death by stoning, lashings, and death by crucifixion depending on the crime committed. A reporter who traveled throughout Sudan wrote, "[a]nd, on occasion children as young as seven are crucified." If this is true, Sudan has gone beyond any other country in the world where the harshness of its Islamic penalties is concerned.

76. Id. at 1270.
77. Id. at 1302.
78. Id. at 1275.
79. Stiff Penalty, supra note 64.
80. UNITED STATES ST. DEP'T., supra note 36, at 1372.
82. Bonner, supra note 20, at 70.
83. UNITED STATES ST. DEP'T., supra note 36, at 1275.
5. Apostasy

The fifth Hudud crime is apostasy which is defined as the turning away from Islam after once having embraced it. Apostasy is punishable by death. On January 18, 1985, Mahmoud Mohamed Taha, the leader of a Sudanese political opposition party, was executed for apostasy. According to a Roman Catholic bishop, four Arab Christians were whipped and then crucified for refusing to reconvert to Islam which they had left twenty years ago. However, a United States State Department official stated that this report has not been confirmed. Other Muslim countries are more forgiving of Muslims who change their religion. The Persian Gulf island state of Bahrain, for example, allows its citizens to convert from Islam to other religions without penalty, which is also the policy in Jordan. However, Egypt, which is liberal in most respects, imprisons Muslims that convert to other religions. This is the case in Morocco as well, despite the fact that Morocco is even more secular than Egypt.

Some states’ Islamic punishment laws have more “bark than bite.” For example in Iran, a Christian convert from Islam was sentenced to death in 1983, but due to heavy pressure from international human rights groups the defendant was not executed and was finally released from prison in 1994. Another example is Qatar, where apostasy is a capital offense, but “no one is known to have been executed for it.” In Saudi Arabia, apostasy is punishable by death, but no one has been punished for this crime in the past several years. However, in a related vein, a Saudi Arabian court sentenced an Egyptian national to 1,000 lashes for blasphemy, 500 of which were administered before he was deported. In Yemen, a teacher has been in prison since 1992 for apostasy and in the

86. Kamel, supra note 34, at 165.
87. Id. at 166.
88. Deng, supra note 8, at 725.
91. United States ST. DEP’T., supra note 36, at 1159.
92. Id. at 1219.
93. Id. at 1171.
94. Id. at 1180.
95. Id. at 1271.
96. Id. at 1279.
97. United States ST. DEP’T., supra note 36, at 1275.
98. Id. at 1310.
U.A.E. six Indian expatriates were imprisoned in 1993 for performing a play critical of Islam.\textsuperscript{99} Even in the tranquil Maldive Islands, apostasy is punishable by loss of citizenship, \ldots although law enforcement authorities say this provision of the law has never been applied.\textsuperscript{100}

Pakistan's blasphemy law has received the most press. It stipulates that anyone speaking or acting against the prophet Mohammed must be punished by death.\textsuperscript{101}

In 1986 legislation was passed inserting Section 295(c) into the Pakistan Penal Code, making blaspheming the Prophet Muhammad a capital offense. The law was apparently aimed at Ahmadis but has increasingly been used against Christians and Muslims as well. In 1992 the Senate unanimously adopted a bill to amend the blasphemy law so that the death penalty is mandatory in cases of conviction.\textsuperscript{102}

Early in 1995, a Christian boy and his uncle were sentenced to hang for writing anti-Islamic slogans on a mosque.\textsuperscript{103} However, this sentence was overturned by the Lahore High Court but hundreds of Muslims vowed revenge.\textsuperscript{104} In summary, although a few Muslim states' laws require death for apostasy, in the past several years, only Sudan has actually executed anyone for the crime.

6. Transgression

The sixth and final Hudud crime is transgression or rebellion against the legitimate authority. Most Islamic jurists agree that a transgression must be "by force" and the legitimate authority himself, must not be a transgressor of Islam in order for the rebel to be punished.\textsuperscript{105} "Those who are unable to fight or those who surrender or are arrested should not be punished by Had, but may be punished by Ta’azir [a less severe penalty]. Those who fight until subdued are subject to the death penalty as a Had."

The problem with this crime is who determines who is the legitimate authority? In reality, this Hudud crime provides an excuse for states like Iran, Sudan, Libya, and Iraq to execute coup plotters or even peaceful opposition leaders.

\textsuperscript{99} Id. at 1303.
\textsuperscript{100} Id. at 1358.
\textsuperscript{101} Horowitz, supra note 30, at 1.
\textsuperscript{102} UNITED STATES DEP'T., supra note 36, at 1377.
\textsuperscript{105} Mansour, supra note A3, at 197-98.
\textsuperscript{106} Id.
B. Quesas Crimes

Quesas crimes (murder, manslaughter, assault and battery) are specifically listed in the *Qu’ran*, but specific punishments are not prescribed; instead, the victim or the victim’s family may choose monetary compensation or retaliation in kind. The *Qu’ran* states, “The life for the life, and eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation.” The *Qu’ran* also states that “[r]etaliation is prescribed for you in the manner of the murdered.”

The punishment and procedure for Quesas crimes in Sudan can best be understood from the following four paragraphs, published in the *Sudan Democratic Gazette*, an opposition newsletter published in London.

Meanwhile, the only state security agent ever to be successfully accused of murder, charged and convicted by a court of law, was set free by the regime. Major Abdel Hafiz El Bashir had confessed to killing engineer Abubaker Mohi El Din Rasikh, whom he confronted on the street and shot in cold blood in October 1992. The regime was pressed by the family of the deceased to bring the matter to trial and despite repeated non-showings of the major for various court hearings, he was eventually brought before a court of law and convicted. The regime then sought to win a reprieve for the major by the applying the Islamic code of blood money, whereby the death penalty can be commuted on the payment of a sum of money to the deceased’s family. The regime was taken aback by the family’s insistence on the death penalty.

The death penalty was handed down to the major by a court of law in February of this year. The regime offered the family of engineer Ababaker the sum of 250,000 Sudanese pounds, a mere $500 United States dollars, as recompense for the loss of their son. The family refused, insisting that Islamic law allowed for the death penalty to be carried out.

The case was then taken to the regime’s supreme court which reinterpreted the Islamic law and ruled that the family of the deceased had no choice but to accept the $500 being offered as blood money. The court further ruled that upon payment of the

money, Major Abdel Hafiz need only serve a term of one year's imprisonment for carrying out the murder.\textsuperscript{110}

Besides Sudan, Quesas retaliation in kind is found in very few places, even in the Islamic world. For example, in Saudi Arabia relatives of a murder victim can demand a beheading of the perpetrator, but this punishment would be carried out by the government and not by the victim's family.\textsuperscript{111} However, like in Sudan, the victim's family can waive the punishment in exchange for a payment of blood money from the perpetrator.\textsuperscript{112}

There have been, however, several reports of Quesas retaliation in kind in war-torn Afghanistan. For instance, there have been at least two cases where commanders of various military factions allowed a relative of a murder victim to kill the "...convicted murderer, using a knife, in a so-called 'Qisas' (revenge) ritual,"\textsuperscript{113} in one well-publicized case in the northern Helmand province of Afghanistan, the wife of a murder victim carried out the sentence; this was believed to be the first case of a 'Qisas' killing by a woman.\textsuperscript{114}

C. Ta'azir Crimes

The third type of crime under Islamic law is the Ta'azir crime; crimes left undetermined by religious law. Ta'azir penalties are always less severe than Hudud penalties and are usually rehabilitative, retribution is not the guiding principle.\textsuperscript{115} Penalties available at the judge's discretion are reprimand, reparation, imprisonment, flagellation, and banishment.\textsuperscript{116} In Sudan, the Ta'azir was imposed when women who failed to cover their hair have been dragged off the street, taken to court, and subjected to forty to seventy lashes upon which one girl passed out after thirty lashes.\textsuperscript{117}

In a few other states, Ta'azir punishments are given for similar offenses. For example, in Saudi Arabia, a woman caught driving a car was run off the road, held for three days, and beaten.\textsuperscript{118}

\textsuperscript{110} Security Agent Freed, SUDAN DEMOCRATIC GAZETTE, July 1994.
\textsuperscript{111} 'Diya' Deal Averts Decapitation, THE SAINT PAUL PIONEER PRESS, Oct. 16, 1997, at 4A.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} MAUDIDI, supra note 35, at 25.
\textsuperscript{116} Cherif M. Bassiouni, Sources of Islamic Law and the Protection of Human Rights in the Islamic Criminal Justice System, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, xii, 24 (Cherif M. Bassiouni ed. 1982)
\textsuperscript{117} Bonner, supra note 20, at 80.
\textsuperscript{118} UNITED STATES ST. DEP'T., supra note 36, at 1275.
IV. RIBA, INTEREST OR USURY?

A final indication of a state's commitment to strict Islamic law is its laws restricting Riba. "What constitutes Riba has long been the subject of debate amongst Islamic scholars. Some believe that Riba refers to usury, whereas others believe that all interest is Riba." Generally, more conservative Islamic states believe that all interest is Riba while more moderate Muslim states believe that Riba only refers to usury. All of the confusion stems from the fact that Mohammed prohibited Riba but he never gave it any precise definition. Whatever Riba is, it is banned by the Qur'an.

Those who devour Riba will not stand except as he stands who has been driven to madness by the touch of Satan...O ye who believe! Fear God, and give up what remains of your demand for Riba, if you are indeed believers. If you do not, take notice of war from God and His Apostle ...

Interestingly, the Bible has a similar provision. The Bible states, "[i]f thou lend money to any of my people that is poor by thee, thou shalt not be to him as a usurer, neither shalt thou lay upon him usury." If one interprets the following quotation literally, it appears that the Bible also prohibits interest, "Take thou no usury of him or increase: but fear thy God . . . ." Despite the similarities between the quotations from the Bible and the Qu'ran, the two religions diverged in this area in the sixteenth century. "...when Protestantism arose, its support, especially the support of Calvinism, came chiefly from the rich middle class, who were lenders rather than borrowers. Accordingly, first Calvin, then other Protestants, and finally the Catholic Church, sanctioned 'usury'.”

Thus, during Europe's colonization of the Islamic world, interest and usury (Riba) was allowed even in the most conservative, Islamic areas. It was not until the independence movements of the 1950's and 1960's, that the theory of Islamic banking emerged when macroeconomic models of interest-free economies were developed and some ideas were given on how interest-free banking could work at the microeconomic level.

121. Id. at 268.
125. Rayner, supra note 120, at 271.
Still, a state’s prohibition of Riba is an indication of that state’s commitment to full-fledged Islamic law due to the fact that an interest-free economy operates at a disadvantage to economies that allow interest. A well-known Islamic jurist, Abd ar-Razzaq as-Sahuri, stated that Riba is a “major impediment to the evolution of Islamic jurisprudence coming into line with the requirements of modern life.”127

Perhaps the biggest disadvantage to an interest-free society is the damage done to its banking system. Since depositors are not allowed to collect interest on their deposits, there is no incentive for prospective depositors to deposit funds into a bank.128 Thus, in Sudan (which as will see, completely prohibits Riba), most people do not make cash deposits into banks but rather buy more land or jewelry with their excess capital. This is economically inefficient because the banks have less capital to loan to entrepreneurs in order to start businesses or expand production. Thus, the Sudanese government has attempted to attract reluctant depositors by granting complete exemption from all taxes for those who put deposits in the Faisal Islamic Bank.129 However, this exemption was terminated in 1984.

In August of 1993, the Governor of the bank of Sudan set up a committee to provide ideas on how Sudan’s ailing banking system could be rescued.130 The committee’s recommendations, which were implemented in July of 1994, included reducing financial and investment risk, establishing Islamic inspection units to make sure that banks are complying with the Shari’a, and enhancing “sales promotion methods to attract more customers.”131 The Islamic inspection units are usually composed of NIF supporters who are appointed to a bank’s board of directors and often receive more compensation than other members of the board due to government pressure.132 It appears that these banking reforms were not successful in attracting more customers because in June of 1995, the Sudanese government was again forced to exempt savings accounts from taxation.133

The Pakistani government has had more success with its Islamization of its economy. Since July 1, 1985, the Pakistani government has

128. Rayner, supra note 120, at 274.
129. Gordon, supra note 48, at 811.
131. Id.
prohibited all interest-bearing deposits in Pakistani banks. Due to imaginative substitutes for interest (such as depositor ownership of companies that the bank invests in), "The effect of Islamization on deposits and the levels of savings has been positive. Bank deposits have continued to expand." However, Pakistan's success appears to be the exception rather than the rule.

Another disadvantage of an interest-free society is that "there can be no certainty in financial negotiations where there is any question of the Shari'a law being applicable." This is especially true for international business transactions conducted between interest free societies and societies that allow interest. For example, in 1984, Saudi Arabia became a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to the convention's public policy exception (Article V; paragraph 2(b)), Saudi Arabia refuses to enforce arbitrated awards if they are found to be contrary to the Shari'a. Thus, if an arbitrated award includes interest, part of or all of the award will not be enforced.

A third disadvantage of an interest-free society is that "[e]ntrepreneurs with good profit expectations may prefer financing their projects on the basis of fixed interest so that they do not have to share the expected profits with someone else." In an Islamic state that prohibits Riba, one of the ways a bank can get a return on its loan is by becoming a partner in the debtor's business, and thus receiving a percentage of the debtor's profits. In Pakistan, this is known as a Musharika, where "Profits are shared according to a pre-agreed formula but losses, if any, are shared in proportion to the funds contributed by each party." However, as mentioned earlier, an entrepreneur may rather pay interest than give up a predetermined percentage of his profits if he expects his business to succeed while the bank may prefer interest payments if the chance of the business earning a profit is slight.

Thus, despite all of the disadvantages of an interest-free society, Sudan has completely outlawed Riba. Islamic law states that Riba is a Ta'azir crime, punishable by lashing.

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135. Id. at 62.
138. Baldwin & Wilson, supra note 119, at 159.
139. Gordon, supra note 48, at 811.
140. The World Bank, supra note 134, at 61.
141. Salama, supra note 49, at 130.
Section 281 of the C.T.A. [Civil Transactions Act, 1984] provides that where a loan agreement contains a provision which would require the borrower to pay back to the lender funds over and above the principal amount of the loan (e.g., interest), such provision shall be void, but the balance of the loan contract shall remain valid.\textsuperscript{142}

As a result, "[i]n the commercial sphere the 'Islamic legal revolution' which promulgated the Civil Procedure Act in the Sudan in 1983, prohibited Riba transactions. . . ."\textsuperscript{143} In order to enforce this law, Sudan has made it a criminal offense to charge interest. The first case to prosecute a defendant for Riba was The State v. Laleet Raiinahl Shah (1984), in which a non-Muslim resident was convicted of lending money and charging interest.\textsuperscript{144}

Most other Muslim states are much more lenient where the question of Riba is concerned. Iraq, Egypt, and Qatar all recognize contracts containing interest.\textsuperscript{145}

In Oman, provided that interest is charged at a rate that could not be deemed exorbitant in the local market, there should be little problem. Contracts including such interest payments have been upheld by the Authority for the Settlement of Commercial Disputes, the judicial body set up by Royal Decree to have exclusive jurisdiction in commercial matters.\textsuperscript{146}

In Kuwait, the Court of Cassation in the High Court of Appeal has held that a plaintiff may recover interest, but only if the plaintiff has specifically asked the court for the payment of interest.\textsuperscript{147} Conversely, in Sudan, section 110 of the Civil Procedure Act of 1983 states, "The Court shall under no circumstances whatsoever make a decree ordering payment of interest on the principal sum adjudged."\textsuperscript{148} The civil laws of Kuwait, Bahrain, and the U.A.E. enforce interest payments, but only up to a ceiling set by the state.\textsuperscript{149} However, in these states, "there remain a significant

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\textsuperscript{142} Gordon, supra note 48, at 812.
\textsuperscript{143} Rayner, supra note 120, at 277.
\textsuperscript{144} Gordon, supra note 48, at 813.
\textsuperscript{145} Rayner, supra note 120, at 279.
\textsuperscript{147} Rayner, supra note 120, at 288.
\textsuperscript{148} Gordon, supra note 48, at 812.
\textsuperscript{149} Rayner, supra note 120, at 303.
}
number of practicing lawyers who will not defend cases whose main cause is the pursuit of Riba.”

There are several reasons why these states do not strictly enforce the Riba prohibition. First, these coastal states have had extensive trading relations with the West and, as a result, are somewhat less conservative than the largely land-locked Sudan. Second, it would be extremely difficult for these states to enforce the prohibition on Riba due to the large number of Western financial institutions found in these countries. Finally, the Gulf States realized that if they prohibited Riba, they would do irreparable damage to their economies.

Even if a state prohibits Riba, an enterprising attorney may be able to come up with Hiyal to circumvent the prohibition. Hiyal is a legal stratagem established by jurists to circumvent legal concepts proving too ideal to be practicable. In order to circumvent the prohibition on Riba, several Hiyal have been established.

The first Hiyal against Riba is called Bay’ al-Wafa and has been in existence for hundreds of years. The debtor sells his property to the creditor for a certain amount of money on the condition that the creditor will return the property once that same amount is paid back to the creditor. The creditor’s use of the property in the interim represents the interest on the loan. The problem with this Hiyal is that it constitutes a sale with a condition, which was strictly prohibited by Mohammed; thus, this contract would not be permitted.

A second Hiyal is the Bay’atan Fi Bya’atin, or double sale. In order to circumvent the Riba prohibition, the debtor sells personalty to the creditor for cash and at a future date, the debtor will buy back the personalty for a larger amount of cash. The difference in the two prices represents the interest. A third possible way for a financial institution to get around the Riba prohibition is by making service charges when granting loans. Sudanese banks claim that service charges are legal as long as the amount of the service charge is not related to the amount of the loan. As mentioned earlier, Section 281 of the Civil Transactions Act prohibits all interest. “It is unclear whether Section 281 would prohibit the ‘service charges’ typically charged....”

There are several other ways for a financial institution to avoid the Riba prohibition, which even the most conservative Islamic government
will not prohibit. One is known as Mudaraba, or a partnership in which the client and the bank share equity. Thus, the bank shares in the losses or profits of the debtor’s business. If a bank makes sound choices on which businesses to loan to, the bank can make even higher profits than a typical Western bank.

V. CONCLUSION

Sudan is clearly one of the strictest countries in the world where the implementation of Islamic law is concerned. However, where does Sudan stand in relation to other fundamentalist states such as Saudi Arabia? If the reports of death by crucifixion are true, then Sudan’s criminal punishments are more severe than those of any other state in the world, including Saudi Arabia. Even if the reports are false, criminal punishment in Sudan still ranks as one of the harshest in the world due to executions for religious beliefs and crucifixion of criminals already executed for highway robbery. The only other state that engages in this practice is Saudi Arabia. Add to this, Sudan’s strict prohibition of Riba, and it is clear that Sudan is the world’s strictest experiment in the implementation of full-fledged Islamic law.

157. RAYNER, supra note 120, at 277.
RECONSIDERING THE ISRAELI COURTS' APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN THE HUMAN RIGHTS CONTEXT

Leonard M. Hammer*

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I. INTRODUCTION

Discussions regarding the problem of identifying customary international law have essentially focused on two principal issues. The first relates to the inadequate manner in which the elements of custom reflect any empirical reality, or lex lata, particularly when according greater merit to the opinio juris of states. Commentators have focused on a host of customary norms, in particular areas of international law, such as environmental law, human rights and international economic law. These commentators have concluded that these so called customary norms serve as the jurisprudential basis of the relevant international laws are either not customary due to a lack of state practice or are too indefinite to be classified as any form of hard law. The second principal contention relates to the relative nature of the sources of custom. The basic problem, when

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2. See Bodansky, supra note 1.


delineating opinio juris, is that the very purpose and nature of customary law is being uprooted in deference to the perceived desires of states.\(^5\)

In attempting to address these aforementioned contentions, some commentators tend to stress the unavoidably pluralist structure of the international community. Unique regional and cultural interests suggest the need for a broader understanding of custom that makes it difficult to identify a customary norm in any definitive manner.\(^6\) Recognizing the purpose of the key elements of custom, particularly the opinio juris of states, is to reflect the basic structure of a customary norm.\(^7\) Commentators have suggested that the distinction between lex lata and lex feranda has blurred.\(^8\) One, therefore, can claim that referring to opinio juris enhances the role of custom as an adjudicatory source. Discerning the values indicated in the opinio juris can provide a more clearer direction for a judicial body applying the customary norm than the strict positivist approach that tends to stress state practice.\(^9\)

Considering the problems associated with customary international law, this article will account for the role of customary law within the domestic legal system of states and the extent of the domestic application of customary international human rights law. Applying customary international human rights law in the domestic sphere might raise different considerations than other areas of international law. Human rights serve to regulate a state’s behavior towards individuals found within its borders. A morally consequential form of reasoning regarding the utility of human rights might incline a domestic legal actor towards different interpretations of customary law. For example, a court might account for the underlying purpose of human rights by considering broader sources when identifying the obligation derived from customary international law.\(^10\)

Following a discussion of the more general problems associated with discerning customary international law, this article will consider Israel’s legal framework for incorporating customary international law. This


7. See generally, MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); ABI-SAAB, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 10 (Cassese & Weiler eds., 1988).

8. BROWNLIE, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 70 (Cassese & Weiler eds., 1988) noting the importance of political circumstances, the catalytic effect of certain statements, and the modalities of application.


article will account for the manner in which the Israel legal system, particularly the Israel Supreme Court, has applied customary international law and the implications of such an approach for the future application of customary international human rights law in Israel.

The reason for this focus on the Israeli system is that the Supreme Court tends to place a rather strong emphasis on the state practice element of custom. The positivist comprehension of the Court, however, tends to reflect the problems associated with this approach. In particular, the Court has been prone to subjective interpretations of the relevant norms and, at times, an unrealistic perspective of the customary status of certain rules.

Furthermore, the Courts approach does not appear to conform with its underlying reasoning for incorporating international customary law into the domestic Israeli law. The significance of customary law for Israeli jurisprudence is that custom creates an obligation on the sovereign state. The state does not maintain an extra-legal status above the strictures of the law, and therefore customary international norms can provide a common core of binding human rights. This suggests a cosmopolitan international framework for human rights, as opposed to an inter-statist approach generally associated with a positivist perspective. A reference to the opinio juris of states might provide a clearer adjudicatory source of custom than would state practice.

This re-examination of the domestic applicability of customary international human rights law in Israel also seems ripe given Israel's ratification of the principal human rights treaties during the early part of this decade. For example, Israel ratified the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, Convention on the Rights of the Child, Convention to Eliminate Discrimination Against Women, and the Convention Against Torture. Coupled with the enactment of two important Basic Laws that strength the status of civil rights in Israel, one can consider the applicability of provisions within these ratified but non-incorporated treaties that embody customary international law.

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11. As compared to a treaty that generally must be incorporated pursuant to a specific statute.
12. See discussion infra. The Israel Supreme Court has also identified the fact that Israel is a mixed jurisdiction as another reason for incorporating custom.
II. CUSTOMARY INTERNATIONAL LAW AS A SOURCE

Customary international law is composed of an objective element regarding the actual practice of states, and a subjective element that the state believes it is acting under a legal obligation, otherwise referred to as *opinio juris*. One of the key problems in discerning custom is the independent relative importance of each of these elements and the proper reference materials for determining their normative content. For example, customary international law has been prone to uncertainty as a viable source of law given the difficulty in identifying state practice or the vague nature of *opinio juris*.8 This form of criticism gained credence particularly after a variety of International Court of Justice [hereinafter "ICJ"] decisions emphasized the importance of ancillary sources, such as UN Resolutions, to establish the grounds for the *opinio juris* of emerging customary norms.'

In response to this problem, some commentators have adopted a more realistic approach towards customary law by accounting for factors such as international relations20 that causally persuade states to engage in similar behavior due to surrounding economic or political circumstances rather than from a binding legal obligation. Alternatively, other commentators point to the importance of upholding a viable international legal system by stressing a strong statist paradigm21 or focusing on other international law sources, such as treaties, as an efficient normative source for developing a state’s customary law obligations.22 One of the key reasons for referring to treaties as a source of custom is that with the lessened homogeneity of states and the increased need for clear and effectively responsive international doctrine resulting from the growing inter-dependency of states. Custom has been deemed a rather slow and cumbersome source for developing international law.23 Because treaties are a written instrument and provide for a deductive application of predetermined rules, they can serve as a key source for entrenching a customary human right. As

21. Weil, supra note 5.
23. See, e.g., THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); VAN HOOF, supra note 22.
acceptance and application of treaties develop, one can elicit an *opinio juris* by states concerning the treaty obligations, and, as states interact with the international bodies established under the treaties, a subsequent change in state practice.  

In the international human rights field, there is also a tendency to rely on statements and declarations made by states in international forums or during the drafting of an international document. Considering the broad range of available sources for deriving international norms, such as United Nations General Assembly Resolutions or reports from Non-Governmental Organizations [hereinafter “NGO”], human rights commentators attempt to expand the reach of customary international law.

One of the basic problems with relying on sources derived from international organizations is that it tends to reduce the normative basis of international law. States might support a particular idealistic notion in international forums but hesitate to uphold those ideals in practice. Hence while it is tempting for states to designate a particularly horrific act, such as torture, as being prohibited by customary law, it is equally important to provide for the enforcement of the norm in a realistic and effective manner.

Nonetheless, the alternative, positivist, approach tends to overlook the benefits of referring to *opinio juris*. As an adjudicatory tool, *opinio juris* can assist the judicial determinacy of the norm by clarifying the underlying value of the norm. Custom derives from a shared understanding of states and, particularly in the human rights field, fundamental principles that structure the evolution of customary norms. As a result, there is a certain amount of commingling between the elements of state practice and *opinio juris* when considering the customary law status of a human right norm.

One can demonstrate the significance of *opinio juris* as assisting to apply a customary rule in a uniform manner upon considering the enforceability of custom in the domestic legal framework of the majority of

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24. See discussion infra. The drawback to this approach is that a treaty is a separate source of law, such that its utility as a source of custom will depend on the number of states ratifying and incorporating the treaty in question.


27. MERON, supra note 7.

28. Weil, supra note 5.

29. Weisburd, supra note 18.

states. While application of the customary norm in the domestic sphere might be subject to different interpretations, the underlying values that shape and form the rule can serve as guidelines for a domestic entity charged with enforcing customary principles. Considering the opinio juris of a customary law enhances judicial determinacy and with it the rule of law while allowing for a relative application of the norm. A better understanding of the application of customary norms in domestic legal systems, notably in Israel, will clarify the reason for stressing a unitary basis for the substantive dimension of the source of custom.

States generally accept the automatic incorporation of customary international law into the domestic legal sphere. In Germany for example, Article 25 of the Grundgesetz, or Basic Law, binds the states to uphold customary international law. The courts look to the Federal Constitutional Court, or Supreme Court, to determine whether a norm has attained the status of custom. In Italy, customary international law also maintains a normative status that places it above the domestic law. While it is difficult to disentangle instances in which the courts have referred exclusively to custom as opposed to constitutional principles, the courts have referred to the customary international law status of the right to housing, own property, equal protection of the law for aliens, and the right against discrimination.

The United States arguably recognizes that international customary norms are applicable in its domestic courts, with some commentators

31. See, e.g., Enforcing International Human Rights in Domestic Courts (Conforti & Francioni eds., 1997).
32. See, e.g., ABI-SAAB, supra note 7 (noting that the elements of custom can provide the procedure for creating and discerning the rule).
34. Tasioulas, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, 16 OXFORD. J. L. STUD. 85 (1996) (for example equates a similar interpretation with the international legal systems goal to achieve peaceful coexistence among states).
35. Note that unlike the United States and United Kingdom, domestic legislation in Germany cannot override a customary international norm.
asserting that custom supersedes prior federal law. The principle, as noted in the United States Courts, is the binding nature of international rules over sovereign states. While reference to customary law by United States Courts has been rare, as well as subject to controversy, customary international human rights norms have served as the basis for a number of legal actions. Customary international law maintains a similar status in Chile and Argentina.

The United Kingdom considers customary international law to be part of the domestic law, save if it conflicts with an existing law. Canada also adheres to a similar adoptive approach to customary law.

A. Customary International Law in Israel

In Israel, like the United Kingdom, custom has automatic binding status in the domestic law unless the customary norm is contrary to an


39. This notion can be traced back to Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). The most widely cited case is The Paquete Habana, 175 U.S. 677 (1900). The proposition that it stands for automatic incorporation of customary law is subject to debate on both historic and legal grounds. See, e.g., Trimble, supra note 1; Weisburd, supra note 18; Bradley & Goldsmith, supra note 37.


41. For example, the Alien Tort Statute provides that an alien may raise a tort claim against another alien who committed breaches of the law of nations. See e.g., Bayefsky and Fitzpatrick, supra note 33.


43. VINUESA, DIRECT APPLICABILITY OF HUMAN RIGHTS CONVENTIONS WITHIN THE INTERNAL LEGAL ORDER THE SITUATION IN ARGENTINA IN ENFORCING HUMAN RIGHTS; supra note 36, at 149.


45. BAYESKEY, INTERNATIONAL HUMAN RIGHTS LAW IN CANADIAN COURTS; supra note 36, at 295.

existing law. In determining the criteria for establishing customary international law, the Israeli Courts have turned to Article 38(1)(b) of the statute of the ICJ. The Article defines custom as a stable, consistent, and general practice that is broadly acknowledged in international circles as binding, with an emphasis on the fact that the norm has acquired binding legal force in the majority of nations. An ambiguous provision in the domestic law will impel the Israeli Courts to incorporate a customary international norm into the domestic law, with the presumption that the legislature is acting within the dictates of a customary norm.

While the Israeli Court acknowledges the importance of opinio juris as demonstrating a state's sense of obligation, the Court tends to stress state practice as a key part of the doctrine of custom. Adhering to a standard that the practice must be established, general, and constant, the Israeli Supreme Court states it is the practice of the subjects of international law, i.e., the states, that is to serve as the key aspect in establishing custom. The Israel Supreme Court noted that the basis for establishing custom cannot be the values emerging from international entities since the latter do


48. See, e.g., Abu Itta v. Commander of Yehuda and Shomron, 37(ii) PD 197 (1983) at 231. Note that international commentators have criticized Article 38(1)(b) as being defective because the definition is inverted; general practice is evidence of custom. See, e.g., Fidler, *Challenging the Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERM. YB. INT'L L. 198 (1996). Karol Wolfke asserts that the travaux preparatoires to the ICJ Statute indicate that the drafters had no clear idea regarding the structure of custom. Wolfke, Custom In Present International Law (1993).


50. Hilu, et. al. v. State of Israel, et. al., 27 (ii) PD 169 (1973) at 177. See also, Affu, et. al. v. Commander of IDF Forces in the West Bank, et. al., 42(ii) PD 4, 35, 76 (1988) (translated in 29 ILM 139); Shimshon v. Attorney General, 4 PD 143 (1951) (apply international law where legislature did not consider the succession of the state to the Mandate requirements).


not address the putative customary values in any practical sense. Although 
ideals are an important indicia of custom, state practice represents a more 
realistic and entrenched element.\textsuperscript{53}

Following this approach, the Supreme Court tends to apply custom in 
a somewhat subjective fashion. For example, the Court has repeatedly 
held that the Fourth Geneva Convention is not customary law and therefore 
inapplicable.\textsuperscript{54} Alternatively, the Court has relied on subjective applications 
of military necessity to avoid the possible customary obligations of the 
state.\textsuperscript{55}

Professor Benvenisti explained the Supreme Court's understanding of 
custom as an attempt by the Court to counter-balance the lack of other 
avoidance doctrines in Israeli jurisprudence, such as the act of state or 
political question doctrines. He also interprets the Courts narrow 
application of custom as reflecting a desire to incorporate a deference to 
the national security considerations confronting the state.\textsuperscript{56}

The noted reasons for favoring a strict interpretation of customary law 
however are descriptive only. They refer to domestic interests that might 
apply only after determining the existence of a customary norm.\textsuperscript{57} Hence, 
while the act of state doctrine might provide a basis for narrowing the 
application of customary law, such an argument ignores the functional 
purpose of custom in international and domestic law as creating a 
recognized set of common principles among states. Additionally, domestic 
standards of national security need not be central factors when considering 
the relevance of customary international human rights since customary 
international human rights norms can assist to shape the contours of 
security considerations in a manner that conforms with international law.

Furthermore, the Supreme Court's interpretation of state practice 
appears to be excessively literal and seems to overlook the role of 
international sources that shape the practices of states and define the 
contours of the customary law. Determining state practice is not a literal

\textsuperscript{53} Id.

\textsuperscript{54} See, e.g., Shahin et al. v. Commander of IDF Forces in the Area of Judea and 
Samaria, 41(i) PD 197 (1987) (family re-unification is not an obligatory right nor is it covered 
by the Fourth Geneva Convention); Kwasama v. Minister of Defense, 35(i) PD 617 (1981) 
(prohibition of expulsion only applies to mass expulsions under the Geneva Convention).

\textsuperscript{55} Taha v. Minister of Defence, 45(ii) PD 45 (1991) (state may fine parents if their 
children commit disturbances in the Occupied Territories).

\textsuperscript{56} EYAL BENVENISTI, THE ATTITUDE OF THE SUPREME COURT IN ISRAEL TOWARDS 
THE IMPLEMENTATION OF THE INTERNATIONAL LAW OF HUMAN RIGHTS IN ENFORCING 
INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 207, 213-14 (Conforti & Francioni eds., 
1997); Benvenisti, The Applicability of Human Rights Conventions to Israel and to the Occupied 

\textsuperscript{57} See, e.g., Matar v. Minister of Defense, 43(iii) PD 542 (1989), where the Israel 
Supreme Court held that the Geneva Convention is not customary law and that deportations of 
individuals associated with terrorist organizations may occur in the interest of national security.
exercise but accounts for a broader more objective view of custom. Instances might occur whereby states entertain strong *opinio juris*, such that the material practice is a secondary consideration that might not reflect the emerging customary standard.

If one were to adhere to a strict account of state practice in the domestic sphere, it is conceivable that states would reject almost all customary norms because of contrary state practice. For example clearly states consider torture to be an unacceptable act under customary international law, yet the practice of torture still unfortunately abounds. Similarly, as decided in the *Nicaragua* case, the ICJ relied on the prohibition of the use of force in the United Nations Charter as a customary norm despite contrary state practice. The ICJ relied on the manner in which states tend to justify their acts of force, by denying any breach of the Charter or attempting to justify their actions as falling within the framework of the Charter. It did not however limit the examination to a hard-look at state practice. Furthermore the ICJ noted that while regularity of behavior is important, there is no need for complete uniformity of behavior particularly concerning human rights, which the ICJ has intimated can derive from customary law sources.

While the focus on the actual practice of states is proper since it is the states that create and uphold custom, actual practice does not adequately account for developments within international organizations. Commentators have deemed a variety of United Nations Resolutions as reflective of custom, or at the very least as guidelines for the proper conduct of states that can reflect the development of a customary norm. This argument is significant given the large number of states that have emerged following the creation of the United Nations, thereby suggesting a

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58. Akehurst, *Custom as a Source of International Law*, 47 Brit. Y.B. Int’l L. 1 (1974-75) (defines state practice as any act or statements by a State from which views can be inferred about international law).

59. A similar approach was indicated in the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J Rep. (when the ICJ deemed the Geneva Conventions equivalent to customary law given the large number of states that have signed the document and the *opinio juris* deriving from statements made in international forums).

60. The fact that the ICJ was dealing with the prohibition regarding the use of force might account for its rather elastic interpretation of the development of a customary norm. See, e.g., D’Amato, *Trashing Customary International Law*, 81 Am. J. Int’l L. 101 (1987).


different pattern for, and relevance of, the elements of custom. Given the organizational role of international entities that influence the procedural development of custom, international forums can offer a strong platform from which to discern the existence or emergence of a customary norm.\(^{63}\)

International forums also serve to consolidate a variety of international interests, including the individual and other interest groups, such as NGOs, that operate in the human rights arena. Unlike other customary international laws that might derive from the actual state practice between states, human rights norms involve the actions of different actors and set of interests, further intertwining state practice and *opinio juris*.

It appears that discerning custom for the Israel Court becomes a comparative exercise of domestic law of states, at the expense of other international law sources.\(^{64}\) In reality, *custom* for the Supreme Court seems to be the third source of international law mentioned in the ICJ statute,\(^{65}\) namely the general principles of international law. General principles differ from custom in that the former entail an examination of the national legal systems of states to obtain a common core of fundamental principles that are necessary in a legal society.\(^{66}\) While general principles can assist to find and interpret a customary principle,\(^{67}\) the focus is on national legal systems in an attempt to discern a fundamental legal norm, a rather different approach than custom, which is a less obvious source of law that applies to a broader range of circumstances.\(^{68}\)

Recognizing the inclination in Israel towards a *realist* approach to custom, finding the proper grounds for the domestic application of a customary principle that also incorporates recent developments in the international arena might be difficult. While the substance of a customary rule might derive from international sources, the authoritative basis for applying custom in the domestic sphere clearly is derived from a domestic source of law.\(^{69}\) Hence even when the Court considered international


64. *See*, e.g., Taha v. Minister of Defence, 45(ii) PD 45 (1991) (where the Israel Supreme Court referred to the domestic laws of other states to demonstrate that a state may control the oversight that parents are to maintain over their children).

65. Article 38(1)(c).


sources that might assist to indicate the practice of states.\(^7\) Deference was accorded to the domestic interpretation of customary international law. As noted by Israel Supreme Court Justice, Professor A. Barak, regarding the applicability of customary international law: “As long as there is no development of practical customary international law, there is no escape from the fact that every state is to apply the accepted measure for this matter pursuant to the dictates of its domestic laws.”\(^7\) It is therefore important to understand why the Israel Supreme Court prefers to accord custom a particularly elevated status. It is possible that the particular reasons for upholding the direct application of customary international law in the domestic sphere might broaden the reference to custom in other situations that not only consider state practice, but also account for the international framework and Israel’s obligations that derive therefrom. This functional understanding of custom will assist to elucidate the normative theory of adjudication adopted by the Court, thereby making it easier to expand on the importance of relying on a broader set of elements when determining the substantive basis of custom.

B. The Principles Behind the Rule

In *The Queen of Right in Canada v. Edelson and others*,\(^7\) the Israel Supreme Court outlined the underlying rationale for the automatic application of custom in the domestic law.\(^7\) The first reason noted was that Israel mirrors the United Kingdom common law, particularly as a result of the Israeli Legislature’s adoption of the previous Mandate Law. The result is that Israel law provides for automatic acceptance of customary law principles without the need for enabling legislation.

While this might be a practical reason for incorporating custom, it does not provide any particular rationale for the rule. Furthermore, it can possibly lead to skewed decisions since it might bind the Israel Courts to interpretations that cannot deviate from the United Kingdom law, even if there is no contrary law in Israel.\(^7\) Nonetheless, one may stress here the distinction between the substantive basis of custom, that would provide the outline of the rule, and the authoritative basis of custom, that would serve as the interpretative guide for binding the domestic courts. Professor

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72. *Id.*

73. Although the Court did not base its reasoning on this point, the Court referred to customary international law because there was no other source of legislation.

74. Lapidotoh, *supra* note 16 (noting this reason in discussing Shtampfer v. Attorney General 10 PD 5 (1956)).
Dinstein has noted that the basis for incorporating custom can derive from the approach of the United Kingdom common law, however that does not bind Israel to the United Kingdom domestic laws since application of the rules derive from a domestic interpretation of the international sources.\footnote{Dinstein, International Law and the State (1971) (in Hebrew).}

Another reason offered by the Supreme Court focused on the notion that Israel is a \textit{mixed jurisdiction}.\footnote{Id; Barak, The Israeli Legal System - Its Tradition and Culture, 40 MISHPATIM 197 (1991) (in Hebrew).} Justice Barak for example has stated that Israeli law is a mixture of civil and common law characteristics that has made it a unique legal jurisdiction. Legal sources are based on legislative codes, the central role of the judge and academia, domestic customs, comparative law, a fine balancing between a systematic and casuistic approach, and unique procedural aspects such as the integration of civil and religious law.\footnote{Barak, supra note 76.} Hence, customary international law can serve as a key source for developing domestic Israel law.\footnote{Barak, Human Dignity as a Constitutional Right, 41 HAPRAKLIT 271 (1993/94) (in Hebrew); supra note 49.}

This \textit{mixed jurisdiction} approach explains the Supreme Court's tendency towards state practice in other jurisdictions rather then referring to international developments. The Court understands custom as a source by which to buttress the existing law rather then treat it as a wholly separate normative framework. In the decision \textit{The Queen of Right in Canada v. Edelson and others},\footnote{Takdin-Elyon, supra note 71.} the Supreme Court recognized the customary notion of restrictive immunity for states, yet noted that the norm is to be applied in a manner that conforms with both international law and the basic legal values of the Israeli law.

In the context of customary international human rights, custom can interpret domestic legislation where the law is either unclear or requires clarification.\footnote{Barak, supra note 76.} Pursuant to this reasoning, customary international human rights can serve as an important source for domestic interpretation, something that the Supreme Court has been hesitant to recognize.\footnote{Benvenisti, supra note 49.}

An additional, and important, reason for invoking customary international law in the domestic sphere is that a sovereign state has the responsibility to uphold its international obligations.\footnote{See supra note 71; see also, Her Majesty The Queen in Right of Canada v. Edelson and others, Takdin-Elyon, Vol. 97(2) 5757/5758-1997. See also, Rubin, Adoption of International Treaties into Israeli Law by Israeli Courts, 13 MISHPATIM 210 (1983-84) (in Hebrew) mentions this as a key reason for upholding customary law in the domestic sphere.} Because custom is a
prime source for such responsibility, it is incumbent on the courts to apply the responsibilities that are derived from customary norms.

While this reasoning is valid given that the state is the principal international actor, one also must account for current developments in international law. The notion of state sovereignty has undergone a change due to the emergence of a variety of international developments such as environment law and human rights. Given the role of international organizations as key bodies for defining the obligations of the state, the importance of referring to the doctrines emanating from international organizations has increased. This increase is most apparent when attempting to derive the customary obligations of a sovereign state.

Further, the Israel Supreme Courts reasoning demonstrates that sovereignty is only a smaller piece in the larger international puzzle. The law limits the activity of the state since the sovereign is a creature of the law and not the master of the law. Sovereignty is not an extra-legal principle that allows the state to act as it sees fit. Rather, as recognized by the Supreme Court, sovereignty is a means to an end within the international normative system, particularly when considering the role of human rights and its domestic enforcement.

C. The Practical Applicability of Custom

The rationale of the Israel Supreme Court for directly incorporating customary international law into the domestic law is based on the state’s responsibility as a sovereign and the constitution of Israel’s legal system as a mixed jurisdiction, being composed of elements of common and civil law. One may now consider the practical applicability of custom in the domestic sphere.

From a sovereign responsibility standpoint, what of the importance of democratic or majoritarian rule, whereby the legislative branch is to pass laws? Surely a sovereign state has an obligation to be true to the mechanisms created by the internal political framework. It seems a counter-majoritarian notion even to allow for the enforcement of a rule that the legislative branch did not consider. This was the rationale of the

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84. Gunning, supra note 10 (outside parties, such as international organizations and NGOs, influence states and the manner in which states exercise their sovereignty).

85. Trimble, supra note 1; Weisburd, supra note 18 (discussing issue from federal/state dichotomy, whereby applying custom can upset the federal balance).

86. Or even by the Executive branch, upon considering the rule that a new state is bound by the previously developed standards of custom. For example, this automatic application of
minority opinion in the *Shtampfer* decision,87 where Israel Supreme Court Justice Goitein noted that only the legislature may create internal legislative changes. Additional domestic policy issues, such as disruption of a state’s foreign policy due to enforcement of an international custom, forcing the court to decide a political question, or the importance of national security88 are also factors that a state can raise when considering the enforcement of custom in the domestic sphere.

Some commentators have addressed the counter-majoritarian problem by noting that domestic courts serve as the best forum within which to confront issues of applicability.89 Courts attempt to adhere to predetermined principles, be it a domestic or international source, without any involvement in the underlying political debate.90 Even regarding domestic issues, courts must address cases that are not based on a particular law such that a court must make recourse to their own presumptive powers.

Additionally, one can interpret the application of a customary norm within the domestic sphere as a means of completing the obligation created by custom. An inherent problem with custom is that the subjective element of *opinio juris* implies that an obligation already existed, thereby rendering the customary obligation redundant.91 However the obligation created by a

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88. These issues have been noted by Professor Eyal Benvenisti in *The Attitude of the Supreme Court of Israel Towards the Implementation of the International Law of Human Rights; supra* note 36, at 207.

89. This is the practice for example in Germany where the Constitutional Court interprets what is custom.


customary norm can become an obligation deriving from custom once enforcement of the norm occurs within the domestic sphere.\textsuperscript{92}

In considering the role of custom in Israel, it is possible that deriving the obligation from a domestic enforcement of the norm can have particular relevance for international human rights obligations, where international commentators tend to rely on \textit{opinio juris} as a primary source of custom.\textsuperscript{93} Recognizing the appropriateness of a particular pattern of behavior, the \textit{opinio juris} crystallizes a variety of state perceptions towards a particular norm. The norm inclines a state to alter its practice according to the norm, particularly as states make an empirical judgement to acquiesce and subscribe to the rule.\textsuperscript{94} The combination of \textit{opinio juris} and state practice as binding the state in a normative sense, rather than merely reflecting or declaring a desired standard,\textsuperscript{95} can occur by way of the domestic legal grounding of the norm\textsuperscript{96} that will serve to solidify the norm.

Similarly, international human rights treaties can serve to embody the elements of custom and provide a court with a reference to principles of law by declaring a previously created customary rule, crystallizing an emerging rule, or generating a new rule of custom.\textsuperscript{97} As treaties enunciate norms in a clear fashion, the emergence of a customary norm is easier to detect, particularly as the customary norm develops over a time.\textsuperscript{98} For example, one can refer to a multilateral treaty as a source of emerging customary law where the underlying goal of the treaty is to create a universal consensus among the signatory nations. While the obligation to

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  \item \textsuperscript{92} Walden, \textit{supra} note 91, alludes to this approach by distinguishing a claim that a rule is binding from the eventual legal application of the rule in accordance with the proposed custom. See also, Maluwa, \textit{Custom Authority and Law: Some Jurisprudential Perspectives on the Theory of Customary International Law}, \textit{6 AFRICAN J. INT’L & COMP. L.} 387 (1994) for an explanation of Finnis’ approach to this conundrum.
  \item \textsuperscript{93} Indeed Cheng, \textit{supra} note 91, focuses almost exclusively on \textit{opinio juris}, noting that state practice will be altered in accordance with a state’s acceptance of an obligation.
  \item \textsuperscript{94} See Maluwa, \textit{supra} note 92, at 402 (noting the importance of authoritative rules as exclusionary reasons for action, particularly where the state acts in the absence of any clear or understood reason).
  \item \textsuperscript{95} See, e.g., Bodansky, \textit{supra} note 2.
  \item \textsuperscript{96} Walden, \textit{supra} note 91, approaches custom as both a primary and a secondary norm that raises the level of obligation to a greater status than mere declaration and action.
  \item \textsuperscript{98} Meron, \textit{The Geneva Convention as Customary Law}, \textit{81 AM. J. INT’L L.} 348 (1987) (citing Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (1986) ICJ Rep. 14 regarding Article 3 of the Fourth Geneva Convention, where the ICJ inferred it was custom yet travaux and prior usage were not so clear).
\end{itemize}
abide by the treaty derives from specific treaty rules, the treaty may also indicate an emerging *opinio juris* of a state and influence subsequent state practice. Further, if a treaty creates a one-sided obligation on the state, such as a human rights treaty, the relevance of the *opinio juris* in forming the treaty will be quite significant in demonstrating the customary status of a rule. State practice serves a secondary role since the practice required by the treaty is, in itself, an obligation to alter one’s practice. The binding nature of custom emerges as a state’s intent becomes entrenched and a state’s actions become influenced by the treaty.

Reflecting this approach are commentators who treat the two principal elements of custom as being in an inverse relationship to one another. Developing the grounds for demonstrating *opinio juris* heightens the role of *opinio juris* as a key element of customary law and proportionally lessens the necessity to turn to state practice. This inverse relationship between the sources of custom, which the ICJ seems to support, is significant for instances where subsequent state practice contrary to an emerging customary rule does not create strong enough grounds to form a new customary norm upon considering the previous *opinio juris*. Such is the case with states recognizing norms as essential and basic to their survival or because states maintain deeply held and widely shared convictions, despite the possibility of contrary state practice subsequent to the development of the norm. The utility in referring to treaties assists to demonstrate the emerging *opinio juris* in a clearer fashion than would a focus on state practice, particularly when addressing human rights norms.

The relationship between treaties and custom, whereby treaties assist to shape the emerging *opinio juris* of a state as well as influence subsequent

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99. As a state signs and ratifies a treaty, the state is subject to the variety of obligations and requirements of the treaty, notably the *pacta sunt servanda* rule that binds the state to act in good faith to uphold even a non incorporated treaty. Vienna Convention on the Law of Treaties.


102. One of the problems with interpreting the central elements of custom in an inverse manner is that state practice can be unduly limited, thereby weakening the normative ground of custom. Weisburd, *supra* note 18. Some commentators refer to other international sources as a basis for developing human rights, such as the general principles of nations, Simma & Alston, *supra* note 1, or attempt to devise a new form of source of law, such as declarative international law. Bodansky, *supra* note 2; Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L. J. 87 (1991).

103. Schachter, *supra* note 97 (referring to prohibition against torture, large scale racial discrimination, genocide or killing prisoners of war. Schachter notes that rules are relative to their importance when considering their method of creation).
state practice, is particularly important upon considering the manner in which the Israel Supreme Court focuses on the state practice element of customary international law. The statements made by states during the drafting of a treaty that reflect an *opinio juris* can have greater significance towards the emergence of a customary law than would subsequent state practice. Indeed, some commentators assert that what is important in the creation of a customary law, particularly when considered alongside a treaty, are the statements made by the state during the drafting or subsequent statements upon ratification. The statements indicate the intent by the states to create a binding obligation.

Nevertheless, one should be careful to avoid adopting what Professor Koskeniemmi has termed a *utopian* approach when referring to the *lex feranda* derived from a treaty negotiation. The inclination is to infer a customary rule from state expressions in international forums, even without the required state perception of the rule as legally obligatory. Furthermore, a treaty rule operates in a similar manner to a customary rule since the interpretative process is a subjective exercise that is affected by the surrounding circumstances.

One can remove customary law from this purely naturalist framework by examining the underlying sources of *opinio juris* in a realist manner. That would not only include consideration of the practice of states, but also the manner by which a state incorporates the norms, as indicated by a treaty ratification or by a states denial of any normative breach of the relevant rule. A customary rule does not create a conclusive means of domestic application and interpretation of the relevant rule upon considering the surrounding factors that have contributed to its creation.

At the same time, one should avoid an *apologist* approach that reduces custom to a mere tacit agreement among states or equates it with a general principle of international law. The tendency can be to defer to the wishes of powerful states at the expense of any actual development of a customary rule from the overall will of the states. One can avoid this approach by considering the relevant international materials that serve as the substantive source, or grundnorm, for a customary law despite differing state practice. Where indications exist that states desire to establish a universal or broad rule, such as the ratification of a multilateral

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107. *Id.*

treaty, the subsequent conformance of state practice to the rule will be undertaken by states by way of different routes.

Regarding the mixed jurisdiction reasoning of the Israel Supreme Court, the role of custom under this rationale would involve addressing lacunae in the domestic law. Because domestic law can deviate from a customary norm, reference to international standards can serve as a means to an end in clarifying particular domestic laws. A court should not approach custom as a supra-national legislative source of law but as working in tandem with the domestic law, with a view towards ameliorating the international and domestic standards. This approach was noted by the Supreme Court in The Queen of Right in Canada v. Edelson and others where the Court combined international and domestic principles to interpret the scope of restrictive immunity to be accorded to a state.

III. CONCLUSION

The aforementioned discussion regarding the reasons for upholding custom in Israeli domestic law indicates that the substantive basis of custom can allow for reference to norms deriving from international sources. The fact that the Israel Supreme Court has hesitated to apply customary norms due to its preference for strict state practice does not mean that customary international law is wholly inapplicable in the domestic law. Israel’s jurisprudence can benefit from a broader reliance on customary international norms, particularly where the domestic legislation requires further interpretation. The Israel Supreme Court would do well to consider international developments that in a broader, and even more realist, sense indicate the actual practice of states.

Israel’s ratification of the principal human rights treaties demonstrates the emergence of an acknowledgement by the state of its human rights obligations. International developments in the human rights context are beginning to play a role within the domestic jurisprudence of Israel, indicating the necessity for a broader approach to its obligations arising from customary international law. It therefore is imperative to consider situations where reference to customary international human rights law might assist these domestic developments.

109. For example, a state not to reserve on a provision within a multilateral human rights treaty that allow for a reservation demonstrates a state’s intentions towards that provision as reflecting a customary rule. What is more important, one can interpret the other articles that do not provide for a reservation as reflecting custom, if associated with other customary provisions and if the travaux preparatoires to the treaty indicate the emergence of a customary norm. See, e.g., Baxter, supra note 97.

110. This demonstrates how custom and general principles differ in that determining the latter would require one to stand on the outside and look into the domestic sphere.

111. Edelson, supra note 71, 97(2) 5757/5758-1997.
I. INTRODUCTION: CONFUSION OF CRIMINALITY WITH JURISDICTION

It is important not to confuse criminality with jurisdiction. The term *criminality* is usually associated with the legislative authority to proscribe conduct. The term *jurisdiction* is usually associated with the judicial authority to subject a person or thing to the processes of a court. The confusion of criminality with jurisdiction is more common than one would suppose. The most recent example in which this confusion surfaces is the argument that because murder, rape, and other war crimes are also crimes under national law, defendants must have known of the illegality of their alleged actions and thus, an international Tribunal may try...
legislative authority to proscribe certain acts by law is not necessarily coupled with the judicial authority to try to punish violators of the law. The question of the criminality of the atrocities that occurred in the former Yugoslavia is distinguishable from the question of which courts have jurisdiction to try those accused of these offenses. The recent creation of the International Criminal Tribunal for War Crimes in the Former Yugoslavia (Tribunal) raises both these questions.

To date, most scholarly debate has focused on the former question, i.e. which international laws govern the atrocities committed in the former Yugoslavia. The latter question has received far less comment. The question of which courts have jurisdiction to try those accused of violations of international humanitarian law is the topic of this paper. Part II addresses the legitimacy of the creation of the Tribunal. Part III discusses the legal limits of the Tribunal’s jurisdiction. Part IV examines the Tribunal’s ability to question its own jurisdiction. Part V draws some conclusions from the reasoning of the prior sections.

II. THE LEGITIMACY OF THE CREATION OF THE TRIBUNAL

A. Composition of the Tribunal

International Criminal Tribunal for War Crimes in the Former Yugoslavia consists of three main organs: the Prosecutor, the Chambers defendants on this basis. See IT. Doc. IT-94-1-AR72, Prosecutor of the Tribunal v. Duško Tadić (Appeals Chamber), para. 135 (Sep. 8, 1995) [hereinafter Appeals Chamber].

Presumably, these scholars are addressing the argument of nullum crimen sine lege, nulla poena sine lege (no crime without law, no punishment without law). Indeed, international law prohibits prosecution for crimes, which were not yet law at the time of their commission. However, these scholars are confusing the defendant’s knowledge of the criminality of his actions with the jurisdiction of the Tribunal. See James C. O’Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AM. J. INT’L L. 639, 647 (1993).

Knowledge of the criminality of one’s actions does not confer jurisdiction to all tribunals in which such actions are deemed illegal. Jurisdiction requires some greater connection between the illicit action and the tribunal sitting in judgment of the accused. For example, assuming the auto theft laws of Germany closely resemble those of California, a German court would not have jurisdiction to try a person accused of stealing an automobile in California, without some greater connection between the theft or the automobile and Germany.


and the Registry.\textsuperscript{5} A major distinction between the current Tribunal and previous war crimes tribunals is the lack of Office of Defense as an organ of the Tribunal.\textsuperscript{6} Although the Statute of the Tribunal contains a provision for the appointment of defense counsel,\textsuperscript{7} the Statute does not create an institutional mechanism to provide for the appointment or support of the defense counsel. The Special Task Force of the ABA Section of International Law and Practice criticized this failing.\textsuperscript{8}

The role of the Prosecutor is to fulfill the purpose of the Tribunal: the prosecution of persons responsible for serious violations of international humanitarian law committed since 1991 in the territory of the former Yugoslavia.\textsuperscript{9} The Prosecutor is responsible for the gathering of evidence, the investigation into criminal cases and the preparation of indictments.\textsuperscript{10} The Prosecutor bears the burden of proof in all proceedings.\textsuperscript{11} The Prosecutor must act independently and may not seek nor receive instructions from any government or from any other source.\textsuperscript{12}

Eleven judges comprise the Court.\textsuperscript{13} No two judges may be nationals from the same state. Each judge serves a term of four years and may be

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\item \textsuperscript{5} Statute of the Tribunal, arts. 11(a)-11(c) reprinted in \textit{United Nations: Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia}, 32 I.L.M. 1159, 1190 (1993) [hereinafter Statute of the Tribunal]. There is also a bureau, which handles administrative matters.
\item \textsuperscript{6} \textit{American Bar Association, Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia} 20 (1993) (noting that “all defendants before the Tokyo War Crimes Tribunal were entitled both to appointed defense counsel provided without charge and to hired defense counsel of their own choosing”).
\item \textsuperscript{7} Statute of the Tribunal, \textit{supra} note 5, at art. 21(4)(d).
\item \textsuperscript{8} \textit{American Bar Association, supra} note 6, at 19-21.
\item \textsuperscript{9} Statute of the Tribunal, art. 16(1); Rules of Procedure and Evidence, IT/32/ Rev. 5 (June 15, 1995) [hereinafter Rules of Procedure and Evidence], incorporating the Statute of the Tribunal, art. 1.
\item \textsuperscript{10} Statute of the Tribunal, \textit{supra} note 5, at arts. 16(1), 18(1-2).
\item \textsuperscript{11} Statute of the Tribunal, \textit{supra} note 5, at art. 21(3). According to this article, the Tribunal, through the Office of the Prosecutor, bears the burden of proof on this issue of jurisdiction.
\item \textsuperscript{12} Statute of the Tribunal, \textit{supra} note 5, at art. 16(2). It is unclear how this article would operate if under the forthcoming Paris peace conference, certain indicted defendants were to receive immunity from prosecution.
\item \textsuperscript{13} Statute of the Tribunal, \textit{supra} note 5, at art. 26. The following lists the judges of the Tribunal and their nationalities.
\end{itemize}

The Appeals Chamber consists of: Antonio Cassese, (Italy) (Presiding Judge); Sir Ninian Stephen, (Australia); Li Hao Pei, (China); Jules Deschénes, (Canada); George Abi-Saab,
eligible for re-election. The judges are responsible for adopting rules of procedure and evidence for the Tribunal. The Chambers are composed of two Trial Chambers (with three judges each) and one Appeals Chamber (with five judges). The Trial Chambers serve as the first level courts of the Tribunal.

The Appeals Chamber handles both interlocutory and final appeals. Both types of appeals are limited to two grounds: an error or question of law invalidating a decision of the Trial Chamber or an error of fact, which has occasioned a miscarriage of justice. The Appeals Chamber may hear an interlocutory appeal of a Trial Chamber's decision on preliminary motions only in the case of a dismissal of an objection based on lack of jurisdiction. All other preliminary motions are immune from interlocutory appeal. Both the accused and the Prosecutor may appeal final judgments of the Trial Chamber. As pointed out by Howard Levie, this language suggests that the Prosecutor may appeal an acquittal!

(Egypt) resigned to resume academic activities and was replaced by Fouad Abdel-Moneim Riad, (Egypt) on Oct. 3, 1995.

The first Trial Chamber consists of: Gabrielle Kirk McDonald, (U.S.A.) (Presiding Judge); Rustam S. Sidhwa, (Pakistan); Lal Chand Vohrah, (Malaysia).

The second Trial Chamber consists of: Adolphus Godwin Karibi-Whyte, (Nigeria) (Presiding Judge); Germain Le Foyer de Costil (France); Elizabeth Odio Benito (Costa Rica) (Vice-President of the Tribunal). See Sec/C./Res. 857 (1993). See also Judge Antonio Cassese of Italy Elected President of International Tribunal for Crimes in Former Yugoslavia, 12/02/1993 Federal News Service; Monday Highlights, 10/03/1993 Federal News Service.

15. Statute of the Tribunal, supra note 5, at art. 15.
16. Statute of the Tribunal, supra note 5, at art. 11-12.
17. Statute of the Tribunal, supra note 5, at art. 25(1).
18. Rules of Procedure and Evidence, Rule 72(B); Appeals Chamber, infra note 34, at para. 6.
19. Rules of Procedure and Evidence, Rule 72(B); Appeals Chamber, infra note 34, at para. 6.
20. Statute of the Tribunal, supra note 5, at art. 25(1); Rules of Procedure and Evidence, Rule 108(A).
The Registry assists the Chambers and the Prosecutor in the performance of their functions. The Registry is responsible for the administration and servicing of the Tribunal, including serving as the channel of communication for the Tribunal, disseminating public information, preparing the minutes of meetings and printing all Tribunal documents.

The appointments of the Tribunal organs and staff were made by the Security Council, agents of the Security Council, or by the Secretary-General. The General Assembly had a very limited role in the formation of the Tribunal and in the selection of the Tribunal's officers and staff. The Secretary-General invited nomination of judges from the General Assembly, and then advised the Security Council to establish from these nominations a list of candidates "taking due account of the adequate representation of the principal legal system of the world." Although this
language seems inclusive on its face, to my knowledge all principal legal systems of the world are Western-based legal systems.  

B. Creation of the Tribunal by the Security Council rather than by Treaty

On May 25, 1993, the Security Council of the United Nations created the International Criminal Tribunal for War Crimes in the Former Yugoslavia. Some States and scholars recommended that the Tribunal be created by treaty, utilizing the more representative and democratic forum of the General Assembly, rather than by the Security Council as a subsidiary organ. The advantages of establishing the Tribunal by treaty would have been: (1) the participation of all United Nation member states in the establishment of the Tribunal would endow it with greater legitimacy; (2) signatory states to a treaty establishing the tribunal could not later dispute the legitimacy of the establishment of the Tribunal, and (3) the participation by such a generality of states, considering themselves legally bound to such a treaty, would provide evidence of the consensus required to create international customary law, which eventually would bind even non-signatory states.  

27. Sharf, supra note 21, at 311 n.28 (commenting that only four of the eleven judges come from countries with predominantly Muslim populations and that none of the judges are Muslim).


29. Among the States opposed to the Security Council formation of the Tribunal were:
   4. Russia (Letter from the Permanent Representative of the Russian Federation to the Secretary-General (Apr. 5, 1993), U.N. Doc. S/25537, at 15 (1993), and
   5. Yugoslavia (Letter from the charge d'affaires a.i. of the Permanent Mission of Yugoslavia to the Secretary-General (May 19, 1993), U.N. Doc. S/25801, at 3 (1993)).

30. Article 38 of the Statute of the International Court of Justice defines customary international law "as a general practice accepted as law." Compare this definition to that of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987): customary international law "results from a general and consistent practice of states followed by them out of a sense of legal obligation."

These two definitions contains two elements: (1) acceptance by a generality of states, and (2) acceptance by the generality of states out of a sense of legal obligation. See Hiram E.
According to the Secretary General, two reasons supported the use of the Security Council rather than the General Assembly as the proper United Nations' organ to establish the Tribunal. First, the Secretary-General feared that if the Tribunal were created by treaty, even after months of negotiation and concessions, some member nations would not have voted for its ratification.31 "[T]here could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective."32

Some scholars suggested and the Secretary-General hoped that the General Assembly would give its consent to the Tribunal by approving both the Tribunal's budget and nominating its judges.33 Indeed, the General Assembly endorsed the establishment of the International Tribunal: by nominating its Judges, by approving the Tribunal's budget, and by passing resolutions in support of the Tribunal.34 However, such consent does not permit States to voice their objections to: the structure of the Tribunal (e.g., the lack of an Office of Defense), the scope of its jurisdiction, the language of the Statute, its criminal procedure and evidence rules or the


Military and Paramilitary Activities (Nicar. v. U.S.), I.C.J. 4 (June 27), established the proposition that treaties could be a source of customary international law. Accordingly, if the General Assembly were to establish the Tribunal by treaty and a generality of states explicitly consented to its establishment, the Tribunal would also be binding on non-signatory states as binding customary international law. See contra J.Y. Sanders, Jurisdiction, Definition of Crimes and Triggering Mechanisms, 25 DENV. J. INT'L L. & POL'Y 233 n. 10 (1997) (quoting GRIGORY TUNKIN, THEORY OF INTERNATIONAL LAW 122-33 (1974) (international law is based on consent)).

32. Report of the Secretary General, at para. 20. One wonders if the Secretary-General, in reference to those states meant the states or parties currently disputing the land in the former Yugoslavia or prominent and outspoken members of the United Nations (e.g., China, Russia or the United States). See J.Y. Sanders, supra note 30, at n. 4.

See also Terry Atlas, Atrocity Docket UN Has Done Little to Prosecute Villains in Bosnia, CHI. TRIB., Feb. 13, 1994:

The U.S. ambassador to the UN, Madeleine Albright, is the most forceful advocate of the tribunal in the face of something less than unqualified international enthusiasm... [T]he British and French, in particular, have been cool toward pursuing war crime indictment of Bosnian Serb leaders that might complicate peace talks.


34. Appeals Chamber, 32 I.L.M. 1993, para. 44.
Tribunal's sanction powers. Accordingly, the manner in which the Tribunal was established greatly diminishes the precedential value of this Tribunal as a representative consensus on the necessity and function of an international criminal court.

The second reason that the Security Council was used to create the Tribunal was the issue of time. The Tribunal was created in less than seven months. The rules of criminal procedure were drafted in less than four months. Gathering the unanimous support of the General Assembly undeniably would have taken far longer than achieving a consensus among the limited number of States serving in the Security Council. The speed of the Tribunal's creation is reflected in the imprecise drafting of its Statute. For example, Article 1 states the Competence of the Tribunal: "The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provision of the present Statute." One scholar explained that Article 1 should have stated that the International Tribunal had the power "to try persons allegedly responsible for" or "accused of" serious violations rather than to "prosecute persons responsible" for them.

Prosecution is the function of the Prosecutor, not of the Tribunal; and persons are not responsible until that has been determined by trial and conviction. Moreover, it was obviously not intended that the serious violations of international humanitarian law were to have been committed in accordance with the provisions of the present Statute.

Such hastily constructed phrasing does not strengthen the legitimacy of this worthy endeavor.

37. Secretary General's Report, supra note 35.
38. Levie, supra note 21, at 7 n.28.
39. Id.
C. Was the Tribunal Established by Law?

The question of how the Tribunal was established is quite important when read in light of one of the most important humanitarian treaties to date, the International Convention on the Protection of Civil and Political Rights. Article 14(1) of this treaty provides that the accused is entitled to the right to be tried by a tribunal established by law. Accordingly, if the Tribunal was established by powers beyond the authority of the Security Council (or beyond those currently belonging the United Nations), it would be disqualified from conforming with Article 14(1).

This objection was raised by the defense counsel for Duško Tadić (Defense), the first defendant to be tried by the Tribunal. The Trial Chamber dismissed the defense’s objection to jurisdiction questioning the validity of the Tribunal’s creation rather than as questioning the Tribunal’s jurisdiction. The Defense then appealed to the Appeals Chamber, under Rule 72(B), which allows interlocutory appeals in the case of dismissal of an objection based on lack of jurisdiction. The Appeals Chamber took the appeal.

The Appeals Chamber avoided the issue of whether the Tribunal was in conformity with Article 14(1) by stating that Article 14(1) of the International Convention on the Protection of Civil and Political Rights applied only to national courts. “This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting.” According to the Appeals Chamber, the rights of the accused are different under international law than under national law. Moreover, at least in this case, the Appeals Chamber is implying that the human rights acceded individuals are less protected under international law than under national law!

This construction of the nature of rights is greatly troubling. The Appeals Chamber’s decision requires that rights stem from beneficent

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41. The thirty-nine year old Duško Tadić is a former cafe owner, karate instructor, and policeman in the town of Kozarac, Bosnia. He is married and has two children. W. H. and Hillary Kessler, Tadić Trial Primer, AM. LAWYER, Sept., 1995, at 59.
42. Case No. IT-94-1-AR72, Prosecutor v. Duško Tadić in the Trial Chamber, para. 4. (Oct. 2, 1995) [hereinafter Trial Chamber].
43. Rules of Procedure and Evidence, Rule 72(B).
44. Appeals Chamber, supra note 34, at para. 6.
45. See generally, Appeals Chamber, para. 42.
grants of legislative and juridical authorities, rather than stemming from a person's entitlement as a human being. This dangerous precedent calls into question the nature of protection afforded by all international humanitarian conventions and treaties. For this reason, the Appeals Chamber's decision warrants a more thorough investigation.

The parties before the Appeals Chamber submitted three potential interpretations of the phrase *established by law*. The first interpretation sounds akin to the Appeals Chamber's conclusion above that rights are created by law, presumably by a legislative body. The Defense argued that the legal establishment of a law requires the efforts of a legislature. Under this interpretation, both executive and judicial acts are not considered law

*Established by law* could mean established by a legislature. [The Defense] claims that the International Tribunal is the product of a mere executive order and not of a decision making process under democratic control, necessary to create a judicial organization in a democratic society. Therefore the [Defense] maintains that the International Tribunal [has] not been *established by law*.

The European Convention on Human Rights, as interpreted by both the European Commission on Human Rights and the European Court of Human Rights, reaches the same conclusion: *established by law* requires the efforts of a legislature.


47. *See generally,* Appeals Chamber, para. 43.

48. *Id.* para. 43:

The case law applying the word *established by law* . . . bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Australia, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, 80 (1979); Piersak v. Belgium, App. No. 8692/79, 476 Eur. H.R. (ser. B) at 12 (1981); Crociani,
Such a construction, however, undercuts the possibility that law can be created in a common law fashion. According to this line of thought, customary law, including customary international law, would cease to be law. The crimes that the accused war criminals are being tried for, crimes, which are considered by most scholars as part of customary international law, would cease to be international crimes. Obviously, the Appeals Chamber did not desire to bring about this counterproductive result.

Because of this danger, the Appeals Chamber refused to interpret the phrase *established by law* in this manner. The Appeals Chamber concluded that because no international legislature exists, which is formally empowered to enact law binding on international legal subjects, this interpretation of *established by law* is not applicable to the international sphere. Of course this interpretation begs the question: if no legislative body can enact binding international law, how could the Security Council create a Tribunal whose jurisdiction is binding on individual defendants.

A second possible interpretation of *established by law* refers to the “establishment of international courts by a body . . . [that] has a limited power to take [sic] binding decisions.” This cryptic phrasing suggests a court is legally established, if enacted by a political body (such as the Security Council) that is endowed with the authority to make legally binding decisions on other branches of an organization.

This second interpretation differs from the first in its not requiring the actions of a legislature to enact law. Taking a domestic example, the decisions of the United States’ Supreme Court are binding on the coordinate branches of the United States government; thus these decisions are considered legally established, even though they are “enacted” without a legislature.

The Defense argued that because the Security Council decisions are not necessarily binding on other coordinate branches of the United Nations, its decisions (such as the establishment of the Tribunal) are not *established by law*. The Appeals Chamber responded that the Tribunal should be considered established by law if the Security Council acted according to its

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49. By common law fashion, I mean law that is built upon principles of justice and fairness found in precedential cases, rather than the law that is created by legislative enactment of statutory law.

50. See generally, Appeals Chamber, para. 98-127.

51. Id. at 43.

52. Id. at 44.

53. Id.
powers under the United Nations Charter.\textsuperscript{54} Thus, if the Security Council were empowered under the United Nations Charter to make binding decisions on either the Secretary-General or the General Assembly on issues falling within its enumerated powers, its creation of the Tribunal would be, under this second interpretation, "established by law."

Under the United Nations Charter, the Security Council is empowered to make legally binding decisions on other organs of the United Nations.\textsuperscript{55} However, its enumerated powers do not include jurisdiction over individuals,\textsuperscript{56} nor can it create subsidiary organs with broader jurisdiction that it itself possesses. The Appeals Chamber correctly noted that Security Council is empowered conditionally to take action when a threat to the peace is involved.\textsuperscript{57} However, the scope of the Security Council's authority to act is the issue at hand, not whether the Security Council can act at all. The Defense did not question the Security Council's ability to intervene in the conflicts in the former Yugoslavia, rather, it maintained that the Security Council's institution of a criminal tribunal was beyond the scope of its constitutional powers.

The third possible interpretation of the phrase \textit{established by law} is that the establishment of the Tribunal "must be in accordance with the rule of law."\textsuperscript{58} This interpretation refers to the standards and procedural safeguard common to all legal systems.\textsuperscript{59} Among these standards are: "fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."\textsuperscript{60}

\textsuperscript{54.} \textit{Id.}: It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter.

\textsuperscript{55.} United Nations Charter, art. 25. Of course, if the establishment of the Tribunal were binding on other branches, theoretically the General Assembly would have been bound to approve the Tribunal's funding and thus this would detract from the earlier argument that the General Assembly's voluntary support was evidence of the consent of its members.

\textsuperscript{56.} The interests of individuals, especially those belonging to minority groups, are not always well represented by the General Assembly, which is composed of appointed representatives of nation states rather than elected officials.

\textsuperscript{57.} \textit{See generally}, Appeals Chamber, para. 29. \textit{See also id.} para. 44: "[W]e are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII [Article 41] in the light of its determination that there exists a threat to the peace."

\textsuperscript{58.} Appeals Chamber, \textit{supra} note 34, at para. 45.

\textsuperscript{59.} \textit{Id.}

\textsuperscript{60.} \textit{Id.}
In addition to finding that the Tribunal satisfied the second interpretation of *established by law*, the Appeals Chamber found that the Tribunal's establishment satisfied this third interpretation.\(^{61}\) The Security Council followed the appropriate procedures of the United Nations Charter in establishing the Tribunal.\(^{62}\) While the third interpretation is obviously necessary to establishing a legitimate Tribunal, this interpretation does not bear on the issue of whether the creation of the Tribunal was *ultra vires*.\(^{63}\) The internal procedures of the Tribunal are of secondary importance compared to whether the existence of the Tribunal is legitimately supported by international law.

Because the creation of the Tribunal expands the jurisdiction of international organizations to try and punish individuals, such an expansion of powers potentially represents a dramatic change in current international law.\(^{64}\) That is, even if the Security Council can create a Tribunal, it cannot enact new international law. Thus, the Tribunal was not legitimately established by existing international law and is most likely an *ultra vires* application of the Security Council's authority. Moreover, the precedent setting judgments of the Tribunal, which can be said to be creating new international humanitarian law, is an exercise of jurisdiction beyond the power of the organ which created the Tribunal, the Security Council.\(^{65}\)

In summary, Article 14(1) calls for any legitimate international court to be *established by law*. The Tribunal was not *established by law* in the sense of having been created by a legislative body. As for the second

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61. *But see Scharf, supra* note 21 (criticizing the Tribunal's procedure for allowing double jeopardy, rotation between the trial level and appellate level, limiting the defendant's ability to cross-examine witnesses, and the partial involvement of the Security Council).

62. Appeals Chamber, *supra* note 34, at para. 47:

"[T]he Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus 'established by law'.”

63. Both the Trial Chamber and the Appeals Chamber glossed over this distinction, citing the fact that a proposed amendment to change the wording of Article 14 to *pre-established by law* was successfully defeated. Trial Chamber, para. 34; Appeals Chamber, para. 45.

Yet the Defense's concern is not whether or not the Tribunal were pre-established by law, but rather whether it was created within the legitimate, (if not specifically enumerated), powers of the Security Council.

64. *See R.J. Goldstone, Submissions by the Prosecutor, an Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadić Also Known by the Names Dusan 'Dule' Tadić* at para. 3 (noting that the Tribunal is the first attempt by the United Nations to enforce international humanitarian law).

65. *See infra* text accompanying note 80.
interpretation, although the Tribunal was established by an organ with binding authority over other branches of the United Nations, the Security Council’s establishment of a tribunal with jurisdiction greater than the Security Council itself possesses does not satisfy Article 14(1). Although the Tribunal was established *by law* according to the third interpretation in the sense of having fair procedures, this alone is most likely not enough to satisfy Article 14(1). According to the most critical test of established *by law*, i.e., having been established by a body acting within its powers, the Tribunal was not established *by law*. Although the Security Council can bind other organs of the United Nations, it cannot bind them with regard to areas in which it lacks jurisdiction, and jurisdiction over individuals is not within the Security Council’s enumerated or existing powers.

**III. LIMITATIONS ON THE TRIBUNAL’S JURISDICTION**

Even if we put aside the question of the legitimacy of the creation of the Tribunal, the question remains whether this Tribunal has the jurisdiction to try and punish individuals, even those accused of war crimes. In order for an international tribunal to legitimately obtain jurisdiction over individuals, two conditions must be satisfied. First, the tribunal must be established *by law*, that is, it must be created in accordance with the current conceptions and limitations of international law. As discussed above, this point is debatable. Second, such a tribunal must have jurisdiction to try individuals.

The question whether a court has jurisdiction over a criminal act may be divided into two parts: (1) whether the criminal law under which the criminal act falls authorizes a specific court to try the alleged offense and (2) whether the court has competence to try the accused for this criminal act. Taking the United States Supreme Court as an example, the United States Constitution explicitly grants the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party. . . .”66 Because the Constitution also is the foundation of the Supreme Court’s competence, this same article provides the competence of the Supreme Court to try anyone accused of these cases. However, the Court’s jurisdiction is not unlimited. For example, the Supreme Court would lack jurisdiction over a dispute involving a French Ambassador and an Australian consul, that took place in England, unless there existed some connection to the United States. The

legislative authority to proscribe conduct does not automatically confer judicial authority to try all instances of transgression.\textsuperscript{67}

A. \textit{International Criminal Law and Competent Courts}

On the international scale, the source of an international criminal law determines which court systems will have legitimate jurisdiction over an international criminal offense. The two chief sources of international criminal law are treaty law and international customary law. When an international criminal law originates in a treaty, we should examine the treaty to determine the appropriate judicial body to administrate the legal consequences of violating the law. When the international criminal law originates in international custom, we should first look to international custom to determine the appropriate judicial body to administrate the legal consequences for violating the law.

Many national courts have the jurisdiction to try crimes committed in violation of international law.\textsuperscript{68} Judicial bodies that may be empowered to adjudicate alleged violations of international criminal law include national or multinational courts.\textsuperscript{69} Usually treaties obligate the courts of the contracting states to try those accused of violating the criminal offenses set out in the treaty.\textsuperscript{70}

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68. \textit{See} German Grundgesetz (Basic Law), art. 25 which incorporates rules of customary international law as part of German federal law. \textit{See also} similar provisions incorporating customary international law as part of national law, and thus within the jurisdiction of national courts: art. 9 of the Austrian Constitution, art. 2 of the Greek Constitution, and art. 10 of the Italian Constitution.

For incorporation of treaty provisions into national law see the Netherlands Constitution, arts. 91(3), 94 (1983); art. 55 of French Constitution as decided by the Klaus Barbie Case (Cour de Cassation, 62 J.C.P. II, No. 20,107 (Criminal Chamber) (October 6, 1983) \textit{reprinted in} 78 I.L.R. 125, 128-31(1988).

69. Prior to the creation of the International War Crimes Tribunal for the Former Yugoslavia, there have only been a multinational war crimes tribunals. \textit{See} Trial Chamber, para. 6: "This is the first time that the international community has created a court with criminal jurisdiction." "The Nuremberg Tribunals--the closest analogy--was not in fact a body representing the international community as a whole, but was created by a special treaty of the victorious nations after World War II." Lieutenant Col. Robert T. Mounts, USAF (Retired), Douglass W. Cassel, Jr. & Jeffrey L. Bleich, \textit{Panel II: War Crimes and Other Human Rights Abuses in the Former Yugoslavia}, 16 WHITIER L. REV. 387, 412 n.44 (1995).

The United Nations Secretary-General recently reaffirmed the criminality of numerous provisions of international humanitarian law. The Secretary-General also stated that violators of these international laws will be held individually responsible. "The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law." However, regardless of the illegality of these actions, this illegality alone does not confer universally the jurisdiction to try those accused of these violations of international humanitarian law. None of the provisions of treaties defining war crimes authorizes the International War Crimes Tribunal for the Former Yugoslavia to try alleged violations of these international crimes.

B. Does the Tribunal have Legitimate Jurisdiction over Individuals?

The question whether the Tribunal has legitimate jurisdiction over individuals accompanies the question relating to the establishment of the Tribunal. Even if the Tribunal was established by law, as required by Article 14(1), the scope of the Tribunal's jurisdiction would still be an issue. For this reason, this section investigates the sources and limits of the Tribunal's jurisdiction.

1. Sources of the Tribunal's Jurisdiction

The sources of Tribunal's jurisdiction differ from those of past war crimes tribunals the most famous of which is the Nürnberg Tribunal. The Nürnberg Tribunal perceived two grounds for its jurisdiction. First, under customary international law, a victor's assumption of jurisdiction, after an unconditional surrender of a defeated state, legitimately transfers the territorial jurisdiction normally exercised by the courts of the defeated state. Thus the unconditional surrender of the German Reich to the Allied Powers, endowed them with legitimate jurisdiction to try and punish individuals for war crimes as defined by German law.

71. Report of the Secretary-General, para. 39, 53.
72. Obviously a court or tribunal set up illegally, would not have the jurisdiction to try these offenses.
73. See supra text accompanying note 40.
74. Id.
75. This territorial jurisdiction is distinguishable from victor's justice jurisdiction, which the Nürnberg Tribunal explicitly rejected: the Allied Power's jurisdiction to try and punish those accused of war crimes and crimes against humanity was "not an arbitrary exercise of power on
Second, the Allied Powers, in creating a war crimes tribunal to try those accused of war crimes and crimes against humanity and punish those found responsible, did "together what any one of them might have done singly." Because the crimes of which the accused were charged were crimes associated with universal jurisdiction, any of the Allied Powers could have tried the accused in their own national courts, regardless of the situs of the offense or the nationalities of the offenders or the victims.

[T]he universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned. Piracy and slave trading are the prototypical offenses that any state can define and punish because pirates and slave traders have long been considered the enemies of all humanity.77

Although the Nürnberg Tribunal stands as an example of an organization of states trying individuals for war crimes, the question remains whether an organization having no direct connection to the hostilities may apply universal jurisdiction in excess of its express jurisdictional limits.

The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia does not rest on either of the grounds that supported the Nürnberg Tribunal. First, no clear victor in the conflict can be determined.78 While victor’s justice has been highly criticized, few victors have ever been tried for their war crimes.79 Second, the accused are being...

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76. *Id.* at 216.


78. "[H]ow do you convene a war-crimes trial when the accused have won the war—or have not been defeated and run to ground?", *No Road to Nuremberg from Dayton*, Chi. Trib. Nov. 12, 1995, at 12, WL 6267217 (comparing the Tribunal to that of the Nürnberg trials).

79. Although the fire bombing of Dresden, the nuclear bombing of Hiroshima and Nagasaki, and the atrocities committed in Vietnam come readily to mind, no soldier or commander has been brought to justice for these intentional losses to civilian life. *See* National Public Radio, *Four Hours in My Lai: Book About the Massacre*, Weekend Edition, (March 14, 1992): . . .400 Vietnamese civilians—unarmed old men, women and young children—were murdered by US soldiers, . . . who destroyed the hamlet of My Lai. Only four participants were ever brought to trial and only one, Lieutenant William Calley, who received a life sentence, ever served time for the killings. Mr. Calley spent several months under house arrest before being paroled.
tried by non-participants in the conflict. If the Tribunal’s jurisdictional
grounds are not those of the Nürnberg Tribunal’s, where, then, can they be
found?

The Security Council functions as the limited executive branch of the
United Nations, possessing neither legislative nor judicial functions. Thus,
the Security Council can neither create new international law nor make
binding interpretations of existing international law.

It should be pointed out that, in assigning to the
International Tribunal the task of prosecuting persons
responsible for serious violations of international
humanitarian law, the Security Council would not be
creating or purporting to legislate that law. Rather, the
International Tribunal would have the task of applying
existing international humanitarian law.80

For this reason, in his report the Secretary-General stated that the
international law applied must be “beyond any doubt part of customary
[international] law so that the problem of adherence of some but not all
States to specific conventions does not arise.”81 It would be absurd for the
Secretary-General to require that the substantive law (i.e. what actions
constitute war crimes) applied by the Tribunal be part of established
customary international law, while allowing the procedural law (i.e. the
scope of the jurisdiction of the Tribunal) applied by the Tribunal to exceed
existing customary international law.

It is problematic that United Nations Charter does not contain a
 provision giving any branch of the United Nations jurisdiction or authority
to try or punish individuals.82 The United Nations does not have the
authority to try or imprison individuals, even those who have violated
international law. Moreover, the Security Council’s ability to punish

80. Secretary-General’s Report, para. 29.
81. Secretary-General’s Report, para. 33. Interestingly, such a construction of the
subject-matter jurisdiction of the Tribunal assumes that a state’s consent is necessary to
legitimizing the process of the court.
82. Although the elimination of discrimination based upon race, sex, language and
religion are listed as purposes of the United Nations, (United Nations Charter, arts. 1(3) and
55(c)), the framers of the Charter contemplated that the promotion and protection of these
purposes would be by member-states rather than by the intervention of the United Nations (arts.
2(2) and 2(7)). Of course, the final sentence of Article 2(7) concludes that this article will not
prejudice the application of enforcement measures under Chapter VII, the very chapter used by
the Security Council to create the Tribunal. However, it is unlikely that Chapter VII was
envisaged as providing near limitless power upon this highly unrepresentative organ.
individuals for international crimes is not among its enumerated powers listed in the United Nations Charter. In addition, no international convention, agreement or treaty that codifies international humanitarian law grants to the United Nations the power to adjudicate these criminal cases. Instead, these documents generally state that the signatory states will have the jurisdiction to try these cases, often regardless of where the violation occurs.

2. Limits of the Tribunal’s Jurisdiction

Undeniably, the Tribunal’s jurisdiction is limited by the Security Council’s jurisdictional limitations. No political body can delegate more jurisdiction than it itself possesses. Thus, the Tribunal’s jurisdiction cannot exceed that of the Security Council’s. The Trial Chamber noted this fact

83. For instance, the pertinent articles of The Convention of the Prevention and Punishment of the Crime of Genocide, provide an example of the understanding that national tribunals are the appropriate tribunals to try those accused of the odious crime of genocide:

Article V: The Contracting Parties undertake to enact, in accordance with the respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.


84. See for example article IV of The International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973) (obligating parties to adopt legislation to try offenders of this law regardless where the crime occurs). But cf. articles 5 and 8 of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex to G.A. Res. 3946 (Dec. 17, 1984) (limiting a state’s national jurisdiction over crime of torture and other degrading treatment to territorial jurisdiction (when the offense occurred in the prosecuting state’s territory), nationality jurisdiction (when the alleged offender is a national of the prosecuting state), and passive personality jurisdiction (when the victim is a national of the prosecuting state)).

85. See generally, Appeals Chamber, para. 28.
when answering the Defenses’ contention that the Tribunal was an *ultra vires* action of the Security Council.

Support for the view that the Security Council cannot act arbitrarily . . . is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them.\(^86\)

Moreover, because the Tribunal is not empowered to create new international law, the Tribunal is limited by the historical limits of the jurisdiction of the Security Council. The Appeals Chamber conceded that:

the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. . . . Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization.\(^87\)

The limitations on the Security Council’s authority are stated in Chapters VI, VII, VIII, and XII of the United Nations’ Charter.\(^88\) The most important of these chapters is Chapter VII, “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” Under Chapter VII, the Security Council is authorized to interrupt economic relations,\(^89\) halt transnational communication,\(^90\) cease diplomatic relations,\(^91\)

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86. *See generally,* Trial Chamber, para. 15.
87. Appeals Chamber, para. 28.
88. U.N. Charter, art. 24(2): “The specific powers appointed to the Security Council for the discharge of these duties are laid down in chapters VI, VII, VIII, and XII.” It is important to note that some scholars maintain that these *specific powers* are not limitations, but examples of powers. According to this argument the Security Council has power limited only by the general purposes of the United Nations (Chapter I). However, it seems unlikely that the drafters of the document would have enabled the least representative branch of the United Nations with such unchecked control. Furthermore, it is unlikely that if such power existed, it would have gone unused as it has—nearly 50 years. This is even more unlikely when taking into account the Security Council’s silence in the face of the atrocities committed in Cambodia, under the Pol Pot regime. *See also* Trial Chamber, para. 7.
89. U.N. Charter art. 41.
90. U.N. Charter art. 41.
91. U.N. Charter art. 41.
enforce economic sanctions, and initiate armed invasion. None of these provisional measures taken by the Security Council may prejudice "the rights, claims, or position of the parties concerned.

None of these explicit powers grants the Security Council jurisdiction over individuals, nor does any other provision of the United Nations Charter, nor has the Security Council ever asserted such powers in the past. For these reasons, we may conclude that, historically, the Security Council has not had jurisdiction over individuals.

Despite the United Nations' lack of authority to try individuals, national courts are often empowered to apply international law in their domestic role. For instance, both the Constitution and the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1990, incorporate both international customary and treaty law into national law. Thus, it would be a completely legitimate exercise of jurisdiction for a national court established by the newly independent states of the former Yugoslavia to try individuals accused of violating international law. Because the existence of alternate forums in which to try those accused of violating international humanitarian law, there is little need to bend out of shape the rules of existing international law to cover the creation of an international tribunal. The prosecution for the Tribunal has argued that it is odd that the community of nations could each try a violator of international humanitarian law individually, but not collectively under the auspices of the United Nations. However, odd it may be, this is the current state of international law.

92. U.N. Charter art. 42.
93. U.N. Charter art. 42.
94. U.N. Charter art. 40. The cryptic phrasing of Article 40 leaves unexplained how the Security Council may launch an armed invasion into a State without prejudice to its rights or claims.
97. See Appeals Chamber, para. 135. Compare this argument to the justification of the Nürnberg Tribunal, see supra text accompanying note 75. The jurisdictional powers of the Nürnberg Tribunal and the International War Crimes Tribunal for the Former Yugoslavia may be distinguished by the foundations upon which the tribunals' jurisdiction rests. The jurisdiction of the Nürnberg Tribunal rested upon three foundations of its jurisdiction: territorial jurisdiction of the German Reich, the customary international law of victors' justice having secured Germany's unconditional surrender and the universal jurisdiction to try those accused of violating international humanitarian law. In contrast, the jurisdiction of the International War Crimes Tribunal for the Former Yugoslavia rests solely upon this final foundation: universal jurisdiction to try those accused of violating international humanitarian law. Moreover, the International War Crimes Tribunal for the Former Yugoslavia's jurisdiction over individuals is highly questionable.
IV. THE TRIBUNAL’S ABILITY TO QUESTION ITS JURISDICTION

Given the arguments of the proceeding sections, the jurisdiction of the Tribunal over individuals is highly questionable. However, without standing to question the jurisdiction of the Tribunal or an appropriate forum in which to question the Tribunal’s jurisdiction the preceding sections would be doomed to realm of academic musings. Part III argues that even though the Tribunal does not have the jurisdiction to try and punish individuals, it does have the jurisdiction to decide the legal scope of its jurisdiction.

The word jurisdiction in regard to a judicial body is capable of several meanings. The first interpretation is the power to decide whether one has the authority to decide the matter before the court. A court’s ability to decide its own jurisdiction fits within this interpretation. The second interpretation is the power to decide the matter under the law. A court’s abilities to adjudicate a dispute and to decide a criminal action are examples of this second interpretation. The third interpretation, often referred to as subject-matter jurisdiction, is the power to decide what law applies to the matter before the court. A court’s ability to rule on which laws govern a given situation illustrates this third interpretation. While the first two parts of this paper addressed the Tribunal’s jurisdictional power over individuals, the second interpretation of jurisdiction, Part III examines the first interpretation of jurisdiction. Part III addresses whether the Tribunal can

98. Jurisdiction is capable of several meanings, each dealing with the relation of authority of different branches of a political organization and law. Legislative jurisdiction is the authority to create law applicable to specific actors, events or things. Adjudicatory jurisdiction is the authority to subject actors or things to the processes of judicial or administrative tribunals. Enforcement jurisdiction is the authority to compel specific actors to comply with its laws and to redress noncompliance. Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 786 (1988).


International law recognizes five types of criminal jurisdiction: (1) territorial -- jurisdiction based on the location where the alleged crime was committed, and including objective territorial jurisdiction, which allows countries to reach acts committed outside territorial limits but intended to produce, and producing, detrimental effects within a nation; (2) nationality -- jurisdiction based on the nationality of the offender; (3) protective -- jurisdiction based on the protection of the interests and the integrity of the nation; (4) passive personality -- jurisdiction based on the nationality of the victim; and (5) universality -- jurisdiction for certain crimes where custody of the offender is sufficient.

rule on its own jurisdiction, or whether such an investigation would either be barred by the limits of the Tribunal’s judicial review powers or be barred as a non-justiciable political question.

A. The Tribunal’s Ability to Decide Whether it Can Question its Own Jurisdiction

The first defendant to be brought before the Tribunal is Duško Tadić. In accordance with Rule 73(A)(I), Tadić’s defense questioned the legitimacy of the Tribunal’s jurisdiction, presenting the Tribunal with the first opportunity to examine this controversial issue. The Trial Chamber held that the Tribunal was not empowered to question the legitimacy of its creation. The Trial Chamber declined to entertain the question of its own jurisdiction for several reasons.

[I]t is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council. . . .

[E]ven if there be such limits [on the powers of the Security Council], that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether . . . those limits have been exceeded.

The Trial Chamber considered such challenges to its jurisdiction and the question of the legitimacy of the Security Council’s action in creating the Tribunal as being non-justiciable, because either the Tribunal lacked the power of judicial review or that questioning the actions of the Security Council (including the establishment of the Tribunal) involved a political question.

With regard to lacking power of judicial review, the Trial Chamber found persuasive precedent in the rulings of the International Court of Justice (I.C.J.) and the Administrative Tribunal that these courts lacked judicial review powers over the decisions of other organs of the United Nations. In the Namibia Advisory Opinion, the I.C.J. held that “the Court

100. See generally, Trial Chamber, para. 8.
101. Id. at para. 16.
102. Id. at para. 17.
does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organ concerned.\textsuperscript{103}

With regard to the Security Council's actions being a political question, and therefore non-justiciable, the Tribunal concluded: "The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber."\textsuperscript{104} Note that the Trial Chamber strictly interpreted its own jurisdiction as described in Article 1 of its Statute as being precisely and narrowly defined, stating the "full extent of the competence of the International Tribunal."\textsuperscript{105} Contrariwise, the Trial Chamber rendered a liberal interpretation of the Security Council's jurisdiction, reading the enumerated economic and political measures accorded placed under Security Council jurisdiction by Article 41 as \textit{not exhaustive}.

The Defense appealed the ruling of the Trial Chamber to the Appeals Chamber. The Appeals Chamber rephrased this Prosecutor's arguments against the Tribunal's ability to question the legitimacy of its creation:

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a 'political question' and, as such, 'non-justiciable', regardless of whether or not it falls within its jurisdiction.\textsuperscript{107}

Although the International Tribunal was not established to "scrutinize the actions of organs of the United Nations,"\textsuperscript{108} the Appeals Chamber found it had jurisdiction to examine the legitimacy of its jurisdiction as established by the Security Council.\textsuperscript{109} The Appeals Chamber found the power to decide its own jurisdiction in the residual power of its judicial function. "[J]urisdiction cannot be determined exclusively by reference to or inference from the intention of the Security Council thus totally ignoring any residual powers which may deserve from the requirements of the 'judicial function' itself."\textsuperscript{110}

\textsuperscript{103} \textit{Id.} at para. 11.
\textsuperscript{104} \textit{Id.} at para. 24.
\textsuperscript{105} \textit{See generally}, Trial Chamber, para. 8.
\textsuperscript{106} \textit{Id.} at para. 28.
\textsuperscript{107} 32 I.C.J. 1993, para. 13.
\textsuperscript{108} \textit{Id.} at para. 20.
\textsuperscript{109} \textit{Id.} at para. 21.
\textsuperscript{110} \textit{Id.} at para. 14.
In deciding this issue, the Appeals Chamber distinguished two types of adjudicatory jurisdiction, each referred to by more than one name: original, primary or substantive jurisdiction refers to the jurisdiction explicitly conferred by statute; incidental or inherent jurisdiction refers to the jurisdiction that derives from the exercise of the judicial function. Among the inherent jurisdictional powers of a court is Kompetenz-Kompetenz in German or la compétence de la compétence in French, i.e. the power of a court to determine its own jurisdiction.

The Appeals Chamber reversed the Trial Chamber's decision on its ability to investigate the legitimacy of its creation, holding that the Tribunal did have the authority to interpret the Charter of the United Nations and thus investigate the legitimacy of the Security Council's actions in creating the Tribunal.

The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defense's jurisdictional plea by the so-called 'political' or 'non-justiciable' nature of the issues it raises.

It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.

According to this ruling, the Tribunal may investigate the legitimacy of its creation by the Security Council. This important decision allows the Tribunal to rectify the situation in which it now finds itself, namely, that despite the best of intentions, the legitimacy of the establishment of the Tribunal is in peril.

111. Id. at para. 20.
112. Id.
113. 32 I.C.J. 1993, para. 18.
114. Id. at 25.
B. Establishing a Legitimate International Criminal Court, With Jurisdiction Over War Crimes

Two courses of action could be taken to institute a International Criminal Court, whose legitimacy would be beyond question. First, the General Assembly could act. The General Assembly is the only branch of the United Nations capable of amending its Charter or expanding the powers vested in the Organization.\textsuperscript{116} Although Article 10 grants the power to amend the Charter to the General Assembly, this article also incorporates Article 12, which limits the General Assembly’s ability to interfere in any action of the Security Council, other than by the Security Council’s request.\textsuperscript{117} The limits imposed by Article 12 are themselves limited to only those functions of the Security Council “assigned to [the Security Council] in the present Charter.”\textsuperscript{118}

Thus the question arises, if the Security Council is exercising powers beyond those assigned by the Charter, is the General Assembly limited by Article 12? It seems unlikely that this question will reach the International Court of Justice, for unless there is overwhelming pressure to have the Statute of the Tribunal ratified as a treaty, the General Assembly will not press the matter. However, if broad support for ratification where to arise, the Security Council would be unlikely to impede the ratification of the Statute of the Tribunal as a treaty. Thus, there being no procedural obstacles, the General Assembly should proceed to ratify the statute as a treaty in order to demonstrate overwhelming support for the Tribunal, or by its inaction the General Assembly could acknowledge that the Security Council has the ability to create new international law. Ratification, which would greatly enhance the Tribunal’s legitimacy, would also provide a viable precedent for the eventual establishment of a international criminal court.

V. CONCLUSION

In Part I we saw that the legitimacy of the creation of the Tribunal is highly questionable. First, the Tribunal was not established by a representative body of the international community. Second, the manner in which the Tribunal was established neither affords the international community of States the opportunity to consent to the establishment of the Tribunal nor enables them to object to its establishment. Third, the

\textsuperscript{116} U.N. Charter, art. 10.
\textsuperscript{117} See id., at art 12.
\textsuperscript{118} U.N. Charter, art. 12.
Tribunal was hastily established. The resultant mistakes from this haste detract from the legitimacy of the Tribunal.

In Part II we saw that Tribunal's jurisdiction is limited to that of the Security Council's. First, nowhere in the United Nations Charter is the Security Council granted jurisdiction over individuals. Second, historically the Security Council has not had jurisdiction over individuals. Third, the Security Council is not empowered to create new international law. For these reasons, the Security Council cannot create a Tribunal with legitimate jurisdiction over individuals.

In Part III we examined the Tribunal's ability to question its own jurisdiction. Because all courts have Kompetenz-Kompetenz, the Tribunal does have the power to investigate the limits of its jurisdiction. The Appeals Chamber concluded that it was not barred from examining its own creation by the Security Council nor was the legitimacy of its creation a non-justiciable political question. Accordingly, based on the reasoning of Parts I and II, the Appeals Chamber should have concluded that it had no jurisdiction over individuals, even those accused of violating international humanitarian law.

The Appeals Chamber overcome with the immensity of the atrocities and its desire to prevent their continuance, glossed over the technical requirements of jurisdiction of the Tribunal.

[T]o the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. . . . No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.119

Such conclusive language without the support of reasoned legal analysis fails to endow the Tribunal with unassailable legitimacy.120

120. On November 21, 1995, the leaders of the former Yugoslavian republics signed a peace agreement in Dayton. The peace agreement carefully avoids using the word consent in reference to the jurisdiction of the Tribunal. For the sake of consistency, those who believe that the Tribunal was established within the legitimate powers of the Security Council, the consent of the governments whose citizens are on trial is irrelevant. Thus, the Dayton peace agreement states that the governments must "cooperate with . . . the International Tribunal for the Former Yugoslavia." Proximity Peace Agreement at Wright-Patterson Air Force Base, Dayton, Ohio (November 1-21, 1995), Chapter 3, art. XIII(4).

Note that by cooperating with the Tribunal, the government have only agreed to cooperate with its adjudicatory jurisdiction, i.e., the findings and holdings of the Tribunal. The
The creation of an international criminal court is very appealing and a most worthy endeavor to pursue. The Trial Chamber has suggested that the Tribunal "represents an important step towards the establishment of a permanent international criminal tribunal." To provide posterity with the precedent of a legitimate international criminal tribunal, the creation of the International War Crimes Tribunal for the Former Yugoslavia should be thoroughly scrutinized. An international criminal court should be established, but established by the most representative body of States in order to ensure that all States have a voice in the creation of a court that can try and punish their citizens. This paper addressed problems in the creation and jurisdiction of the International Criminal Tribunal for the Former Yugoslavia. This Tribunal was not created in complete conformity with the rules and limitations of existing international law. It is my hope that bringing these problems into clearer focus, will enable the world community to overcome the legal hurdles obstructing the establishment of a fully legitimate international criminal court.

enforcement jurisdiction of whatever body may be charged with "arresting" alleged war criminals is not mentioned in the peace agreement. However, the final words of article XIII(4) add that the governments will cooperate with "any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law." Presumably the governments have committed to the implicit understanding that they will cooperate with other organizations legitimately authorized (i.e., within its powers) by the Security Council.

121. See generally, Trial Chamber, para. 6.
On January 27, 1998, an embattled President Clinton stood before the nation promoting a litany of government initiatives in his State of the Union Address. Buried in his list of promises was a reference to a renewed pursuit of foreign trade agreements. President Clinton attempted to allay the fears of those who believe the expansion of free trade will only result in lower environmental and labor standards for the United States. Rather, the
President asserted that the United States cannot promote higher standards if it retreats from foreign trade.¹

The President directed this portion of his speech to fellow Democrats, who played a large role in the defeat of Fast-Track in 1997.² Many Democrats feared how support of Fast-Track would impact their re-election campaigns slated for 1998. Specifically, the AFL-CIO, a traditional supporter of the Democratic Party, invested heavily in a public campaign to defeat Fast-Track, claiming the expansion of free trade would only cost the United States jobs.³

The Clinton Administration desired Fast-Track, in part, to assist in building a hemispheric free trade zone to include all of the Americas by the year 2005.⁴ The President promoted this agenda in a 1997 trip to South America.⁵ The use of Fast-Track to create a free trade zone of the Americas, however, confronts some tensions within the United States’ federal structure.

The Constitution creates a federal system based upon the coexistence of the central government and the state governments.⁶ The state governments retain certain powers. However, the trend of trade liberalization and the power of states have come into conflict. Trade liberalization includes the reduction of “non-tariff barriers.” These non-tariff barriers are regulations that have the effect of limiting access to a particular market of imported goods. However, regulations may stem from legitimate concerns of a state for its population. Yet, as the states do participate in trade agreement negotiations, they may find themselves bound by an instrument calling for changes in their regulatory scheme without participation. By giving the President the authority to act as the

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2. Fast-Track involves a grant of authority to the President in international trade matters. Under Fast-Track procedures, the President would have the authority to enter into trade negotiations, conclude a trade agreement, and submit the implementing legislation to Congress. Congress would then be prohibited from amending the implementing legislation, and could only approve or disapprove the measure. Fast-Track aims to streamline the process of concluding trade agreements, resulting in greater efficiency and certainty for trading partners of the United States.
6. When dealing with an issue such as international trade that affects both foreign nations and the fifty states of the United States, there exists a danger of confusion with respect to terms. The word “state” has a different meaning within the context of international law, and United States domestic law. To avoid this confusion, where possible, the term “state” in this paper refers to one of the fifty political subdivisions within the United States. For the sake of simplicity, the term “nation” will be used to denote a state in the context of international law.
voice of the nation in trade agreements involving non-tariff barriers, Fast-Track has the effect of eroding federalism.

This paper examines how Fast-Track affects the United States constitutional system. Part I explains the background to Fast-Track and NAFTA. Part II outlines the power of Congress to regulate Foreign Commerce with respect to state sovereignty. Part III argues that states have a legitimate concern under the Constitution in regulating for the benefit of their citizens. As Fast-Track does not involve formal consultation with the states prior to the conclusion of the trade agreements, it does threaten to erode the principle of federalism. Part III suggests an alternative to preserve federalism by including consultations with state governors during the negotiation process.

I. FAST-TRACK, FREE TRADE, AND NON-TARIFF BARRIERS

A. Background

Congress delegated power to the President to conclude international trade agreements as a method of avoiding the influence of special interests. Congress became aware of this danger after protectionist interests in 1934 pursued policies helping to push the world into the Great Depression. Congress responded through the Reciprocal Trade Agreements Act of 1934 which delegated in the President the authority to negotiate and implement international trade agreements. Congress periodically extended this authority until 1967 when it lapsed.

President Ford and Congress negotiated a renewal of presidential authority over international trade through the Fast-Track provisions of the Trade Act of 1974 (hereinafter “1974 Act”). Under Fast-Track, the President must first make a determination that barriers to trade “unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy.” Then, the President may enter into a trade agreement to remove those barriers. The President must notify Congress of his intentions ninety days before entering into a trade agreement. The President then submits the implementing bill through the majority leaders in

13. Id.
14. Id. at § 2112(e)(1).
both the House of Representatives and the Senate. Congress may not amend the implementing bill. Congressional committees then have forty-five days to consider the bill. If the bill is still in committee after forty-five days, it is automatically discharged. A vote on the final passage of the bill is to be held no later than fifteen days after its discharge. This gives Congress a total of sixty days to consider the bill. Debate in both the House and the Senate is limited to twenty hours. Fast-Track under the 1974 Act lapsed in 1980. Congress renewed Fast-Track authority with the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988. Fast-Track authority lapsed in 1993.

B. Changes in Trade Agreements: NAFTA and the WTO

The end of the Cold War led to dramatic changes in the world economy. The economies of the world have become more interdependent. There has been a general rise in the understanding that international issues affect domestic interests. The process of globalization has caused "a worldwide convergence of economic and political values." As the North American Free Trade Agreement (hereinafter "NAFTA") and the World Trade Organization (hereinafter "WTO") demonstrate, the nations of the world have agreed that the lifting of barriers is the best way to promote international trade. However, these new trade agreements have provoked a debate on the limitations of Fast-Track in considering the domestic impact of international trade issues.

1. Fast-Track and Adequate Debate

Through agreements such as NAFTA and the WTO, the scope of international trade agreements have expanded to include issues previously

16. Id. at § 2191(d).
17. Id. at § 2191(e)(1).
18. Id.
19. Id. at § 2191(f)(2).
24. Id. at 429, 433.
25. Id. at 429.
considered to be within the exclusive jurisdiction of the national government. These new trade agreements give international entities a greater ability to review domestic laws to determine if they create non-tariff barriers that are incompatible with the principles of the agreements. This creates the potential for the alteration of a nation’s domestic laws and a limitation on that nation’s sovereignty. As Fast-Track limits debate, there is a question as to whether there is an adequate opportunity to assess fully the impact of these agreements on domestic law.28

Fast-Track may not adequately protect the interests of states with respect to the harmonization of domestic laws. In December of 1992, the United States, Canada, and Mexico concluded NAFTA. NAFTA differed from previous trade agreements involving the United States as it provided for greater economic integration between the United States, Canada and Mexico.29 Through NAFTA, “the United States [surrendered] its role, at least to Canada and Mexico, as a separate trading entity and [became] a part of a regional entity.”30

By developing a system that strives for greater harmonization, NAFTA created a tension between trade liberalization and the sovereignty of subsidiary governments. Article 105 of NAFTA states: “The Parties shall ensure that all necessary measures are taken to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.”31 Thus, the drafters of NAFTA consciously bound their governments to strive for integration even of their subsidiary governments.

For the United States, this aspect of NAFTA led to objections from state governments. The “impetus for globalization” has limited the states’ ability to regulate in areas such as environmental protection, labor

28. See Dana Rohrabacher, Pennies for Thoughts: How GATT Fast Track Harms American Patent Applicants, 11 ST. JOHN’S J. LEGAL COMMENT. 491, 494 (1996). Representative Rohrabacher raised the concern of adequate debate when she testified before the Subcommittee on Courts and Intellectual Property on the effect the WTO had on United States patent law. Before the creation of the WTO, United States patent law guaranteed seventeen years of protection to the patent owner after the date the patent was issued. Id. Under the WTO, however, Representative Rohrabacher claimed patent protection was changed to twenty years from the date of application. Id. at 495. Because protection under United States law would now start at the time of application, inventors applying for patents representing significant technological breakthroughs would receive less protection under these changes as such patents typically take a number of years to issue. Id. at 495-96. Representative Rohrabacher claimed that as this passed under Fast-Track procedures, Congress did not give the change “neither full debate nor full scrutiny.” Id. at 494. As Fast-Track prohibited Congress from adequately addressing this issue due to the limitation of debate, this significant change in the law was not addressed thoroughly.


30. Id. at 7. (alteration in original).

31. NAFTA, supra note 26, art. 105 (emphasis added).
protection, health and safety standards, and competition rules. No constitutional duty exists for federal authorities to consult with the states when negotiating trade agreements. Yet, by the terms of NAFTA, states must regulate according to its guidelines. In response to this situation, state authorities complained that NAFTA weakened the enforcement of state regulations. State laws would now become subject to challenge as non-conforming to NAFTA provisions on non-tariff barriers. NAFTA brought into conflict the goal of integrating the North American economies in order to facilitate trade and the sovereignty of state governments.

2. NAFTA Labor and Environmental Issues

NAFTA's failure to address labor and environmental issues in the text of the primary agreement set the stage for a bitter political battle in the United States. By including Mexico in the agreement, the opponents of NAFTA feared the agreement would lead to the erosion of labor and environmental standards in the United States. Mexican labor is cheaper than that of the United States and Canada. This gives Mexico a comparative advantage in labor costs. Thus, by adding Mexico to the free trade agreement, opponents argued jobs would migrate from the United States to Mexico. Opponents also argued NAFTA would also create pressure on the United States to lower its labor standards.

With respect to environmental protection, Mexico is a developing nation. Mexican environmental regulations are less stringent than those of the United States and Canada. The Mexican government is also less effective in enforcing those regulations. As companies can take advantage of this situation, this gives Mexico a comparative advantage with respect to environmental standards. Companies wishing to decrease their costs in connection to protecting the environment could move to Mexico. Further, opponents to NAFTA were concerned that United States environmental standards could come under attack as non-tariff barriers.

33. Id. at 245-46.
34. Id. at 251.
36. Id.
37. Taylor, supra note 29, at 8.
38. Id. at 82-83.
39. Id. at 80.
40. Id. at 99-100.
41. Id. at 101.
NAFTA was seen by opponents as setting a dangerous precedent for future trade agreements. By ceding authority over non-tariff barriers to other trading partners, the United States endangered the concerns of labor and environmental interests. To this end, President Clinton proposed addressing labor and environmental issues in side agreements to NAFTA. This, however, did not alleviate the concerns of NAFTA opponents. The result was a fierce political battle over the passage of the implementation legislation.

C. The 1997 Proposals

President Clinton submitted to Congress a proposal to renew the President's authority to negotiate trade agreements utilizing Fast-Track. This proposal was known as the Export Expansion and Reciprocal Trade Agreements Act of 1997 (hereinafter "1997 Clinton Proposal"). The proposal came at a time when the President desired to begin negotiations to include Chile in NAFTA.

In response to the President's request for Fast-Track authority, Representative Bill Archer, Chairman of the House Ways and Means Committee, introduced H.R. 2621, a bill entitled the "Reciprocal Trade Agreement Authorities Act" (hereinafter "H.R. 2621"). H.R. 2621 left intact the procedure for Fast-Track as set forth in the 1974 Act. H.R. 2621 also provided for consultations between the Executive and Congress.

H.R. 2621 also sought to ensure that foreign nations would not use labor, environmental, health and safety standards are as arbitrary or unjustified barriers to trade. H.R. 2621 further aimed to prevent a nation from taking advantage of lowering their labor and environmental standards. To accomplish this task, H.R. 2621 charged the President with ensuring that a nation does not waive or derogate from its existing standards in order to gain a competitive advantage in trade.

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42. Taylor, supra note 29, at 8.
43. Letter from President William J. Clinton to the Congress of the United States (Sept. 16, 1997).
47. Id. § 103(b)(3).
48. Id. § 104.
49. Id. § 102(b)(7)(A).
50. Id. § 102(b)(7)(B).
II. FAST-TRACK AS A THREAT TO FEDERALISM

A. The Role of Federalism in the United States Constitutional System

The Founding Fathers built the United States' government upon the principle of federalism. Instead of creating a single central government and dissolving the existing state governments, the Federal Government was superimposed upon the several states. James Madison specifically rejected the notion that the Constitution would spell the downfall of the state governments. Rather, Madison envisioned the states as "essential parts of the federal government," playing a larger role in the lives of the people than the Federal Government.\(^5\) To that end, Madison argued, "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."\(^6\)

Federalism continues to serve a vital function in the United States. By retaining the states, the federal system promotes diversity, pluralism, and experimentation in public policy.\(^5\) In addition, federalism serves a prophylactic function. The continued existence and vitality of the states protects the people "from arbitrary majoritarianism and overcentralization . . . ."\(^5\) The structure of the Constitution sought to avoid the accumulation of power in a single entity.\(^5\) By dispersing power, not only among the three branches of the Federal Government, but also among the Federal Government and the governments of the states, the Constitution serves to secure the people from such an excessive accumulation.

Federalism ensures a "greater degree of citizen participation."\(^5\) Through a republican form of government, the people choose representatives to serve their interests. When a single legislature governs a population the size of the United States, the voice of a single citizen is necessarily diluted. But when a republican government governs smaller geographical units with smaller populations, the citizens have a greater voice in the formation of public policy. In a state legislature, the ratio of citizens to representatives is smaller than in the Congress which governs the entire nation. The smaller the ratio, the greater influence a single voter has. Federalism, therefore, ensures greater liberty, and gives the voter greater control over their own governance. Federalism is a value that should be secured, and protected.

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51. THE FEDERALIST NO. 45 (James Madison).
52. Id.
54. Id.
55. THE FEDERALIST NO. 47 (James Madison).
56. ADVISORY COMMISSION, supra note 53, at 105.
B. Congressional Power over Commerce and State Sovereignty

Congress has the power "[t]o regulate Commerce with foreign nations." Chief Justice John Marshall stated "[T]he power of Congress does not stop at the judicial lines of the several States. It would be a very useless power, if it could not pass those lines." The Tenth Amendment, however, declares that all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The question is whether this reservation of power to the states can act as a limit on the power of Congress to regulate foreign commerce.

1. The Commerce Clause and State Sovereignty

The Supreme Court addressed the issue of the relationship between the Commerce Clause and state sovereignty in *National League of Cities v. Usery.* Congress exercised its commerce power by amending the Fair Labor Standards Act [hereinafter "FLSA"] to extend its coverage to state employees. The Court proclaimed: "This Court has never doubted that there are limits upon the power of Congress to override sovereignty, even when exercising its otherwise plenary power to tax or to regulate commerce which are conferred by Article I of the Constitution." Congress used its Commerce power to regulate "States in their capacities as sovereign governments," interfering with states acting "in areas of traditional governmental functions." The act was, thus, unconstitutional.

The Court revisited *Usery* in *Garcia v. San Antonio Metropolitan Transportation Authority.* The Court faced the issue of whether state sovereignty immunized states from the minimum wage and overtime provisions of the FLSA. The Court asserted that lower federal courts

57. U.S. CONST. art. I, § 8, cl. 3.
58. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 195 (1824). Gibbons, however, involved the conflict between a New York act that granted a monopoly over the navigation of waterways within its jurisdiction with a license granted by Congress. Id. at 2-3. As the case involved interstate commerce, Marshall's discussion of international commerce is dicta. However, Marshall was using the discussion to explain the extent of Congressional power over commerce, and to illustrate how that power penetrates state boundaries.
60. 426 U.S. 833 (1976).
63. Id. at 842.
64. Id. at 851-52. Chief Justice Rehnquist listed a few traditional governmental functions. They are: fire prevention, police protection, sanitation, public safety, and parks and recreation.
66. Id. at 533.
struggled with the *Usery* standard of "identifying a traditional function for the purpose of state immunity under the Commerce Clause."\(^{67}\) The Court rejected the *Usery* standard as "unworkable" and "inconsistent with established principles of federalism . . . ."\(^{68}\) Accordingly, the Court upheld the constitutional validity of the FLSA as it applied to the states.\(^{69}\)

In support of his opinion, Justice Blackmun contended that the rights of states received protection from the structure of the federal government.\(^{70}\) The Constitution accommodated state sovereignty through representation in the House of Representatives, and equal representation in the Senate.\(^{71}\) This protected the states from an overreaching Congress.\(^{72}\)

Justice O’Connor dissented stating, "The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded."\(^{73}\) O’Connor proclaimed, "The true ‘essence’ of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though it laws are supreme."\(^{74}\) In O’Connor’s view, the courts must remain diligent in protecting the principle of federalism.\(^{75}\) Reminding the Court of Chief Justice Marshall’s formula from *McCulloch v. Maryland*,\(^{76}\) Justice O’Connor declared, "It is not enough that the ‘end be legitimate’; the means to that end must not contravene the spirit of the Constitution."\(^{77}\) Therefore, just because the task may be difficult, courts should not abdicate its duty to protect state sovereignty.\(^{78}\)

Writing for the majority, Justice O’Connor defended state sovereignty in *Gregory v. Ashcroft*.\(^{79}\) In that case, state judges challenged a provision of the Missouri Constitution requiring judges to retire at age seventy as a violation of the ADEA.\(^{80}\) Justice O’Connor asserted that “a healthy balance of power between the States and the Federal Government will

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\(^{67}\) *Id.* at 530.

\(^{68}\) *Id.* at 531.

\(^{69}\) *Id.* at 546.


\(^{71}\) *Id.* at 551.

\(^{72}\) *Id.*

\(^{73}\) *Id.* at 580 (O’Connor, J., dissenting).

\(^{74}\) *Id.* at 581 (O’Connor, J., dissenting) (*citing* Younger v. Harris, 401 U.S. 37 (1971)).

\(^{75}\) *Garcia* at 581 (1984) (O’Connor, J., dissenting).

\(^{76}\) 17 U.S. (3 Wheat) 316 (1819).

\(^{77}\) *Garcia*, 469 U.S. at 585 (O’Connor, J., dissenting).

\(^{78}\) *Id.* at 588-89 (O’Connor, J., dissenting).


\(^{80}\) *Id.* at 456.
reduce the risk of tyranny and abuse from either front." The states, therefore, "retain substantial powers under our constitutional scheme, powers with which Congress does not readily interfere." The citizens of a sovereign state have a right to set the qualifications for judges within their state. Thus, as ambiguity existed as to whether judges were employees under the act, O'Connor construed the act to avoid the intrusion upon the rights of the states, thereby upholding the Missouri constitutional age requirement.

The limits of the use of commerce power by Congress to proscribe rules to the states when involved in environmental matters became an issue in *New York v. United States*. A provision of an act of Congress required the states to regulate radioactive waste in a manner consistent with the direction of Congress, or to "take title to and possession of low level radioactive waste generated within their borders and become liable for all damages waste generators suffer as a result of the States' failure to do so promptly." The Court concluded: "that while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer on Congress the ability to compel the States to do so."

Therefore, Congress cannot use its commerce power to direct the states to adopt a particular scheme of regulation. The choice given to the states, to regulate according to the Congressional desire or take title to the waste, was "tantamount to coercion," and therefore an unconstitutional invasion of state sovereignty.

Under the Commerce Clause, Congress has the power to regulate the state's relationship to its employees as if it were a private employer. However, Congress may not intrude upon the states' sovereign prerogatives. Congress may not use its commerce power to interfere with the means by which a state chooses it public officials. Nor may Congress use its commerce power to direct the states to adopt regulations that Congress prescribed.

81. *Id.* at 458.
82. *Id.* at 461.
83. *Id.* at 473.
86. *Id.* at 174-75.
87. *Id.* at 149 (emphasis added).
88. *Id.* at 161.
89. *Id.* at 175.
2. Foreign Affairs and State Sovereignty

The cases mentioned above, however, dealt with Congressional power over interstate commerce. As Fast-Track would extend to the President the ability to negotiate international trade agreements, the power of Congress to regulate when faced with state sovereignty may take on a new dimension.

Justice Holmes found the power of the Federal Government over international affairs to confront different considerations when conflicting with state action in Missouri v. Holland.90 Holland involved a treaty between the United States and Great Britain concerning the killing of migratory birds that passed between Canada and the United States.91 Justice Holmes first noted while "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution"92 no such qualification existed with respect to the supremacy of treaties. Holmes found it questionable whether the provisions of the treaty were contrary to the Constitution.93 "The only question is whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment."94 Holmes concluded that "[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."95 Therefore, when the nation faced an issue that could only be addressed in conjunction with a foreign nation, the Federal Government may intrude upon the states' power and proscribe a rule through a treaty.96

State action may nonetheless be upheld even when that action may have an effect on international relations. In Clark v. Allen97 a resident of the State of California died in 1942 bequeathing her property to relatives in Germany.98 The California Probate Code at that time required a foreign nation grant reciprocal rights to United States citizens before aliens residing in that nation could take property by succession or through a will.99 The Court conceded that this statute had some incidental effect in foreign nations.100 However, when there is no overriding federal interest, and the state did not actively pursue foreign policy, a statute having incidental

90. 252 U.S. 416 (1920).
91. Id. at 431.
92. Id.
93. Id. at 433-34.
94. Id.
96. Id. at 435.
97. 331 U.S. 503 (1947).
98. Id. at 505.
99. Id. at 506, n.1.
100. Id. at 517.
effects on foreign relations is not automatically invalid.\textsuperscript{101} Therefore, the California statute was valid.

Different consequences follow when a state actively pursues a foreign policy agenda. In \textit{Zschering v. Miller}\textsuperscript{102} a resident of Oregon died intestate leaving heirs in the Communist nation of East Germany. An Oregon statute required a foreign nation to guarantee the right of its citizens to receive property by succession “without confiscation” before the property could be transferred.\textsuperscript{103} The Court determined that the statute was an intrusion in the field of foreign affairs, entrusted by the Constitution to the President and Congress.\textsuperscript{104} The Court noted that the statute aimed to exclude Marxist nations from taking title to the property of the deceased.\textsuperscript{105} In order to determine when “confiscation” occurs, the State of Oregon would have to make inquiries into foreign law, and judge the credibility of diplomatic statements.\textsuperscript{106} The Court noted that decisions under this law were made according to foreign policy attitudes present during the Cold War.\textsuperscript{107} The Court stated that the lack of a treaty on the subject matter was itself not dispositive. Rather, “even in the absence of a treaty, a State’s policy may disturb foreign relations.”\textsuperscript{108} As such, the Oregon statute was found unconstitutional.

The Supreme Court addressed the issue of the extent of the foreign commerce power of Congress in \textit{Japan Line, Ltd. v. County of Los Angeles}.\textsuperscript{109} In this case, Japanese shipping companies owned ships designed to carry cargo containers. These containers would travel through the State of California. Under California law, property located in the state on March 1 of any year was subject to an ad valorem tax.\textsuperscript{110} The Japanese company paid the tax, but sued for a refund.\textsuperscript{111}

The issue before the Court was whether the California tax unconstitutionally intruded upon the power of Congress to regulate foreign commerce. The Court noted that “[w]hen construing Congress’ power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required” than under the interstate commerce power.\textsuperscript{112}

\textsuperscript{101} \textit{Id.} at 517. One such overriding federal interest could be if a treaty is in force on the subject.

\textsuperscript{102} 389 U.S. 429 (1968).

\textsuperscript{103} \textit{Id.} at 431.

\textsuperscript{104} \textit{Id.} at 432.

\textsuperscript{105} \textit{Id.} at 434.

\textsuperscript{106} \textit{Id.}


\textsuperscript{108} \textit{Id.} at 441.

\textsuperscript{109} 441 U.S. 434 (1979).

\textsuperscript{110} \textit{Id.} at 437.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.} at 446.
Specifically, in foreign commerce, there is a greater need for national uniformity: "[A] state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."\(^{113}\) The California tax created an asymmetry in international taxation that created a disadvantage for Japan.\(^{114}\) Therefore, as the tax defeated uniformity, it stood as an unconstitutional invasion of the foreign commerce power of Congress.\(^{115}\)

That a tax scheme may differ from state to state, however, is not enough to invalidate the tax as an invasion of the foreign commerce power. In *Container Corp. of America v. Franchise Tax Board*\(^{116}\) a California franchise tax employed the "unitary business" principle in determining the tax base.\(^{117}\) California applied this principle to a Delaware corporation doing business in California as well as in foreign nations. The Court asserted that merely because a tax has "resonations" in foreign affairs, it is not necessarily unconstitutional.\(^{118}\) Here, the tax did not create an asymmetry in international taxation.\(^{119}\) Taken with the fact that it was imposed on a United States corporation, the Court held that the foreign policy of the United States was not seriously threatened by the tax.\(^{120}\)

The *Holland* holding dealt specifically with the power of *treaties* to displace state regulation. Under the authority granted by Fast-Track, the President would not negotiate a treaty for the purposes of Article VI of the Constitution, but an executive agreement authorized by a delegation of power by Congress. Congress would need to pass implementing legislation for the agreement to have the force of law. In that regard, it would not deserve the enshrinement as the supreme law of the land as a treaty.

Both the *Clark* and *Container Corp. of America* decisions show that more is necessary for a state law to be unconstitutional than the fact that the law touches upon foreign relations incidentally. Under these precedents, a state law will be found unconstitutional when a state *intends* to affect foreign policy, even when that law falls within the traditional state jurisdiction. Thus, despite the fact that probate law is an area of regulation

\(^{113}\) *Id.* at 448.


\(^{115}\) *Id.* at 453-54.


\(^{117}\) *Id.* at 162-63. Under the unitary business formula, the state first defines the scope of the business entity's activities in the taxing jurisdiction. Then, the state apportions income between the taxing jurisdiction and the elsewhere by looking at the character of the activities performed within and without the jurisdiction. *Id.* at 165.

\(^{118}\) *Id.* at 193 (*citing* Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 448 (1980)).

\(^{119}\) *Id.* at 195.

\(^{120}\) *Id.* at 196.
reserved to the states, when the Oregon law in Zschering required state judges to make foreign policy considerations it intruded upon the foreign policy powers of the Federal Government. The aim of the Oregon statute was to further Cold War objectives by denying the validity of testamentary gifts made to citizens of Communist nations. In contrast stands the decision in Clark. The California statute applied equally to all foreign nations. The only requirement was that of reciprocity. The California statute did not attempt to pursue an international affairs agenda of favoring nations adhering to an ideology consistent with that of the United States.

A state regulation that has the effect of barring the importation of foreign goods should not be found invalid unless it reflects an attempt on the part of a state to interfere in foreign policy matters. Often, when a state regulates in the areas of health, safety, environmental and labor standards, it is acting to protect the interests of its citizens. So long as the regulations are not applied in a discriminatory fashion there is little danger that the aim of the state is to affect foreign policy. When the regulation does not aim to affect foreign policy it does not represent an unconstitutional encroachment upon the power of the Federal Government.

The decision of the Court in Japan Line appears to be consistent with the need for establishing a uniform system of taxation with respect to foreign commerce. Thus, the Foreign Commerce Clause would forbid a state from imposing its own tariffs. Extending the reach of the foreign commerce power of Congress to all non-tariff barriers, however, would appear contrary to the design of the Founding Fathers. The historical experience of the American Colonies supports the notion that in delegating the power to regulate foreign commerce to Congress, the Founding Fathers were concerned primarily with taxation as a means of regulation.121 Thus, in the experience of the Founding Fathers, the imposition of duties acted as the main vehicle of regulation of international trade.

The concept of non-tariff barriers only recently emerged in multilateral trade agreements. The Tokyo Round of GATT negotiations, which lasted from 1973 to 1979, was the first time multilateral trade

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121. Prior to independence, Great Britain imposed upon the American Colonies the system of mercantilism. Britain imposed high duties on imports in order to force the American Colonies to purchase goods from other British possessions, and not from competing foreign colonies in the West Indies. ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 12 (1935).

Alexander Hamilton asserted that a unity of national regulation over international trade was necessary in order to give the United States an advantage over foreign powers. THE FEDERALIST, No. 11 (Hamilton). By uniting against foreign nations such as Great Britain, Hamilton theorized that the United States could force Britain to open markets in the West Indies, and protect American rights concerning fisheries, and navigation of the Great Lakes and Mississippi River. Id. Therefore, the grant of power over foreign commerce was meant to provide the United States with a united front when acting in international trade issues.
negotiations focused on the issue of non-tariff barriers. Previously, the primary concern of trade negotiations was the level of tariffs. It appears unlikely that the Founding Fathers conceived of the regulation of non-tariff barriers when drafting the Constitution.

III. INJECTING THE STATES INTO FAST-TRACK

A. States Have a Legitimate Role to Play in International Trade

The United States embarked on a new era of international trade relations demanding greater federal and state cooperation. Since the end of the Cold War, the world has become increasingly economically interdependent. Issues of foreign relations have direct effects on the lives of United States citizens. For example, lower wage levels in nations such as Mexico create incentives for companies to locate manufacturing facilities in those nations. As a result, manufacturing jobs have been migrating out of the United States.

Greater participation of the state governments in international trade does not represent an intrusion upon the power of the Federal Government. Rather, it is an adaptation "to a changing world in which the line between national and state or local concerns is much less clear than when the Republic was founded." By acting in international trade, states merely "promote legitimate concerns and interests and express the views of their citizens in international and foreign policy issues of relevance and importance to them." Foreign trade and investment translates into more local jobs. The role of the state in some respects has become to act as the protector and creator of jobs within their boundaries. Much of the state action in international trade has been to further these roles. Additional concerns have been raised by the creation of a free trade zone through NAFTA. Free trade zones aim to eliminate barriers to trade among its members. This means not only the elimination of customs and duties, but also the elimination of non-tariff barriers. Non-tariff barriers

123. Seita, supra note 23, at 439.
124. Id. at 433.
126. Id.
127. For example, the Commonwealth of Pennsylvania, and the City of Philadelphia recently pursued the Norwegian shipbuilding firm of Kvaener SA to invest in the Philadelphia Navy Yard. The Navy Yard was closed by the United States Government in 1995. Since then, the Commonwealth and City governments have actively sought an investor to utilize the shipyard in order to create more jobs in the Philadelphia area. J. Alex Tarquino, Developments: Philadelphia's Ship May Be Coming In, WALL ST. J., Nov. 26, 1997, at B10.
include more than just the imposition of quotas on imports. The term is ill defined, and subject to an expansive meaning. In 1974, when Congress approved Fast-Track, the Senate stated that the term: "cover[s] a variety of devices which distort trade, including quotas, variable levies, border taxes, discriminatory procurement and internal taxation practices, rules of origin requirements, subsidies and other direct and indirect means used to discourage imports or artificially stimulate or restrict exports." The Senate definition demonstrates the ambiguity, and expansive nature of the term. Specifically, an indirect measure used to discourage imports may refer to any regulation that has the effect of restricting trade. Such an expansive definition of "non-tariff barriers" has been used by the European Union. Regulations in matters such as health, safety, and labor issues can be viewed as non-tariff barriers if they have the effect of acting as an impediment to market entry of products from other nations. If congressional power over foreign commerce is read to pre-empt state regulation over all non-tariff barriers, there is a real danger of encroaching upon the state sovereignty.

128. Non-tariff barriers have been defined as obstructions to international trade other than customs duties or taxes on importation. 2 R. STURM, CUSTOMS LAWS & ADMINISTRATION § 61.2 (1985).


130. Any national rule directly or indirectly, actually or potentially capable of hindering trade is forbidden by the EU as a non-tariff barrier. Case 120/78, Reme-Zentral AG v. Bundesmonopolverwaltung fur Branntwein, [1978] E.C.R. 649.

131. NAFTA does allow the member nations to retain the right to promulgate standards related to safety, protection of life and health, protection of the environment, and the protection of consumers. These regulations must conform to the principle of non-discrimination. In addition, unnecessary obstacles to trade cannot be established. The regulations must have a demonstrated purpose of achieving a legitimate object, and the regulation cannot exclude goods of a member nation that meets that legitimate object. NAFTA, supra note 26, art. 904.

A similar provision is found in the European Union. Nations that are part of the EU may maintain their own standards. However, any national rule that is directly or indirectly, actually or potentially capable of hindering trade is forbidden as a non-tariff barrier. If the EU has not itself developed a rule on a certain issue, the member nations may adopt their rules that are reasonable and proportional. A proportional measure cannot be broader than necessary. Case 120/78, Reme-Zentral AG v. Bundesmonopolverwaltung fur Branntwein, [1978] E.C.R. 649.

Indeed, Germany’s beer purity laws came under attack for violating the rule of proportionality. While Germany defended its law as a measure necessary to protect the health of German citizens, the European Court of Justice found that the regulation was not necessary to protect public health. Of key importance was the fact that other European nations allowed the very additives and preservatives forbidden by German law. In addition, Germany allowed the same preservatives when used in other beverages. Case 178/84, Re Purity Requirements for Beer: Commission v. Germany, 1979 E.C.R. 649.
In order to create greater integration of markets, harmonization is necessary not only among the national governments, but the subgovernments as well. Within a national government that employs a federal scheme, power is diffused among the national and subgovernments. In the United States, the fifty states and the District of Columbia may regulate certain subject matters. Specifically, under the police power, the states have the power to regulate the health, safety, welfare, and morals of its citizens. Such standards may preclude the admission of imported products to the state’s market when those products fail to meet those standards. The negotiators of NAFTA specifically aimed to address this problem, by binding the national governments to ensure that their subgovernments adhere to the agreement. If states must adhere to the requirements of a trade agreement such as NAFTA, regulations may need to come into conformity with the agreement. By aiming to reduce non-tariff barriers, these agreements may encroach upon state sovereignty. State governments do not play a formal role in trade negotiations. As a result, states may be bound to change their laws and regulations by an agreement which they had no part in creating. By precluding states from participating in the negotiation of international trade agreements, issues which increasingly have local consequences are being made by a more remote decision-making bodies. Involving states in international trade only serves to further the democratic process.

It has been argued that the structure of the federal government protects the rights of states. However, constitutional changes have eliminated any body of the Federal Government that represents the interests of states as states. Each state is entitled to two Senators. However, due to the Seventeenth Amendment Senators are popularly elected, not appointed by the state governments. While Senators do represent the population of the state from which they are elected, they do not necessarily represent the interests of the state governments.

Under Fast-Track, no provision exists to protect the legitimate interests of the states to promulgate regulations. Yet, should the United States follow the precedent set in NAFTA, states will be bound by trade agreements to comply with their terms. This effectively robs the states of

133. NAFTA, supra note 26, art. 105.
134. "As national governments become larger, more remote and more indifferent, it is only through state and local governments, more accessible and responsive to their views, that ordinary citizens can make their voices heard." Bilder, supra note 125, at 828-29.
137. Originally, under Article I, § 3 of the Constitution, the state legislatures chose the Senators. The rules changed in 1913 with the passage of the 17th Amendment.
their sovereignty in favor of the central government. Through the mechanism of trade agreements, the President and Congress may direct the states to adopt a course of regulation of subjects rightfully within the states’ police power. Trade agreements, therefore, would allow the federal government to violate the standard of *New York v. United States.*

**B. A Proposal**

A solution to this problem would be to create a role for the states in Fast-Track. When the President enters into negotiations over a trade agreement that will affect non-tariff barriers, the President could consult the governors of the states. The President need not consult each governor individually, just as under Fast-Track the President need only consult the members of the House Ways and Means Committee and the Senate Finance Committee. In a similar fashion, the governors of the fifty states could organize themselves in a committee to deal with trade issues affecting states’ interests. Such a requirement would ensure a voice for the states in the process of negotiating trade agreement that could affect states’ interests.

The participation of the governors should be limited to those areas where states have a legitimate interest. Those are non-tariff barriers. Specifically, the governors should only offer their opinions on those non-tariff barriers that would change state regulations. These would be in health, safety, environmental, and labor issues. The governors should not be able to affect those parts of the trade negotiations dealing with issues fully within federal jurisdiction, such as tariff levels, the elimination of quotas, and rules of origin. Such constraints would ensure that the governors only participate in areas of legitimate state concern, and not unduly hinder the negotiation process.

Congressional consultations are reinforced by the fact that Congress must still approve of the trade agreement before it can become law. Thus, Congress has the security of voting on the trade agreement. The governors do not have such insurance. This can be remedied by requiring any provision of a trade agreement that involves changes in existing health, safety, environmental and labor regulations to receive approval from a majority of the committee of governors. Without such approval, any such provision cannot become law.

To set up such a mechanism within Fast-Track need not create an inefficient hindrance to the President. First, as Chief Justice Burger

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139. H.R. 2621, supra note 46, § 104(a)(1)(B).
140. This proposal would be consistent with current United States policy as 19 U.S.C. § 2114c(2)(A)(i)(1998) provides an informal method whereby the President consults with state governments where “he deems appropriate,” during the course of trade negotiations.
asserted, efficiency is not a primary goal of a democracy.\(^\text{141}\) Indeed, if efficiency translated into the accumulation of power in the hands of the President at the expense of the states, this could lead to a tyrannical government. The President would be able to rule without taking into concern the interests of the state governments.

Second, efficiency would actually be promoted by adding a prophylactic mechanism to protect state sovereignty\(^\text{142}\) before the conclusion of the trade agreement. Currently, states would be forced to wait until after the agreement is concluded to challenge the agreement.\(^\text{143}\) Otherwise, without a final agreement, there would be no tangible injury

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\(^\text{142}\) See supra, notes 51-56 and accompanying text for an argument that federalism is an independent value from the rights and interests of the people who live within the states that is worthy of protection. See also, supra notes 74-79 and accompanying text for a summary of Justice O’Connor’s defense of federalism.

\(^\text{143}\) In Public Citizens v. United States Trade Representative, 970 F.2d 916, 917 (D.C.Cir. 1992), the Court of Appeals for the D.C. Circuit faced a challenge to NAFTA negotiations. The plaintiffs sought an order for the Trade Representative to prepare an environmental statement for NAFTA during the negotiation process. The court found that for there to be a cause of action, there needed to be a final act of an administrative agency. \textit{Id.} at 919. In this case, as the negotiations were still in progress, there was no guarantee that the negotiations would produce a final agreement. Without a final agreement, there can be no final act of an administrative agency. \textit{Id.}

After NAFTA had been concluded, but before it had passed Congress, the plaintiffs renewed their suit. The Court of Appeals reasoned that since the President had the authority to renegotiate NAFTA, or decide not to submit it to Congress, it was not the Trade Representative’s action that the plaintiffs were challenging. Public Citizens v. United States Trade Representative, 5 F.3d 549, 553 (D.C.Cir. 1993), \textit{cert. denied}, 114 S.Ct. 685 (1994). As presidential actions were not final administrative agency acts, they were not reviewable under the APA. \textit{Id.} The court concluded by stating that “NAFTA’s fate now rests in the hands of the political branches. The judiciary has no role to play.” \textit{Id.} This statement is a power indication of the deference the courts gave to the Executive branch. It implied that the courts would not interfere in the process of implementing the trade agreement, even if it involved the accelerated process involved in Fast Track.

One more attempt to compel the issuance of an environmental impact statement came to the District Court in Public Citizens v. Kantor, 864 F.Supp. 208 (D.D.C. 1994). In this case, the Uruguay Round of GATT had to be completed, and an agreement sent to Congress under Fast-Track procedures. \textit{Id.} at 211. This time, the court asserted that the decision of the Court of Appeals in the second action brought by the plaintiffs “unequivocally foreclosed judicial review.” \textit{Id.} The court could not revisit the issue on a writ of mandamus. \textit{Id.} at 213.

These cases demonstrate a reluctance on the part of the courts to review the process of negotiation of trade agreements. Instead of deciding the case on the merits of the cause of action, the courts dismissed the cases under a doctrine of deference. The courts decided to dismiss the cases finding either the controversy to lack the requisite ripeness, or the plaintiff to lack standing. This suggests a tendency of the courts to avoid the issue of the constitutionality of the President’s authority under Fast-Track.
that the states could contest. The states would be forced to challenge trade agreements only after becoming law. At that point, there would be greater pressure on the courts to uphold the validity of the agreement.

The better alternative would be to address the issue of state sovereignty before the agreement is concluded. The removal of non-tariff barriers that affect state regulations could then be addressed during the negotiation process, and receive an approval before the agreement becomes final. Then, an agreement such as NAFTA could not be said to dictate to the states how to regulate without including the states in the process. This would have the function of protecting not only the value of creating greater certainty with regard to trade agreements that affect the states, but also of upholding federalism.

IV. CONCLUSION

The history of presidential trade authority has shown a tendency of Congress to delegate power to the President to decrease influence of special interests. Beginning in 1934, Congress sought to avoid the influence of protectionist forces. The effect of Fast-Track today is to blunt the influence of labor and environmental interests. It is for this reason that labor and environmental interests have aimed to defeat Fast-Track.

However, in centralizing authority over international trade agreements, Congress may be acting to circumvent safeguards deliberately placed in the constitutional structure. Specifically, federalism acts to ensure excessive power does not become accumulated in one set of hands. The aim is to avoid tyranny.

No safeguards exist in Fast-Track for federalism. As trade agreements address non-tariff barriers, the Federal Government must recognize that trade agreements affect states’ interests. By the very terms of NAFTA, the Federal Government is bound to seek state compliance. Yet, the states have no role in the formation of the trade agreements. Instead, they are forced to accept the agreement and any changes in state laws, without a voice in its creation. This problem can be solved easily by requiring the President to consult representatives of state governments during the negotiations, just as the President consults members of Congress. Such a requirement would not act as a hurdle to the formation of a trade agreement, and encourages greater efficiency by avoiding attacks on the agreement after it has been concluded. Requiring consultations with representatives of state governments during trade negotiations would ensure continued vitality of federalism.

144. Public Citizens, 970 F.2d at 919.
I. THE INVOLVEMENT OF THE EUROPEAN COMMUNITY IN COMBATING MONEY LAUNDERING

The first concrete reference to money laundering can be traced to the European Parliament [hereinafter “EP”] Resolution of October 16, 1986. This Resolution urged the Council of Ministers (the community’s main decision making organ) to adopt promptly an instrument on “concerted action to tackle the drug problem.” More particularly, the EP urged the Council of Ministers to introduce effective measures to deal with laundering of proceeds from narcotics trafficking by, inter alia, adopting a directive making the reporting of currency transactions compulsory in all Member States. On October 30, 1986, the Council of Ministers meeting at
the justice ministers level issued a declaration on the drug problem. However, the declaration did not go as far as the EP's proposal. It only proposed that practical guidelines be established for freezing and confiscating the assets of drug traffickers.2

The following year, the European Community [hereinafter "EC"] participated actively in the preparatory work of the International Conference on Drug Abuse and Illicit Trafficking [hereinafter "The Conference"] which was held in Vienna, Austria in June 1987.3 The Conference led to the adoption of the Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.4 The Vienna Convention is primarily concerned with criminalizing narcotics trafficking,5 it also envisages that signatory parties should make the laundering of proceeds resulting from narcotics a criminal offense. In the Vienna Convention, the term "money laundering" has been defined in the following two ways:

1. The conversion or transfer of property, knowing that [it has derived from a drug offense] for the purpose of concealing or disguising the illicit origin of the property or of assisting any other person who is involved in the commission of [a drug offense] to evade the legal consequences of his actions;6 and

2. See Bull. Eur. Communities 10-1986, point 2.4.10.


5. Vienna Convention, supra note 4, at art. 3(1). It obliges signatory parties to make the commission of relevant offenses liable to criminal sanctions, which take into account their grave nature. Note that the European Community has implemented this provision by adopting the Council Resolution of Dec. 20, 1996 on Sentencing for Serious Illicit Drug-Trafficking, 1997 O.J. (C 10) 3.

6. Id. at art. 3(1)(b)(ii).
2. The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property, knowing that such property is derived from [a drug] offense.  

The Vienna Convention includes a number of provisions aiming at effective investigation and prosecution of money laundering cases. More particularly, it provides for extradition between signatory parties in criminal cases involving money launderers, for mutual legal assistance and for the possibility of transferring to another jurisdiction proceedings for criminal prosecution of alleged money launderers. Finally, the Convention obliges participating states to take appropriate measures to facilitate the confiscation of laundered property, which has been transformed or converted into legitimate assets. To that end, parties must ensure that national courts are empowered to order the disclosure of bank records; states may not invoke domestic rules of bank secrecy to avoid compliance.

Fresh impetus to the problems posed by the wide-ranging money laundering activities and the interaction between organized crime and the banking system was given once again by the EP. In its Resolution of September 12, 1991, it called upon the European Commission (the Community's executive organ) to work with national governments to come up with efficient measures drastically combating organized crime. In particular, it suggested that in appropriate circumstances, bank secrecy rules should be lifted in order to control and prevent money laundering. However, since bank secrecy is an area traditionally associated with state sovereignty, the EP's call was largely ignored and no concrete action was taken by the EC.

These sporadic initiatives did not fully address the real problem facing the EC. The liberalization of the financial sector achieved in the late

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7. Id. at art. 3(1)(b)(i).
8. Id. at art. 6. Extradition proceedings between most EC Member States are regulated by the European Convention on Extradition, Dec. 13, 1957, under the auspices of the Council of Europe, E.T.S. 24.
10. Id. at art. 8. The European treaty covering this field is the Convention on Transfer of Proceeding in Criminal Matters, May 15, 1972, 1137 UNTS 29, under the auspices of the Council of Europe, E.T.S. 73.
11. Vienna Convention, supra note 4, at art. 5.
1980's and early 1990's posed complex problems of banking supervision. More importantly, it allowed money launderers to take full advantage of the new regime, thus endangering the foundations of the Community's financial sector. The situation became even more complicated, because in a large number of Member States the notion of money laundering was an unknown entity. It is true that the criminal law of all Member States does punish the offense of dishonestly handling stolen goods or goods deriving from the commission of other crimes or the proceeds of such crimes. Although the theoretical construction of money laundering and the handling of stolen goods share common characteristics, there are fundamental differences in their nature.

The myriad of issues and difficulties involved in devising an effective framework for combating money laundering made it imperative that the EC responded en block and that it was not left to Member States to deal with money laundering on an individual basis. Although, at the time, the principle of subsidiarity had not yet been incorporated in the Community legal order. However, it has been submitted that money laundering constitutes a typical example of an area, where legislative action adopted by the EC can achieve far better results than any action undertaken by each Member State separately.

The reason for this submission is that money laundering is not a crime confined within the boundaries of any given country. On the contrary, money launderers operate as internationally organized players for which the notion of nation-state is obsolete. Due to the integration of the world economy at large and the bringing down of barriers in the EC in particular, it has been possible for money launderers to organize themselves on a transnational basis and exploit the financial sectors of those countries.


14. E.g. §§ 21-22 Theft Act, 1968, (Eng. & Wales); Larceny Act § 7 (1990) (Ir.); Penal Code art. 394 (Greece); Penal Code art. 261 (F.R.G.); Penal Code art. 546 (Spain).

15. See Magliveras, supra note 13, at 96-97.

16. It was inserted as art. 3b of the EC Treaty by virtue of art. G(5) of the Treaty Establishing The European Union [hereinafter "EU Treaty"], Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992). This principle sets out the rule that in those areas which do not fall within the European Community's exclusive legislative competence, the Community shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States acting on their own.

is because their legal systems, either premeditatedly\textsuperscript{18} or inadvertently,\textsuperscript{19} are unable to halt money laundering operations.\textsuperscript{20}

II. THE DIRECTIVE PREVENTING MONEY LAUNDERERS FROM USING THE EUROPEAN COMMUNITY FINANCIAL SYSTEM

The concerted response of the European Community to money laundering came in mid-1991. On June 10, 1991, the Council of Ministers adopted Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering.\textsuperscript{21} Directive 91/308 envisages a threefold action. First, to ensure that all Member States introduce legislation, which will make the laundering of proceeds deriving from serious crimes a criminal offense (Article 2). Second, to devise a system whereby credit and financial institutions facilitate investigations undertaken into money laundering operations by the competent national authorities. This is to be achieved, \textit{inter alia}, by keeping adequate records of suspicious transactions, which will then be made available to such authorities (Articles 3 to 11). Third, to allow Member States to extend the provisions of Directive 91/308 to all those professions and entities involved in large cash transactions which are usually carried out undetected, \textit{e.g.} dealers in art and in precious stones and metals, real estate agents, accountants, casinos, bureaux de change and travel agencies. In this way, it was hoped that the loopholes created by these largely unregulated businesses will be covered (Article 12).

In Article 1, Directive 91/308 attempts to cover the whole financial system of the European Community. Therefore, its provisions are not only applicable to banks but extend to all types of credit and financial institutions, which are being used or could be used by money launderers. Credit institutions are defined in accordance with Article 1(1) and (3) of the First Banking Directive.\textsuperscript{22} Financial institutions are very broadly defined:

\textsuperscript{18} We have in mind those states, which, although they have been severely criticized for lacking or maintaining lax money laundering legislation, they oppose any amendments to bring their laws in conformity with international standards; most of the so-called international tax havens belong to this category.

\textsuperscript{19} We refer to those states, which for various reasons (\textit{e.g.} lack of expertise or resources) are prevented from promulgating the required anti-money laundering legislation.

\textsuperscript{20} In its report of Feb. 28, 1996, the United Nations International Narcotics Control Board concluded, \textit{inter alia}, that criminals take advantage of countries with unregulated or inadequately supervised financial sectors to move their laundering operations there.


on the one hand, they comprise undertakings, other than credit institutions, which have their registered offices inside or outside the European Community's territory and whose principal activity is to carry out any of the transactions stipulated in the Annex of the Second Banking Directive; on the other hand, they comprise insurance companies duly authorized to carry out activities in accordance with the relevant Directive.

The definition of money laundering is also given in Article 1 and it becomes immediately clear that it has been heavily influenced by Article 3(1)(b) of the Vienna Convention. The following intentional acts constitute the offense of money laundering:

(a) conversion or transfer of property, when it is known that such property has derived from criminal activities, for the purpose of concealing or disguising the illegal origin of the property or of assisting those involved in the carrying out of such activities to avoid prosecution;

(b) concealment or disguise of the true nature, source, location, disposition or movement of property, although it was known that the property had derived from the commission of criminal offenses;

(c) acquisition, possession or use of property, where the perpetrator was aware, at the time of receipt, that the property had derived from illicit activities; and

(d) participation or association in attempts to commit, aid, abet, facilitate or counsel the commission of any of the acts described above.

The offense of money laundering is also committed when the criminal operations from where the laundered proceeds originated, were carried out in the territory of a Member State or third country, different from the state where prosecution is pursued. The term criminal activity is defined in Article 1 and has been deliberately drafted in wide terms. It comprises the offenses specified in Article 3(1)(a) of the Vienna Convention. The
definition of criminal activity includes the cultivation, production, manufacture, transportation and sale of narcotic drugs and the management or financing of any of these activities, and "any other criminal activity designated as such for the purposes of this Directive by each Member State." This wording suggests that Member States are not compelled to extend the scope of prohibited money laundering operations to proceeds other than those deriving from drug trafficking offenses (the predicate offenses).

In this respect, the definition of money laundering has been badly drafted because it leaves it to the discretion of Member States to decide which criminal activities should be designated. In effect it allows for considerable disparities between national legislation. One consequence of this disparity could be seen in cases of extradition: if Member State A requests from Member State B the extradition of C for alleged laundering of funds derived from terrorist activities and the laws of Member State B criminalize only the laundering of drug trafficking proceeds, the request shall be turned down, because the principle of double criminality (i.e. that the act for which extradition is petitioned must be a criminal offense in both Member States)\(^\text{26}\) would not be fulfilled. It would have been better, if a minimum catalogue of predicate offenses had been included in Directive 91/308, possibly covering drug trafficking, terrorism, tax evasion, loan sharking, illegal gambling and prostitution, and Member States had been left free to add to that list.

Directive 91/308 has a stipulation that money launderers may only be prosecuted if they were aware that the property given to them for conversion derived from committing or participating in a predicate offense.\(^\text{27}\) This places an additional obstacle to successfully bringing before the courts money laundering cases. This is because prosecutors bear the onus of proving that the launderers had concrete knowledge of the property’s illicit origin.\(^\text{28}\) It should be stressed that Directive 91/308’s strict requirement that the alleged money laundering operations must have been intentional in order to be prosecuted has not been followed by all Member States. Thus, the implementing legislation adopted in the Netherlands,\(^\text{29}\) Ireland\(^\text{30}\) and Britain\(^\text{31}\) also punish negligent money

\(^{26}\) In Wright v. Henkel, 190 U.S. 40, 58 (1903), the United States Supreme Court stated that "the general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both states." This rule has been incorporated as art. 2(1) of the European Convention on Extradition, \textit{supra} note 5.

\(^{27}\) \textit{Cf.} Art. 3(1)(b) of the Vienna Convention, \textit{supra} note 4.

\(^{28}\) Vienna Convention, \textit{supra} note 4, at art. 5(7) (urging signatory parties to consider reversing the burden of proof regarding the lawful origin of alleged proceeds liable to confiscation).

laundering. In other words, cases where the defendant ought to have suspected that the proceeds whose identity he disguised had derived from the commission of a predicate offense.

A further difficulty with which prosecutors in Member States are faced is that they must link the illicit proceeds to a specific crime. This is particularly true in the case of drug trafficking offenses, which are usually committed many times in the course of a single day. As early as 1988, the British Metropolitan Police maintained that the fact that the prosecution had to show, beyond a reasonable doubt, that the laundered money had been the proceeds of drug trafficking resulted in considerable difficulties, not only in conducting in-depth investigations but also in securing convictions for money laundering offenses.32

Similar obstacles exist in relation to confiscation orders. The position of the British law exemplifies how a Member State had to amend its legislation to overcome these difficulties. Under the Criminal Justice Act 1988, confiscation orders could have only concerned proceeds derived from the offense for which the defendant was convicted. It followed, that proceeds of crimes, the defendant was not charged with could have never been the object of a confiscation order. With the promulgation of the Proceeds of Crime Act 1995, the British legislator changed this state of affairs: section 2(4) of the 1995 Act now empowers courts to make the assumption that all property held by the defendant at the time of conviction is perceived as proceeds of the offense charged with.33

Article 2 of the Money Laundering Directive proved to be quite controversial, because its original wording insisted that Member States “ensure that money laundering is treated as a criminal offense.”34 At one point, this provision jeopardized the adoption of the whole directive by the Council of Ministers.35 The dispute at issue was whether the European Community enjoys any legislative power in the area of criminal law. This was not the first time that an EC instrument falling within the broad area of criminal law proved to be controversial. For example, in 1987 a proposal was put forward for a directive harmonizing insider dealing across the Community.36 This Directive required that insider dealing should be


35. See Magliveras, supra note 21, at 178-79.

treated as a criminal offense. The uncompromising position of Germany led to the amendment of the relevant provision (Article 13) to the following wording: "Each Member State shall determine penalties to be applied for infringement of the measures taken pursuant to this Directive."37

A similar compromise was reached in the Money Laundering Directive and Article 2 was changed to read: "Member States shall ensure that money laundering as defined in this Directive is prohibited." In order to compensate for this watered-down provision, the European Community partners gave the undertaking that their implementing legislation would make money laundering a criminal offense by December 31, 1992.38

Article 2 of the Money Laundering Directive was supplemented by two new provisions, which did not appear in the original proposal.39 The first is Article 14, whose wording is identical to Article 13 of the Insider Dealing Directive.40 This Directive obliges Member States to determine the penalties to be imposed in case the measures adopted under the Directive are infringed upon. The second is Article 15, which empowers Member States to promulgate against money launderers measures stricter than those envisaged in the Directive.41

During the deliberations for the adoption of the Money Laundering Directive, the EP proposed that Article 2 should have also obliged Member States to ensure that all proceeds from criminal activities were subject to confiscation. This view was not shared by the Council of Ministers. The EP amendment considerably altered the scope of the Directive, which aims only at preventing money launderers from exploiting the European Community's integrated financial system for their benefit. It follows that the Directive was not conceived as an instrument facilitating confiscation of illicit proceeds. Currently, this may only be achieved under specific


38. The undertaking took the form of a declaration of intent, attached to the text of the Directive, supra note 21. Note that the European Parliament has argued that because of the importance of the organized crime problem, the fight against it should become a matter of exclusive Community competence. See European Parliament Resolution on Criminal Activities in Europe, PARL. EUR. DoC. A3-0033/94; 1994 O.J. (C 61) 235.


40. Vienna Convention, supra note 4, at art. 5.

treaties, such as the Vienna Convention, the Council of Europe Convention on Laundering, Seizure and Confiscation of the Proceeds of Crime and the Schengen Implementing Agreement.

Articles 3 through 7 of the Money Laundering Directive contain the measures, which Member States must impose on credit and financial institutions operating in their jurisdiction. Article 3(1) provides that such institutions must proceed with customer identification when an account is opened or a transaction is carried out exceeding, in local currency, the amount of ECU 15,000 ($13,650) either in a single operation or in separate operations, appearing to be loosely connected (the so-called smurfing). In practice, the identification requirement is implemented when banks check in detail the identity of customers (the so-called know your customer principle) and refrain from opening anonymous or proxy accounts where the beneficiary’s identity is not fully revealed.

The identification requirement also extends to insurance companies. Article 3(3) and (4) exclude from its application those insurance policies whose periodic premiums, in any given year, do not exceed ECU 1,000 ($1,350) or whose lump sum investment amounts to ECU 2,500 ($3,375) or less, or insurance policies of occupational pension schemes. These limits have been set at rather low levels and that provision ought to have been made to index-link these amounts to inflation, which in certain Member States is not inconsiderable. Finally, Article 3(8) stipulates that the identification requirement is fulfilled, if payment of the insurance policy is effected through an account held in the customer’s name and in a credit institution covered by the Directive. This provision could have been problematic at the time the Directive was adopted. However, because supervision in the financial sector was not properly harmonized across the

42. Vienna Convention, supra note 4, at art. 5.

43. The Convention was concluded in Strasbourg, France on Nov. 8, 1990, in force since Sept. 1, 1993, E.T.S. 141, at articles 13-17; reprinted in 30 I.L.M. 148 (1991). Twenty-seven states have signed it, but only thirteen have ratified it; the United Kingdom was the first country to ratify it on Sept. 28, 1992, 1993 Gr. Brit.T.S. No. 59 (Cmnd. 2337).


46. Id.

47. On Austria’s insistence to maintain anonymous accounts, see infra at 108-111.

European Community, the situation has been undoubtedly improved with the entry into force in July 1996, of the so-called Post-BCCI Directive.49

Article 6 of the Money Laundering Directive imposes a duty on credit and financial institutions to report suspicious transactions to the competent national judicial or law enforcement authorities. However, it was agreed not to adopt a general reporting requirement similar to the one, which has been imposed in the United States since 1970.50 The United States Currency and Foreign Transactions Reporting Act of 1970 requires banks to file a report (CTR) with the Treasury Department within 15 days after a customer deposits, withdraws or transfers currency in excess of $10,000, regardless of whether the transaction was of a suspicious nature.51 Undoubtedly, the Directive’s drafters had a lot to learn from the application of the United States regulations, especially in relation to smurfing. Courts have held that the 1970 Act did not prohibit the structuring of banking transactions to multiple operations involving amounts less than $10,000 in order to avoid the CTR filing requirement.52 This lacuna was not closed until the Money Laundering Control Act was promulgated in 1986;53 it enacted the so-called anti-smurfing statute, which provides that “no person shall for the purpose of evading the reporting requirements, structure or assist in structuring, or attempt to structure any transaction with one or more domestic financial institutions.”54

The United States legislation has been notably followed in Australia, where section 7 of the Cash Transaction Reports Act 1988 (in operation

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since July 1990 and amended by Part II of the Crimes Legislation Amendment Act 1992) has introduced a rather low threshold amount requiring banks, credit unions, casinos, etc. to report cash transactions over Ash 10,000 ($6,650) to the Australian Transaction Reports and Analysis Centre (formerly, the Cash Transaction Reporting Agency). Section 31 of the 1988 Act creates the offense of smurfing and already there have been a number of prosecutions. It is interesting to note that in the first case of successful prosecution, the accused was not a bank customer, but the manager of a foreign bank’s Sydney representative office, whose staff had itself developed a system to enable certain clients to engage in smurfing. 55

Although the system of compulsory reporting of all transactions involving a minimum amount has not been particularly effective in detecting money-laundering operations in the banking sector, certain countries have recently adopted it. More specifically, section 4 of Bahamas’ Money Laundering (Proceeds of Crime) Act 1995 stipulates reporting requirements similar to those imposed on United States financial institutions. 56 In addition, Articles 11 through 13 of the 1998 Brazilian Bill on Money Laundering obligate home banks and representative offices of foreign financial institutions to report transactions above a certain threshold to the national Financial Activities Control Board. 57

Article 6 of the Money Laundering Directive also obliges credit and financial institutions to furnish the competent authorities of a Member State with all requested information, documents or records and to assist them in their criminal investigations into money laundering cases. 58 Since furnishing such information results in bank secrecy being lifted, this may possibly lead to a breach of contract by the forwarding institution. Article 9(2) stipulates that any such disclosure, done in good faith to the competent authorities, shall not involve civil or penal responsibility of any kind on the part of the institution or its employees that disclosed the sensitive information. 59

56. See Gibson, Bahamas Money Laundering Regulations 1996, 13 INT’L ENFORCEMENT L.REP. 1 (1997). The Bahamas was the first offshore financial center to enact legislation against money laundering.
59. Cf. Post-BCCI Directive, supra note 49, at art. 5. It provides that when an auditor reveals irregularities in the audited company to the competent authorities and thus violates his duty of professional secrecy, such disclosures shall not constitute a breach of restrictions on disclosure of information imposed by contract or any legislative or administrative provision and shall not involve liability of any kind.
During the Directive's drafting stages, the EP proposed two amendments to the system of reporting suspicious transactions, which were accepted by the Council of Ministers. The first, incorporated as Article 8, ensures that banks will not disclose to their customers the fact that information relating to their transactions has been requested and transmitted to judicial authorities or that a money laundering investigation is being carried out and that their names are in some way implicated in it (the so-called tipping off).

The second amendment, incorporated as Article 6(3), imposes an obligation upon the competent authorities not to use the information released in accordance with this provision for purposes other than investigations into money laundering operations. A similar provision can be found in Article 10(3) of the Insider Dealing Directive, preventing the competent authorities from using the information received in any other context apart from administrative or judicial proceedings against insider traders.

In Article 10, the Money Laundering Directive calls for cooperation between the various competent authorities of a Member State. However, the exact structure of such cooperation is to be decided by each state individually. The exception is that if inspections have been carried out in credit or financial institutions by competent supervisory authority and they reveal evidence of possible laundering operations, it must be passed on to the judicial or law enforcement authorities responsible for combating money laundering. In the United Kingdom this obligation has been implemented in Regulation 16 of the Money Laundering Regulations 1993. This regulation places a legal duty upon the supervisory authorities to disclose to the police as soon as practically possible any information collected by them indicating money-laundering operations.

Unfortunately, the Directive's drafters did not include a provision allowing the competent authorities in one Member State to request the transmission of information from another Member State relating to money laundering investigations. This possibility would have ensured the fullest cooperation and assistance between the competent authorities in all Member States by exchanging vital information regarding money launderers who operate across borders. The lack of such a provision is rather curious.

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60. See supra note 37. Enumerating in a restrictive fashion in which cases confidential information collected by or exchanged between banking supervisory authorities may be used and for what purpose.

61. In EC law, the principle is that supervision is exercised solely by the competent authorities of the state which first authorized the institution to pursue business, the so-called "home country principle;" see Second Banking Directive, supra note 24, at art. 13.


considering that such requests are possible under Article 10(1)-(2) of the Insider Dealing Directive.\textsuperscript{64}

As the situation now stands, such assistance can be afforded either in the context of an official request pursuant to a bilateral mutual legal assistance treaty,\textsuperscript{65} or in accordance with the provisions of the European Convention on Mutual Assistance in Criminal Matters\textsuperscript{66} or the Council of Europe Convention on Laundering.\textsuperscript{67}

Article 10 of the latter treaty empowers one signatory party to forward to another party, without prior request, information on proceeds from illegal activities when it considers that, by disclosing such information, the receiving state might be assisted in initiating or carrying out investigations or prosecuting money launderers.\textsuperscript{68} It should be noted that this provision does not give rise to a binding obligation. In other words, signatory parties are entitled to exercise their discretion in deciding whether such information should be transmitted to another state. Taking into consideration that the Convention could be acceded to by non-Council of Europe Members, namely Australia, Canada and the United States,\textsuperscript{69} the prospects which this provision opens for effective international cooperation are enormous, should states be prepared to implement it with an open mind.\textsuperscript{70}

Although it has been argued that this was the first time that a multilateral treaty has envisaged such wide-ranging cooperation between signatory parties,\textsuperscript{71} this submission is not accurate. Article 46(1) of the Schengen Implementing Agreement had already stipulated that "In particular cases, each Contracting Party may, in compliance with its national law and without being asked, send the Contracting Party

\textsuperscript{64} See supra note 37. In Germany this provision has been implemented under paragraph 14 of the Securities Trading Act.

\textsuperscript{65} E.g. Agreement between UK and Italy concerning mutual assistance in relation to traffic in narcotic drugs and the restraint and confiscation of the proceeds of crime, signed in Rome, Italy, on May 16, 1990, in force since May 8, 1994. 1995 Gr. Brit.T.S. No. 33 (Cmnd. 2853).

\textsuperscript{66} See supra note 9.

\textsuperscript{67} See supra note 43.

\textsuperscript{68} Id.

\textsuperscript{69} This reflects the fact that these three countries participated actively in the Convention's drafting; so far, only Australia has signed it, on Sept. 28, 1992.


concerned any information which may be of interest to it in helping prevent future crime." 72

III. THE IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

According to Article 16, the European Community partners had to implement the Money Laundering Directive into their internal legal orders by January 1, 1993 at the latest. However, this deadline was not observed by the majority of Member States. It is interesting to note that even countries which had promulgated relevant legislation before the Directive was adopted failed to achieve complete implementation by the stipulated deadline. For example, in Britain where the laundering of proceeds from drug trafficking was made a criminal offense in 1986,73 the Directive was fully incorporated into national law by virtue of the Criminal Justice Act of 199374 and the Money Laundering Regulations of 1993.75 Similarly, in Belgium, where the Act of July 17, 1990, introduced to its Penal Code Article 505 creating the offense of intentional or negligent laundering of proceeds of any crime,76 the Directive was finally given effect by the Money Laundering Act of January 11, 1993.77

Although it is not within the scope of the present article to analyze how the Directive was turned into domestic legislation in each and every Member State, reference will be made to specific problems, which have been encountered. The method of implementation opted for by most Member States in Continental Europe has been to amend their Penal Codes in order to criminalize money laundering and to promulgate separate legislation catering for the substantive provisions of the Directive (e.g. the identification requirement, the obligation to reveal to the competent authorities all suspicious transactions and the duty not to alert customers suspected of money laundering). This method was followed, inter alia, by Germany where the 1992 Act on impeding illegal drug trafficking and other forms of organized crime introduced a new paragraph 261 to the

72. The Agreement, supra note 44, was concluded three months before the Council of Europe Convention on Laundering, supra note 43.
73. See Drug Trafficking Offenses Act, 1986 § 24 (Eng.). It was later replaced by the Drug Trafficking Act, 1994 § 50 (Eng.).
75. See supra note 62.
Penal Code78 and the 1993 Act on the detection of proceeds from serious crimes incorporated the substantive provisions.79

In the case of the Netherlands, the Dutch Penal Code was amended with effect on February 1, 1992, to criminalize intentional (Article 416) or negligent (Article 417bis) acceptance, possession or transfer of property (including money) which has been obtained by committing any felony.80 The substantive provisions were implemented by the adoption of two separate pieces of legislation: the Identification (Financial Services) Act 1993 and the Disclosure of Unusual Transactions (Financial Services) Act 1993, both of which came into force on 1 February 1994.81 This method of implementation could be considered as advantageous, in the sense that it allows Member States to adopt detailed and precise legislation. However, it has the disadvantage of not being able to tackle the problem effectively should the various pieces of legislation prove to be incoherent with each other. The gist of the Directive is that the panacea of money laundering is not addressed by simply ensuring that it is made a criminal offense; this is only one of the required measures. Equally important is the assistance afforded by many different players: law enforcement agencies, financial institutions, supervisory authorities, etc. Only the concerted effort of the legislature and these players ensures that the money-laundering problem is efficiently tackled.

A. The Case of Spain

This argument is best illustrated by examining the shortcomings of the Directive’s implementation in Spain. Organic Law 1/1988 of March 24, 1988, reforming the Penal Code in relation to illegal drug-trafficking introduced Article 546bis(f), which penalized the laundering of proceeds derived from dealing in drugs.82 A first attempt to incorporate the Directive’s substantive provisions was the promulgation, on December 28,
Since this instrument did not implement the Directive fully, a provision was made whereby the government was granted six months from the day the Act entered into force (i.e. until June 28, 1994) to adopt the necessary supplementary legislation. However, this deadline was not observed and, in effect, Spain was faced with a situation where only some aspects of the anti-money laundering legislation were in place. The supplementary legislation was finally promulgated on June 9, 1995, as Royal Decree 925/1995.

This plethora of instruments regulating the same area has resulted in unavoidable contradictions. As already mentioned, Article 564bis(f) of the Penal Code criminalizes the laundering of proceeds deriving solely from drug trafficking. Whereas the scope of Act 19/1993 has been augmented to cover not only drug trafficking proceeds, but also proceeds from criminal activities perpetrated by terrorists or by organized crime groups. It follows that although a person who launderers proceeds from an armed attack on a security van carried out by terrorists may not be prosecuted under the Penal Code, a bank manager who failed to report a transaction for which there was evidence or knowledge that constituted an operation to launder proceeds from the armed attack will be prosecuted under Act 19/1993. This divergence between the two instruments, which had been acknowledged by the Spanish government, was rectified in Article 301 of the new Penal Code.

It would be untrue to argue this state of affairs paralyzed the Spanish law enforcement agencies. The argument made here is that, until Royal Decree 925/1995 was promulgated, Spanish law was not in a position to deal, in a drastic manner, with money laundering operations. It is interesting to note the money laundering operations which have been unveiled by the Spanish police were not discovered as a result of the legislation’s application but by reason of the arrest of the drug traffickers,


84. Published in B.O.E., June 9, 1995, No. 160 and corrected in B.O.E., Oct. 31, 1995, No. 260. The Decree, inter alia, provides the complete list of entities whose activities are covered by the money laundering legislation (art. 2); stipulates in which cases the identification requirement does not apply (art. 4); sets out the functions of and the procedure before the Commission for the Prevention of Money Laundering and Monetary Offenses, the competent authority to receive notification of suspicious transactions (arts. 19-26); and amends the penalties imposed for money laundering offenses (art. 16).


who revealed how the proceeds were laundered. The most spectacular prosecution occurred in October 1995, when four individuals were accused of laundering two billion pesetas ($13 million) between 1988 and 1991, which had derived from drug trafficking. The method of laundering was a very simple one: they exchanged in a specific bank the narcotics proceeds, held in Italian liras and Dutch florins, into pesetas.

B. The Case Of Austria

The implementation of the Money Laundering Directive has not only been problematic for the existing Member States, but also for countries which acceded to the European Community after it was adopted. The case of Austria affords a very good illustration and shows that, notwithstanding the deep integration of the European Community's banking sector, there still exist considerable differences regarding banking ethics. As a signatory party to the Agreement on the European Economic Area and to the Treaty of Nordic and Austrian Accession, under which she became a Member State on January 1, 1995, Austria was under an obligation to transform the Money Laundering Directive into national law. Implementation was achieved on July 30, 1993, with the promulgation of the Penal Code (Money Laundering) Act 1993.

The Act introduced the offense of money laundering in paragraph 165(1) of the Austrian Penal Code. It stipulates that anyone who conceals valuables in excess of ASh 100,000 ($7,900) obtained through a crime or who disguises their illicit origin or makes untrue statements in respect of them is to be punished with a maximum term of imprisonment of two years or with a pecuniary penalty. Paragraph 165(3) deals with money laundering operations involving more than ASh 500,000 ($39,500) or carried out by members of criminal groups which were established with the

92. Id.
purpose of continuously laundering illicit proceeds; these offenses attract the heavier punishment of a term of imprisonment between six months and five years. The lack of the possibility to impose a pecuniary penalty on money launderers involved in such cases should be criticized, because, as consistent practice has shown, it is not always possible for the prosecution to detect the physical location of the laundered funds so as to proceed with their seizure. In these instances, the imposition of a heavy penalty results, at least partially, in skimming the convicted launderer of his illicit gains.

Since 1996, Austria has been involved in a bitter dispute with the European Commission on whether its banking laws comply with the requirements of the Money Laundering Directive. The issue of the dispute is the fact that the Austrian legislation, unique among Member States, allows the opening and holding of anonymous savings accounts, known as Sparbuch Kontos. On February 15, 1996, the Commission forwarded a formal complaint warning the Austrian government that, by not ensuring the proper identification of individuals opening savings accounts, it had failed to comply with its obligations under the Directive. The Commission concluded its communication with requesting Austria to proceed immediately with abolishing all such anonymous accounts. The European Commission has not been alone in severely criticizing Austria in this respect. A 1995 United States government report on the vulnerability of the world banking system to money laundering ranked Austria’s banking sector alongside those of Colombia, Venezuela and Thailand because of its potential for abuse by money launderers.

On April 9, 1996, Austria flatly rejected the Commission’s complaint. Reflecting the strong nationalist reaction, which this issue provoked, Mr. Klaus Liebscher, the Central Bank president, characteristically said that anonymous savings accounts “are part of the Austrian savings culture [which] should not be touched.” In its response, Austria insisted that these accounts be maintained on the following considerations. First, the Austrian Constitution guarantees bank secrecy and domestic legislation provides for adequate guarantees that bank secrecy will be lifted in the

93. Laundering the proceeds of a criminal organization at its request is regulated in Article 278a of the Austrian Penal Code and is punishable with a term of imprisonment of between six months and five years.

94. The Commission has estimated that Austria’s population of eight million maintains some 26 million such savings accounts holding approximately ASh 1,4 trillion ($ 110 billion).


98. Id.
event of criminal investigations. Second, bank accounts have been held anonymously in Austria for 200 years. Third, these accounts may only be opened by Austrian citizens and the maximum amount held in them cannot exceed ASh 200,000 ($15,800). Therefore, they are not of particular assistance to money launderers who are mostly engaged in transferring considerably larger amounts. Fourthly, although during 1995 Austrian banks reported 310 cases of suspected money laundering transactions, with a volume of ASh 2.5 billion ($197 million), only a handful of these involved savings accounts.

As was expected, the European Commission was not at all impressed by the argumentation put forward by Austria and especially by the submission that a different banking culture has existed for so long, which should be taken into consideration. Consequently, in September 1996, the Commission addressed Austria in another communication stating its view that the rule of anonymity in opening savings accounts is incompatible with the identification requirement enshrined in Article 3(1) of the Directive and that the continued existence of such accounts offers a safe haven for illicit funds. The gist of the Commission’s communication was that the current Austrian legislation infringes upon not only European, but also common international standards on the prevention of money laundering to which all countries are expected to subscribe.

Austria’s uncompromising position on its bank secrecy laws led the Commission to commence the infringement proceedings envisaged in Article 169 of the EC Treaty. Thus, in March 1997, it sent a Reasoned Opinion to the Austrian government where it recorded the alleged violations of the Money Laundering Directive and gave Austria final opportunity to have its anonymous bank accounts abolished. In April 1997, the Austrian government rejected the Commission’s contentions and

99. Id.

100. According to paragraph 40(1) of the Austrian Banking Act 1993 (Bankwesengesetz) published in Bundesgesetzblatt, July 30, 1993, No. 194, at 3903, when banks suspect money laundering operations, they are under the duty to establish the customer’s identity and communicate promptly their suspicions to the law enforcement authorities. The latter are empowered under paragraph 40(3) to demand that the bank does not carry out the suspicious transaction until authorization to do so has been granted. This power has been strongly criticized because it infringes customers’ rights without the legislation expressly authorizing it. See Fuchs, supra note 97.

101. See supra, at note 21.


103. This provision reads as follows: “If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”
refused to comply with its request. The next step in the infringement proceedings is for the Commission to lodge an application before the European Court of Justice asking for a declaration that Austria has violated its obligations under the EC Treaty.

It has been reported that on October 15, 1997 the European Commission decided to refer the case to the European Court of Justice. The Commission's case is based on two considerations. First, that the retention of anonymous savings accounts is a flagrant breach of the principle of identification cornerstone of the Money Laundering Directive. Second, that the offense of money laundering applies only if the laundered proceeds exceed the threshold amount of ASH 100,000 contravenes the Money Laundering Directive, which contains no such threshold. Although it is an undisputed reality that the judgments of the European Court can only rarely be predicted, it is submitted that Austria's position will not be vindicated. This is because the European Community's financial sector is so deeply integrated that no Member State could be permitted to maintain contradictory legislation. This is so, even though there are no clear cases suggesting that these anonymous savings account are being consistently used for money laundering operations in Austria.

IV. OTHER COMMUNITY ACTIVITIES RELATING TO MONEY LAUNDERING

A. The European Police Office (Europol)

In July 1995, the Council of Ministers drew up the Convention setting up EUROPOL. Before examining what powers EUROPOL has been conferred in dealing with money laundering, it is worthwhile to refer briefly to EUROPOL's predecessors, namely the Trevi Group and the European Drugs Unit (hereinafter "EDU"). For a substantial number of years Member States had collaborated on an ad hoc basis on a string of


105. See EC Treaty, supra note 103, at art. 169(2).


108. See supra note 21, at art. 3.

issues falling within the scope of the responsibility of justice/home affairs ministries. The most successful of these arrangements has been the Trevi Group. This entity was set up during the December 1985, Rome Summit of the European Council and became operative in June 1986. The Trevi Group's original terms of reference were to promote police cooperation and exchange of information in relation to terrorist activities.

Even though justice and home affairs ministers from all Member States participated in the Trevi Group, it operated outside the formal EC structure. In effect, its decisions were not legally binding on Member States, since they were not legislative acts of the European Community (they rather took the form of gentleman's agreements) and, at the same time, they were not open to judicial review by the European Court of Justice. In its meeting in Paris, France in December 1989, the Trevi Group adopted a declaration stating that its activities will extend to drug trafficking and money laundering of narcotics proceeds, because these were considered as areas of high priority.110

The important but not well documented work undertaken by the Trevi Group was integrated in Title IV of the Treaty on European Union (hereinafter "TEU") providing for cooperation in the fields of justice and home affairs (the so-called third pillar). More particularly, it formed part of the Coordinating Committee of Article K.4. The European Drugs Unit was established by the Trevi Ministers in June 1993, and became operational in January 1994.112 It was conceived as an entity to replace the activities of the Trevi Group until EUROPOL was set up.113 The European Council meeting in Essen in December 1994, decided to widen its mandate by including the following three criminal activities, which since the early 1990's have constituted the new areas of criminality in Europe: trafficking in motor vehicles; trafficking in nuclear and radioactive substances; illegal immigration smuggling and associated money laundering operations. Furthermore, it asked the Council to implement this action immediately by appropriate legal instruments.114

Soon thereafter the EDU’s legal basis was replaced by a Joint Action based on Article K.3 TEU,115 which empowers the Council of Ministers to

110. See Benyon et al, Police Cooperation in Europe - An Investigation, 157 (Centre for the Study of Public Order, University of Leicester, 1993).

111. See supra note 16.


113. Id.


adopt joint action in all matters of common interest in the fields of justice and home affairs. However, this only applies if the objectives of the European Union can be better achieved in this way rather than by the Member States acting individually. The areas of common interest are enumerated exclusively in Article K.1 TEU and include, *inter alia*, asylum, immigration and fraud.

In Article K.1 TEU the existence of EUROPOL was envisaged in the context of "police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime in connection with the organization of a Union-wide system for exchanging information within a European Police Office." Although this provision does not expressly lay down that such an entity is to be set up, the Council of Ministers drew up the EUROPOL Convention on the basis of the power conferred upon it under Article K.3(2)(c) to adopt treaties in any of the areas of common interest mentioned in Article K.1.

Although the drawing up of the Convention had already been agreed in principle by the European Council meeting in Lisbon in June 1992, it met with considerable opposition which delayed its conclusion until June 21, 1996, when it was finally signed. The EUROPOL Convention is expected to enter into force on October 1, 1998, by which time it should have been ratified by all 15 Member States.

EUROPOL’s objective, as elaborated in Article 2(1) of the Convention, is to promote the effectiveness and cooperation of the Member States’ competent authorities in preventing and combating terrorism, narcotics trafficking and other serious international crimes. However, EUROPOL will assume jurisdiction only if there are factual indications that an organized criminal structure is involved affecting two or more Member States in such a way as to require a common approach by Member States owing to the scale, significance and consequences of the offenses concerned.

This objective is to be achieved progressively. According to Article 2(2) of the EUROPOL Convention, its initial terms of reference are to prevent and fight narcotics trafficking, trafficking in nuclear and

116. *Id.*

117. *Id.*

118. See *Bull. Eur. Communities* 6-1996, point I.5. The Convention is based on the Revised Draft of Oct. 25 1994, which has not been officially reproduced. This draft was the object of a meticulous examination by the British House of Lords; see House of Lords, Select Committee on the European Communities, Session 1994-95, 10th Report, EUROPOL, Apr. 25 1995, HL Paper 51.


radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime. 121 Its areas of jurisdiction are identical with those of EDU with the addition of illicit trade in human beings. By virtue of Article 2(3), EUROPOL is also competent to deal with illegal activities to launder the proceeds from these offenses. By specifically linking money laundering with these crimes, the Convention acknowledges the fact that the traditional patterns of crime have changed fundamentally and that it is now imperative to address effectively at the Community level specific manifestations of these offenses, such as the laundering of proceeds.

Since the EUROPOL Convention did not offer its own definition of money laundering, it was to be expected that the definition contained in the Money Laundering Directive would have been adopted. However, the Convention expressly states that the term money laundering is understood as meaning the criminal offenses listed in Article 6(1)-(3) of the Council of Europe Convention on Laundering. 122 The restrictive nature of the definition contained in the Directive made it inadequate for inclusion in the EUROPOL Convention, which opted for the quite extensive provisions of the Council of Europe Convention on Laundering.

B. Relations with Central and Eastern European Countries

The question of whether the membership of the European Community should expand to include the states of Central and Eastern Europe has given rise to considerable controversy. During the Luxembourg Summit Meeting (December 12-13, 1997), the European Community took the political decision to proceed with enlargement with 11 candidate-states. 123 With the six countries which were chosen as the first group of states to be considered for membership (Cyprus, Estonia, Hungary, Poland, Slovenia and the Czech Republic), the negotiations were formally opened in London, Britain on March 30, 1998. 124 This decision was the culmination of a long process, which commenced in the early 1990’s, when the European Community entered into association agreements with these states. 125

121. On Dec. 4, 1997, the Justice and Home Affairs Ministers agreed to extend the EUROPOL’s jurisdiction to include the collection and analysis of information on child pornography; see Bull. Eur. Union 12-1997, point 1.4.9.

122. See supra note 43.


124. With the remaining five states (Bulgaria, Latvia, Lithuania, Romania, and Slovakia) the European Community formally opened the accession process; see The European Commission (London Office), The Week in Europe, Apr. 2, 1998, WE/13/98, at 1.

These instruments, commonly known as *Europe Agreements*, have aimed at facilitating their economies to reach the standard, which is required for eventual European Community membership. One common aspect of these Agreements is that they incorporate the following provision, which imposes upon them a duty to become active in combating money laundering:

1. The Parties agree on the necessity of making every effort and cooperating in order to prevent the use of their financial systems for laundering of proceeds from criminal activities in general and drug offenses in particular;

2. Cooperation in this area shall include administrative and technical assistance with the purpose of establishing suitable standards against money laundering equivalent to those adopted by the Community and international fora in this field, in particular the Financial Action Task Force.

The essence of this provision, which appears as Article 85 in the Europe Agreement with Poland, as Article 86 in the Europe Agreements with Hungary, Slovakia and the Czech Republic and as Article 87 in the Agreements with Bulgaria and Romania, is that the European Community expects that these countries shall adopt legislation which incorporates the Money Laundering Directive and the recommendations of the Financial Action Task Force (FATF). The latter was conceived during the 15th Economic Summit Meeting of the G-7 Group (Paris, July 1989), as a body to promote international cooperation in preventing the utilization

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126. The idea to proceed with the Conclusion of the Europe Agreements was launched by the Commission in its Communication of Aug. 27, 1990 on the conclusion of association agreements with countries of Central and Eastern Europe, COM(90) 398 final; Bull. Eur. Communities 7/8-1990, point 1.4.5.


132. Signed in Brussels, Belgium on Mar. 8, 1993, 1994 O.J. (L 358) 3. See also, the Europe Agreement with Slovenia, which was signed in Luxembourg on June 10, 1996, Bull. Euro. Communities 6-1996, point 1.4.52. This Agreement has not been officially reproduced.

of the banking system and financial institutions for money operations. Its recommendations, which were adopted on February 7, 1990, and revised on June 28, 1996, have long been regarded as the minimum standards that national anti-money laundering laws must observe.

Already a number of countries in the region have promulgated comprehensive anti-money laundering legislation: Hungary, the Slovak Republic, Slovenia, the Czech Republic, Poland and Lithuania. On September 8, 1994, the European Community’s Ministers for Justice and Home Affairs met with their counterparts from Central and Eastern Europe in Berlin, Germany to discuss even closer cooperation in the fight against organized crime. They agreed to make full use of the relevant provisions of the Europe Agreements and to focus their attention, apart from drug trafficking, to illegal immigration networks, crime involving radioactive and nuclear materials, motor vehicle theft and money laundering of proceeds derived from such offenses.

There is no dispute that most Central and Eastern European countries have made great advances in putting in place an effective framework for combating money laundering. However, it should not escape one’s attention that these states were asked to change fundamentally the structure of their economy and financial sector within a relatively short period of time. This process has been plagued by the lack of adequate financing and expertise, and by inexperience on how to resolve conflicts between existing legislation and the adopted anti-money laundering statutes. These problems have been highlighted in a recent report by the United States government,


143. Id.
which has recorded the request by Hungary and Poland (the region's most important economies). The report states that the United States and the European Community provide increased training and financial support to help their banking institutions and law enforcement agencies to implement more strenuous anti-money laundering controls.\(^{144}\)

Finally, it should be noted that the European Community is taking every opportunity to press the candidate-states of Eastern and Central Europe to deal with organized crime in an effective manner. Thus, when in March 1998, the London negotiations on European Community membership were inaugurated,\(^{145}\) the European Community and the eleven applicant states agreed to establish the European Conference as a high level forum for discussing and implementing policy issues relating to the European Community's enlargement.\(^{146}\) Combating transnational organized crime was one of the five priority areas on which the European Conference will concentrate.\(^{147}\)

C. *The Extradition Convention (The Convention)*

Perceived as a top priority in improving judicial cooperation,\(^{148}\) the Extradition Convention [hereinafter "Convention"] relating to Extradition between Member States of the European Union was adopted on September 27, 1996.\(^{149}\) Building upon two relevant Conventions adopted under the auspices of the Council of Europe, namely the European Convention on Extradition\(^{150}\) and the European Convention on the Suppression of Terrorism,\(^{151}\) it aims at accelerating extradition between Member States and at reducing the number of cases where extradition might be refused. In facilitating the latter goal, the Convention breaks away for the traditional rule of double criminality.\(^{152}\)


\(^{145}\) See supra note 124.


\(^{147}\) Id.


\(^{149}\) 1996 O.J. (C 313) 12; Bull. Eur. Communities 9-1996, point 1.5.3. The Explanatory Memorandum to the Convention is published in 1996 O.J. (C 374) 4. This instrument should not confused with the EU Convention on Simplified Extradition Procedure, 1995 O.J. (C 78) 2; Bull. Eur. Union 3-1995, point 1.5.3.

\(^{150}\) See supra note 8.


\(^{152}\) See supra note 26.
Article 3(1) of the Convention stipulates that extradition must be granted when requested in relation to any offense in the field of drug trafficking and other forms of organized crime, which is punishable in the requesting state by penalty of deprivation of liberty for more than twelve months. The innovative aspect of the Convention is that the requested state must observe the extradition request, even if its domestic law does not stipulate that the same facts and circumstances constitute a criminal offense. In other words, the rule of double criminality does not apply. Since laundering of drug proceeds is a crime directly associated with trafficking in narcotics, the Convention undoubtedly facilitates the extradition of money launderers. However, there is one consideration, which will significantly restrict the ambit of this provision: Article 3(3) allows signatory parties to declare that they reserve the right not to apply Article 3(1) or to apply it under certain conditions.

Whether the Extradition Convention will ever enter into force is open to speculation, since it requires the prior ratification by all fifteen Member States. Some of its provisions are extremely far reaching and may give rise to problems of a constitutional nature. For example, Article 8(1) lays down the rule that extradition may not be refused on the ground that the prosecution or punishment of the individual whose extradition is sought would be barred under the law of the requested Member State.\(^{153}\) Finally, it should be noted that this Convention is not a comprehensive extradition treaty and does not seek to replace the European Convention on Extradition as between the Member States.\(^{154}\) In effect, the preamble makes it clear that the provisions of the 1957 Treaty remain applicable for all matters not covered by it.

V. CONCLUSIONS

As G. Giacomelli, the Executive Director of the United Nations International Drug Control Program, noted the unprecedented advances in the areas of technology and communications together and the fact that the banking sector is becoming more and more globalized have resulted in making money laundering an extremely sophisticated crime.\(^{155}\) The European Community, as a regional organization whose combined

\(^{153}\) See supra note 8. It would appear that this provision contradicts Article 10 of the Council of Europe Convention on Extradition. Stipulating that extradition will not be granted when the person claimed has, according to the law of either the requesting or the requested state, become immune by reason of lapse of time from prosecution or punishment.

\(^{154}\) Note that Article 28(2) of the Council of Europe Convention on Extradition, supra note 8, expressly allows signatory parties to conclude between them multilateral agreements in order to supplement the provisions of this Convention or to facilitate the application of its principles.

membership controls the largest banking sector in the world, is particularly vulnerable to be exploited by the internationally organized money launderers, whose vast proceeds exceed the annual gross national product of the smaller Member States.

The European Community has not regarded money laundering as simply a criminal offense. From the very beginning its efforts concentrated in making the laundering of illegal proceeds a crime and in adopting a series of measures to protect the banking and financial sectors from the sophisticated methods used by money launderers. However, it was soon realized that by concentrating on the Member States’ banking and financial sectors, the European Community was not addressing the panacea of money laundering effectively, because launderers can very easily transfer their operations in less regulated systems. Therefore, the European Community, by exercising the considerable influence it enjoys, has attempted to persuade third countries to become seriously involved in the fight against money laundering.156

Parallel to these efforts, the European Community has strived to improve its own framework. The conclusion of the EUROPOL Convention and the Treaty on Extradition will undoubtedly contribute in materializing this aim. Furthermore, the application of the Money Laundering Directive has already made apparent its shortcomings, especially in relation to its ambit. In June 1996, the European Parliament regarded that the system for fighting money laundering was inadequate and called upon the Community to revise urgently the provisions of the Money Laundering Directive and, in particular, to extend its scope to cover all conceivable natural and legal persons involved in financial transactions.157

It has been reported that the Council of Ministers is considering broadening both the list of predicate offenses and the compulsory reporting of suspected transactions to gambling, prostitution and building industries.158 However, there are no clear indications that an amendment is imminent. Any amendment of the Money Laundering Directive would be a very delicate exercise, because its implementation in the domestic laws of the Member States has led to considerable disparities among them. Perhaps it is high time to realize that whether the fight against money laundering will be won or lost does not any longer depend so much on further European Community initiatives but on how committed Member States are in applying, observing and safeguarding the existing framework.


Despite the spectacular integration that the European Community has achieved in the banking and financial sectors, Member States still retain peculiarities in these areas, as the dispute regarding Austria’s anonymous savings accounts has characteristically shown.
THE CONVENTION ON THE RIGHTS OF THE CHILD: THE NECESSITY OF ADDING A PROVISION TO BAN CHILD MARRIAGES

Ladan Askari

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The United Nations Convention on the Rights of the Child [hereinafter "CRC"], adopted on November 20, 1989 is considered by many to be a comprehensive treaty.\(^1\) It is identified as comprehensive because it not only contains civil and political rights such as freedom of expression and religion but also economic, social, and cultural rights including the rights to an adequate standard of living, to healthcare, and to education.\(^2\) For

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instance, CRC articles 6 through 22 cover civil and political rights, while articles 23 through 31 are economic, social, and cultural ones. Cynthia Price Cohen further identifies the CRC as all encompassing given that it protects and promotes the rights of the girl child.

Despite its comprehensiveness, the CRC does not adequately protect and promote the rights of girl children as Cynthia Price Cohen seems to believe. The absence of a provision against child marriage will be used as the basis for the conclusion that the CRC does not apply to boys and girls equally. While the CRC was designed to be gender blind, violations that primarily affect boys (i.e., child soldiers) are covered under CRC article 38. The same consideration is not given to violations predominantly affecting girls with child marriage. This argument can be taken further in the sense that violations that are peculiar to girls (female circumcision) are likewise not expressly addressed in the CRC. For the purposes of this article, however, the focus shall be on child marriages, specifically those that involve girl children. This study will examine various international law treaties, which contain provisions against child marriage and conclude that this is not a sufficient reason to exclude a provision against early marriage from the CRC.

This article will begin with an overview of the incidence of child marriages. Next, an examination of the various provisions contained in the CRC, as well as the Convention on the Elimination of Discrimination Against Women [hereinafter “CEDAW”] article 16, banning child marriages, the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages [hereinafter “Marriage Convention”] will be conducted as a way to determine their efficiency in ending early marriages. This examination will prove that different factors including: vague treaty terminology, loopholes, treaty reservations, and refusal to ratify make these other provisions’ and/or treaties’ attempts to ban child marriages less effective than if the CRC itself contained a provision against early marriage. In the end, only by modifying the CRC to include a provision against child marriage can it be deemed a more


5. It should be noted that in certain regions of the world including the northern Indian state of Rajasthan, boys are also victims of child marriage and are married off during adolescence. John F. Burns, Though Illegal, Child Marriage is Popular in Part of India, N.Y. TIMES, May 11, 1998, at A1, A8.
gender neutral and complete treaty and one which protects the rights of boys and girls equally.

I. AN OVERVIEW OF THE INCIDENCE OF CHILD MARRIAGES

Over thirty countries still allow child marriages below the age of fifteen. These countries include African countries such as Ethiopia, Kenya, and Nigeria, Latin American countries including Peru and Argentina, Middle Eastern countries such as Lebanon and Iran, Asian countries such as Sri Lanka and Malaysia, and North American ones like the United States.

Some researchers claim that the marriage age has increased worldwide. However, upon closer examination these claims are invalidated because most marriages, despite legislation advising otherwise, are not registered. Furthermore, a shift toward higher age at marriage may not be indicative of a shift in customs or social attitudes, but rather a state policy designed to serve demographic interests. In other words, countries driving toward development are raising the marriage age as a way to reduce fertility. Finally, age at marriage and the potential for change differs from region to region.

The propensity to raise the marriage age is higher in urban areas, where laws are more comprehensive and more expeditiously enforced. Educational levels tend to be higher in urban areas than in rural areas. Due to these factors as well as the paramount importance of tradition, women have fewer opportunities in rural regions. Consequently, child

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6. Even if the CRC is modified to include a provision against child marriage, it will still remain lacking and discriminatory toward girl children because it also does not contain a provision directly addressing female circumcision.


marriage retains its advantages for poor families in rural locations. These advantages stem from cultural, religious, social, political, and economic variables.

The demand of dowries combined with poverty give rise to a situation where girls are perceived as economic burdens. Early marriage relieves the parents of the costs and responsibilities attached to raising a girl. At the same time as the girl’s parents are relieved of their burden, the groom’s parents also benefit because they gain an unpaid slave and often, a dowry. Thus, child marriages are mutually convenient for both sets of parents.

Another purpose child marriage serves and one sanctioned by the religious community is to assure the girl’s chastity. Virtue is a highly prized commodity in African, Asian, and Arabic countries. Parents worry that the longer the girl remains unmarried, the greater the threat to her virtue. Furthermore, under Islamic law for instance, each year past a girl’s puberty, doubts concerning her purity increase. In parts of India this results in dowry payments rising for each year after menarche, "... an unwed girl who has attained puberty can already be classed as damaged goods." In contrast, the younger the bride, the less dowry demanded.

Early marriage also ensures a girl is young enough to be molded and trained by her husband and in-laws, before she can develop a personality or identity of her own. Early marriage denies a girl’s independence. They go directly from being under their father’s domination to their husband’s...
domination. Consequently, she is powerless and dependent. This state of affairs is further intensified if the man she marries is markedly her senior, assuring the girl a lifetime of intimidation, inequality, and subjugation.

Some connect early marriage to social status. Marriage grants girls adult status (even if they are only twelve years old or less) with domestic and childbearing responsibilities. These domestic responsibilities are often considered a girl's best source of education, whereas actual schooling is considered a waste. A girl's sole achievement in life hinges on her fertility and early marriage ensures that she will have many fertile years ahead and be the mother of many sons, thereby further increasing her status. This view is not shared by all. For instance, Erica Royston and Sue Armstrong maintain that high maternal deaths, following too many pregnancies, too closely spaced, starting at too young an age, imply low social status for women. This is so because women's needs and health have been neglected in favor of men's needs. Other critics argue that rather than early marriage increasing a girl's status, it is indicative of her inferiority. It forestalls her personal development and limits her options to mother and wife. These critics, therefore, advocate delaying marriage as a way to raise women's status.

International law is one among several vehicles designed to solve the problems associated with child marriage such as right to life, right to control the number and spacing of one's children, right to enter a marriage freely, right to equality, and so forth. Various international law treaties including the CRC, CEDAW, and the Marriage Convention have all to varying degrees tackled the issue of child marriage. The following sections examine the efficacy of these approaches to ending the practice of early marriage.

II. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD'S TREATMENT OF CHILD MARRIAGE

As already mentioned, there is no provision in the CRC which specifically or directly bans the practice of child marriage. However, the
case could be made that certain other provisions under the CRC indirectly address and prohibit early marriage. This section will analyze these other provisions and show why they fail to satisfactorily protect girls against child marriage.

One article that can be applied to child marriage is CRC article 2(2). CRC article 2(2) places a duty upon States Parties to, "take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members." Child marriage, which chiefly affects girls is a form of sex discrimination that stems from the parents’ belief that girls are less valuable than boys. Girls are viewed as economic burdens because money needs to be raised for their dowries, or they are viewed as an inconvenience because it is costly to raise daughters when the money is better spent on sons, who will later take care of the parents in their old age. Therefore, because of son preference, daughters are discriminated against and married off at a young age as a way for parents to dispose of their burden. Consequently, when States Parties fail to legislate or enforce the ban on child marriages, they perpetuate the type of discrimination outlined in CRC article 2(2).

Unfortunately, because CRC article 2(2) does not specifically mention early marriage, proponents of child marriage can argue that it is not applicable to the practice of early marriage. They can further employ CRC article 2(1) to invalidate the claims of CRC article 2(2). CRC article 2(1) prohibits “discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” CRC article 2(1) can be interpreted to support child marriages because they stem from the parents’ religious

27. CRC, supra note 3, at art. 2(2).
28. SOHONI, supra note 8, at 32; Lynn P. Freedman & Deborah Maine, Women's Mortality: A Legacy of Neglect, in THE HEALTH OF WOMEN: A GLOBAL PERSPECTIVE 150 (Marge Koblinsky et al. eds.); Child Mothers and Marriage, supra note 7, at 14; CHALLENGES FOR CHILDREN, supra note 12, at 30; PREVENTING MATERIAL DEATHS, supra note 7, at 55.
29. SOHONI, supra note 8, at 21-22; O'CONNELL, supra note 7, at 76; Christiana E.E. Okoje, Gender Inequalities of Health in the Third World, 39 SOC. SCI. MED. 1237, 1244 (1994); FREEDMAN & MAINE, supra note 28, at 150; SUSAN HILL GROSS, WASTED RESOURCES, DIMINISHED LIVES: THE IMPACT OF BOY PREFERENCE ON THE LIVES OF GIRLS AND WOMEN 43 (1992); SOHONI, supra note 8, at 7-8.
beliefs. For instance, because Islamic law sanctions early marriage, attempts to ban child marriages can be perceived as discriminating against the parents’ religious convictions and in violation of CRC article 2(1). As a result, CRC article 2(1) and CRC article 2(2) clash with one another and offer conflicting rights when applied to the practice of child marriage.

Child marriage likewise violates CRC article 6 (right to life). Early marriage means early and multiple pregnancies. Pregnancy is encouraged soon after marriage because it is considered the female’s role in life. She is expected to assume her obligations and prove her capability without delay. Unfortunately, this assignment carries grave physical dangers for which child brides are not equipped. Girls starting from ten years old to fourteen years old are five to seven times as likely to die during pregnancy than the lowest risk group.

Rebecca Cook links the roots of maternal mortality to infancy or even prior to birth. According to her, calcium, vitamin, or iron deficiencies begin at these stages and continue throughout the girl’s life leading to several health and malnutrition problems such as stunted growth, contracted pelvis, iron deficiency anemia, all of which make pregnancy an even more life threatening endeavor for the girl. Underdeveloped and inadequately developed bodies, which are the result of unfulfilled nutrition needs and skeletal growth, lead to obstructed labor due to the disproportion between the pelvis size and the baby’s head. Labor becomes a trying and frequently fatal undertaking because the pelvis has not fully developed for

32. SOHONI, supra note 8, at 33; O’CONNELL, supra note 7, at 15; SOHONI, supra note 8, at 9; Mane, supra note 14, at 83.

33. Anderson, supra note 11, at A27; SOHONI, supra note 8, at 12-13; SAEED, supra note 11, at 139; Ghosh, supra note 9, at 26.

34. Low risk groups are women twenty to twenty-four years old. SOHONI, supra note 8, at 74; Julie Mertus, State Discriminatory Family Law and Customary Abuses, in WOMEN’S RIGHTS, HUMAN RIGHTS 138 (Julie Peters and Andrea Wolper eds., 1995); DIXON-MUELLER, supra note 7, at 142; KATARINA TOMASEVSKI, WOMEN AND HUMAN RIGHTS 31 (1993); MAGGIE BLACK, GIRLS AND WOMEN: A UNICEF DEVELOPMENT PRIORITY 9 (1993); Challenges for Children, supra note 12, at 30; Julia Cleves Mosse, The Risks of Being Female, in CHANGING PERCEPTIONS: WRITINGS ON GENDER AND DEVELOPMENT 86 (Tina Wallace & Candida March eds., 1991); PREVENTING MATERIAL DEATHS, supra note 7, at 38.


36. Id.

37. PRIVATE DECISIONS, PUBLIC DEBATE: WOMEN, REPRODUCTION AND POPULATION 5 (Judith Mirsky & Marty Radlett eds., 1994); BLACK, supra note 34, at 9; MOSSE, supra note 34, at 86; Ghosh, supra note 9, at 26.
up to two years after menarche (2% to 9% of pelvic growth occurs during this time).\textsuperscript{38}

Child pregnancies further endanger the life of the young girl because they take place too early, too frequently, and are too closely spaced.\textsuperscript{39} Estimates indicate that approximately eight births are needed to ensure the survival of some children.\textsuperscript{40} The child bride’s survival rate is affected by births less than two years apart or births to more than four children.\textsuperscript{41}

Child marriage violates CRC article 6 because often high-risk pregnancies lead to maternal mortalities. Advocates of child marriage can invalidate this article’s applicability to the practice of early marriage by claiming that not all early marriages lead to death. The ambiguous language of article 6 then offers loopholes for advocates of child marriage to secure that this practice continues. CRC article 6 would have been a more effective deterrent against early marriage if it read as, States Parties recognize that every child has the inherent right to life. Furthermore, this right shall not be discriminated against by the perpetuation of such practices as child marriage, female circumcision, child soldiers, child labor, etc.

Child marriage similarly violates CRC article 24(3) calling on States Parties to “abolish traditional practices prejudicial to the health of children.”\textsuperscript{42} As already mentioned, one outcome of child marriage, a traditional practice in many societies, is the health risks associated with early pregnancy. Unfortunately, because CRC article 24(3) fails to expressly mention child marriage as one of the traditional practices to which it is referring, many States Parties can choose to deny that the practice of child marriage falls under the provisions of article 24(3).\textsuperscript{43}

Child marriage violates the girl child’s right to education as outlined under CRC article 28. Early marriage ensures, if her education has not already been terminated, the end of the girl’s education. The parents, knowing that she will marry young, are not overly concerned with her

\textsuperscript{38} Kathleen Merchant & Kathleen Kurz, Women’s Nutrition Through the Life Cycle: Social and Biological Vulnerabilities, in THE HEALTH OF WOMEN: A GLOBAL PERSPECTIVE, supra note 28, at 75; PREVENTING MATERIAL DEATHS, supra note 7, at 47.

\textsuperscript{39} O’CONNELL, supra note 7, at 24; DIXON-MUELLER, supra note 7, at 142; Child Mothers and Marriage, supra note 7, at 14; Renee Holt, Women’s Rights and International Law: The Struggle for Recognition and Enforcement, 1 COLUM. J. GENDER & L. 117, 124 (1991); STRATEGY FOR IMPROVED NUTRITION OF CHILDREN AND WOMEN IN DEVELOPING COUNTRIES 30 (1990).

\textsuperscript{40} SOHONI, supra note 8, at 81.

\textsuperscript{41} DIXON-MUELLER, supra note 7, at 142; CHALLENGES FOR CHILDREN, supra note 12, at 31; PREVENTING MATERIAL DEATHS, supra note 7, at 187.

\textsuperscript{42} Supra note 3, at art. 24(3).

education. There is no specific reference to child marriage under the terms of CRC article 28 so this too can be interpreted as not addressing the practice of early marriage. Additional safeguards can also be employed to circumvent article 28. For example, grooms can promise to allow child brides to attend school after marriage thereby no longer rendering the practice of early marriage in violation of the right to education. Whether they actually comply with their promise or whether the local government officials apply pressure on the population to obey the right to education provision of the CRC is another matter. What is clear is that the CRC article 28 is not a satisfactory ban on child marriage and can be easily bypassed.

The provision in CRC article 32(2a), "States Parties shall provide for a minimum age for admission to employment," could also be applied to the practice of child marriage. Child brides often end up no better than servants or unpaid slaves in their in-laws household. Unfortunately, CRC article 32(2a) appears to mainly address child labor in the public sector. However, servitude of pubescent girls in the private sector is also a form of child labor, which possesses the same hazards and pitfalls (i.e. long hours, physical punishment, stunted mental, moral, social, spiritual development) as child labor in the public sector. Actually, child brides are worse off because they do not receive the benefits, such as pay, that victims of child labor in the public realm receive. The situation of child brides cloaks economic exploitation and child labor within the private domain. However, this public/private distinction is disposed of by CRC article 3 in situations where the best interests of the child are at stake. Therefore, child labor occurring in the private realm as in the case of child brides performing as servants for their in-laws, does not make the violation of article 32(2a) any less persuasive. The state has a duty under CRC article 32(2a) in conjunction with CRC article 3 to end child labor whether taking place in the public or private realms due to the compelling health and development risks that stem from child labor. Nevertheless, supporters of child marriage can argue that CRC article 32(2a) applies to employment in the public sector only, and in any event housework is not child labor according to the traditional definition of that word.

CRC article 37 (right against torture, or other cruel, inhuman or degrading treatment or punishment) can likewise be employed to ban the exercise of child marriage. Like CRC article 32(2a), CRC article 37 reads as a provision banning torture specifically in the public sector, or torture at
the hands of public officials. This narrow interpretation of the right against torture needs to be revised.

According to article 1 of the Torture Convention, four elements are needed for an act to be defined as torture: 1) severe physical and or mental pain and suffering; 2) intentionally inflicted; 3) for specified purposes; 4) with some form of official involvement, be it active or passive. These four elements that make up the definition of torture apply to the practice of child marriage.

First, severe physical and mental pain and suffering accompany child marriage. The young girl in many cases is coerced into getting married. Once married, she suffers physical and mental abuse at the hand of her husband and in-laws. The young bride is forced to get pregnant immediately after marriage, frequently and at too close intervals, when her body is inadequately developed. Second, to be classified as torture, the pain must be intentionally inflicted. Requiring girls to marry before they are psychologically prepared for the responsibilities of married life or their bodies are physically prepared for child-bearing, constitutes purposeful behavior. Third, the specific purposes behind torture include: intimidation, punishment, and discrimination. The physical and mental abuse the child bride suffers at the hands of her husband or in-laws is either for reasons of intimidation as a way to keep her in her place or punishment when she fails to accomplish a task satisfactorily. Finally, the requirement of official involvement is likewise fulfilled in the case of child marriages.

Either national legislation actively promotes these types of unions or, where legislation does not allow for child marriages, the State’s

48. See id.
49. Askari, supra note 43.
51. SOHONI, supra note 8, at 32-33; GUDETA, supra note 11, at 99-100; SOHONI, supra note 14, at 9; Karkal & Rajan, supra note 10, at 505; PREVENTING MATERIAL DEATHS, supra note 7, at 55.
52. National child marriage laws often fall short of an effective or explicit ban on the practice itself. For example, The Indian Child Marriage Restraint Act created in 1929 and amended in 1977, raises the minimum age for marriage but fails to ban child marriages nor does the Act render child marriages null and void (SAEED, supra note 11, at 139; Sara Hossain, Equality in the Home: Women’s Rights and Personal Laws in South Asia, in HUMAN RIGHTS OF WOMEN, supra note 50, at 476; Child Marriages Performed in India, supra note 13, at 19L; Karkal, supra note 20, at 7; Karkal & Rajan, supra note 10, at 505).
unwillingness to restrict these practices allows them to continue resulting in a passive type of official involvement.53

By looking at torture from this broader perspective and expanding it beyond acts in the public realm to also include actions in the private sector, a case could be made to stop child marriages because they constitute a form of torture. Still, because the language of CRC article 37 is directed mainly at torture at the public level, its expansion into the private sphere as a way to ban child marriages will not be readily accepted. In order to validate the notion that acts in the private realm also constitute torture, the drafters of the CRC, when and if they add a provision against child marriage must identify it as a form of torture.

It is evident that these other indirect provisions against child marriage found in the CRC do not effectively deter the practice of early marriage. Where the CRC is lacking in a definite provision banning child marriage, CEDAW is not. CEDAW offers a better source of protection against child marriage that the CRC.

III. THE CONVENTION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, ARTICLE 16: BAN ON CHILD MARRIAGES

Unlike the CRC, CEDAW contains a specific provision prohibiting the practice of early marriages. CEDAW article 16(2) provides that child marriages shall have no legal effect.54 Thus, child marriages in those states that have ratified CEDAW not only violate international law but are void. On the surface then, CEDAW article 16 appears to adequately ban early marriages. Unfortunately, a variety of factors, which will be discussed subsequently, dispel the notion that CEDAW article 16 is an effective deterrent against child marriage.

Linguistic flaws are among some of the shortcomings from which article 16 suffers, rendering its implementation tentative. For example, CEDAW article 16 fails to prescribe a minimum age at which a girl can be married. This oversight weakens article 16 because it fails to clarify what the drafters of CEDAW define as child marriage. Is child marriage the marriage of a child below the age of 10, 12 or 16? How old or young does the child have to be for a marriage union to be identified as a child marriage and therefore in violation of CEDAW article 16? The failure to set a minimum age at marriage under its provision banning child marriage allows signatories to CEDAW to easily avoid obligations under article 16. For example, countries such as Chile, Ecuador, Panama, Paraguay, Sri Lanka, and Venezuela, all States Parties to CEDAW for over ten years have set twelve as the minimum age for marriage.55 The omitted language

53. Askari, supra note 43.
55. Cohen, supra note 1, at 42.
of CEDAW article 16 allows rather than prohibits these countries to establish low minimum ages for marriage.

CEDAW is also incompetent as an international law treaty because it has the highest rate of reservations than any other human rights treaty.\textsuperscript{56} Reservations limit treaty obligations and the potential domestic effect of the treaty by implying partial commitment.\textsuperscript{57} Introducing reservations connotes the essential human rights guarantees of the treaty are weakened.\textsuperscript{58} Moreover, two of the main reasons reservations have been entered into for CEDAW are the following: 1) laws pertaining to marriage and family relations and 2) religious and customary laws.\textsuperscript{59} As a result, the proficiency of CEDAW article 16 is further called into question.

In addition to the overwhelming number of reservations that make CEDAW a weak human rights instrument, it further suffers because it is not widely ratified. In contrast to the CRC, which is almost universally ratified (191 nations),\textsuperscript{60} CEDAW is not as popular.\textsuperscript{61}


\textsuperscript{57} Askari, supra note 2; Askari, supra note 43; MAYER, supra note 56, at 179-182; Cook, supra note 56, at 452; Rebecca J. COOK, \textit{State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women, in Human Rights Of Women, supra note 50}, at 252.

\textsuperscript{58} Lijnzaad, supra note 8, at 3-7; STAMATOPOULOU, supra note 56, at 38; Hossain, supra note 52, at 470; Rebecca J. Cook, \textit{Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, 30 VA. J. INT'L L.} 643, 649 (1990).

\textsuperscript{59} COOK, supra note 56, at 451-452; Bayefsky, supra note 56, at 352.


\textsuperscript{61} Cohen, supra note 1, at 76.
Finally, CEDAW was devised as an international Bill of Rights for women.\textsuperscript{62} CEDAW was created to "equalize relationships between adult men and women."\textsuperscript{63} Girl's rights and women's rights are linked in many respects. Inequalities during girlhood are the basis of discrimination during womanhood. The drafters of CEDAW overlooked this fact. Consequently, rights under CEDAW are intended to apply to adult women, not girls. The existence of a provision against child marriage in CEDAW appears out of place and incompatible with the rest of the treaty. That is, unless one interprets CEDAW article 16 as an article intended to equalize spousal rights\textsuperscript{64} to provide adult women the right to choose who they want to marry, give adult women the right to make fertility and health decisions, and not as a provision against early marriage. CEDAW article 16 then is not so much about ending child marriages and protecting the rights of the girl child as about granting adult women more rights over marital decisions. The ban on child marriages appears more akin to an afterthought\textsuperscript{65} than the focal point of CEDAW article 16. An article prohibiting early marriage would be more effective if present in a treaty geared at children (CRC) than in one directed at adults (CEDAW).

Another human rights treaty that covers early marriage is the 1962 Marriage Convention. It too contains provisions aimed at ending child marriages. However, as with article 16 of CEDAW, the Marriage Convention's efforts against child marriage are found lacking due to the ambiguous and exclusionary wording of its provisions.

\textbf{IV. 1962 CONVENTION ON CONSENT TO MARRIAGE, MINIMUM AGE FOR MARRIAGE AND REGISTRATION OF MARRIAGES}

Many problems plague the effectiveness of the Marriage Convention as a ban against child marriages. For example, article 1 of the Marriage Convention, article 24 of the International Covenant on Civil and Political Rights and article 16 of CEDAW all require full and free consent of both parties before a marriage is entered into.\textsuperscript{66} Free consent of the marriage partners in the presence of a competent authority is the centerpiece of the 1962 Marriage Convention. The notion that children should not be pressured or allowed to enter into marriage thus became a codified part of international law.\textsuperscript{67} However, what the provisions intend and what reality

\textsuperscript{63} Cohen, supra note 1, at 37.
\textsuperscript{64} Id. at 40.
\textsuperscript{65} See id.
\textsuperscript{66} Supra note 54, at art. 24; Anonymous International Covenant on Civil and Political Rights. 6 I.L.M. 360 (1966); Marriage Convention, supra note 17, at art. 1.
\textsuperscript{67} Marriage Convention, supra note 17.
provides are two different things. Equality of spouses in entering a marriage (or for any other reasons) in most cultures is non-existent.

Requiring consent prior to entering into a marriage does not necessarily translate into establishment of equality. A young child bride can be tricked into consenting to marriage by being offered various inducements. Equality has not been achieved because child marriage is based on the notion of inequality; the male spouse enjoys a disproportionate amount of power over the female spouse. Requiring prior consent likewise does not usher in the end of child marriages. Instead, fulfilling the prerequisite of consent ensures that child marriages continue and do so within the boundaries of international law.

Article 2 of the Marriage Convention, on advising States to prescribe a minimum age at marriage is also a sham. The Marriage Convention asks States to legislate a specific age at marriage and not recognize as legal, marriages by persons under this age, with the exception that “a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.” The competent authority such as a religious leader may consider following cultural mores a serious reason for allowing child marriages to continue. Therefore, the competent authority’s own prejudices could allow for the perpetuation of discriminatory traditions. As a result, the Marriage Convention does not definitively ban child marriages.

In addition, many states already have legislation that sets a minimum age at marriage such as Sri Lanka, where the legal marriage age is twelve years old. Article 2 goes on to ban marriages of persons under this age. If Sri Lanka ratified the Marriage Convention and marriages below twelve years of age took place, it would be in violation of international human rights law. However, marriage of twelve year old girls would be recognized as legal under the terms of the Marriage Convention. At the same time though, provisions of the Marriage Convention would conflict with those of the CRC, which sets the end of childhood at eighteen years of age. Under the CRC, a marriage of twelve year old is still a child marriage and illegal, but it is legal from the point of view of the Marriage Convention as it is currently worded. Consequently, it appears that the Marriage Convention does more to encourage and support child marriages than not.

68. See id.


70. Marriage Convention, supra note 17, at art. 2.

71. CRC, supra note 3, at art. 1.
V. CONCLUSION

Having examined provisions under the CRC, CEDAW and the Marriage Convention it is apparent that they are unsuccessful in adequately protecting the rights of girl children against child marriage. The CRC lacks a provision against the practice of early marriage altogether. CEDAW article 16 mainly focuses on adult marital relations and rights and only peripherally bans child marriages. The 1962 Marriage Convention is also weak because its ambiguous terminology allows the ban on early marriages to be avoided.

A provision explicitly prohibiting child marriage needs to be added to the CRC, an international law treaty focusing entirely and expressly on children. The CRC is intended to include rights exclusive to children as well as reemphasize rights found in other human rights treaties and make them applicable to children. For the most part, the drafters of the CRC have been successful in carrying out these dual goals. However, the omission of an article banning early marriage renders the CRC incomplete and unable to sufficiently fulfill its goals. The right against child marriage is not only one that is exclusive to children but it is also one that is found in other human rights treaties (e.g., CEDAW, Marriage Convention). The problem with the provision(s) against early marriage in these other international law treaties is that they focus more on equalizing adult spousal rights and less on the rights of the child. Adding a provision to the CRC banning early marriage will reshift the focus of child marriage to the child as the victim and as the party whose rights need to be protected and promoted.

The CRC's near universal ratification and the fast rate with which it went into force have served to over shadow the fact that the CRC is deficient especially in its protection of girl children. The CRC is lacking and prejudicial because it excludes certain violations which predominately affect girls. For children and specifically girls to be sufficiently protected against early marriage, something more is needed than vague and indirect provisions inundated with loopholes that actually perpetuate rather than end the practice of child marriage. What is needed is an article in the CRC, that categorically identifies child marriage as a practice that violates children's rights, identifies an exact minimum age at marriage and obligates States Parties to ban these types of practices. Only when the CRC is amended to include such an article, will it be beneficial to employ

72. Child marriage involves a situation in which one or both marriage participants are children.

73. Failure to identify an exact minimum age at marriage as evidenced in CEDAW article 16 and the Marriage Convention allows room for States Parties to avoid their obligations under these provisions and to set low minimum ages at marriage. A provision against early marriage can be protected against these safeguards by not leaving this task to each individual state's own discretion.
supplementary provisions under the CRC (i.e., right to life, right to education, etc.) to further strengthen the case against early marriage.
THE PERMANENT INTERNATIONAL CRIMINAL COURT: AN EXAMINATION OF THE STATUTORY DEBATE

Michael Bachrach*

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I. INTRODUCTION

In 1994, the International Law Commission ("ILC") authored a Draft Statute in an attempt to help establish a permanent International Criminal Court ("ICC"). Beginning in March 1996 the United Nations General

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* This article was written in June 1998, just prior to the Rome Diplomatic Conference, which completed and adopted the Rome Statute for an International Criminal Court. This article discusses the expectations heading into the final diplomatic conference, and examines the statutory debate, which had been undertaken prior to Rome.

Michael Bachrach represented the New York County Lawyers’ Association at the August 1997 United National Preparatory Committee Meeting for the establishment of a permanent International Criminal Court ("PrepCom"), and represented Redress Trust (UK) at the December 1997 and March-April 1998 PrepComs. He has also chaired conferences on the International Criminal Court in New York City and Vienna. This report is based on the closed and open door meetings that he attended during the Prepcoms, as well as research completed at the Benjamin N. Cardozo School of Law in New York City, and at Oxford University in England.

Assembly held Preparatory Committee meetings ("PrepComs") in which the representatives of the majority of the world's nations gathered to debate the various aspects of the 1994 ILC Draft Statute. Each PrepCom lasted between two and three weeks and was essentially a preparatory conference, designed to facilitate debate and fine-tune each State's concerns.

The final PrepCom was held from March 16 to April 3, 1998. At this final PrepCom the 1994 ILC Draft Statute was replaced by a new text, the Report of the Inter-Sessional Meeting from January 19 through January 30, 1998 in Zutphen, The Netherlands ("Zutphen Draft"), which formed the basis of the remainder of the debate leading up to a Diplomatic Conference which will take place from June 15 to July 17, 1998, in Rome, Italy ("Rome Conference"). Furthermore, after the completion of the final PrepCom, the official texts ("CRP's") were compiled into one document, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Part I, Draft Statute for the International Criminal Court. This final compiled document revised the Zutphen text to reflect the Proposals of the March-April 1998 PrepCom, and will serve as the basic draft text of the Rome Conference. "There is international momentum, that by [June] we must establish an effective, efficient, and independent International Criminal Court," the statute for which, it is hoped, will be completed and ready for signature by the end of the Diplomatic Conference.

The purpose of this paper is to examine the progression of some of the key issues that have been under debate, in an attempt to help explain the creation of the "last great legal edifice of the 20th Century."

2. Although only State representatives have an official place in the negotiations, participating on one level or another are representatives of various subsidiary organizations of the United Nations such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as other international and non-governmental organizations such as the International Committee of the Red Cross, UNICEF, Amnesty International, Redress, and the Lawyer's Committee for Human Rights. Furthermore, this is by no means an exhaustive list of the organizations involved in the PrepComs. For example, working under the umbrella organization of the Coalition for an International Criminal Court, over 450 non-governmental organizations have lobbied for the inclusion or exclusion of numerous proposals relating to these debates.


5. Roy S. Lee, Director, Codifications, Office of Legal Affairs, United Nations, addressing the American Branch of the International Bar Association on Nov. 7, 1997 at its International Law Weekend '97 during the panel "The Establishment of a Permanent International Criminal Court: The Need, The Possibilities and the Legal, Political and Practical Realities."

A. The Purpose of the International Criminal Court

For years lawyers, politicians, and lay persons have grappled with the problem of what can be done when there is no justice left to be had. Over the past fifty years some of the most horrendous atrocities in recorded history have unfolded. With the creation of the International Military Tribunal at Nuremberg, for the first time leaders and their peoples were held individually accountable for massive violations of international standards of conduct. Unfortunately, many States and individuals have failed to learn from the mistakes of World War II and the Holocaust. Over the past 50 years there have been approximately 250 conflicts, totaling over 170 million casualties—more casualties than World War I and World War II combined. Most recently, in 1994 following the breakup of Yugoslavia, Bosnians, Serbians and Croatians, entered into a war that practiced “ethnic cleansing” in a manner not seen since the Holocaust. Also in 1994, a civil war ensued in Rwanda involving the killing of almost 500,000 people. To many it appeared that every inhabitant of Rwanda was transformed into both a victim, and a butcher. The law cannot stand silent to crimes so heinous that domestic judicial systems have no adequate solutions. “These types of crimes cannot go forth without some form of accountability, some form of punishment, at least for the most egregious crimes like aggression, genocide, and . . . torture.”

As the dawning of a new millennium quickly approaches, and international atrocities continue to proliferate, the international community continues to strive for new ways to bring peace and security to the world. In 1993, Trinidad and Tobago suggested that a permanent international criminal tribunal should be established to try international terrorists and narcotics dealers. Although the international community did not agree upon those bases of subject matter jurisdiction, there was support for a court that would try violators of what many consider the most serious breaches of international law: genocide, war crimes, and crimes against humanity. Learning from the successes of the Nuremberg Tribunal, the idea of a permanent ICC raised the hope of furthering international

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10. Professor M. Cherif Bassiouni, Vice Chair, UN Preparatory Committee of the Establishment of a Permanent International Criminal Court, addressing the American Branch of the International Bar Association on Nov. 7, 1997 at its International Law Weekend '97 during the panel “The Establishment of a Permanent International Criminal Court: The Need, The Possibilities and the Legal, Political and Practical Realities.”
cooperation, thereby enhancing "the effective prosecution and suppression of crimes of international concern."\textsuperscript{11}

B. Issues under debate

Almost every aspect of the proposed ICC is still being debated. These issues range from the number of judges required for a quorum, to the specific definition of crimes against humanity. However, the issues which have garnered possibly the most debate are: the consent and triggering process of the Court; the subject matter jurisdiction of the Court; the balance between international and domestic judicial systems, known as complementarity; the process of investigation; and the types of penalties that the Court will have the authority to impose.

Although the specific definitions of the core crimes (the crimes that shall comprise the Court's subject matter jurisdiction) are still under fierce debate, the categories of core crimes which will be incorporated into the Court's statute has been mostly determined. The ILC Draft Statute proposed jurisdiction over genocide, aggression, war crimes, crimes against humanity, and a list of treaty based crimes mostly relating to human rights or terrorism.\textsuperscript{12} Although there will continue to be debate over the subject matter jurisdiction of the Court until a resolution is officially announced in Rome, it appears that only genocide, war crimes, and crimes against humanity are certain to be retained, and of the others, only aggression still retains even a minimal chance.\textsuperscript{13}

On the other hand, the debates over trigger mechanisms, investigation, complementarity, and penalties are still unresolved; it is these issues that this paper will examine.\textsuperscript{14}

II. TRIGGER MECHANISMS (PRECONDITIONS TO JURISDICTION)

Whenever a new situation arises where the ICC is the preferred forum for adjudication, it will be necessary to "trigger" the Court into action. For the ICC to preside over any given situation it must not only have subject matter jurisdiction, but it must also have personal jurisdiction over individual defendants. However, because this will be an international court, as opposed to a domestic court, the hurdles necessary to acquire such jurisdiction do not merely turn on the place of arrest or place of the crime, but also on the broader concept of State consent.

\textsuperscript{11} See supra note 3.

\textsuperscript{12} Art. 20, U.N. DOC. A/49/355.

\textsuperscript{13} Many conclusions such as this one are based not upon formal written proposals but rather on oral interventions or informal comments. However, when possible, citations to written proposals will be noted.

\textsuperscript{14} This paper will not discuss the specific definitional debate still undergoing over the Court's core crimes; so much remains unresolved that any fair discussion would require a separate paper of its own.
Under customary international law, there are several different bases of maintaining personal jurisdiction through State consent:

(1) The Territorial Principle — All crimes, be them acts or omissions, which were "committed (or alleged to have been committed) within the [territory] of a State may, come before the municipal courts and the accused if convicted may be sentenced. This is so even where the offenders are foreign citizens;"\(^{15}\)

(2) The Nationality Principle — "By virtue of nationality, a person becomes entitled to a series of rights ranging from obtaining a valid passport enabling him to travel abroad to being able to vote. . . . The concept of nationality is important since it determines the benefits to which persons may be entitled and the obligations (such as conscription) which they must perform;"\(^{16}\)

(3) The Passive Personality Principle — "[A] State will claim jurisdiction to try an individual for offenses committed abroad which have affect or will affect nationals of the State;"\(^{17}\)

(4) The Protective Principle — "[S]tates may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular State concerned;"\(^{18}\)

(5) The Universality Principle — Crimes of the most egregious manner, such as piracy and war crimes, can be tried by any court, because the international sphere as a whole is involved.\(^{19}\)

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16. Shaw, supra note 15, at 404. See Nationality Decrees in Tunis and Morocco Case, P.C.I.J., Series B, no. 4, 1923, 2 I.L.R. 349 ("The question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations. Thus in the present state of international law, questions of nationality are, in the opinion of this court, in principle within this reserved domain."). The problem is that there is no consistent, accepted definition of nationality in international law and only the conflicting descriptions of the different municipal laws of States, Shaw, p. 404. Civil law States tend to claim jurisdiction based on all crimes committed by their nationals, whereas common law States tend to restrict their claims regarding their nationals abroad to only very serious crimes. Id. at 407. But see The Nottebolm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 22 I.L.R. 349 (Nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.").


These five principles, as well as the obligations of treaties, have been used by domestic courts to maintain jurisdiction over individuals which have more than one State attempting to claim jurisdiction. However, an international court, if its statute allowed, could also base jurisdiction under these principles, or others specifically outlined in its statute or other treaties.

According to the 1994 ILC Draft Statute, the Court could exercise its jurisdiction in several different ways. First, in a case of genocide, the Court could exercise its jurisdiction whenever a State party to the 1948 Genocide Convention\textsuperscript{20} lodges a complaint with the Prosecutor which alleges "that a crime of genocide appears to have been committed."\textsuperscript{21} Second, in the case of aggression, the Court could exercise jurisdiction if the Security Council "has first determined that a State has committed the act of aggression which is the subject of the complaint."\textsuperscript{22} The Security Council could also refer any other case to the Court, which it deemed appropriate so long as the Security Council was acting under its Chapter VII powers to maintain or restore international peace and security.\textsuperscript{23} Furthermore, the ILC Draft Statute provided that in any other case charging one or more of the core crimes, the ICC could exercise its jurisdiction when consent has been granted to the Court by the State which has custody of the suspect ("the custodial State") and the State maintaining territorial jurisdiction.\textsuperscript{24}

To some it appeared that the ILC Draft Statute offered a fair distribution of power between the States, the Security Council, and the ICC. However, many States objected to this formulation of the Court's preconditions to its exercise of jurisdiction. During the negotiations several alternative proposals were offered which subtly yet drastically changed the jurisdictional authority of the proposed ICC.

A. \textit{The Role of the Security Council}

Beyond what was mentioned above, the ILC Draft Statute also included a very controversial provision relating to the consent process. The ILC Draft Statute provided that "a complaint of or directly related to an act of aggression," or any other breach of international peace and security, could not be brought under the ILC Draft Statute unless "the Security Council first determined that a State [had] committed the act or

\begin{itemize}
\item \textsuperscript{21} Art. 25, U.N. DOC. A/49/355.
\item \textsuperscript{22} Art. 23(2), U.N. DOC. A/49/355.
\item \textsuperscript{23} Art. 23(1), U.N. DOC. A/49/355.
\item \textsuperscript{24} Art. 21, U.N. DOC. A/49/355.
\end{itemize}
omission which [was] the subject of the complaint." 25 In essence this provision would allow the Security Council to prevent the ICC from obtaining jurisdiction over any matter falling within the Security Council's Chapter VII powers. This provision became one of the greatest areas of dispute in regards to the ICC's jurisdictional procedure.

During the August 1997 PrepCom the United States took the position that the Security Council should be the sole body with the power to authorize or prevent any situation from being referred to the ICC. The United States acknowledged that placing the triggering mechanisms of the Court into the Security Council would be placing the burden of determining jurisdiction into a political institution, but the United States also believed that the same would be true if the consent process was left to governments. 26 The United States intervention hinted at the possible expansion of the Security Council, and explained that this expansion would help dilute the political pitfall that the institution currently maintained. According to the United States intervention, "when the Security Council reform process concludes, we expect that the representation of a much wider cross-section of the global society will have been accomplished. Any decision that the Security Council makes with respect to the referral of a situation to the ICC thus will reflect the considered judgment of that larger and more representative group of nations." 27

Not surprisingly, other members of the Security Council shared the US sentiment that the ICC's jurisdiction should be subordinate to the decisions of the Security Council. The French delegate stated on 6 August 1997, that national courts should handle all crimes, and that this right should only be taken away if the Security Council decides it is necessary to refer the matter to the International Criminal Court. 28 Furthermore, the delegate argued that this would not be a step backwards, both legally and politically speaking, because this was the method that had been employed during the creation of all of the ad hoc international criminal tribunals.

Germany made a proposal, which was much more expansive than the proposal by France. The German delegation proposed that the ICC should have jurisdiction through several methods: 1) a Security Council referral; 2) a complaint lodged by an interested State; or 3), if the Prosecutor concludes that there is a sufficient basis for prosecution. 29 Furthermore, for their proposal to be successful the German delegation believed it was


27. Id.


necessary that all parties to the ICC Statute must accept the inherent jurisdiction of the Court with respect to all of its core crimes.  

As might be evident, the role of the Security Council in respect to the ICC continues to be hotly debated, but the proposals have turned more on subtly than anything else. Throughout the debate, the two sides laid there anchors either upon the stance initiated by the ILC Draft Statute, and furthered by the five permanent members of the Security Council ("P5"), that the Security Council must consent as a precondition to the ICC's jurisdiction, or upon the broader belief that the Security Council was merely one of several methods in which a matter could be referred to the Court. Interestingly, it was Singapore, one of the smallest nations, that put forth the proposal that has now gained the favor of the majority of States including the United Kingdom (and possibly soon the United States). The compromise, appropriately dubbed, "The Singapore Proposal", states that "no investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect." Here the importance of subtle changes is extremely evident. Under the P5 proposals the ICC could only have jurisdiction over a matter referred to it by the Security Council. However, under the Charter of the United Nations, any declaration by the Security Council can be vetoed by the single vote of any of its permanent members. Thus, if the United States, United Kingdom, France, China, or the Russian Federation did not want the matter to be referred to the ICC, any one of them could prevent it with a simple veto. However, under the Singapore Proposal, the ICC has the ability to act not once the Security Council so declares, but rather until the Security Council declares otherwise. Therefore, under the Singapore Proposal, a single vote of a permanent member would not be enough to rescind the ICC's jurisdiction, rather a single vote would be all that was required to prevent the Security Council's interference.

It should be pointed out that in the debate over Security Council referrals, most States have held strong to the belief that "the statute should give to the Security Council the explicit competence to submit to the Court situations involving threats to or breaches of international peace and security and acts of aggression." But, as Germany stated on the first day

30. *Id.*


of the August 1997 PrepCom, "it would be in our view quite inappropriate if the Security Council could submit individual cases or prevent the investigation and prosecution of cases involving such situations." The distinction here by Germany is that the Security Council should be given the ability to refer matters, issues, or situations to the Court, but that it was the Court's responsibility to choose individual cases that arise out of those broader referrals.

In the beginning of the final PrepCom in March 1998, the ILC Draft Statute was replaced by a newer draft known as the Zutphen Draft (or "Zutphen text"). However, by the end of the PrepCom much of the text had been further revised, including the provisions relating to the role of the Security Council in the consent and triggering process. Regarding aggression there was still much disagreement over an acceptable definition and trigger mechanism, however, in relation to all of the core crimes, only two options remain which explain the Security Council's role in the triggering process. Both options were inserted as Article 10 paragraph 3. The first option stated that no prosecution could be commenced if the Security Council decided there was a breach of international peace and security, unless the Security Council consented to such prosecution. On the other hand, the second option reflected the input of the Singapore Proposal, allowing the ICC to act without first requiring the consent of the Security Council. The second proposal also stated that although the Security Council could determine that a prosecution should not proceed, it required that the Security Council act within a reasonable amount of time, and if it failed to act within that time, the ICC could proceed without the Security Council's consent.

B. Interested States

As stated in the previous section, under a proposal submitted by Germany during the August 1997 PrepCom, the Court could exercise jurisdiction not only when the matter is referred to the Court by the Security Council, but also if the complaint is lodged by an interested State, or by the Prosecutor. Although the role of the Security Council is possibly the most potentially crippling portion of the Court's consent process, easily the least controversial method occurs when the interested

36. Id.
37. Art. 10(7), supra note 4, art. 10(7).A/CONF.183/2/Add.1.
39. What totals a reasonable amount of time has not yet been determined; proposals have ranged from 30 days to one year.
States consent to the Court’s personal jurisdiction. But who are the interested States and how many are needed to consent?

Initially, States such as France proposed that the interested States could be: 1) the State on whose territory the acts were committed; 2) the State of the nationality of the victim of those acts; and 3) the State of the nationality of the person suspected of committing the acts. France’s proposal was based upon the jurisdictional theories of territoriality, passive personality, and nationality, respectively. But soon it became evident that other States might also warrant sufficient concern over the incident to require their consent to the ICC’s jurisdiction. The Russian Federation, among other States, believed that custodiality should also be added as a basis of necessary State consent. Custodiality, being defined as, “the State which has custody of the suspect with respect to the crime.” Furthermore, a majority of States believed that the existence of extradition treaties might also form a basis of the Court’s jurisdiction. Thus, by the end of the August 1997 PrepCom the above four bases of jurisdiction were included in the definition of interested States, plus a fifth, “if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purpose of prosecution, unless the request is rejected.”

In addition to the debate over which States could claim jurisdiction, there was also debate over how many of these interested States should be required to offer their consent before the ICC could maintain jurisdiction over the case. For these issues to be settled, some questions needed to be answered: is unanimous consent required, do only one or two States need to consent, or should the Court have inherent jurisdiction over the core crimes? Obviously, if every State consented to the Court’s jurisdiction then there would be no problem for the Court. Such broad consent, however, is not always the likely scenario. Thus, there was great debate over the minimum number of interested States that were required to consent for the Court to exercise jurisdiction. There was universal agreement that if consensual jurisdiction was utilized as the basis of the Court’s jurisdiction, it would be necessary to require more than one concerned State to consent, but how many more was undecided. Israel and France, for example, believed it necessary for the complainant State, the custodial State, and the State of nationality of the accused, to all consent in order for the Court to exercise its jurisdiction. As explained by the

44. Id.
45. Id.; supra note 38; see supra note 4.
delegate from Niger, this proposal would seem the most realistic because it would enable the investigation to be much more efficient than if the Court were acting without the consent, or against the wishes, of one of those interested parties.\footnote{Id.} On the other hand, many other States believed that such broad requirements would severely hinder prosecution at the most formative stage of the proceedings. These States have advocated that it should be up to the Office of the Prosecutor\footnote{Also referred to as the Procuracy, see art. 12, A/49/355; art. 36, A/AC.249//L.13.} to decide whether the Court should or should not exercise its jurisdiction over a case, that the Court should have inherent jurisdiction over its cases.

Before continuing, an important question must be addressed: What exactly is inherent jurisdiction? Simply put, the theory of inherent jurisdiction means that by ratifying the ICC's Statute, States at that point have accepted the automatic jurisdiction of the Court over all of the core crimes, thus obviating the need to obtain further individual consent of all the interested States. As stated by the representative of Ireland, "we should rely on an old-fashioned concept, the concept of justice."\footnote{Oral intervention made on Aug.7, 1997.} Essentially, the representative of Ireland proffered that by requiring States accept the inherent jurisdiction of the ICC, as a condition to signing the treaty, States would be prevented from allowing political considerations to mar traditional notions of justice. Therefore, any State which would want the protection of the Court, would also itself have to be subject to the jurisdiction of the Court. Although many States seemed to believe that inherent jurisdiction might make for the most effective court, political concerns prevented them from fully supporting the idea. David Scheffer, United States Ambassador-at-large for War Crimes, explained the United States' position.

There is a reality, and the reality is that the United States is a global military power and presence. Other countries are not. We are. Our forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring our American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.\footnote{Barbara Crossette, World Criminal Court Having a Painful Birth, N.Y. TIMES, Aug. 13, 1997, at A10 (quoting David Scheffer).}
In Ambassador Scheffer's remarks, he highlighted an important problem for these negotiations: supposedly neutral legal matters were completely colored by political concerns. Thus, often times the debate over appropriate preconditions to jurisdiction turned on which core crimes were in question. As the United States pointed out, no one was arguing for inherent jurisdiction over all of the core crimes, but with respect to genocide, crimes against humanity and war crimes, there was at least some basis for discussion over whether inherent jurisdiction could be involved. The Russian Federation proposed that only genocide should be held to the standard of inherent jurisdiction, whereas ICC jurisdiction over the other core crimes needed the consent of the appropriate interested States. Furthermore, the United States pointed out that the crime of aggression had to be viewed differently from the other core crimes assuming it was included in the Statute at all because jurisdiction over aggression could never be based upon inherent jurisdiction without the precondition of a Security Council referral; to ignore the Security Council in relation to aggression would be in direct conflict with Chapter VII of the Charter of the United Nations which grants the Security Council the power to determine when a breach of international peace and security has occurred, and what actions should be taken to resolve the situation. Even Germany, one of staunchest supporters of the idea of a fully independent ICC, divided the crimes as follows:

the Court should have inherent (automatic) jurisdiction over the three core crimes of genocide, crimes against humanity and war crimes, so that the Court can exercise, if necessary, concurrent jurisdiction with each State party. The Court should also have inherent jurisdiction with regard to the crime of aggression once the Security Council . . . has first determined that a State has committed an act of aggression.

By the time the final PrepCom concluded in April 1998, it had become apparent that the only crime that stood a good chance of being characterized as a crime over which the Court had inherent jurisdiction was the crime of genocide. This is because of all of the core crimes, only the definition used for genocide has achieved the benchmark of customary international law. Aggression has never been defined in a prospective manner that States can agree upon, and although war crimes and crimes

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53. Article 39, Charter of the United Nations; Oral intervention made on Aug. 7, 1997. This conclusion assumes that the Security Council would not agree to amend the Charter of the United Nations so as to comply with the Statute of the ICC.
against humanity have been sufficiently defined by the Geneva
Conventions\textsuperscript{55} and its protocols,\textsuperscript{56} the drafters of the ICC Statute felt it
necessary to modernize the language of those conventions when including
them into the ICC Statute. By modernizing the definitions of war crimes
and crimes against humanity, as opposed to merely incorporating the
language already accepted as customary international law, it becomes
harder to reach the universal consensus necessary for States to agree to
accept inherent jurisdiction over those crimes. The final text leading up to
the diplomatic conference leaves many of these issues greatly unresolved.
The five interested States defined earlier, were all included in the text, but
it was still unclear whether all or none would have to consent as a
precondition to the Court's jurisdiction.\textsuperscript{57}

C. Prosecutorial Referral

The next method of trigger mechanism under consideration was that of
a prosecutorial referral. Initially, the Draft Statute did not provide for this
type of trigger mechanism. According to the ILC Draft the prosecutor
could only act for the purpose of investigation or otherwise, once the issue
had been referred to it by an interested State or the Security Council.\textsuperscript{58}
However, according to the Zutphen text and its revisions, the Court may
have jurisdiction with respect to its core crimes if the matter is brought by
the Prosecutor in accordance with information received through its own
investigations.\textsuperscript{59} Utilizing prosecutorial referrals as a trigger mechanism
could only work with regard to crimes over which the Court maintained
inherent jurisdiction, or over crimes which the situation and not merely
individual defendants, had already been consented and directed to the Court
by either the Security Council or the necessary States. Furthermore, for
States to agree to incorporate the Prosecutor as a trigger mechanism in the
ICC's statute, their decision will be highly dependent on what further
agreement can be made regarding the Prosecutor's ability to initiate its own
investigations. Most States will not agree to a trigger mechanism that
would provide for a Prosecutor with unfettered discretion.

\textsuperscript{55} The Four Geneva „Red Cross” Conventions of 1949, 75 U.N.T.S. 287; 75 U.N.T.S.

\textsuperscript{56} Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the
Protection of Victims of International Armed Conflicts (Protocol I), 16 I.L.M. 1391 (1977);
Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection
of Victims of Non-International Armed Conflicts (Protocol II), 16 I.L.M. 1442 (1977).

\textsuperscript{57} See supra note 38; see supra note 4.

\textsuperscript{58} Arts. 21, 23, and 26, A/49/355.

\textsuperscript{59} Arts. 6 and 46, A/AC.249//L.13 (1998); A/AC.249/CRP.8 (1998); arts. 6 and 12,
A/CONF.183/2/Add.1.
III. INVESTIGATION

As is the case in any fair trial, either domestic or international, before a suspect can be indicted by the Court an investigation must ensue which concludes that sufficient evidence exists to show that a trial of the accused is warranted. Domestically, investigations are initiated by the local governments through the prosecutor's office. Since the prosecutor is an agent of the State, the State does not attempt to prevent or hinder the investigations. Internationally, this procedure is not so straightforward. The Prosecutor of the ICC will not be working for the States, but for an independent court. For an investigation to succeed a prosecutor will need the consent of the States to enter their territory and pursue its investigations. Sometimes States will cooperate, and sometimes States will not. Thus, for investigations to be effective, the ICC Statute must include provisions detailing what authorization the Prosecutor has in regards to investigation and prosecution.

A. The Role of the Prosecutor

According to the 1994 ILC Draft Statute, the Prosecutor was authorized to initiate investigations whenever a State party to the ICC Statute, or the Security Council, issues a complaint requesting the Prosecutor take action. Furthermore, for the purposes of its investigation the Prosecutor could "request the presence of and question suspects, victims, and witnesses; collect documentary and other evidence; conduct on site investigations; take necessary measures to ensure the confidentiality of information or the protection of any person; as appropriate, seek the cooperation of any State or the United Nations." The assumption implicit in the Draft Statute is that any State requesting an investigation will cooperate with the Prosecutor, and then so too will any State upon whose territory the Prosecutor needed to search. However, neither the assumption of the drafters, nor the language itself, was acceptable to most States. Some States believed that this language would require the Prosecutor to act like a blind monkey, ignorant of the food blatantly in front of it, until another State was kind enough to bring the atrocities to the monkey's attention. Other States believed that a Prosecutor with the authority to investigate without State consent would lead to overreaching and inappropriate investigations, which could eventually turn into witch hunts. Thus, much debate has ensued over what type of investigations the Prosecutor can and should be allowed to undertake, and furthermore, what end the investigations should seek.

The delegations of Canada, New Zealand and Samoa issued a joint proposal suggesting the necessity that the Prosecutor "take

60. Arts. 25 and 26, A/49/355.
appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests of victims and witnesses, including age, gender, and health, and take into account the nature of the crimes [particularly][above all] where it involves sexual and gender violence."^62

Furthermore, the participants of an inter-sessional meeting held in Vienna, in April 1998, thought it important to highlight that the Court should "not only ascertain the truth but also provide effective justice for victims, their families, and assigns,"^63 since victims are often survivors, and even when not, victims are not merely the dead.

The Zutphen text and its revisions have ended up including similar provisions as the ILC Draft Statute, but with numerous hurdles which the Prosecutor would first need to overcome, such as notifying the States prior to investigation that an investigation was to commence, and allowing States one month to challenge the appropriateness of the Prosecutor's actions.^64

Regardless, such provisions are almost all lacking consensus; they are generally only favored by States that wish to hinder the independence of the Court. Many other States believe that the Prosecutor should be able to investigate whenever there is a need, and not merely when all States consent. Much of this debate has also revolved around the appropriateness of including into the text of the Statute one of two terms: *ex officio* or *proprio motu*.

Proponents of the idea of a prosecutor with the authority to initiate investigation on its own accord, tend to refer to the Prosecutor as acting either *ex officio* or *proprio motu*. Germany, for example, stated that "the Prosecutor of the Court should have the competence to initiate investigations *ex officio*, on his or her own initiative, in any case where the Court has jurisdiction. . ."^65 Furthermore, at the inter-sessional meeting in Vienna mentioned above, the participants entreated "that the Court be led by a fully independent *ex officio* prosecutor, that can gather information from any source."^66 The implication being proffered is that a prosecutor acting *ex officio* would have the authority to take any action required in order to proceed with a thorough and effective investigation.

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Article 46 of the Zutphen text states: “The Prosecutor [may][shall] initiate investigations [ex officio][proprio motu]. [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations].” The structure of the Zutphen text implies that any text in brackets represents one of two things: that the text has not yet been agreed upon, or that it has yet to be determined which of two or more alternatives should be used as the proper language for that portion of the phrase. Regarding the ex officio v. proprio motu debate, the Zutphen text lays the terms side by side in brackets, implying that one or the other should be chosen. In the debates many States have used the terms as if they were synonymous, but if the terms meant the same thing, then this choice is merely a petty debate over writing style. Obviously, it seems odd at this stage of the negotiations, for States to introduce and quibble over synonymous language.

Although most States use the term ex officio when referring to the type of independent prosecutor which they seek, a growing number of States have been substituting ex officio with the term proprio motu. A translation of the two terms in their context indicates that ex officio refers to the duties arising out of “the office” of the Prosecutor, whereas proprio motu refers to the duties particular to the individual prosecutor - this is a monumental difference. To put it another way, an ex officio prosecutor is empowered with the duties granted to all of the prosecutors in the Office of the Prosecutor combined, whereas a proprio motu prosecutor is confined only to his respective duties.

Understanding the different meanings of these terms of art clarifies why the United States tends to prefer proprio motu whereas Germany tends to prefer ex officio; particularly in light of United States sentiment that it is more concerned with the possibility of an unfettered prosecutor, than is Germany. However, regardless which term, if either, is chosen, many States have made it clear that they believe even an independent Prosecutor’s powers should not proceed without some sort of check and balancing system. To rectify this omission, the idea of a Pre-Trial Chamber was born.

68. BLACK’S LAW DICTIONARY, (1990); CASSELL’S LATIN DICTIONARY, LATIN-ENGLISH AND ENGLISH-LATIN.
B. The Role of the Pre-Trial Chamber

During the August 1997 PrepCom, while States were arguing over the Court’s trigger mechanisms, and particularly whether the Prosecutor itself should be empowered to initiate investigations on its own accord and thus trigger the processes of the Court, the belief emerged that even a fully independent Prosecutor needed some sort of check to keep its acts from getting out of control. To combat this fear, the delegate of France proposed the creation of an organ that would supervise the jurisdictional matters of the Court. The French delegate expressed the belief that the Prosecutor needed to be supervised from the very outset of the proceedings. Furthermore, the delegate stated that a chambre d’examen of some sort could strike a balance between the accused and the accusation, thereby creating an office separate from the Prosecutor that could protect the rights of the accused, and prevent proceedings from being opened at too early a stage.

Initially, France’s proposal met with both partial support and partial dissent. The Canadian delegate, for example, agreed that a supervisory chamber could be useful, but only to insure the equality of arms, and not to interfere with the independence of the Prosecutor. Ireland’s delegate expressed his support for a chamber that would act as a check on the unmonitored ex officio power of the Prosecutor, and affectionately dubbed France’s proposal the X-Chamber, since there was agreement on the general concept, but not exactly what it should do or be called. The Netherlands then countered with “Pre-Trial Magistrate” because there seemed to be agreement that the chamber would not provide an investigative judge, juge d’instruction, as allowed in civil law systems, but would act to strike a balance between the prosecution and the defense during the pre-trial stage of the proceedings. Seeming slightly surprised at how other States had interpreted its proposal, France quickly pointed out that their idea of a pre-trial chamber was merely a suggestion for how to deal with the direct proceedings of a prosecutor who intends to conduct investigations within a State; the implication was not meant to be any more or any less. Regardless, the idea was alive that even though no one was quite sure how exactly such a chamber could be incorporated into the Statute, there seemed to be initial consensus that a supervisory chamber of some sort might be in order.

71. Id.
72. Id.
73. Id.
74. Id.
76. Id.
On August 5, 1997, the United Kingdom presented the first written statement regarding the Pre-Trial Chamber. In the document, the United Kingdom summarized its view of the initial debate:

a) Most delegations which spoke yesterday support the view that a supervising chamber could be established to hold the balance between the Prosecutor and the Defense in respect of certain aspects of the investigation at the early stages of an investigation; this would ensure equality of arms;

b) Many delegations which spoke yesterday oppose the establishment of a chamber to supervise the work of the Prosecutor, expressing the opinion that, if the Prosecutor is to be independent, a supervisory role for the Court would tend to undermine the Prosecutor’s independence;

c) No clear view has emerged about whether a supervising chamber should be set up in every case; and

d) Many delegations support the view that the rights of States must be protected in cases where on-site investigations are to take place.\textsuperscript{77}

Despite uncertainty concerning which powers the supervisory chamber would be granted, references to it were quickly added to any proposal which it might concern. In a note by the United States meant to explain a proposal it made regarding the amendment or withdrawal of an indictment, the commentary noted that the Pre-Trial Chamber was meant “to balance the equality of arms between the prosecution and the defense.”\textsuperscript{78}

When the August 1997 PrepCom concluded, the idea of a Pre-Trial Chamber was added to the official text of the proposed Statute, however, the text was not entirely what was originally proposed by France, nor what it will likely be in the end. According to the August 1997 official text, the idea of the Pre-Trial Chamber contemplates that, “in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defense.”\textsuperscript{79} The text also stressed that some States believed that “the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor’s conduct,” however, others believed the Pre-Trial Chamber’s role should be

\textsuperscript{77} UK Delegation, Supervision Chamber, Non-paper/WG.4/No.3 (Aug. 5, 1997).

\textsuperscript{78} U.S. Proposal regarding amendment or withdrawal of the indictment, art. 27, para. 4 (Non-paper/WG.4/No.7) (Aug. 8, 1997).

expanded to reflect "the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber."\textsuperscript{80}

For the most part, the role of the Pre-Trial Chamber has not been revisited during the formal debate at the PrepComs. It has been reflected in the informal discussions that delegations have conducted behind the scenes, but the official text remained the same at the end of the final March-April 1998 PrepCom as at the end of the August 1997 PrepCom.\textsuperscript{81} Although there has been little formal debate on the matter, a recent proposal submitted by Argentina and Germany received such strong support that it appears the debate is not yet over, nor is it likely that the official text will remain the same.

According to the Argentine/German proposal, when the Prosecutor is acting upon the receipt of information submitted by sources other than the Security Council or interested States, and the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, the Prosecutor "shall submit to the Pre-Trial Chamber a request for authorization" for an investigation.\textsuperscript{82} It would then be the responsibility of the Pre-Trial Chamber to consider whether "there is a reasonable basis to proceed with an investigation," and whether "the case appears to fall within the jurisdiction of the Court."\textsuperscript{83} A United States proposal which came out later the same day, agreed that before the Prosecutor could commence investigation of suspected criminals, "the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination."\textsuperscript{84} If the Argentine/German proposal survives debate and ends up incorporated into the text of the Statute, then an effective means will have been created to allow the Prosecutor to act as a third trigger mechanism for the Court. Furthermore, by incorporating the Argentine/German proposal, the Prosecutor would be entitled to initiate its own investigations, but at the same time the Pre-Trial Chamber would be able to protect the rights of the defense and balance the independence of the Prosecutor with the sovereignty of the States.

**IV. COMPLEMENTARITY**

Underlying every case brought before an international tribunal is the tension between domestic and international claims over the same offenses. This tension exists because of the universal agreement over the importance
of the prevention of double jeopardy, or *non bis in idem*, that no person should be twice tried for the same crime. To rectify this potential problem, each of the *ad hoc* international military and criminal tribunals were granted supremacy over national courts' jurisdiction. In Nuremberg and Tokyo supremacy was accepted to a great extent because the tribunals were set up by the undisputed victors of World War II. In the former Yugoslavia and Rwanda the tribunals were again granted supremacy over domestic jurisdiction, this time not merely because of victors' will, but rather to maintain and restore international peace and security to the regions. The decision to implement supremacy clauses in all of these instances was eased by the retrospective nature of the proceedings. The tribunals were not being created to adjudicate possible future crimes, but rather over specific instances that had already occurred, and where agreement had already been reached that international tribunals would be the best forum to adjudicate such crimes.

For the creation of a permanent International Criminal Court, the retrospective nature of the prior tribunals is impossible to maintain, and must instead be replaced by a prospective outlook. Indeed, the ICC will not adjudicate crimes that have already occurred, but rather crimes that may occur after the Court has been established. Because of this difference in perspective, most States are unwilling to relinquish their future claims to the jurisdiction of an international court, especially when their domestic judicial systems are just and effective.

To balance the ICC's ability to maintain jurisdiction (when appropriate), with national concerns over the importance of State sovereignty, the concept of "complementarity" was developed. The general premise of complementarity is that the ICC would only have jurisdiction to try an individual when the respective national criminal justice systems were either unwilling or unable to try the case themselves. To paraphrase the delegate of Korea, the core of the principle of jurisdiction is to find a nexus between the ICC and the national courts; it should not be meant to define supremacy, but rather balance. Although it is easy to give a general definition of complementarity, it has been much harder for States to agree on a specific definition that should be included in the Statute of the ICC.

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85. Also referred to as *ne bis in idem*, A/AC.249//CRP.20 (1988); art. 18, A/CONF.183/2/Add.1.
The ILC Draft Statute proposed that the ICC could not have jurisdiction when the crime in question:

has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or is not of such gravity to justify further action by the Court. 90

However, the ILC definition was considered to be much too broad.

At the beginning of the August 1997 PrepCom, Germany entreated, “the Court itself should have the power to determine whether in a given situation national trial procedures are not available or may be ineffective.” 91 Germany, joined by Canada, then issued a proposal in which they suggested that a case would be inadmissible if “the case is under investigation or prosecution by a State which has or may have jurisdiction over the case, and the investigation or prosecution is being diligently undertaken,” or the diligent investigation resulted in the decision not to proceed to prosecution, based on “well-founded . . . knowledge of all relevant facts.” 92

Italy proposed that in making a determination on admissibility, the ICC should be entitled to consider whether:

there has been and continues to be unreasonable delay in the conduct of national investigations or proceedings, or . . . the said investigations or proceedings . . . were or are designed to shield the accused from international criminal responsibility, or were or are conducted with full respect for the fundamental rights of the accused, and . . . the case was, or is, diligently prosecuted. 93

The United States added that the burden of proof should be vented onto the ICC, however, a dual burden is also on the States to handle the case properly. 94

During the formal working groups some States proposed the inclusion of the term, good faith, in the explanation of complementarity. But since

90. Art. 35, A/49/355 (sub-numbering omitted).
94. Oral intervention made on Aug. 5, 1997. It was unclear from the comment made by the US delegate whether the burden placed on States not to adulterate domestic prosecutions, should be a legal onus or a moral responsibility.
*good faith* was not a term utilized by, or familiar to, most civil law nations, this too was rejected. A rolling text issued on the subject, stated that the case would be admissible to the ICC if the relevant national criminal justice systems were either “unable or unwilling to carry out effectively the investigation or prosecution.” The text then footnoted that phrase “unable or unwilling” with the comment that “these terms attempt to reflect the rationale underlying the issue of complementarity, and are suggested in the absence of any other generally accepted phrase.” Ironically, however, this phrase stuck, and was included in the next rolling text and then in the final official text of the August 1997 PrepCom, with only a slight modification the ICC has jurisdiction over the case when “the State is unwilling or unable *genuinely* to carry out the investigation or prosecution.”

Aspects of the complementarity principle surfaces in numerous sections of the Statute of the ICC. However, the simple definition of complementarity as laid out by the Zutphen Draft and its revisions, was as follows:

1. Having regard to paragraph 3 of the preamble, the Court shall determine that a case is inadmissible where:

   a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

   b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

   c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 13; and

   d) the case is not of sufficient gravity to justify further action by the Court.

95. Informal Consultation on art. 35, Coordinator’s Draft Consolidated Text, Aug. 6, 1997.
96. *Id.*
99. *Id.*
2. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5;

b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and

c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.100

Heading into the Diplomatic Conference in Rome, there appears to be consensus that this definition of complementarity will survive any further negotiations. On the other hand, a minority of delegations still hold to the belief that the Court should not be granted complementary jurisdiction at all, and that the Court "has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."101 However, as the delegate of Austria pointed out, "complementarity constitutes a guiding spirit,"102 and as the delegate of Ireland concluded, complementarity might not be the strongest grounds for the Court to rest on, but it might be the best.103

V. PUNISHMENT AND REPARATIONS

Thus far this paper has dealt primarily with the processes of the ICC leading up to a trial. However, underlying the entire process including the trial itself, is what actions the Court should take once it has determined that


101. Id.


103. Id.
a person was guilty of the crimes with which he or she was charged. Is the purpose of this court merely to punish the world’s most egregious international criminals, or to offer satisfaction and redress to their victims as well? To answer this final question it is necessary to examine the possible punishments that the Court may be empowered to impose.

A. Applicable Penalties

The ILC draft appears to have assumed that the penalties phase of the proceedings would be quite simple and up-front. The ILC Draft stated that the Court could impose a life sentence of imprisonment or imprisonment for a specified number of years, and/or a fine. The fines could be transferred by the Court to: the Registrar, "to defray the costs of the trial"; a State whose nationals were the victims of the crime in question; and/or a trust fund "established by the secretary-general of the United Nations for the benefit of victims of crime." Furthermore, the ILC Draft proposed that in determining the length of sentence or amount of fine to be imposed, the laws of the passive personality State, the territorial State, and the custodial State could all be taken under consideration. Although clear and concise, this draft had many holes.

The most glaring missing piece was the death penalty. Thus, upon much political pressure the death penalty was added, at least for the time being, into the official text as another possible penalty. The new text explained that the Court could impose the death penalty, "as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage." However, the provision on the death penalty was immediately placed in brackets, to indicate that it needed further debate. After that, it was purposefully skipped over in the formal debates, and left completely untouched leading up to Rome, except for one minor change. The text relating to the death penalty was changed in the Zutphen text to read as the first of two options, then the second option merely stated, "No provision on death penalty." Apparently the lines had been drawn, but it was recognized that only the plenipotentiaries meeting in Rome were the appropriate figures to attempt some sort of compromise.

105. Id.
106. Id.
107. Id.
108. Id.
Another aspect that many felt was missing from the ILC Draft was a provision relating to minors. It was proposed that the ILC Draft should be amended to include a provision where anyone who committed the crimes between the ages of 13 and 18 could not be sentenced for more than 20 years of imprisonment.\textsuperscript{111} However, that same text also provided that the Court could determine that the circumstances of the case could allow the Court to take exception and ignore age as a mitigating circumstance, allowing minors to be sentenced as adults.\textsuperscript{112} This second provision met with much opposition, particularly from non-governmental organizations and the UN Committee on the Rights of the Child. The Zutphen text removed the second provision, and stated that no person who committed a core crime while under the age of 18 could be sentenced for more than 20 years of imprisonment.\textsuperscript{113}

Debate also ensued over the applicability of national legal standards to the imposition of penalties, but the text remained essentially the same heading into Rome. One provision was added in brackets, "In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law."\textsuperscript{114} Regardless, the entire article has been footnoted to say that "the view was held that this kind of provision should be avoided altogether."\textsuperscript{115} Therefore, it seems likely that the Court will be allowed to set its own international standards for appropriate penalties, and not be limited or hindered by domestic norms. However, "A sentence may be appealed, in accordance with the Rules, by the Prosecutor or the convicted person on the ground of [significant] disproportion between the crime and the sentence."\textsuperscript{116}

Finally, during the March-April 1998 PrepCom, victim's groups lobbied for a reordering of the listing of the types of fines that could be collected by the Court. The delegate of France seemed to agree with the non-governmental organizations and then argued themselves that the listing of fines should be rearranged to reflect the difference in the importance of each type of fine. The final official text of the March-April 1998 PrepCom stated that fines and possibly assets collected by the Court could be transferred to one or more of the following: a trust fund, the State whose nationals were victims of the crime in question, and the Registrar.\textsuperscript{117} Also added to the text in brackets was a point stressing that the listing was in an

\textsuperscript{111.} A/AC.249//CRP.1 (1997).
\textsuperscript{112.} Id.
\textsuperscript{114.} A/AC.249//CRP.13 (1998); art. 78, A/CONF.183/2/Add.1.
\textsuperscript{115.} Id.
\textsuperscript{116.} A/AC.249/WG.4//CRP.7 (1998); art. 80, A/CONF.183/2/Add.1.
\textsuperscript{117.} A/AC.249//CRP.13 (1998); art. 79, A/CONF.183/2/Add.1.
order of priority.\textsuperscript{118} Furthermore, a footnote stressed that it was suggested that there may be other options other than the first two listed, "as to the manner in which fines or assets collected by the Court could be distributed to victims."\textsuperscript{119}

B. Reparations

The ILC Draft Statute did not include any provisions for reparations. The closest the draft came to including provisions on reparations were the references to how the fines collected by the Court could be distributed.\textsuperscript{120} However, even there, the money was not going directly to victims, their families or assigns, but rather to intermediary bodies, which could then utilize the money in an undefined manner. To rectify this omission, delegations suggested two areas where reparations could be incorporated into the statute: first, as another applicable penalty; and second, as a separate article dealing specifically with compensation to victims.

The formal debate over reparations was supposed to occur during the December 1997 and March-April 1998 PrepComs. Although formal debate did occur to some extent, most of the negotiations over reparations occurred during informal, off the record, discussions and working groups. However, without breaching any bonds of secrecy, it is still quite possible to explain what developed through a look at the few official texts, which did surface on the subject.

In the official text on the Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997,\textsuperscript{121} the Working Group on Penalties recommended that under the Applicable Penalties article, a fifth penalty should be included, "Appropriate forms of reparation." The suggestion meant that besides imprisonment, fines, and possibly the death penalty, the Court should also be able to impose on the convicted person the responsibility of paying reparations to victims, their families or assigns. However, there was still much disagreement on not only whether reparations should even be considered a penalty, but also if it were, what wording should be used. The suggestion of the working group read as follows: "[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State] [or reparation through any other international arrangement] appropriate forms of reparation [[including] [such as] restitution, compensation and rehabilitation]]."\textsuperscript{122} This language was then inserted into

\begin{flushright}
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Art. 47, A/49/355.
\textsuperscript{121} A/AC.249/L.9/Rev.1 (1997).
\textsuperscript{122} Id. The examples used to suggest forms of reparations (i.e. restitution, compensation and rehabilitation), as well as the definition used to explain the term "victim", were made in reference to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of
the Zutphen text under the article on penalties and will debated more in Rome. However, not everyone was convinced that reparations were a penalty, nor was everyone convinced that that brief explanation was sufficient in explaining what type of reparations could be granted to victims. Thus, another article was inserted into the Zutphen text, which did not exist in the ILC Draft, Compensation to Victims.

The Zutphen text offered three proposals regarding Compensation to Victims. The first proposal granted the Court with the binding authority to declare the criminal liability of the person convicted, but granted States the competence to determine issues of reparations. The second proposal stated that where necessary,

the Trial Chamber shall also determine the scope and extent of the victimization and establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the person convicted, in order to allow victims to rely on that judgment for the pursuit of appropriate forms of reparations, such as restitution, compensation and rehabilitation either in national courts or through their governments, in accordance with national law.

Essentially, this proposal allowed the Court to make recommendations as to what it felt domestic courts or governments should award, but did not bind the States to its judgment. Under the third proposal, it was suggested that the Court itself should be able to order a convicted individual to issue both pecuniary and non-pecuniary forms of reparations. As could be assumed about any text with so many different proposals, the text included in the Zutphen Draft did not last very long before being modified.

On February 10, 1998, a joint proposal issued by France and the United Kingdom shrunk the article into two proposals. The first, in very broad language, granted the Court the ability to order both individuals and States to pay reparations to victims, their families and assigns. The second, suggested that the Court could only order a “monetary award, or any other award by way of reparations,” against an individual, but not

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124. Art. 66, A/AC.249/L.13 (1999); Art. 73, retitled, Reparations to Victims, A/CONF.183/2/Add.1.
125. Id.
126. Id.
127. Id.
against a State. Furthermore, the monetary award could be comprised of a punitive element, a compensatory element, or both, and the reparations could include an order for restitution of property or “any other order which the Court considers appropriate.” Both proposals had their merits and pitfalls. The first proposal allowed the Court to essentially order whatever forms of reparations it considered appropriate, both against an individual and a State, but did not allow for monetary awards, which is possibly the easiest form of compensation that could be granted. On the other hand, the second proposal allowed for monetary awards, but not from States, which are the most likely and effective source of monetary awards and other forms of reparations.

A rolling text issued on March 23, 1998 by the Working Group on Procedures, combined the two proposals submitted by France and the United Kingdom, into one text incorporating the better elements of both, but unfortunately most of the text was still in brackets indicating lack of consensus. In the rolling text there was agreement that the Court should be authorized to make an order directly against a convicted individual for an appropriate form of reparations, including restitution, compensation and rehabilitation. The rolling text also seemed to indicate that there had been agreement that monetary awards of reparations could be composed by both an exemplary element and a compensatory element, or both. However, it later turned out that such agreement had not in fact been met. Furthermore, included in brackets, and thus indicating a lack of agreement, were references to the Court being able to “recommend that States grant an appropriate form of reparations to, or in respect of, victims . . .”

The final official text of the March-April 1998 PrepCom, mirrored most of the language of the March 23, 1998 rolling text. It included a footnote explaining that the references to appropriate reparations was “to be granted not only to victims but also to others such as the victim’s families and successors (in French, “ayant-droit”). The official text also explained, albeit in brackets, that orders of reparations made by the Court against States could only be made “[if the convicted person is unable to do so himself/herself; [and . . . the convicted person was, in committing the offense, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]].” It appears that much of the

129. Id.
130. Id.
132. Id.
135. A/AC.249/CRP.12 (1998); art. 73, A/CONF.183/2/Add.1.
136. Id.
debate that will continue with regard to compensation to victims, will be centered on whether a monetary award could also be included as a form of reparations, whether the ICC should compel States to make reparations, and whether reparations should be considered a penalty, a separate form of compensation, or both.

VI. CONCLUSION

There is cautious-optimism leading into the Diplomatic Conference in Rome. Over 1700 sets of brackets remain in the proposed text, all of which must be resolved before the treaty can be signed. Although many people believe compromise can be met in time, almost as many wonder what the cost of compromise will be. Still others are concerned that five weeks in Rome will not be enough to hammer out the differences, and future conferences will have to be held, possibly undermining support for the creation of an International Criminal Court.

Much of the uncertainty exists regarding the outcome of the negotiations because delegations are unsure where to draw the bottom line in their compromises. Some scholars already believe that a fatal mistake was incurred in the beginning of the PrepComs when States decided that the Statute should not merely be the procedural creation of a court, but also a redefinition and modernization of fundamental concepts of international law, such as the definitions of aggression, crimes against humanity and war crimes. However, that choice was made, so heading into Rome governmental and non-governmental representatives are proceeding under the premise that both goals can be accomplished.

To help States decide what bottom line should now be drawn, many State delegations have requested that non-governmental representatives offer their advice as to what they see as a bottom line. No State wants to sign a treaty that its citizens will reject. Amnesty International has suggested sixteen fundamental principles for a "Just, fair and effective International Criminal Court."

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1. The Court should have jurisdiction over the crime of genocide . . .
2. The Court should have jurisdiction over other crimes against humanity . . .
3. The Court should have jurisdiction over serious violation of humanitarian law in international and non-international armed conflict . . .
4. The Court must ensure justice for women . . .
5. The Court must have inherent (automatic) jurisdiction . . .
6. The Court must have the same universal jurisdiction over these crimes as any of its States parties . . .
7. The Court must have the power in all cases to determine whether it has jurisdiction and whether to exercise it without political interference from any source . . .
Whether Amnesty International has highlighted the appropriate sixteen principles is surely debatable, but at the same time their input was greatly appreciated by the delegations. The importance of State cooperation, respect for the principle of complementarity, and removal of political interference from the Court, will hopefully receive unanimous acceptance. It is beyond dispute that for the creation of the Court to be considered a success, the ICC must be an independent, impartial, just and effective, permanent judicial institution.

This paper has attempted to show the progression of the negotiations on certain key elements concerning the creation of the permanent International Criminal Court. This attempt is intended to help explain the creation of, and how close we are to, mankind’s greatest effort towards the eradication of impunity. However, one of the biggest problems the negotiations and the Court might face, is the basic redefinition of the core crimes. It appears that most States are unwilling to sign onto a treaty that does not explicitly lay out culpability. On the other hand, just as failing to modernize the core crimes would have allowed these same States to limit the jurisdiction of the Court to only historical frameworks, not allowing the definitions to be reexamined in the future will limit the Court solely to the notions of today. In 1928 no one ever dreamt of genocide. In 1948 no one equated rape with a crime against humanity. What understandings will the new millennium bring? Regardless of all of the obstacles we need a court that can offer public acknowledgment of international crimes. To do so, this Court must uphold and imbue the evolving face of international

8. The Court should be an effective complement to national courts when these courts are unable or unwilling to bring to justice those responsible for these grave crimes . . .

9. An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate judicial scrutiny, and present search and arrest warrants and indictments to the Court for approval . . .

10. No political body, including the Security Council and States, should have the power to stop or even delay an investigation or prosecution under any circumstances whatsoever . . .

11. To ensure that justice is done, the Court must develop effective victim and witness protection programs, involving the assistance of all States parties, without prejudicing the rights of suspects and the accused . . .

12. The Court must have the power to award victims and their families reparations, including restitution, compensation and rehabilitation . . .

13. The Statute must ensure suspects and accused the right to a fair trial in accordance with the highest international standards at all stages of the proceedings . . .

14. States parties, including their courts and officials, must provide full cooperation without delay to the Court at all stages of the proceedings . . .

15. The Court should be financed by the regular UN budget, supplemented, under appropriate safeguards for its independence, by the peace-keeping budget and by a voluntary trust fund . . .

16. There should be no reservations to the Statute . . .
criminal law, humanitarian law and human rights. Through a permanent International Criminal Court, not only will the world’s most egregious international criminals be relieved of their impunity, but their victims will be allowed a vehicle for satisfaction and redress.
CHILD SEX TOURISM AND CHILD PROSTITUTION IN ASIA: WHAT CAN BE DONE TO PROTECT THE RIGHTS OF CHILDREN ABROAD UNDER INTERNATIONAL LAW?

Elizabeth Bevilacqua*

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I. INTRODUCTION

Children are undoubtedly the future of any society, and have the potential for someday becoming incredible assets to the countries in which they live. Major traumatic events that occur during ones youth assists to mold individuals into the adults they become. Sexual abuse as a child is one such traumatic event of such major proportion that impacts an individual's life so profoundly the event carries over into adulthood by aiding in the formation of ones adult personality and psyche. Children do not possess the capability to address situations such as being the victims of sexual abuse by adults. Children by their very nature are inexperienced and vulnerable to adult persuasions. Adults are the authoritative figures in virtually all societies throughout the world. Hence, children do not possess the ability to handle themselves in adult situations regarding their own sexual exploitation by adults.

Due to poverty resulting from lack of employment opportunities for their parents, many children in Asia are forced to fend for themselves in the adult world. Unfortunately, a myriad of children, both boys and girls, turn to a life of prostitution. Although some choose prostitution, the majority of them are forced into it through kidnapping. Often, children are trafficked across borders. The traumatic experiences of these children are so intense that rehabilitation is almost impossible. These victims are generally left psychologically as well as physically scarred for life.

In Thailand, estimates of the number of prostituted children range anywhere from 200,000 to 800,000.¹ Although Thai laws expressly condemn sexual offenses against children, the laws have been relatively ineffective due to poor law enforcement.² Despite the obvious inhumanity

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Whoever has sexual intercourse with a girl who is not yet over fifteen years of age and who is not his wife, whether or not the girl consents, shall be imprisoned four to twenty years and fined eight thousand to forty thousand Baht.

If the commission of the offense according to the first paragraph is committed against a girl not yet over thirteen years of age, the offender shall be imprisoned seven to twenty years and fined fourteen thousand to forty thousand Baht, or imprisoned for life.

If the commission of the offense according to the first or second paragraph is committed by participation of persons and such gird does not consent, or by carrying a gun or explosive, or by using such weapons, the offender shall be imprisoned for life.

If the offender commits the act stated in the first paragraph against a girl over thirteen years but not yet fifteen years of age with her consent, and the Court grants such man and girl to marry together afterwards, the offender shall not be punished for such offense. If the Court permits them to marry while the offender is in prison for such an offense, the Court shall release such offender.
of child exploitation, a number of countries in Asia have created an international market for child prostitution: *child sex tourism*. Most of the consumers are males from the industrialized nations.\(^3\) Countries such as Thailand and the Philippines are often chosen because they are havens for organized sex tours.\(^4\) Some are simply looking for a causal experimental experience. Others are notorious pedophiles, representing a significant sector of the trade.\(^5\)

The first part of this note will focus on the national laws of the leading providing countries providing *child sex tourism*, namely Thailand and the Philippines, and the national laws of consumer countries, namely the United States. It will concentrate on the implementation of national laws as mandated by international law, and the likelihood of success of criminal prosecution here in the United States of Americans committing sex offenses abroad. The second part of this note will deal with suggestions for enforcing national strategies here in the United States in order to eliminate *child sex tourism* abroad. The third and final part of this note will address the issue of how the emerging International Criminal Court may also play a role in adjudicating matters of child trafficking and prostitution.

**II. THE LAWS OF PROVIDER AND CONSUMER NATIONS OF CHILD SEX TOURISM: PROTECTING CHILDREN FROM SEXUAL EXPLOITATION**

Thailand, the Philippines, Sri Lanka, and Taiwan are the countries traditionally connected with *child sex tourism*, and all have serious child prostitution problems.\(^6\) Prostitution of a massive nature involving children originated in Thailand and the Philippines in the late 1960s during the Vietnam War.\(^7\) In Thailand, Burmese women and girls as young as 13 are illegally trafficked across the border by recruiters, and sold to brothel owners.\(^8\) In the Philippines, many children are tricked into prostitution after their parents sell them to recruiters with the promise of legitimate work in the city.\(^9\) The organization, End Child Prostitution in Asian Tourism ("ECPAT"), has offered a 1994 estimate of 250,000 prostituted children in Thailand alone.\(^10\) The Philippine government calculated the number of child prostitutes in the Philippines at 50,000.\(^11\)

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4. *Id*.
5. O'GRADY, *supra* note 1, at 56.
6. *Id.* at 91-106.
7. *Id.* at 92-101.
8. *Id*.
9. *Id*.
11. *Id*.
During the late 1970s and early 1980s, pedophiles from both Europe and North America found a Shangri-La for sexual activity with minors in Thailand and the Philippines. More than half of the overall sex tourists are pedophiles, and approximately one-third of them are North American or European.

A. The Provider Countries: The National Laws of Thailand and the Philippines

Thailand has responded to the problem of child exploitation by enacting laws criminalizing sexual activity with minors. Thai law prohibits sexual intercourse with a child under the age of fifteen regardless of consent. Sexual activity with a child under thirteen may warrant life imprisonment.

The Philippine government has taken positive measures to curb child exploitation by promoting the Special Protection of Children against Child Abuse, Exploitation and Discrimination Act. The Act allows heavy penalties to be applied against advertisers, clients, procurers, pimps, and houses of prostitution. It has provided for the arrest and deportation of a number of foreign pedophiles.

Although it is evident that the providing countries have passed legislation that protects children from sexual exploitation, these laws are often not enforced against tourists. In Thailand, the sex tourism policy has been a difficult force to rise up against. The sex trade has become a major industry in both Thailand as well as in the Philippines, creating resistance against the child sexual offenses laws. The police have known to guard brothels, as well as traffic or procure children for prostitution.

12. O'GRADY, supra note 1, at 98-99, 103-104.
14. See supra note 2, at § 277.
15. Id.
16. Id.
21. Id. at 505.
22. Id.
23. Id.
Moreover, police officers also tend to be customers themselves, yet they are virtually never investigated or prosecuted. Child prostitutes are reluctant to cooperate with legitimate law enforcement officials for fear of prosecution themselves.

B. The United States' Role as a Consumer Country: Laws Enacted at Home to Prevent Child Exploitation Abroad

On September 13, 1994, President Bill Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"). The Crime Bill included the Child Sexual Abuse Prevention Act of 1994, which criminalizes travel to another country for the purpose of engaging in sexual intercourse with a minor. The present act extends the Mann Act of 1910, which was originally passed to prevent the transport of women across state lines for sexual purposes. In 1986, the Mann Act was amended to criminalize the transport of any person under the age of eighteen either between states or abroad with the intent that the minor engage in sexual activity. The current 1994 amendment criminalizes traveling to foreign countries for the purpose of engaging in sexual acts with a child less than eighteen years of age if that act would be in violation of United States federal law. The legislation carries financial penalties or imprisonment up to ten years, or both. In addition, the law contains no double criminality requirement. Therefore, the United States nationals who commit sex offenses abroad may be prosecuted under federal law, regardless of whether or not the act is considered a crime abroad.

C. The Mandates of International Law on the United States as a Consumer Nation

The most widely recognized development in international law regarding the protection of children is contained in the United Nations Convention on the Rights of the Child [hereinafter "UNCRC"].

24. Id. at n.10 (citing Aaron Sachs, The Last Commodity, Child Prostitution in the Developing World, WORLD WATCH, July/Aug. 1994, at 24, 28).
25. Robinson, supra note 17.
27. Id.
30. Id.
31. Id.
adopted by the United Nations General Assembly in 1989, and entered into force in 1990.\textsuperscript{33} Articles 34(a) and (b) of the Convention require all signatories to take appropriate national, bilateral, and multilateral measures to prevent the exploitation of children in unlawful sexual activities and prostitution.\textsuperscript{34} Article 35 provides that states take measures in order to prohibit the sale, abduction, or trafficking of children.\textsuperscript{35}

To date, 191 nations have ratified the UNCRC.\textsuperscript{36} However, the United States has not yet done so.\textsuperscript{37} There are a number of reasons why opposition to the ratification of the UNCRC exists in the United States. A main concern is federalism. Many of the convention's enunciated rights fall within areas, which have traditionally been left to the discretion of the individual states.\textsuperscript{38} Under the United States Constitution, ratified treaties become federal law.\textsuperscript{39} Therefore, there is some apprehension that the UNCRC would supersede a number of state laws, thus allowing for prosecution in federal rather than state courts.

D. The Likelihood of Success of Prosecution of Sex Tourists in the United States.

While these national laws demonstrate a progressive approach towards abolishing sex tourism in providing countries like Thailand and the Philippines as mandated by international law, the actual legal effect is minimal.\textsuperscript{40} While providing countries have difficulty enforcing laws against child exploitation within their borders, consumer countries like the United States face the obstacles of extraterritorial jurisdiction and evidentiary standards.\textsuperscript{41} International law recognizes five areas of extraterritorial criminal jurisdiction.\textsuperscript{42} The United States adheres to the principles of territoriality and nationality in order to establish federal jurisdiction in criminal cases.\textsuperscript{43} Territoriality deals with where a crime is

\begin{thebibliography}{99}
\footnotesize
\bibitem{33} \textit{Id.}
\bibitem{34} \textit{Id.} at art. 34(a) and (b), at 11, 218 I.L.M. at 1469.
\bibitem{35} \textit{Id} at art. 35, at 11, 28 I.L.M. at 1469.
\bibitem{36} As of this writing, there are 191 states parties to the CRC. U.N. Homepage (visited Nov. 17, 1997), \url{<http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part boo/iv 11html>}.
\bibitem{37} \textit{Id.}
\bibitem{39} \textit{Id.}
\bibitem{41} \textit{Id.}
\bibitem{42} \textit{Id.}
\bibitem{43} \textit{Id.}
\end{thebibliography}
committed. Therefore, the United States will rely on its territorial power to try any criminal offenses committed within its borders. Nationality provides for jurisdiction over United States nationals who commit criminal acts abroad. The amendment to the Mann Act, which explicitly allows for prosecution of United States nationals for traveling or conspiring to travel abroad for purposes of engaging minors in sexual acts, permits the United States to exercise federal jurisdiction based on the nationality principle.

Although they may overcome potential jurisdictional obstacles, United States law enforcement officials may have problems meeting federal evidentiary standards. Due to the novelty of the amendment to the Mann Act, such problems have not yet arisen. However, retrieving admissible evidence from foreign nations may prove to be an arduous task in prosecuting sex offenders in the United States. It should be noted that United States law focuses on the intent to commit a sex offense abroad rather than the sexual act itself. This would otherwise indicate that procuring admissible evidence from another country may be unnecessary, since one could be prosecuted without ever having left the country. Nevertheless, most offenders are likely to be apprehended in a foreign country while engaging in the criminal act. This, in turn, will necessitate collecting evidence abroad, which is admissible in a United States court of law. In order to aid in this process, the United States and Thailand have signed the Mutual Legal Assistance Treaty [hereinafter “MLAT”] which facilitates the gathering of admissible evidence from abroad. It guarantees that the evidence collected corresponds with the constitutional and evidentiary requirements of both countries. However, in sex offense cases, the testimony of the victim may be inadmissible if not given in person, due to hearsay objections.

To date, there have been no prosecutions of United States citizens regarding the amendment to the Mann Act which deals with travel with the intent to engage in sex with a minor. The United States Department of Justice has expressed interest in prosecuting operators of child sex tours,

44. Nadelmann, supra note 40.
45. Id.
46. Id.
47. Id.
48. Id.
49. Nadelmann, supra note 40.
50. Id.
52. Nadelmann, supra note 40, at 37.
53. Id.
and the United States Customs Child Pornography Enforcement Program has initiated investigation of those potentially liable under the new United States law.  

III. BEYOND LAW ENFORCEMENT: WHAT THE UNITED STATES MUST DO AS A GLOBALLY RECOGNIZED PROPONENT OF CHILDREN’S RIGHTS IN ORDER TO ERADICATE CHILD SEX TOURISM ABROAD.

Child sex tourism is a lucrative business of international proportions. Its suppression necessarily involves the participation of governments, national and international law enforcement agencies, non-governmental organizations, and international bodies such as the United Nations. National legislation of both provider nations, such as Thailand and the Philippines, and consumer nations, such as the United States, are important components in the effort to end child sexual exploitation abroad. The United States must take additional steps in order to deter sex tourism originating in the United States.

A. Ratifying the UNCRC

The United States’ position regarding the UNCRC stands in stark contrast to other consumer nations, such as Sweden and Australia, which have not only ratified the convention, but have incorporated it fully into their strategies against child sex tourism. Although the United States has signed the convention, it appears unlikely that it will be ratified without significant reservations denying the treaty binding power over United States law. The United States’ disposition regarding the ratification of the convention leads other consumer nations to believe that the United States holds itself above international treaties, while at the same time, the United States seeks to bind provider nations to the mandates of international law. This lack of support for the UNCRC weakens the effectiveness of the United States’ position against child sexual exploitation, and its capability as a world leader to encourage respect for children’s rights worldwide.

By becoming a party to the convention, the United States would recognize the international human rights of children, including civil,

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55. Id.
56. The author has arrived at this conclusion after researching numerous sources on the subject.
57. Li, supra note 20, at 522.
political, social, cultural, and economic rights. Although there is opposition to ratification on grounds of federalism, implementing a federal-state reservation clause so as to allow individual states to conform or not to conform to the Convention in certain matters traditionally left to the states, may serve as a tool to facilitate Congressional consent in ratifying the treaty. Under international law, the United States may still become a party to the treaty even with a federal-state reservation.

B. Collaboration with Foreign National Governments and Non-governmental Organizations

In order to prevent sex offenders from further exploiting children in providing nations, exchange programs between law enforcement officials and community leaders of provider and consumer countries should be fostered. Such programs would include tracking the behavior of United States nationals where there is a threat to children of providing countries. This may be achieved by the exchange of information and data to trace and track pedophiles and criminals who exploit children.

A further way to stop the spread of sex tourism is through the use of travel restrictions by both provider and consumer countries. For example, governments should consider revoking the passports of convicted sex tourists. In addition, opponents of the trade should promote campaigns that enlist the support of national and international commercial airlines and travel agents in order to guarantee that sex tour operators are identified and prosecuted. This will help to deter travelers looking for casual sex with children in foreign countries. Withdrawing the licenses of travel agencies promoting sex tours may also help to deter sex tourism.

There have been a growing number of national initiatives against child sexual exploitation conducted by non-governmental organizations [hereinafter “NGOs”] that have become increasingly coordinated in networking to prevent child prostitution with effective media campaigns. Contrary to legal remedies, NGOs seek to attenuate the root causes of child prostitution and to offer help where the problem exists. Projects include


63. Robinson, supra note 17, at 31.

64. Id.


66. Robinson, supra note 17.

67. Id.
helping families in social development, hot lines to help children in difficulty, and emergency homes and shelters for abused and exploited children. \(^68\) NGOs cite education and awareness as the focal points of their crusade against child sex tourism. \(^69\)

One notable campaign against child sex tourism is End Child Prostitution in Asian Tourism [hereinafter “ECPAT”]. \(^70\) ECPAT works to influencing governments to eliminate tourist-related prostitution and to comply with international conventions. \(^71\) It has also been effective in mobilizing action at the national level by initiating children’s forums against military bases, and advocacy against pedophilia and the exploitative use of children in advertising in various countries. \(^72\) In addition to gathering data on sex tourism, ECPAT has brought this issue to the world’s attention and has mobilized global concern regarding the exploitation of these innocent child victims. \(^73\) By working closer with organizations such as ECPAT, the United States will set an example for other consumer nations as a global leader in effectuating an end to child sex tourism and child prostitution abroad.

IV. THE ROLE OF THE EMERGING INTERNATIONAL CRIMINAL COURT: THE PROPOSITION TO PROSECUTE TREATY CRIMES IN THE ICC.

The horrifying crimes against women and children in Rwanda and the former Yugoslavia have prompted the international community to call for the establishment of a permanent International Criminal Court [hereinafter “ICC”]. \(^74\) The ICC will most likely be created by a multilateral treaty, which will bind only state parties to the treaty. \(^75\) There has been a broad consensus that the ICC will try serious war crimes, genocide, and certain crimes against humanity such as mass rape, and torture. \(^76\) The inclusion of treaty crimes, such as the exploitation and trafficking of children presently remains under negotiation.

A. The Possibility of Including Treaty Crimes Such as Crimes Against Children in the ICC Statute

The concept of expanding the jurisdiction of the ICC to include other crimes, such as treaty crimes, has been met with much opposition. Many

\(^{68}\) Id. at 28.

\(^{69}\) Id. at 29.

\(^{70}\) O’GRADY, supra note 10.

\(^{71}\) Robinson, supra note 17, at 20.

\(^{72}\) Id.

\(^{73}\) Id.


\(^{75}\) Id.

\(^{76}\) Id.
states, including the United States claim that an ICC would not be equipped to adequately adjudicate treaty crimes. Moreover, State Parties fear that broadening the powers of the ICC will infringe on the sovereignty of national courts. However, the most recent draft statute of the ICC includes the principle of complementarity. This means that the ICC would hear a case only when no national court is available or willing to hear it. Thus, State Parties would decide whether they were willing or able to try a case in domestic courts, or whether the state would rather submit the case to the ICC. The ICC could proceed only if consent to jurisdiction over that crime had been given by the following: 1) the state in whose territory the crime occurred; 2) the state with custody over the suspect; and 3) the state which requested extradition of the suspect from the custodial state.

International criminal law must be enforced if the perpetrators of the most serious crimes in the international community are to be brought to justice. An ICC would not only enforce international criminal law, but it would also serve as a model for other national criminal justice systems around the world. If certain treaty crimes, such as those in violation of the UNCRC, were to be prosecuted in an international criminal tribunal, this action may prompt provider countries like Thailand and the Philippines to deal with the exploitation of children within their borders more vehemently.

Arguments have been made that the substantive provisions of the UNCRC and its recognition of the need for coordinated efforts among intergovernmental and non-governmental bodies, offer significant potential to help curb trafficking in children. The primary mechanism for monitoring implementation of the rights in the UNCRC is the state reporting procedure. The reporting mechanism is intended to expose situations where a government may have adequate national legislation but inadequate law enforcement. However, infrequency of monitoring is a significant drawback to the reporting mechanisms established under the

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78. Id.
79. Id.
80. [visited 10/13/97], <http://www.abanet.org/irr/hr/icc.html>.
81. Id.
82. Id.
treaty. States do not always provide reports which are in compliance with the treaty, and oftentimes do not submit reports at all.\textsuperscript{86} Moreover, the reporting mechanisms discussed in the treaty apply only to the states that have ratified the treaty.

The implementation of national laws in provider and consumer countries through mandates in international law from the treaty itself and the collaboration with NGOs and foreign national governments are all effective initial attempts to abolish child sex tourism. However, more must be done to guarantee consistent and forceful application of existing laws. The UNCRC treaty itself does not provide true enforcement measures in case of violation.\textsuperscript{87} Therefore, the inclusion of treaty crimes, such as crimes against children, within the ICC statute is necessary in order to command respect for the law.

B. The Possibility of Including Crimes Against Children in the ICC Statute as Crimes Against Humanity

There are several obstacles to curbing the problem of child sex tourism. First, there is an unwillingness to prosecute offenders in provider and consumer countries. In provider countries, reluctance stems from the economic benefits of child prostitution.\textsuperscript{88} In consumer countries, the reason for the reluctance is more elusive. Second, not all states are parties to the UNCRC. Although many countries such as the United States have signed the UNCRC, signatories still need to ratify the treaty in order to prosecute violations of the treaty under the ICC. Finally, treaty crimes in general have not yet been included in the ICC statute. Therefore, crimes against children, such as child sex tourism and child prostitution, are more likely to be dealt with if prosecuted under the auspices of crimes against humanity.

Crimes against humanity have not yet been comprehensively codified but, like genocide and war crimes, they are considered crimes under customary international law.\textsuperscript{89} One of the debates in negotiations on the draft statute of the ICC has centered on whether crimes against humanity should be linked to armed conflict.\textsuperscript{90} NGOs have argued that such crimes should be separated from armed conflict because widespread and

\begin{itemize}
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Eric Thomas Berkman, \textit{Responses to the International Child Sex Tourism Trade}, 19 B.C. INT'L \& COMP. L. REV. 397, 417 (1996).
  \item \textsuperscript{88} Ehrlich, \textit{supra} note 3, at 70.
  \item \textsuperscript{89} Nadelmann, \textit{supra} note 40.
\end{itemize}
systematic attacks against a civilian population can, and have been, committed in peacetime.\textsuperscript{91}

In the event that a compromise cannot be reached regarding the inclusion of treaty crimes within the ICC statute, the only solution may be to include such crimes within the definition of crimes against humanity. Due to the fact that crimes against humanity have not been codified, this may allow for the definition to be structured so as to include crimes against children, such as child trafficking and child sex tourism. This way, states not party to the UNCRC will either have to try such an offense in domestic courts, tender the case to another state willing to try it, or submit it to the ICC.

V. CONCLUSION

The amount of children subject to prostitution and sex tourism is astronomical.\textsuperscript{92} The damage suffered by these children subject to such sexual crimes is often times irreparable. Countless numbers of children in countries like Thailand and the Philippines are grossly affected each day by child sex tourism, which has flourished in part from the involvement of industrialized nations such as the United States. The international community must acknowledge its role in fueling sex tourism and act responsibly by implementing laws to reign in these violations. Enacting national laws in order to facilitate criminal prosecution of sex offenders abroad is a step in the right direction for the United States and other consumer countries. However, much more can be done to deter child sex tourism. Cooperation with foreign law enforcement officials and NGOs, informational exchanges between countries, and educational campaigns are all events that if implemented can assist to deter child sex tourism within consumer countries. Of course the most effective mechanism may be to prosecute offenders in the International Criminal Tribunal. This may be done by including treaty crimes within the ICC statute, or including crimes against children within the definition of crimes against humanity. This may be the only way to circumvent the lack of criminal prosecution of offenders.

Sex Tourism has stimulated the growth of the child sex industry, making the sexual exploitation of children an international problem. The international community cannot simply close its eyes to these grave criminal offenses committed against children. It is obvious that the measures taken by both provider and consumer countries have not been very effective thus far. With the creation of an international criminal court, the next logical step in solving a problem of treat international proportions is to allow these offenses to be prosecuted on an international level. This would include owners, pimps and child trafficker from

\textsuperscript{91} This is referring to the crimes during wartime only.

\textsuperscript{92} See O'GRADY, supra note 1.
provider countries. The international community must acknowledge the seriousness of these heinous, senseless crimes and provide some sort of recourse to past victims as well as protection to those who may be the targets of such crimes in the future.
AN ANALYSIS OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

*Aimee L. Weiss*

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I. INTRODUCTION

Nogales, Mexico is a city along the United States and Mexico border that is often referred to as “Paradise Lost.”¹ This once remote and beautiful city, located at the corner of where Mexico meets Arizona, has become home to poverty, disease and pollution.² In the past twenty-five years, over two thousand manufacturing plants, called maquiladoras, have moved into the Nogales area creating jobs and economic opportunity, but also creating a “cesspool and breeding ground for infectious disease” and pollution.³ Nogales is no longer the beautiful place residents remember.

The maquiladora program was established by the Mexican government to encourage United States companies to bring their plants to the Mexican side of the border.⁴ These American companies are allowed to import raw materials into Mexico without paying duties and to export the finished product back to the United States, subject to a low value-added customs duty.⁵ Under this system, United States companies are able to make goods at lower costs and Mexicans are able to find work. However, the maquiladora plants have lowered their manufacturing costs by circumventing mandatory environmental regulations.⁶ A 1992 study indicated that only five percent of these plants returned their waste to the United States for proper disposal. In communities with maquiladoras, people fear that hazardous conditions exist in the air, soil and water.⁷

² Id.
³ Id.
⁵ Stanton, supra note 4, at 72.
⁷ Ribadeneira, supra note 1, at 10.
Waste is returned to the United States because Mexico does not have proper treatment facilities to treat the hazardous materials.\(^8\)

This environmental pollution has damaging impact on Nogales, Arizona. Air samples from Nogales show very high levels of carcinogens. Also, there are high rates of cancer and lupus in the area.\(^9\) In fact, there were sixteen cancer cases in fourteen homes on one street in Nogales.\(^10\) Since the creation of the *maquiladora* system in 1965,\(^11\) the border area has become an environmental nightmare and attempts to remedy the situation have little political support. To combat border area pollution, the United States, Mexico, and Canada created the North American Agreement on Environmental Cooperation in 1993.\(^12\) This agreement was adopted to promote environmental protection through cooperation between the three member countries.

### A. International Cooperation

The North American Agreement on Environmental Cooperation is an attempt to restore a necessary balance between economic growth and environmental protection. Nations are very dependent upon one another for goods, services, investments, etc.\(^13\) It is these transactions solidified on paper that keep the world economy flourishing. Examples include the North Atlantic Free Trade Agreement (hereinafter "NAFTA") and the European Union (hereinafter "EU"), two international trade entities created to promote economic growth and cooperation through few or no trade barriers.\(^14\) Also, international environmental agreements such as the United States - Canada Air Quality Agreement and the Nordic Convention show that one country cannot control and resolve all of its environmental problems on its own.\(^15\) The environment does not honor national

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8. *Id.*
9. *Id.*
10. *Id.*
11. Rowe, supra note 4, at 198.
13. NAFTA, supra note 12, at 447.
boundaries. Even though many countries create standards to improve their environmental conditions, pollution in border areas is often the responsibility of more than one country. These responsible countries need to work together and cooperate in order to protect these areas. Economic growth and environmental protection cannot be achieved without international cooperation. However, with cooperation, strategies may be adopted to help create a balance between the two.

1. The United States Environmental Protection Agency

The Environmental Protection Agency (hereinafter “EPA”) has been a central figure in international environmental protection. The EPA’s mission is to promote human health and environmental protection along with “sustainable economic activity in a cost-effective manner.” A key to the EPA’s achievement of its mission is international cooperation. The EPA provides training and information regarding environmental regulation to other countries. For example, the EPA has provided Mexico with drinking water treatment technologies in order to make Mexican water safe to drink. The EPA’s actions and the cooperation of other countries have enabled this organization to make a significant difference regarding international environmental concerns.

2. The North American Agreement on Environmental Cooperation

As illustrated in the introduction, the border area has become a serious environmental concern. This paper analyzes the effectiveness of the National Agreement on Environmental Cooperation (hereinafter “NAAEC”) and its dispute resolution process. Recommendations will also be provided regarding how this process may better serve the NAAEC’s goals.

Overall, the NAAEC provides an effective means of environmental protection. However, this agreement is not perfect. In assessing the NAAEC and recommending reforms, it is important to recall that this agreement was created to address the problem of pollution in the border area and the need to make Mexico enforce its environmental laws. Since 1889, the United States, Mexico, and Canada have attempted to create environmental agreements to address environmental concerns. However,


17. Id. at 447.

18. Id.

19. Id. at 450-51.

20. Id. at 451.
many of these plans have failed due to a lack of enforcement and dedication on the part of all parties involved. The NAAEC is a product of this period of trial and error and good intentions.

The NAAEC and the NAFTA were not created overnight. The NAAEC provides a foundation to be built upon and altered in due time. It is not something that can be severely altered in a short period. Change needs to occur gradually in order to be accepted and successful.21 Drastic change often results in resistance. Major changes to the NAAEC, as many critics desire, would threaten the foundation that the NAAEC represents and would frustrate cooperation, which the NAFTA and the NAAEC stand for. Therefore, the recommendations offered in this paper are classified as short-term or long-term solutions, indicating their present feasibility. Also, these recommendations are centered around the NAAEC goal of cooperation.

This paper will begin with a background discussion to provide the reader with a frame of reference. Next, a closer look will be taken at the NAAEC’s Commission on Environmental Cooperation (hereinafter “CEC”), its composition, functions and potential reforms. Finally, the paper will analyze the NAAEC’s dispute resolution process and suggest possible reforms.

II. BACKGROUND

A. The North Atlantic Free Trade Agreement

In order to understand how and why the NAAEC was formed, it is necessary to provide some background information regarding the NAFTA, the environmental laws and prior agreements of the United States, Mexico and Canada and the reasons for the NAAEC. The United States, Mexico and Canada signed the NAFTA agreement in December of 1992 with the goal of eliminating all restrictions on trade within fifteen years.22 The United States and Canada had always kept an arguably open border, but the

21. “Although the pace of legal and economic reform in Russia over the past six years or so has been breathtaking, it would be naive to expect that formal changes of such magnitude would be accompanied by similarly rapid changes in social attitudes or in the mindset of the former Soviet bureaucratic apparatus.” Karen Halverson, Resolving Economic Disputes In Russia’s Market Economy, 18 Mich. J. Int’l L. 59, 93 (1996); “China has approached its goal [a socialist market economy] gradually, directly opposing the adopted policies of Poland and the Soviet Union, the former implementing painful and fast shock therapy to change from a centrally planned economy to a market-based economy in one step, and the latter testing many immediately effective political reforms in the face of economic crisis.” Lyndsey A. Erickson, Gradual Economic Reform in China, (visited in 1997) <http://www.middlebury.edu/list_archives/ipe-wt97/0138.html>; “China’s gradual reforms have been the most economically successful.” Id.

NAFTA forced "Mexico to abandon a legacy of protectionism and economic nationalism." In the early 1980s Mexico was facing impending economic collapse and access to the United States markets was a major factor in Mexico's economic reform. Fearing competition with Mexico for investment in the United States, Canada decided to join the NAFTA. Therefore, the NAFTA was created in order to promote cooperation and economic growth.

Proponents of the NAFTA believe that the NAFTA will lower the amount of pollution generated, improve Mexico's environmental laws and increase wealth among the member countries. Without the NAFTA, proponents, mainly businesses, say that the maquiladoras would increase in number and continue to pollute. They argue that the NAFTA is necessary in order to establish good relations and cooperation among the three member countries. Proponents also argue that these good relations will carry over into attempts to create environmental policy.

The NAFTA opponents, such as labor organizations and environmental groups, believe that free trade will increase the depletion of natural resources and attract polluters to Mexico. They also fear United States environmental laws may be relaxed because they create trade barriers and industries will challenge the validity of these laws. Therefore, the NAFTA has created a search for a balance between economic growth and environmental protection.

Despite these criticisms, the NAFTA does contain environmental provisions. Chapter Eleven of the NAFTA prohibits the creation of a "pollution haven" for economic advancement. Many countries felt lax environmental law enforcement gave Mexico the economic advantage of lower production costs. Chapter Eleven adopted a "polluter pay principle," which states a polluter should pay the costs of meeting environmental regulations. In theory, this measure limits Mexico's use of lax environmental enforcement to allow low production costs.

23. Id.
25. Id. at 127-28.
26. Rowe, supra note 4, at 216.
27. Robbins, supra note 24, at 130.
28. Id.
29. Id. at 129.
30. Rowe, supra note 4, at 216-17.
31. Silverman, supra note 22, at 367.
32. Id.
Other provisions in the NAFTA reflect environmental concerns. For example, Article 904(2) states "each party may pursue its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment, or consumers." However, the term "legitimate objective" is rather vague and dispute panels have interpreted it narrowly. Therefore, despite the NAFTA's explicit concern for the environment, these provisions do not mandate interventions in support of environmental protection. Nevertheless, the NAFTA was a step towards further cooperation between these North American countries, and has provided them with a basis upon which to address environmental issues.

B. United States and Mexican Environmental Laws

The environmental laws of the United States and Mexico indicate a commitment to environmental protection. Although Mexico has been labeled a lax environmental law enforcer, in 1988, Mexico enacted the General Law of Ecological Balance and Environmental Protection (hereinafter "General Law"), which greatly resembles United States law. The General Law recognizes that all citizens have a right to a safe and healthy environment and in order to protect this right those citizens have a duty to protect the environment. Mexican law provides guidelines for

33. "[I]f there is an inconsistency between NAFTA and the Convention of the International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on the Control of Transboundary Movements of Hazardous Wastes, and other agreements listed in Annex 104.1, then these agreements shall prevail over NAFTA "to the extent of the inconsistency, provided that where a party has a choice among equally effective and reasonably available means of complying with such obligations, the party chooses the alternative that is the least inconsistent with the other provisions of [NAFTA]." Robbins, supra note 24, at 143-44.

34. Id. at 144.

35. Id.

36. Robbins, supra note 24, at 136; In the past it was commonly understood that Mexican pollution was so pervasive because the industries' actions went unchecked. Mexican environmental laws were weak, compared to other countries, and further, governmental corruption prohibited already ineffective enforcement. Therefore, it was believed that Mexican pollution was also affecting U.S. air quality. Cameron A. Grant, Transboundary Air Pollution: Can NAFTA and NAAEC Succeed Where International Law Has Failed?, 5 COLO. J. INT'L ENVTL. L. & POL'Y 439, 440 (1994).

37. Robbins, supra note 24, at 136; The General Law gives the Social Development Secretariat (the "SEDESOL") the responsibility of enforcing and implementing Mexican environmental law. A 1993 report stated that SEDESOL was given $263 million for enforcement but that $6.5 billion was needed to reach internationally acceptable pollution levels. Also, a 1992 Congressional survey found that none of the maquiladora plants chosen at random had met the 1988 law requirements and only 5 percent met the requirement to return hazardous waste to the U.S. for disposal. Nevertheless, there are signs that Mexico is becoming more serious about environmental protection. Mexico has taken measures to reduce lead content in petroleum, closed...
creating regulations, but does not include a superfund program and does not have the resources to enforce these laws. In addition, private citizens are unable to bring toxic tort or citizen suits to demand enforcement of environmental laws. All environmental disputes are resolved in administrative proceedings under Mexico’s civil legal system.

United States environmental laws consist of independent statutes and regulations regarding various environmental concerns. The EPA enforces these statutes and creates environmental regulations and standards. Enforcement is handled through judicial proceedings, civil and criminal litigation and administrative enforcement. However, the majority of disputes end in settlement. In addition, the United States system, in contrast to the Mexican system, encourages public participation. Even though Mexican law differs from United States law, Mexico has shown that it is concerned about the environment and with greater resources would have better regulation.

C. Prior Environmental Agreements

1. United States and Mexico

Since 1889, the United States, Mexico and Canada have created several bi-national agreements regarding the environment. In 1944, the United States and Mexico established the International Boundary Water

oil refineries, is replacing smog producing fuel with natural gas and has increased its budget by ten times for environmental protection since 1989. Also, the U.S. EPA is training the SEDESOL. Silverman, supra note 22, at 355-57.

38. Rowe, supra note 4, at 200-01.

39. Silverman, supra note 22, at 357; The NAAEC requires each member country to “ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the party’s environmental laws and regulations.” NAAEC, supra note 12, art. 6, 32 I.L.M. at 1484. However, private suits would not be considered “legally recognized” interests in Mexico.

40. Rowe, supra note 4, at 202, 204.

41. Id. at 200.

42. Id. at 204.

43. Id.

44. Id.

45. Canadian environmental law is very similar to United States law, Canada like the United States is very experienced in environmental litigation. Grant, supra note 36, at 454.

Commission (hereinafter "IBWC"), which has the power to stop violators, settle disputes and make recommendations.\textsuperscript{47} However, the IBWC lacked power and has had little impact.\textsuperscript{48} In 1984, the La Paz Agreement was created to promote cooperation between the United States and Mexico.\textsuperscript{49} It was not successful because it did not give the IBWC enforcement powers, lacked resources and did not establish a dispute resolution process.\textsuperscript{50} Under the La Paz Agreement, the United States and Mexico were to ensure "to the extent practicable" their environmental laws were enforced, but this obligation was vague and never enforced.\textsuperscript{51} Without a dispute resolution process, and with vague provisions, the La Paz Agreement did not curb pollution.\textsuperscript{52} In 1991, Presidents Bush and Salinas and Prime Minister Mulroney had committed themselves to the creation of the NAFTA and abandoned these prior agreements.\textsuperscript{53} Nevertheless, these prior agreements indicate that environmental protection was a concern as early as 1889 for the United States and Mexico.

2. United States and Canada

Past environmental agreements between the United States and Canada have produced mixed results. First, in 1909 the Boundary Waters Treaty was created to deal with the misuse and diversion of water along the United States - Canadian border.\textsuperscript{54} Under this treaty, the International Joint Commission (hereinafter "IJC") was established to resolve disputes and it still exists today.\textsuperscript{55} In the 1980's the United States and Canada entered into the Great Lakes Water Quality Agreement, but it has not been successful in

\textsuperscript{47} M. Grace Giorgio, Transboundary Pollution Disputes Under the North American Free Trade Agreement, 3 S.C. ENVTL. L.J. 166, 178 (1994).
\textsuperscript{48} Id.
\textsuperscript{49} Id at 180.
\textsuperscript{50} Id.
\textsuperscript{51} Id at 182.
\textsuperscript{52} Id. at 178.
\textsuperscript{53} Gaines, supra note 6, at 430.
\textsuperscript{54} Giorgio, supra note 47, at 175.
\textsuperscript{55} Boundary Waters Treaty, opened for signature Jan. 11, 1909, Canada - United States, The International Joint Commission and the Boundary Waters Treaty. Under Article IX, the U.S. and Canada may submit a dispute to the IJC regarding "questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada" Id. at 10. A submission under Article IX only permits the IJC to examine and report on the facts of the matter along with the ability to provide recommendations and conclusions. Id. These reports are not decisions. Under Article X, the same disputes can be heard as in Article IX, but if parties submit a claim under Article X, the IJC is able to reach a decision and if it cannot, the U.S. and Canada select an umpire to resolve the matter. Id.
resolving water pollution disputes, namely because the IJC lacks enforcement power.\textsuperscript{56} In 1986 the United States and Canada entered into the Hazardous Waste Agreement in order to control the transportation of waste. Similar to the La Paz agreement, each country was to enforce its own environmental laws "to the extent possible." Unfortunately, there were no enforcement procedures in place for failure to meet this obligation.\textsuperscript{57} The only remedy for injury under this agreement was an insurance policy in which each member was required to insure waste was being transported across the border.\textsuperscript{58} The Air Quality Agreement was created in 1991 and has been very successful because it encourages settlements through alternative dispute resolution ("ADR") and promotes transparency of environmental laws, goals and techniques for environmental regulation.\textsuperscript{59}

As mentioned above, political leaders in the early 1990's did not support environmental protection and shifted their attention to the NAFTA. Nevertheless, the environmental agreements between the United States and Canada, along with others, have strengthened relationships between the United States and Canada. The Air Quality Agreement is an example of how international environmental protection can be achieved through cooperation.

\textbf{D. Reasons for the North American Agreement on Environmental Cooperation}

In 1993, the United States, Mexico, and Canada signed the NAAEC, to promote cooperation and to oblige each member country to enforce its

\textsuperscript{56} Giorgio, \textit{supra} note 47, at 176.

\textsuperscript{57} \textit{Id.} at 177.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} Air Quality Agreement, \textit{supra} note 15, art. IV, VI, VII, XI & XIII, T.I.A.S. No. 11783, at 2-5; The purpose of the Air Quality Agreement is "to address shared concerns regarding transboundary air pollution." Both countries expressed the belief that a healthy environment is necessary "to assure the well-being of present and future generations." \textit{Id.} at 1-2; Both parties developed specific objectives stated in the annexes and each party has the responsibility to develop programs and to take the necessary measures to meet those objectives. \textit{Id.;} If one country does not agree with the other's proposals the dispute is resolved through consultations. Further, if one country plans to engage in an activity likely to cause pollution, it must consult the other country. \textit{Id.} at 2-3; The parties are to do research to learn about transboundary pollution and how to control it, and they must share this information with the other party. \textit{Id.} at 3; In dispute resolution, the parties are to enter consultations and if no result is reached, to use negotiations. \textit{Id.} at 5; If that does not work, the parties are to submit the matter to the IJC for either examination or decision \textit{see} Boundary Waters Treaty, \textit{supra} note 55, at 10, or the parties may agree on ADR. \textit{Id.} at 5.
environmental laws. The NAAEC was created as a result of the tremendous pollution caused by the *maquiladora* plants in the border area.

In the early 1990's, local residents and environmental advocates pressured the NAFTA governments to create legal provisions and an administrative mechanism that would integrate environmental protection into the NAFTA. These groups wanted a system that would create obligations and commitments to the preservation of the environment. Overall, people wanted political leaders to take environmental protection seriously because they were being injured and had no power to protect themselves.

The NAAEC was also created to fill in the gaps of the NAFTA environmental provisions, such as Chapter Eleven, and to provide a balance between trade and environmental preservation. Mexico's conspicuous absence of environmental law enforcement permitted low cost production and the NAFTA's *polluter pay principle* was not enforced. Under the NAAEC, each member must establish high levels of environmental protection and enforce its laws. Overall, the NAAEC was created to promote cooperation between the three member countries and effectuate environmental protection.

III. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION AND ITS DISPUTE RESOLUTION PROCESS

A. Motivations & Obligations

The NAAEC's objectives center on the general goals of environmental protection, cooperation, public participation, balancing economic growth with environmental protection, and promoting the enforcement of environmental laws. Other important aspects of the NAAEC are that


61. Gaines, *supra* note 6, at 432.

62. *Id.*


64. *Id.* at 163.

65. *Id.* at 164; NAAEC, *supra* note 12, art. 3, 32 I.L.M., at 1483.

66. NAAEC, *supra* note 12, art. 1, 32 I.L.M., at 1483; NAAEC articulates ten major objectives:
each member must prepare reports on the state of its environment, publish all environmental laws, and provide citizens with access to judicial or administrative proceedings when a citizen has a legally recognized interest. Regarding interpretation of the NAAEC, the member countries are to come to a mutual understanding on the agreement’s meaning, and settle any interpretation concerns through cooperation and consultations. In addition, each party is to notify any other party if the first party believes its actions may affect the operation of this agreement or significantly affect the other party’s interests. These provisions promote accountability, environmental protection, transparency and public awareness.

B. The Commission

The NAAEC’s dispute resolution institution is the Commission on Environmental Cooperation (hereinafter “CEC”). The CEC does not settle a wide range of disputes but only determines whether there has been a persistent pattern of failure by a party to effectively enforce its environmental laws. Therefore, this process does not provide a private right of action. The CEC consists of a Council, Secretariat, Joint Public Advisory Committee (hereinafter “JPAC”) and other committees. Each actor has a distinct function within the NAAEC.

1) foster the protection and improvement of the environment in the territories of the parties for the well-being of the present and future generations;
2) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
3) increase cooperation between the parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
4) support the environmental goals and objectives of the NAFTA;
5) avoid creating trade distortions or new trade barriers;
6) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
7) enhance compliance with, and enforcement of, environmental laws and regulations;
8) promote transparency and public participation in the development of environmental laws, regulations and policies;
9) promote economically efficient and effective environmental measures; and
10) promote pollution prevention policies and practices.

Id.

67. NAAEC, supra note 12, art. 4-6, 32 I.L.M. at 1483-84.
68. NAAEC, supra note 12, art. 20, 32 I.L.M. at 1489.
69. Id. at 1489-90.
71. Giorgio, supra note 47, at 191.
72. NAAEC, supra note 12, art. 8, 32 I.L.M. at 1484.
1. Council

The Council, as the governing body of the CEC, consists of cabinet level representatives from each member country and oversees the Secretariat. The Council is able to delegate authority and obtain information from experts, private individuals and non-governmental organizations ("NGOs"). The Council provides a forum in which to resolve environmental matters related to the NAAEC and makes recommendations regarding the environment and pollution-prevention techniques. The Council encourages cooperation between the members and helps each member improve its environmental laws by promoting the exchange of information regarding methods used to establish or enforce environmental standards. The Council must also assist the NAFTA Free Trade Commission ("FTC") in achieving the environmental goals in the NAFTA. The Council has the duty to make recommendations regarding the potential for cross-border suits by injured persons. However, Council recommendations are not binding.

The Council convenes a panel to resolve disputes when they occur. The Council created a roster of persons willing to be panelists that it keeps undated. Roster member must have experience in environmental law, its enforcement in the resolution of disputes under international agreements or other relevant experience or expertise. Each roster member must comply with the Council's code of conduct and if a party believes a panelist to be in violation of the code, the parties shall consult. If all parties agree, the panelist will be removed and a new panelist will be selected.

In the panelist selection process, the parties agree on a chair within fifteen days after the Council votes to convene a panel. If the parties cannot agree on a chair, the party chosen by lot must pick a chair within five days. Within fifteen days after that chair is selected, the parties are to choose two panelists who are citizens of the opposing party's country. If a party cannot make a choice, the panelists will be chosen by lot.
When a panelist is chosen who is not on the roster, any party may use a preemptory challenge to remove that panelist. 85

2. Secretariat

The Secretariat is headed by an Executive Director who is chosen by the Council for a three-year term. This position rotates among members of each member country. 86 The Executive Director appoints a staff procured from a list prepared by the member countries and the JPAC. The Council can reject any appointment by a two-thirds vote. 87

The Secretariat has a variety of functions. It provides technical, administrative and operational support to the Council, submits the annual program and budget for Council approval, and prepares an annual report that is released to the public after Council review. 88 This report may include information about actions taken by each member country in connection with its obligations under the NAAEC or data regarding each member's environmental law enforcement. 89 The Secretariat receives submissions from private persons or NGOs asserting that a member country has failed to effectively enforce its environmental laws. 90 The Secretariat may request a response from the other party involved if the claim is well founded, but if the matter is pending in another court or administrative proceeding, the Secretariat will not honor the claim. 91 Each claim must:

a) be in writing;

b) clearly identify the person or organization making the submission;

c) provide sufficient information to allow the Secretariat review the claim;

d) promote and not harass industry;

85. Id.
86. NAAEC, supra note 12, art. 11, 32 I.L.M. at 1487.
87. Id.
88. NAAEC, supra note 12, art. 11, 12, 32 I.L.M. at 1488.
89. NAAEC, supra note 12, art. 12, 32 I.L.M. at 1488.
90. NAAEC, supra note 12, art. 14, 32 I.L.M. at 1488.
91. Id.
e) indicate that the matter has been communicated in writing to the relevant authorities of the party and indicate the party’s response; and

f) be filed by a person or organization residing or established in the territory of a party. If the submission warrants the making of a factual record, the Secretariat notifies the Council and provides reasons. A two-thirds Council vote is needed to make a factual record and another vote is required to make the factual record public.

The Secretariat may be equated to that of an Administrative Manager because it collects all claims and undertakes the initial investigation to determine if the claims are worthwhile. The Council then votes on the Secretariat’s determination of whether to publish these factual records and annual reports. These procedures make the dispute resolution process more efficient because the Council vote is a check on the Secretariat’s determinations, ensuring the Secretariat acts in an acceptable manner. In preparing the factual record, the Secretariat will obtain information from the submitting parties, the JPAC, independent experts, information it has discovered and publicly available information. The Secretariat, however, has no authority to review a party’s failure to enforce its environmental laws.

3. Committees

The JPAC is made up of fifteen representatives, five from each member country. The JPAC provides technical and scientific information

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92. This is how a member country becomes involved in the suit. The NAAEC is not clear on whether approval is needed or if notice to the member country is sufficient.

93. NAAEC, supra note 12, art. 14, 32 I.L.M. at 1488; When the Secretariat determines that a submission meets the filing requirements, it must determine whether the submission merits a response from the complained against party. The Secretariat considers:

1) if the submission alleges harm to the person or organization making the claim;
2) if the submission raises issues whose further study would advance the goals of the NAAEC;
3) if private remedies have been pursued under the party’s laws; and
4) if the submission is based solely on media reports.

Id.

94. NAAEC, supra note 12, art. 15, at 1488-89.
95. Id.
96. Often called a preparatory judge, case manger, civil prosecutor or judge de mise.
97. NAAEC, supra note 12, art. 15, at 1488-89.
98. Grant, supra note 36, at 449.
99. NAAEC, supra note 12, art. 16, at 1489.
to the Secretariat and advice to the Council. Each country may convene a national advisory committee made up of members of the public and/or governmental advisory committees made up of federal and state representatives to advise on the implementation and possible alterations to the NAAEC.

C. Assessment of the CEC & Actors

The CEC employs a coordinate structure in which each actor has separate functions, subject to checks on these functions. The Council is involved in dispute resolution, recommendations promoting cooperation, and helping the member countries create highly protective environmental laws. The Secretariat investigates claims, creates factual records and prepares other reports. All these actions performed by the Secretariat are subject to Council review. The JPAC and other committees provide services only when called upon by the Council or Secretariat.

The CEC also has a vertical or hierarchical structure. The Council is the governing body and the Secretariat, and other committee functions, are subject to Council oversight. The JPAC, subject to the orders of the Secretariat and Council, is an information-providing source for the two bodies, while the other national advisory committees are under the control of each member country. In many ways this system shares characteristics with the structure of the United States government in that each actor has defined roles, similar to the separation of powers concept. Each actor in the CEC is subject to a check or oversight, similar to the United States checks and balances system. However, the Council is the one body in the CEC whose actions do not appear to be subject to any checks.

Except for the selection process and criteria requirements for panelists, the NAAEC is extremely vague regarding the selection of Council members as well as the number appointed. It also does not mention how many Secretariat staff persons are appointed or if an equal number is selected from each member country. These vague provisions create difficulty in interpreting the NAAEC.

The North American Agreement on Labor Cooperation (hereinafter "Labor Side Agreement") provides greater detailed descriptions of these selection procedures. For example, the CLC Council is made up of labor ministers from each member country. There should be a requirement under the NAAEC that members of the CEC Council have

100. Id.
101. NAAEC, supra note 12, art. 17, 18, at 1489.
103. The Labor Side Agreement, supra note 102, art. 9, 32 I.L.M. at 1505.
environmental law experience or require that the Council be composed of environmental ministers. These specialized representatives could provide guidance and possibly better dispute resolution skills, than a representative without environmental experience. The CLC Executive Director selects its Secretariat staff while taking into consideration "the importance of recruiting an equitable proportion of the professional staff from among the nationals of each party."\(^{104}\) Also, the Council is made up of fifteen staff members. The Council can change this number if they deem it necessary.\(^{105}\)

These detailed selection provisions in the Labor Side Agreement may be due to the fact that labor issues involve human rights. When dealing with human rights issues, further protections are usually taken to avoid violating an individual's rights. Adding these detailed descriptions of the selection process of CEC intervenors would serve to clarify the NAAEC, provide skilled decision-makers and avoid interpretation disputes.

The NAAEC does contain evaluation criteria. For example, the Council may remove the Executive Director for cause, each panelist must abide to a code of conduct and the filing party must meet certain initial requirements to file, and the Secretariat's actions are subject to Council oversight.\(^{106}\) These measures would appear to effectively check the actions of Council members. However, the Council's power, in practice, appears to be unfettered.

A check should be placed on the Council's authority, such as removal of the two-thirds vote to deny a claim and the publishing of a factual report. An apt replacement would be a frivolous claim standard that the Council must apply accompanied by a requirement to provide reasons for why a claim should be denied.\(^{107}\) There is little reason not to prepare a factual record because the Secretariat has already done most of the research and publishing the factual record promotes transparency and public awareness.\(^{108}\) If the Council denies a claim then decides not to publish the factual record, a suspicion of cover-up will flourish that will undermine the credibility of the CEC.\(^{109}\) Therefore, the Council's two-thirds veto power should be restricted. This power limitation would promote public awareness and participation, create an incentive for enforcement of domestic environmental laws and protect CEC credibility.

104. The Labor Side Agreement, supra note 102, art. 12, 32 I.L.M. at 1506.
105. Id.
106. NAAEC, supra note 12, art. 10, 11, 14, 25, 32 I.L.M. at 1485, 1487, 1488, 1491.
107. See infra pp. 34-35 for a further discussion of this concern.
108. David S. Baron, NAFTA and the Environment: Making the Side Agreement Work, 12 ARIZ. J. INT'L & COMP. L. 603, 611 (1995); NAAEC does take into account confidential information and will not make such information public. NAAEC, supra note 12, art. 39, 32 I.L.M. at 1494.
109. Id.
The Council gathers technical data, develops recommendations, and encourages members to incorporate these recommendations into their laws and policies. These actions have some political impact because they encourage a member to alter its present laws and may infringe on a member's sovereignty. However, because these Council recommendations are not binding, they have little influence. To make these recommendations binding would give the Council too much power and usurp the control of the member countries over their domestic environmental laws, a power retained by the members under the NAAEC.¹¹⁰

In order to make this Council function more effective, the member countries should have the right to vote on adopting a recommendation. This procedure would promote cooperation because if a recommendation is approved, the laws of the members will become more unified. Therefore, although the Council has too much power in some areas, such as denying submissions and the publishing of factual records, it seems illogical to give the Council the power and resources to conduct research and make recommendations if these recommendations have little weight. This is a waste of resources. Council research and recommendations are very important because they promote cooperation through the potential for unification of law. Therefore, giving each member the right to vote upon each recommendation would substantiate this function of the Council and give the Council a quasi-legislative role. It would also be advantageous to let Council members initiate legislation and vote on policy. In addition, the members have their own research and environmental regulation procedures, which may be attractive to other members. This sharing of ideas can lead to additional cooperation between nations, and assist less advanced nations by enhancing technology ideas and information.

D. The CEC Dispute Resolution Process

Once the Secretariat accepts a submission, any party may request a consultation with any other concerned party, whether or not there has been a persistent pattern of failure by the other party to effectively enforce its environmental laws.¹¹¹ The request must be in writing and submitted to the Secretariat and the other party.¹¹² A third party may participate in the consultations if it believes that it has a significant interest in the matter.¹¹³ The parties are expected to take every measure in order to reach a resolution, but if no result is reached within sixty days, any party may request a Council session.¹¹⁴ The Council is to convene within twenty days

¹¹⁰. NAAEC, supra note 12, art. 3, 32 I.L.M. 1483.
¹¹¹. NAAEC, supra note 12, art. 22, 32 I.L.M. at 1490.
¹¹². Id.
¹¹³. Id.
¹¹⁴. NAAEC, supra note 12, art. 22, 23, 32 I.L.M. at 1490.
of receiving the request, and may utilize the assistance of technical advisers, experts or other groups. To assist the parties in reaching a mutually satisfactory agreement, the Council may use conciliation and mediation or make a recommendation. These procedures involve the use of a neutral party to help the disputing parties reach a settlement. A Council recommendation will be made public if approved by a two-thirds Council vote.

If the dispute has not been settled within sixty days, the Council, by written party request, shall convene an arbitrary panel to decide whether there has been a persistent pattern of failure by a party to effectively enforce its environmental laws. The panel bases its determination on the submissions and arguments of each party, and the information presented by experts. Within 180 days, the panel must present an initial report to the parties containing findings of fact, a determination of whether or not a persistent pattern of failure to effectively enforce environmental law has occurred, and its recommendations for the resolution of the dispute. Any party may submit written comments to the panel and after considering these comments, the panel will present a final report, which will be published. If the panel decision is in the affirmative, the parties may mutually agree on an action plan, which must conform to the panel decision and must be presented to the Council and Secretariat.

Under certain conditions, the panel may reconvene. If the parties, (a) cannot agree on the action plan or (b) cannot agree on whether or not the defending party has fully implemented an action plan chosen by the parties or an action plan created by the panel, any party may request the panel to reconvene. If the panel is reconvened under (a), it will determine whether an action plan proposed by the defending party is sufficient and if

115. Id.
116. Id.
117. Id.
118. NAAEC, supra note 12, art. 24, 32 I.L.M. at 1490; A panel will only decide this issue if the matter involves "workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the parties; or (b) that compete, in the territory of the party complained against, with goods or services produced or provided by persons of another party." Id. Therefore, it must be a trade-related issue.
119. NAAEC, supra note 12, art. 28-30, 32 I.L.M. at 1492; The Council is to establish rules of procedure that provide a right to at least one hearing before the panel and the chance to make written submissions. NAAEC, supra note 12, art. 28, 32 I.L.M. at 1491.
120. NAAEC, supra note 12, art. 31, 32 I.L.M. at 1492; The punishment is an action plan requiring the losing party to correct its non-enforcement. NAAEC, supra note 12, art. 33, 32 I.L.M. at 1492.
121. NAAEC, supra note 12, art. 31, 32 I.L.M. at 1492.
122. NAAEC, supra note 12, art. 33, 32 I.L.M. at 1492.
123. NAAEC, supra note 12, art. 34, 32 I.L.M. at 1492.
so, it will approve the plan.\textsuperscript{124} On the other hand, if the plan is not permissible, the panel will establish an action plan.\textsuperscript{125} The panel may also impose monetary sanctions.\textsuperscript{126}

If the panel is reconvened under (b), the panel is to determine if the offending party has fully implemented the action plan and if that party has not done so the panel is to impose monetary sanctions.\textsuperscript{127} The money from these sanctions is used to improve environmental law enforcement in the offending country.\textsuperscript{128} A party may again convene a panel to determine if the opposing party has fully implemented the action plan.\textsuperscript{129} If a party fails to pay a monetary sanction, the complaining party may suspend that party's NAFTA benefits.\textsuperscript{130} The sanctioned party may submit a written request that the Council reconvenes the panel to determine whether the suspension of benefits is excessive.\textsuperscript{131}

These enforcement procedures are subject to Annex 34 and 36A.\textsuperscript{132} Annex 34 states that a monetary sanction cannot exceed .007 percent of the total trade in goods between the parties during the most recent year for which such data is obtainable.\textsuperscript{133} Annex 36A states that if a panel determines that Canada shall pay a sanction or fully implement an action plan, the CEC will file the panel determination with a Canadian court with competent jurisdiction and such panel determination will become a court order.\textsuperscript{134} This panel determination is binding on the court and it is not subject to domestic review or appeal.\textsuperscript{135}

E. Assessment of the North American Agreement on Environmental Cooperation

This discussion will begin with an analysis of the vagueness\textsuperscript{136} within certain NAAEC provisions regarding compulsory/non-compulsory

\begin{thebibliography}{99}
\bibitem{124} \textit{Id.} at 1493.
\bibitem{125} \textit{Id.}
\bibitem{126} \textit{Id.}
\bibitem{127} \textit{Id.}
\bibitem{128} Stanton, \textit{supra} note 4, at 76.
\bibitem{129} NAAEC, \textit{supra} note 12, art. 35, 32 I.L.M. at 1493.
\bibitem{130} \textit{Id.} at 1494.
\bibitem{131} \textit{Id.}
\bibitem{132} NAAEC, \textit{supra} note 12, annex 34, 32 I.L.M. at 1496; Annex 36B also places limits on the suspension of NAFTA benefits; NAAEC, \textit{supra} note 12, Annex 36B, 32 I.L.M. at 1497.
\bibitem{133} \textit{Id.}
\bibitem{134} NAAEC, \textit{supra} note 12, annex 36A, 32 I.L.M. at 1497.
\bibitem{135} \textit{Id.}
\bibitem{136} Although most international agreements do contain vague language, in order to form an agreement that all parties will support, this language often creates disputes regarding
\end{thebibliography}
jurisdiction, interpretation consultations, and the phrase "high levels." The discussion will then shift to the actual dispute resolution process. First, entry or access to the process will be discussed. This will include: the party who submits the claim, who is involved in the suit, the issue decided, and Council oversight. Second, party control, as a theme throughout the entire process, will be analyzed, including the concepts of consensual resolution and time restrictions for settlement. Third, the methodology of the decision-making will be discussed, focusing on how decisions are made and what is taken into consideration. Finally, the discussion will look at the outcome, whether it is binding or non-binding, the enforcement of the outcome and other related concerns.

1. Vagueness

The NAAEC does not specifically state if consent to jurisdiction is compulsory or non-compulsory. In Article 22, after a party makes a request for consultations to another party, there is no mention of whether or not the requested party can deny the request. This could be a problem because parties may take vastly differing views on if and when consent is needed. If the requested party is required to comply, that party is now subject to the entire CEC dispute resolution process and possibly a binding panel decision. If the party is able to deny the request the goal of cooperation among member countries would be frustrated, which would constitute avoidance which would be detrimental to the success of this agreement and the members’ relations. Although non-compulsory jurisdiction may have been the intent of the NAAEC’s drafters, compulsory jurisdiction is practiced because of pressure from member countries. Compulsory jurisdiction is the best method for the NAAEC because it forces the parties to meet and resolve their problems. The fact that a binding panel decision may lie ahead is an incentive to reach a mutually satisfactory decision as soon as possible. This provision needs to be clarified in order to prevent future conflicts. Also, this change could be made in the short-term because it would not change the nature of the NAAEC but rather align the interpretations of the member countries. The NAAEC fails to provide procedures for consultations when an interpretation dispute arises. The NAAEC does not mention where the parties are to meet; which issues are to be discussed; and how long the parties have to resolve the matter through consultations. Also, the NAAEC does not provide further procedures in the event a result cannot be reached through consultations. When the members disagree on the NAAEC’s interpretation the parties must use “cooperation and consultations to resolve

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137. *NAAEC, supra* note 12, art. 22, 32 I.L.M. at 1490.
any matter that might affect its operation."138 This provision provides little guidance.

The Labor Side Agreement, provides explicit procedures regarding disputes over interpretation.139 A National Administrative Office (hereinafter "NAO"), which serves as a contact point for each member and the Secretariat, may request consultations with another NAO. Any party may request, in writing, consultations with another party regarding any matter within the scope of the Labor Side Agreement.140 If the matter is not resolved through consultations, a party may request the establishment of an Evaluation Committee of Experts (hereinafter "ECE"). The ECE is selected in a manner similar to the CEC panel, which will create a draft report to which the parties can submit comments and then publish a final report.141 The Council is able to keep the matter under review.142 These procedures provide a framework and promote cooperation, unlike the confusion the NAAEC provides. Specific procedures, like those in the Labor Side Agreement, could be added to the NAAEC in the short-term. These procedures would be a positive addition because they would reduce or eliminate interpretation disputes and promote cooperation through consultations.

Another vague provision in the NAAEC is the obligation that each member country must create environmental laws, which provide high levels of environmental protection.143 The meaning of high levels in the United States differs from its meaning in Mexico. Each member has a different view of what the definition of high levels of environmental protection is. In addition, the NAAEC does not provide a check to make sure that each member's laws meet this standard. Overall, this provision has little weight because of its vagueness and lack of enforcement.

After the NAAEC becomes more influential, it would be beneficial to establish specific environmental standards that apply to all members. Specific standards would give this provision a purpose while creating a basis of measurement to determine whether or not each party has met the standard. This reform would change the CEC's threshold issue of determining whether the standards have been met instead of whether each member has enforced its own laws. However, domestic law should still cover the methods used to obtain these standards. This would be a long-term goal since the NAAEC is new and such a drastic change would limit sovereignty.

138. NAAEC, supra note 12, art. 20, 32 I.L.M. at 1489.
139. The Labor Side Agreement, supra note 102, art. 20-26, 32 I.L.M. at 1507-09.
140. The Labor Side Agreement, supra note 102, art. 21, 22, 32 I.L.M. at 1507-08.
141. The Labor Side Agreement, supra note 102, art. 23, 32 I.L.M. at 1508.
142. The Labor Side Agreement, supra note 102, art. 26, 32 I.L.M. at 1509.
143. NAAEC, supra note 12, art. 3, 32 I.L.M. at 1483.
Overall, an international agreement with gaps or vague language causes disputes and could impair cooperation. However, too much specificity could be detrimental and impede approval. Except for the third one, the aforementioned measures do not significantly alter the agreement, and would only improve interpretation and compliance.

2. The Process

Access into the process has several positive and negative features. It is easy for a private individual or an NGO to submit a claim and to have the Secretariat make a factual record, so long as it meets the requirements stated earlier. These requirements are read liberally in order to ensure that the process provides much public participation, a goal of the NAAEC.

On the downside, the parties making the submissions are not the parties to the suit; rather the member countries are the parties to the suit. Therefore, it seems as though private individuals and NGOs would be discouraged from making a claim since they cannot recover damages through this system. However, since the CEC is the only institution providing an environmental dispute resolution process regarding the border, private individuals and NGOs are more likely to submit claims in order to make their member country aware of another member’s failure to enforce its laws.

Another concern limiting access is that the CEC dispute resolution process only resolves one issue. That issue is whether or not a party has shown a persistent pattern of failure to effectively enforce its environmental laws. This is a difficult issue to prove because it may require technical information that an individual or NGO does not have access too. Also, the determination of this question is based upon how the actors involved in the dispute resolution process perceive what does and what does not constitute a persistent pattern of failure to enforce environmental laws. Therefore, a subjective method is used which may prohibit impartial decision-making.

In addition, limiting access to one issue, denies injured individuals with valid claims against a polluting party, access to an international environmental dispute resolution process. Mexico does not allow citizens to bring private actions to demand enforcement of environmental laws. Therefore, the NAAEC requirement that each member provide a right of action for citizens with a “legally recognized interest”, would not apply to Mexican citizens who were injured.

144. NAAEC, supra note 12, art. 14, 32 I.L.M. at 1488.
145. Baron, supra note 108, at 608.
146. Id.; see supra note 144.
147. NAAEC, supra note 12, art. 22, 32 I.L.M. at 1490.
148. See infra pp. 37-39 for a further discussion of this issue.
149. Silverman, supra note 22, at 357; NAAEC, supra note 12, art. 6, 32 I.L.M. at 1484.
Supporters of cross-border suits believe that although suits may be filed across borders today, government corruption severely restricts the use of this option. Thus, cross-border suits under the NAAEC would provide injured persons with a means by which to seek remedy against the government, and to participate in the movement toward environmental protection and accountability.

The Nordic Convention of 1974 between Denmark, Finland, Norway, and Sweden is an environmental agreement that allows cross-border suits. Any person affected by environmentally harmful activities in another contracting state has the right to bring a claim to the appropriate court or administrative authority regarding the permissibility of such activities. An individual may appeal the decision and has the same legal rights as a person of that country in which the harmful activities are taking place. One critic of the NAAEC believes that cross-border suits need to be added to the NAAEC because there is no private right of action. Additionally, since the United States is very skilled at environmental litigation, United States citizens and organizations could effectively sue in Mexican courts and receive the remedies due. However, critics suggest that cross-border suits would infringe upon each member country's sovereignty. Mexico holds sovereignty in high regard and would likely withdraw from the NAAEC if cross-border suits were established. In addition, this change would force member countries to alter their standing laws giving up more sovereignty. The United States and Canada are very experienced in environmental litigation and cross border suits would result in a flooding of Mexican courts which would be grossly unfair to Mexico and would frustrate cooperation. Additionally, it has been argued that since the present CEC does not permit private individuals to directly sue polluting factories for damages, there is a diluted impact on the actual polluters, since the member country of the polluter is the one who is punished. While this argument is very persuasive, the NAAEC is

150. "Any member country is free to place burdensome restrictions to recognizing a right of action for citizen or non-citizen suits." Stanton, supra note 4, at 79; "Ensuring a right of action to citizens would not be enough on its own if citizens fear that corruption of the system may put their lives or liberty in danger by exercising that right". Id.


152. Id.

153. Id.

154. Stanton, supra note 4, at 76.

155. Id.

156. Grant, supra note 36, at 452.

157. Id.

158. Id. at 454.

159. Id. at 455.

160. Id.
not prepared for cross-border suits. However, such a process may be desirable in the future.

Cross-border suits would require substantial change in a limited time.\textsuperscript{161} It would limit sovereignty and force member countries to change their domestic laws. The member countries would not be willing to give up this much control so soon after the NAAEC's adoption. Before making a large revision to the NAAEC, the member countries would want to analyze the NAAEC's impact and success in its original form. After the NAAEC establishes itself, problems will be easier to locate and such a reform, as a cross-border suit, may be implemented.

Another measure, such as the creation of a commission to oversee suits, could be implemented to provide injured individuals with a right of action against polluters. The NAAEC could support a commission to deal solely with private individual and organization claims against polluters. This commission, containing representatives from each member country, would use ADR to give the parties a chance to resolve their issues. If a result cannot be reached, the court could then hold a trial type hearing and reach a dichotomous decision. It is important not only to punish the member country for not enforcing its laws, but also to punish the polluter for ignoring the laws and injuring innocent people.

Another potential solution is to allow the CEC to settle private disputes, thus increasing the number of issues the CEC can resolve. However, this solution has several weak points. First, if the CEC resolved public and private international disputes it would be burdened with a huge caseload. Second, this suggestion would involve restructuring the CEC and its dispute resolution process. Third, this procedure would give the CEC too much power. Therefore, creating a new commission for private suits would make more sense. It would be comparable to the United States Tax Court in that it would be a specialized court only hearing cases related to private and organization disputes, just as the Tax Court only hears tax related cases.

A third possible reform would be to allow the United States and Canadian citizens and organizations, experienced in environmental litigation, to file suits against United States plants in the border area. Thus, eventually full cross border suits could be enacted. Although this process sounds good, it is discriminatory since United States plants would be subject to pay damages when Japanese or Mexican plants located near the United States plants are able to pollute. In addition, since pollution knows no boundaries, the pollution from another factory could make its way to a United States plant's section of the river, soil or air, making that United States plant liable for the pollution from other plants. United States

\textsuperscript{161} Even though the Council has the authority to make recommendations to the member countries about cross border suits, these recommendations are not binding and nothing in my research suggests that cross border suits are being considered at this time. NAAEC, supra note 12, art. 10, 32 I.L.M. at 1487.
plants would have to pay higher production costs and this would clearly interfere with free trade under the NAFTA. This system would not be successful and would not promote cooperation.

Unlike the European Union (hereinafter "EU"), the United States, Mexico, and Canada do not want to become entirely interdependent.\textsuperscript{162} They cherish their sovereignty while supporting cooperation through the NAFTA and the NAAEC. Therefore, a commission solely for private suits would be the best solution since a forum is needed for individuals injured by pollution are able to seek redress from the polluters.

Another aspect of the CEC that denies access is the Council's power to deny a claim even if the Secretariat believes that the claim meets the stated requirements and merits a factual record. The Council can deny this action by a two-thirds vote, and can also deny making a factual record public by a two-thirds vote.\textsuperscript{163} This Council power is too great and impedes the NAAEC goal of public participation. If a claim is based on incorrect information and is unfounded it should not be considered. However, if the Secretariat expends the time and money to investigate a claim and provides good reasons for making and publishing a factual record, the Council should approve the submission. Therefore, a frivolous claim standard, similar to the United States rules of summary judgment or failure to state a claim should be adopted. This would promote public participation, continue to put a check on the Secretariat along with restricting the Council's vast authority to deny claims, even when the Secretariat fully believes the claim is well supported. Publishing the factual record would provide parties with an incentive to enforce their laws and would also promote public awareness.

3. Party Control

\textsuperscript{162} The EU was created in 1957 under the Treaty of Rome with the purpose of creating a unified economy and environmental issues were not considered an economic concern at this time. Robbins, supra note 24, at 144-45; In 1987, the Single European Act [hereinafter "SEA"], Title VII, often called the Environmental Title, gave the EU the express power to consider environmental protection as an essential factor in all economic and social policy-making. \textit{Id.}; The SEA established the following objective: "to preserve, protect and improve the quality of the environment, to contribute towards protecting human health and to ensure prudent and rational utilization of natural resources." WILLIAM RAWLINSON, \textsc{European Community Law: A Practitioner's Guide} 263 (2d. ed. 1994); The EU Court of Justice has jurisdiction over a wide range of issues and has recognized environmental protection as an EU objective since 1985. Zacker, supra note 14, at 264; Therefore, if an EU member violates EU environmental law, the Court of Justice will punish that member. EU members are able to create their own environmental laws, but EU law supersedes member law with a few exceptions. Symposium, \textit{The European Community in 1992: An Integrated Approach to Economy and Ecology}, 1990 B.Y.U. L. REV. 1759, 1779 (1990). EU members have a desire to be unified economically and in other ways, but the NAFTA and the NAAEC members do not want such interdependence.

\textsuperscript{163} NAAEC, supra note 12, art. 15, 32 I.L.M. at 1488-89.
The CEC process provides the parties to the dispute with much control over how the dispute will be resolved.\textsuperscript{164} The parties initiate the procedures by requesting a council or panel session, or by reconvening a panel after a panel decision is made.\textsuperscript{165} This procedure gives the parties control over the resolution of their dispute and promotes cooperation because it would be in the parties' best interests to reach a resolution before they go to a panel and have the matter decided for them. Party control also exists in the selection of the intervenor because the parties appoint cabinet level officials from their respective countries to serve on the Council and also select the panelists.\textsuperscript{166}

Party control extends into the Council session. The Council may use a variety of procedures to settle the dispute and may also make recommendations to assist the disputing parties in reaching a mutually satisfactory resolution.\textsuperscript{167} However, prior to being subject to a Council decision, the parties have a chance to reach a resolution in a non-adversarial way, thus avoiding a dichotomous decision and promoting cooperation.\textsuperscript{168} The parties must weigh the costs and benefits of resolving the dispute through the CEC and may choose ADR outside the CEC. In the future, the parties may be able to resolve some disputes through cross border suits. The Council has the duty of making recommendations to the member countries regarding the possible implementation of such

\textsuperscript{164} Party control is a theme found in NAFTA and the Air Quality Agreement.

\textsuperscript{165} NAAEC, \textit{supra} note 12, art. 23-24, 35, 32 I.L.M. at 1490-91, 1493.

\textsuperscript{166} NAAEC, \textit{supra} note 12, art. 9, 27, 32 I.L.M. at 1484, 1491.

\textsuperscript{167} NAAEC, \textit{supra} note 12, art. 23, 32 I.L.M. at 1490.

\textsuperscript{168} "Cooperative resolution of disputes by the parties themselves is a laudable goal, and the Agreement provides ample opportunity to pursue that end." Baron, \textit{supra} note 145, at 612; The dispute resolution process of the Labor Side Agreement is almost identical to the CEC dispute resolution process, thus promoting party resolution of disputes before being subject to a binding determination. The Labor Side Agreement, \textit{supra} note 141, art. 27-41, 32 I.L.M. at 1509-12; The NAFTA dispute resolution process has the goal of enhancing relations between the parties and a great commitment to reaching an agreement at the consultations stage rather than at the FTC or panel stage. GILBERT R. WINHAM, ASSESSING NAFTA: A TRINATIONAL ANALYSIS 256 (Steven Globerman & Michael Walker eds., 1993); Article 2022 says that each party must encourage the use of arbitration and other ADR and that each party should establish procedures to observe agreements to arbitrate and to recognize and enforce arbitration decisions. The NAFTA, \textit{supra} note 12, art. 2022, 32 I. L. M. at 698; Therefore, the NAFTA process seems even more rigorous in forcing members to resolve disputes on their own. The Air Quality Agreement also places extreme emphasis on party resolution of disputes. The parties must go through consultations and negotiations before they may submit their matter to the IJC. The Air Quality Agreement, \textit{supra} note 11, art. XI, XIII, T.I.A.S. No. 11783 at 4-5; In addition, the parties are not bound to submit matters to the IJC and are encouraged to use ADR. \textit{Id.} Therefore, it can be inferred that much of the CEC dispute resolution process is taken from the NAFTA and the Air Quality Agreement.
procedures with the possibility that such measures may be included in the NAAEC in the future.\footnote{169}{NAAEC, \textit{supra} note 12, art. 10, 32 I.L.M. at 1487.}

Another aspect of party control is the fact that the CEC dispute resolution process limits the length of consultations and Council sessions to sixty days.\footnote{170}{NAAEC, \textit{supra} note 12, art. 23, 24, 32 I.L.M. at 1490.} This is a good safeguard to make sure the parties approach ADR seriously and work rigorously to reach a result. The limitations provide an incentive to reach a settlement quickly because the parties may be subject to a binding panel decision which one or all parties may not find advantageous.

Overall, as in NAFTA and other agreements, the CEC dispute resolution process strongly promotes party control over the resolution of disputes through the use of ADR. This process promotes cooperation and provides the members with skills that will be useful in the future for making additional changes or additions to the NAAEC and other agreements.

F. \textit{Methodology of Decision}

Since the NAAEC is a relatively new agreement, the CEC does not have pre-existing law upon which to base its decisions. The CEC decision-makers make determinations based on what they believe constitutes a persistent pattern of failure to effectively enforce environmental laws. With members from all three countries on the Council and panel, reaching this conclusion may be difficult and result in inconsistent conclusions. There is no prior law and the issue to be decided is a factual question. Therefore, the method used in decision-making is a subjective test. Results are based upon the interests and perceptions of the intervenors and not upon a body of law. The interests of these intervenors should be to promote environmental protection and to make sure each member country enforces its laws. However, there is no check on the discretion of the decision-makers, so other interests interfere with objective reasoning. Since each member is represented on the Council and panel, the decision seems fair because each party is equally represented, but the subjective test prohibits impartiality.

NAAEC critics claim that the CEC should be composed of government and non-governmental organizations, environmental and health experts, environmental organization members, the public, interested local and regional environmental, industrial, and development organizations in order to better serve the needs of the border areas.\footnote{171}{Rowe, \textit{supra} note 4, at 228.} A more inclusive CEC would promote public and expert participation, community involvement and local bi-national cooperation.\footnote{172}{\textit{Id.}}

\begin{flushleft}
169. NAAEC, \textit{supra} note 12, art. 10, 32 I.L.M. at 1487.
170. NAAEC, \textit{supra} note 12, art. 23, 24, 32 I.L.M. at 1490.
171. Rowe, \textit{supra} note 4, at 228.
172. \textsl{Id.}
\end{flushleft}
public participation should promote equitable consideration of maquiladora community residents' needs, acknowledge both economic and social considerations, and reduce environmental racism." Therefore, one solution to biased decision-making may be to make the CEC more diverse. In addition to diversifying the CEC, an objective test standard should be created to be applied to each dispute. An objective test will reduce biased decision-making by applying the same standard to each case.174 The NAAEC does take into consideration Customary International Environmental Law, which states that each country has the sovereign right to control the use of resources within its boundaries unless or until such activities harm an area outside the country's territory.175 Bilateral international agreements regarding the environment create broad principles and domestic law is required to enforce these international principles.176 The domestic law of each member country must provide high levels of environmental protection in order to meet the objectives of the NAAEC.177

G. Outcome and Enforcement

The NAAEC provides extremely effective procedures for enforcing panel determinations. The NAAEC is new and the United States, Mexico, and Canada have never created an environmental commission like the CEC. Therefore, decisions must be enforced in order to ensure the NAAEC is complied with while giving the CEC respect and clout.

1. Binding

Panel decisions are binding due to the enforcement procedures that are initiated by party request.178 Under this new dispute resolution process, Mexico can no longer use the excuse that it is too costly to enforce its environmental laws. Under the NAAEC, it is too costly not to enforce those laws because if a member has not fully implemented an action plan or has not paid a sanction, the panel may suspend NAFTA benefits or institute

173. Id.

174. The objective test may entail the following analysis: 1) the complained against party's law enforcement practices since the NAAEC's enactment; 2) the extent of injuries to private individuals and any organizations involved; and 3) an analysis of the severity of actual land, water or air damage keeping in mind that a large amount of environmental damage may result from one sudden and unexpected event. These three steps will be based on a reasonableness standard similar to the U.S. system. Therefore, even if many of the Council representatives are biased toward a party, they will have to provide reasons for why there is a persistent pattern of failure to enforce environmental laws and cannot make a decision solely because of personal beliefs.

175. Giorgio, supra note 47, at 168.

176. Id. at 170. These broad international principles are called "soft law."

177. NAAEC, supra note 12, art. 3, 32 I.L.M. at 1483.

178. NAAEC, supra note 12, art. 34, 35, 32 I.L.M. at 1492-94.
monetary sanctions. These enforcement procedures provide an incentive for a member country to enforce its laws and for disputing parties to resolve the matter through ADR, consultations or Council sessions. Overall, these procedures have a deterrence effect and are imperative for the NAAEC's success.

2. Non-Binding

Alternatively, consultations and Council session determinations are non-binding. The rational is that parties will be less likely to agree to participate in these procedures if decisions are binding and rigidly enforced. If a resolution is reached through consultations, Council session or ADR, the decision is not binding per se because it is mutually agreed upon and assumed the parties will comply.

Nevertheless, some check should be imposed to make sure non-binding decisions are followed. One possibility would be to require the parties meet one year after the decision is reached to ensure the decision has been complied with. If after one year the parties are satisfied with the results of the decision, no further meetings are necessary. If there is non-compliance, the parties should be allowed to re-enter the CEC dispute resolution process, use other ADR to reach a new solution, or decide how to achieve the old solution. This would promote cooperation by forcing compliance. If a party will not comply with the settlement, they are frustrating the goals of the NAAEC and must be forced to comply or else asked to withdraw from the NAAEC. This additional procedure to ensure that non-binding decisions are complied with would make the NAAEC stronger, and indicate a true commitment by the parties to environmental protection and cooperation.

3. Party Comments

Although the CEC process does not provide for appeals, the panel is able to change its initial determination. After the panel makes an initial report, the parties are able to submit written comments that the panel considers in reaching its final determination. At this stage it is possible for the panel to change its decision if a party comment points to an error in the initial report. This procedure is good because it forces the panel to review its prior determination and correct any inconsistencies. An appeals

179. NAAEC, supra note 12, art. 34, 35, 32 I.L.M. at 1493 & 1494.

180. NAAEC provides further proceedings, that are party initiated, in which the panel reconvenes to determine if the losing party has fully implemented the approved action plan, and if not, that party will pay sanctions or have its NAFTA benefits suspended. NAAEC, supra note 12, art. 34, 35, 32 I.L.M. at 1493-94.

181. Each member is able to withdraw from the NAAEC six months after submitting a written notice of withdrawal to all members. NAAEC, supra note 12, art. 50, 32 I.L.M. at 1495.

182. NAAEC, supra note 12, art. 31, 32, 32 I.L.M. at 1492.
process would increase the CEC caseload and cause delay. Environmental issues need quick determinations in order to avoid further pollution. This two step procedure provides a review of the prior determination plus allows for quick decision-making. The CEC enforcement procedures are effective because they force compliance and make sure that each member enforces its environmental laws.

H. Justifications for Outcome

The final determination is based on evidence presented by the parties to the proceedings, the parties who submitted the claim, experts, and the Council and Secretariat. As mentioned above, the decision is not based on a standard, but rather on what the CEC decision-makers and the parties believe constitutes a persistent pattern of failure to enforce one's environmental laws. However, the NAAEC does provide objectives and goals that provide guidance for making decisions. Also, the NAAEC incorporates International Environmental Customary Law as a basis for decision-making. This customary law principle is that each country is able to use their resources and pollute their land until it harms another country. Therefore, the NAAEC provides some framework to be applied in decision-making, but an objective standard needs to be imposed to avoid biased decisions.

The power of the CEC panel to issue sanctions and suspend NAFTA benefits is a very effective way to encourage compliance. The NAAEC needs this power in order to be successful, ensuring compliance to the sanctions.

IV. Societal Factors

Several societal factors challenge the NAAEC's success. First, each member has a very different history and ideology. Mexico appears to be changing its old belief that economic growth and environmental regulation

183. Within 180 days after the last panelist is chosen, the panel must issue the initial report and within sixty days after the initial report's issuance, a final report must be presented. These time limits force the panel to work efficiently and to reach a decision as soon as possible. Id.

184. This feature of the NAAEC sets this agreement apart from the various United States-Mexico and United States - Canada bi-national environmental agreements mentioned earlier. Outcome enforcement is a key factor for a successful agreement.

185. Giorgio, supra note 47, at 168.

186. Each member country may have different interest regarding environmental protection, but with the NAAEC, they are able to combine their interests through cooperation. Through cooperation, under the NAFTA and the NAAEC, the members are able to determine how far they want to go with free trade and how far they want to go with environmental protection. By reaching these determinations together, they are strengthening relations, creating a better environment, and encouraging economic growth.
can not go hand in hand. Based on the General Law, Mexico is becoming concerned about pollution in the border area and the rapid spread of disease that has resulted.\textsuperscript{187} People living on the border are being injured by the \textit{maquiladora} pollution and have no recourse under Mexican law. The United States on the other hand, is economically advanced and has a lot of experience with environmental law, legislation and litigation.\textsuperscript{188} The United States environmental laws provide a safe environment for its citizens, plus the right of action in the United States court system if a citizen is injured.\textsuperscript{189} Canada is very similar to the United States and has strengthened relations with the United States through several successful bi-national environmental and trade agreements.\textsuperscript{190} One of the biggest obstacles for the NAAEC will be trying to get three different countries to interpret and comply with the NAAEC in a similar manner. However, the NAAEC would not be in existence if not for the commitment of the United States, Mexico, and Canada to environmental protection through cooperation.

Second, the border area is a unique area because there are many socially and economically linked communities called \textit{sister cities} on each side of the border.\textsuperscript{191} These communities are a result of the border area's disparate division. The West Side of the border was divided and plotted by surveyors without concern for mountains, rivers, and other terrain.\textsuperscript{192} The East Side was more naturally divided and, before 1848, the Rio Grande was entirely in Mexico, but it was later divided so that parts of the river were in both countries.\textsuperscript{193} This has created a challenge for the NAAEC because the United States and Mexico suffer from the same environmental problems but have very different cultures, laws and economic conditions.\textsuperscript{194} In addition, the border area contains many different ecological zones, such as, mountains, deserts, rivers and ocean making environmental protection more complex.\textsuperscript{195} Therefore, in order to protect the environment, the

\begin{thebibliography}{99}
\bibitem{187} However, Mexican citizens are very poor and many have moved to the boarder area for work and believe they are better off now then they were before. Ribadeneira, \textit{supra} note 1, at 10.
\bibitem{188} Stanton, \textit{supra} note 4, at 76.
\bibitem{189} Robbins, \textit{supra} note 24, at 136.
\bibitem{190} "The friendly relationship between the United States and Canada has been responsible in large part for the successes in negotiating agreements over transboundary issues, such as pollution and water boundaries, because many of these agreements rely on voluntary negotiations to work out disputes." Stanton, \textit{supra} note 4, at 78-79.
\bibitem{191} Gaines, \textit{supra} note 6, at 435.
\bibitem{192} \textit{Id.} at 436.
\bibitem{193} \textit{Id.}
\bibitem{194} \textit{Id.} at 435.
\bibitem{195} \textit{Id.}
\end{thebibliography}
NAAEC needs to promote cooperation so that the member countries can work together in solving the environmental problems they encounter. Overall, the three member countries realize the need to protect the environment on border areas. Mexico has come to understand that a stable environment is necessary for economic growth. Through the NAAEC, private individuals and NGOs are able to bring forth claims to encourage accountability, to make others aware of how laws are or are not being enforced and to clean-up the border area where Mexican and American citizens live and work. Despite the obstacles involved, the NAAEC, as does the NAFTA, stands for cooperation and indicates the potential for further unification in the future.

V. CONCLUSION

Since the NAAEC is rather new it is difficult to fully analyze its impact or success. The NAAEC was a necessary addition to the NAFTA in order to protect the environment against economic growth. Although the NAAEC was created in response to the border area pollution, this agreement governs all environmental issues involving the United States, Mexico and Canada.

The recommendations provided above serve to clarify vague provisions, provide private individuals with a forum in which to seek damages, limit the Council's unfettered power and to make the CEC dispute resolution process advocate cooperation. The United States, Mexico and Canada must establish specific environmental standards for each member to attain, that is objective and reasonable for all parties and that do not create trade barriers.

The future holds two challenges to the NAAEC and to international environmental protection in general. In May of 1998 the Multilateral Agreement on Investment may be ratified. This agreement threatens environmental protection because it would prohibit governments from imposing certain restrictions on foreign businesses and investors. Canada and twenty-eight other countries are involved in the agreement. Many believe "the MAI will [not] provide anything more then token environmental protections." The challenge is not only a limit to

196. As mentioned earlier, international cooperation is essential for international environmental protection. Despite prior unsuccessful environmental agreements, the NAAEC members are committed to environmental protection. They have no choice. If the United States, Mexico, and Canada want economic growth they must protect the enforcement also.


198. Id.

199. Id. "The lack of public discussion, combined with the complexity of the 175-page MAI draft, means that most Canadians are still in the dark about its contents."

200. Id.
environmental regulations on foreign businesses, but also Canada’s membership in the MAI. Canada will be bound to the MAI and also to the NAAEC and the NAFTA, which supports economic growth along with environmental protection. This could frustrate relations with the United States and Mexico, while restricting Canada’s ability to meet NAAEC obligations.

A second important concern for the future is the Kyoto Protocol. This agreement will require the United States to cut emissions by approximately eighteen percent.\(^{201}\) It could ultimately result in the United States building new nuclear power plants and eliminating the use of coal.\(^{202}\) Industry leaders are concerned because the Kyoto Protocol “doesn’t allow enough time to reduce emissions without inflicting massive damage on the economy.”\(^{203}\) Rapid change is often unsuccessful and may cause resistance. Some suggest that industry and the government should work together to develop the technology required to meet the Kyoto Protocol standards.\(^{204}\) Therefore, this agreement also presents the tension between environmental protection and economic growth.

The international world will always have the problem of balancing the industrial world with the needs of the environment. However, cooperation between nations is necessary, in order to responsibly protect the environment while promoting economic growth. The world may never find the ultimate balance, but by establishing strategies through cooperation it is making progress.


\(^{202}\) Id. Coal provides over half of the nation’s electricity.

\(^{203}\) Id.

\(^{204}\) Id.
REVIEW ESSAY - THE RELUCTANT SHERIFF

IV Ashton*

Dr. Haas sums up his basic approach as follows: "I propose that the United States adopt a foreign policy based on the notion of regulation." That theme is one of several things that makes this an important book. The theme and the title go right to the heart of the challenge for United States foreign policy in the post cold war world. As important, they do it in a way that is easy to understand, thereby enhancing the possibility that larger segments of the American public will rise to the challenge. This is not a heavy treatise built on a foundation of jargon making it accessible only to specialists and international relations of international law. Instead, it is brisk, direct, and makes effective use of the regulation, sheriff, and posse metaphors to frame the important questions.

Appropriate political structures, in Dr. Haas’ view, are necessary for an effective American foreign policy and for a peaceful world. Political structures represent a kind of "regulation" in the international arena. The cold war provided a bi-polar political structure that offered a place for almost all nation states and provided a compass for American foreign policy. The end of the cold war, with nearly 200 nation states adrift, made American foreign policy directionless. The absence of a political framework for small or less powerful countries increases the risk of anarchy. The absence of a coherent foreign policy erodes the basis for the necessary political support for any kind of international engagement by the United States.

"The reluctant sheriff" explains that all of the post cold war empirical evidence suggests that the United States must exercise leadership. In order for this to happen, there must be an intellectual framework within the United States from which coherent foreign policy directions can be extracted, and there must be a reasonable political consensus supporting international engagement by the United States.

Coherence in either the intellectual framework or the actual foreign policy requires simple and understandable goals. Dr. Haas suggests stability as the central goal of a post cold war American foreign policy. Pursuit of this goal will, on occasion, justify United States intervention, which sometimes will take the form of military intervention, which

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sometimes will take the form of military intervention. When this is appropriate, the United States will act in the role of a sheriff.

The posse metaphor signifies that while the United States is the preeminent military power, it is not sufficiently powerful to act effectively alone. It needs participation by other states to support any military intervention. Thus, the United States as sheriff can act effectively only by persuading others to join its "posse."

The stability goal means that use of force in the international arena must be opposed.

The implications of Dr. Haas' second central goal, free trade, is less clear. Whether major threats to free trade would justify military intervention is doubtful. Presumably the means used to promote free trade would range up to, but not beyond, economic sanctions. There also, the United States could play the role of sheriff but could not act effectively alone and must enlist others in its posse.

Dr. Haas erroneously distinguishes sheriffs from police officers, asserting that police officers, but not sheriffs, need explicit legal authority to perform their law enforcement functions. On the contrary, the duty of a sheriff in Anglo-American law traditionally was to execute writs (specific orders in specific cases) issued by courts. A sheriff acting without such judicial authority would be no different from an ordinary citizen in his legal capacity and would be subject to civil liability for conversion of property, trespass, battery, and false imprisonment.

In one respect, that is a mere lawyer's quibble over a metaphor. The metaphor provides firm support for Dr. Haas' essential point, which relates to the role of the posse and the sheriff's relationship with it. In the wild west, the sheriff's legal authority from a writ issued by a court, typically an arrest warrant, did him little good as a practical matter. In order to effectuate his authority, he needed sufficient physical force to overcome the resistance of the subject of the writ. The posse provided that coercive supplement to the sheriff. As a theoretical matter, all citizens were obligated to obey the sheriff's command to join a posse. In fact, however, whether the sheriff could form a posse was a political matter and depended on persuasion and collective interest rather than the law.

This is exactly the relationship between international law and peace enforcement in the post cold war world. In theory, and under international law, the United States' role as organizer and leader of peace enforcement efforts depends on legal authority - a United Nations ("UN") Security Council resolution, or the privilege of self defense under customary international law and article 52 of the United Nations charter. But the existence of these sources of legal authority are hardly sufficient, they do little more than the arrest warrant did for the sheriff in the wild west. What really matters is the political practicability of organizing a posse, and that depends on collective self-interest and on persuasion at the political level.
But to stop there understates the role of international law, just like Dr. Haas’ book understates the role of the writ for the wild west sheriff.

The sheriff in the wild west faced a law suit and damages if he acted and organized a posse without a writ. But that was not the important point. What is important about the antecedent of the metaphor is that the sheriff would not be able to organize a posse as a political matter without a writ. He had no legitimacy without a writ. A posse, whether or not organized by the sheriff, was a lynch mob unless there was a writ authorizing its formation and activity. Lynch mobs of course formed from time to time, but the sheriff had stronger rhetorical leverage and thus was more persuasive when he could say to potential posse members, “Do your duty. We must enforce the law and order” rather than saying, “Join my lynch mob.” Similarly, in the post cold war international arena unilateral action occurs, and to be sure, it is not subject to the obrobrium attached to the term “lynch mob.” Nevertheless, sources of legitimacy found in international law play a major role in the rhetoric leading up to the modern form of a posse. The United States had a stronger moral position and thus could be more persuasive in desert storm because it had Security Council resolutions. Similarly, in Bosnia, the United States organized North Atlantic Treaty Organization Implementation Force was more practicable because there was a source of legitimacy both in peace keeping UN Security Council resolutions and in the privilege of self-defense because the signatories of the Dayton Accords. Bosnia, Serbia, and Croatia had requested NATO assistance, thereby triggering the privilege of self-defense under Article 52 and customary international law.

The intellectual challenge for students of international law and international relations, and the policy challenge is to work out the relationship between the United States role as sheriff and the appropriate metaphor for the writ in the post cold war world. As Dr. Haas points out, the mechanisms for obtaining international writs, the UN Security Council process especially, is convoluted. Its performance in Bosnia was disgraceful.

But there may be a richer array of choices than Dr. Haas suggests. There may be intermediate possibilities between waiting for a UN Security Council resolution sufficiently explicit to represent a writ authorizing military action, and unilateral action by the United States without any basis of authority in international law. One obvious possibility is commitments by regional authorities. More needs to be done to understand why NATO succeeded where the UN failed in Bosnia. Even if regional possibilities for issuing post cold war writs can be worked out, that source of authority must be reconciled with the UN Security Council’s authority under Article 53. Controversy has swelled for years around the issue whether entire Security Council authority is necessary for regional action (most people think not) and whether the absence of post action authority negates the legitimacy of continued regional action.
The need for legitimacy is just as great with respect to the posse engaged in application of economic sanctions as with one engaged in military intervention. The recent uproar over application of Helms-Burton and the Iran Sanctions Act to punish those violating the United States' economic sanctions against Cuba and Iran are examples. The rest of the world does not consider extra territorial application of United States' law to be legitimate in the absence of some kind of imprimatur under international law (and maybe even with such an imprimatur).

The most immediate problem is for the United States to decide what it will do if the World Trade Organization ("WTO") decides adversely to it in Helms-Burton or Iran Sanctions Act cases. There will be a concrete decision under international law. There will be not question of the United States' obligation to comply with it. In the long run, compliance will enhance the stature of the WTO institutions. In the long run stronger WTO institutions will enhance free trade. But the United States. has, in the international trade arena as in the military arena, sufficient strength to act unilaterally. It is possible for it to ignore the "writ", though in this case as the target of the posse rather than its leader.

Second, there should be a clearer understanding of the role of international law as a mechanism for crystallizing political positions through rhetoric.
PLEADINGS AND AUTHORITIES

I. ARDEN'S REFUSAL TO EXTRADITE TERRAQ FULLY COMPLIES WITH INTERNATIONAL LAW.

A. Terraq Will Not Receive a Fair Trial in Remorra.

Under customary international law, criminal defendants have a fundamental right to a fair trial. A state may refuse to extradite a fugitive if there is "substantial ground for believing that the individual will not receive a fair trial." In *Barcelona Traction, Power and Light Co.*, this Court characterized the protection of fundamental human rights as obligations *erga omnes*—owed by all states to all persons. In *Soering v. United Kingdom*, the European Court of Human Rights suggested that the requested state may be liable in an extraordinary circumstance where extradition would expose the fugitive to a risk of "a flagrant denial of a fair trial in the requesting country."

This case presents the Court with such an extraordinary circumstance. Remorra's actions demonstrate its resolve to exact revenge. The Remorran Intelligence Service violated Nylesia's territorial integrity by orchestrating a predawn raid on Terraq's home. International condemnation of state-sponsored abduction in the aftermath of the *Eichmann* and *Alvarez-Machain* cases demonstrates that international law does not permit invasion of a state's territorial sovereignty to kidnap a fugitive. In its zeal for revenge, Remorra

5. Comp. ¶ 23.
executed three members of the NPA’s Revolt Planning Committee without even indicting them. Although Remorran criminal procedure provides a right to an appeal that usually takes about nine months, all three were executed immediately after the court’s verdict. The next day, a Remorran spokesperson declared, “Your government promises that Terraq will be tried and punished for his crimes. The blood of our martyrs will be dishonored unless such criminals receive the justice they deserve!” The politically explosive context of this case provides “substantial ground” for Arden to believe that Terraq will not receive a fair trial. Accordingly, Arden properly denied Remorra’s extradition demand.

In complying with customary international law, Arden is not vindicating Terraq’s right to a fair trial purely for the sake of the right itself. Rather, the prospect of any lasting peace is inextricably linked to the neutral, evenhanded disposition of justice.

B. Arden Must Deliver Terraq to the International Criminal Tribunal for the Former Integra Pursuant to Its U.N. Charter Obligations.

As a member of the United Nations, Arden must implement U.N. Security Council enforcement measures and cooperate with subsidiary organizations created to enforce those measures. These obligations supersede any other international law duty. The Statutes of both the Former Yugoslavia and Rwanda Tribunals illustrate the obligation of all U.N. members to cooperate with criminal tribunals established by the Security Council. The Secretary-General of the United Nations reinforced this obligation by mandating that any request by the Yugoslavia Tribunal to surrender an individual shall be considered to be a binding enforcement measure under Chapter VII of the Charter. This Court has held that all U.N. members must carry out Security

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9. Comp. ¶ 25; Clar. ¶ 16; see also ICCPR, supra note 1, art. 14(3)(a).
10. Clar. ¶ 2; Comp. ¶ 25.
11. Comp. ¶ 31.
13. See Charter, supra note 12, art. 103.
Council decisions, which "prevail over . . . any other international agreement[.]")

Pursuant to Chapter VII of the Charter, the Security Council established ICTFI which, in turn, formally requested that Arden surrender Terraq to its custody. Arden's Charter obligations mandate compliance. If Remorra opposes the Security Council's executive decision, Remorra's quarrel is with the Security Council, not with Arden.


"The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression," and shall take appropriate measures to maintain international peace and security. The Security Council acted properly under Article 39 of the Charter because the Integran conflict threatened international peace. The Integran war claimed the lives of over 120,000 people and the killing temporarily ceased only after a regional force from an association of neighboring states disarmed most, but not all, of the combatants. Thus, it is reasonable to infer that the regional association of neighboring states reacted to a flood of refugees into their own states, or out of fear that the Integran conflict would spill over into their territories.

Remorra's attempt to label this war as an "internal armed conflict" does not bar the Security Council's authority to determine a "threat to peace." The Security Council, with the support of the General Assembly, found that the civil wars in the Congo, Liberia, Somalia, and Rwanda constituted threats to international peace and security. The Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Appeals Chamber") recognized that the practice of the U.N. membership at large reflects a common understanding that a "threat to peace" may include internal armed conflicts.

Article 41 lists non-forcible implementation measures of the Security Council, but the list is not exhaustive. The Yugoslavia Appeals Chamber held

17. Comp. ¶ 22.
18. Comp. ¶ 33.
21. Comp. ¶¶ 15, 16.
23. See Yugoslavia Appeals Chamber, 35 I.L.M. at 43.
25. See Yugoslavia Appeals Chamber, 35 I.L.M. at 43.
26. See id. at 44-45; Charter, supra note 12, art. 41.
that "the establishment of an International Tribunal falls squarely within the powers of the Security Council under Article 41." The Court has never struck down a Council resolution as a violation of the Charter.

In this case, the maintenance of a lasting peace depends on the neutral disposition of justice. The Security Council acted within its discretion to maintain peace by establishing ICTFI. Even the cessation of hostilities does not bar the invocation of Chapter VII.

2. ICTFI Has Subject Matter Jurisdiction Over Terraq's Crimes.

The former Integra was and Arden is a party to the Geneva Conventions and Protocols. At the time of Terraq's alleged crimes, Integra still existed and these treaties were in force. Even if the Court characterizes the Integran war as "internal," Common Article 3 and Protocol II of the Geneva Conventions govern this conflict. As demonstrated in the International Criminal Tribunal for Rwanda, violations of Common Article 3 and Protocol II, which proscribe, inter alia, torture, taking hostages, and pillage, are subject to individual criminal culpability. The international community has realized that individual responsibility for such offenses should not hinge on whether the atrocities occurred technically within a country's boundaries.

Customary humanitarian norms prohibiting crimes against peace and humanity apply equally to internal conflicts. Those slaughtered in civil wars deserve no less protection than those killed in international conflicts.
establishing ICTFI, the Security Council ensured that the atrocities in the former Integra would receive the full attention of the international community.

3. Delivering Terraq to ICTFI is Consistent With Its Complementary Jurisdiction.

ICTFI's jurisdiction is "complementary" to that of Remorra. The International Law Commission's Draft Statute of the International Criminal Tribunal ("ILC Draft") uses the same "complementary" jurisdiction language. The ILC Draft preamble provides "the [International Criminal Tribunal] is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective." Although the Draft Statute is silent on what "unavailable" or "ineffective" means, one commentator defines "ineffectiveness" as either "(1) the forum provides a standard of guilt or punishment which is incompatible with international norms; or (2) the State in question has not demonstrated an actual intention to prosecute or to conduct a full and prompt investigation." Extraditing Terraq to Remorra would violate Arden's obligation to safeguard his fundamental right to a fair trial. Remorra's lust for revenge renders its judicial process ineffective and undercuts its primacy claim.

II. DELIVERING TERRAQ TO ICTFI DOES NOT BREACH ANY INTERNATIONAL LAW OBLIGATIONS.

Extradition depends on the existence of a treaty obligation. Absent a treaty, aut dedere, aut judicare, try or extradite, is a moral obligation rooted in comity. Even assuming that Arden does have a duty under international law to investigate and try alleged perpetrators of crimes against humanity, Arden is complying with this obligation by sending Terraq to ICTFI.

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38. Comp. ¶ 22.
40. Id. at pmbl., ¶ 3.
42. See supra part I.A.
44. Id.; see Oppenheim, supra note 22, § 17.
A. The Extradition Treaty Between Arden and the Former Integra Does Not Survive Integra's Dissolution.

Under the Vienna Convention on Succession of States in Respect to Treaties ("Succession Treaty"), a successor state assumes the treaty obligations in force that apply to its territory at the time the successor state separates from an existing state. The Succession Treaty is not a codification of the law of state succession and does not reflect state practice.

Article 7 of the Succession Treaty limits its application "to a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed." Remorra signed the Peace Treaty and formally assumed the governmental responsibility over its territory no later than April 1996. Because the Succession Treaty entered into force on November 6, 1996, its provisions do not apply in the present case.

Even if this Court finds that the Succession Treaty applies, Arden has not yet ratified the Succession Treaty, and therefore is not bound to recognize Remorra as a successor to the extradition treaty between Arden and the former Integra. As a signatory to the Successor Treaty, Arden is cognizant of its duty not to defeat the object of the Succession Treaty. Arden's refusal to recognize Remorra as a successor to the extradition treaty, however, does not defeat the Succession Treaty's goal of "ensuring greater juridical security in international relations." Arden objects to Remorra's succession claim because of the intimate, predominately political nature of the bilateral extradition treaty. Without such an agreement, no state could obtain jurisdiction over a fugitive located in another state without violating that state's territorial sovereignty. The decision to enter into a bilateral extradition agreement is a deliberate exercise of autonomy based on the consent of the sovereign governments involved.

49. Succession Treaty, supra note 47, art. 7(1).
50. Comp. ¶¶ 16, 20.
52. Comp. ISSUES/CLAIMS.
54. Succession Treaty, supra note 47, pmbl.
55. See R. Governor of Brixton Prison, ex parte Soblen, 33 I.L.R. 255, 277-78 (Eng. 1963); Ivan Shearer, Extradition in International Law 28-29 (1971).
There is a distinction between "personal" and "dispositive" treaties in the area of state succession. "Personal treaties," such as those involving judicial cooperation, military alliances, or economic aid, are fundamentally contractual in nature and premised upon the continued existence of the contracting parties. "Dispositive treaties," such as those establishing borderlines, run with the land and are intended to be permanent. Because extradition treaties are analogous to judicial cooperation treaties, they are "personal" and do not survive the dissolution of a contracting party. State practice supports this conclusion. When Czechoslovakia emerged as a new state after the dissolution of the Austro-Hungarian Empire, it was neither bound nor entitled to claim the benefits of the personal bilateral treaties of the Austro-Hungarian Empire. Similarly, when Singapore seceded from the Federation of Malaysia, it did not succeed to any prior bilateral extradition treaty absent mutual consent of Singapore and third parties. Absent mutual consent, Remorra does not succeed to the extradition treaty between Arden and the former Integra.

B. Even Assuming That the Extradition Treaty Applies, the Political Character of Terrq's Offenses Jeopardizes His Right to a Fair Trial.

Extradition requires a state to balance the need to ensure that no serious crime goes unpunished with the concern that persons accused obtain a fair trial. A primary justification for the political offense exception is to safeguard the accused's right to an impartial trial. States have drawn distinctions between "pure" and "relative" political crimes. "Pure" political offenses are acts against the State including treason, sedition, and espionage. Individuals accused of such crimes traditionally have


57. See State Succession, supra note 56, at 15; Daniel O'Connell, State Succession in Municipal Law and International Law 212 (1967); Oppenheim, supra note 22, § 63.

58. See State Succession, supra note 56, at 49.

59. Shearer, supra note 55, at 46.


61. Restatement, supra note 2, § 476, cmt. a.


63. See Quinn v. Robinson, 783 F.2d 776, 793-96 (9th Cir. (Cal.) 1986); In re Campora, 24 I.L.R. 518, 521 (Chile Sup. Ct. 1957); In re Giovanni Gatti, 14 Ann. Dig. 145 (Fr. Ct. App. 1947); In re Ockert, 7 Ann. Dig. 369, 370 (Switz. Fed. Trib. 1953).

64. See Manuel Garcia-Mora, Crimes Against Humanity and the Principle of Nonextradition of Political Offenders, 62 Mich. L. Rev. 927, 942 (1964); Quinn, 783 F.2d at 793-94.
received protection from extradition. States, however, apply three distinct tests to determine "relative" political transgressions. The Political Incidence Test centers on two primary elements: whether the act occurred during a political uprising and whether action was incidental or in furtherance of that uprising. The Proportionality Test focuses on the predominance of the actor's underlying political motivation, and the Objective Test focuses on the identity of the victim and the nature of the rights harmed.

Here, Remorra charged Terraq with treason, sedition, and murder. "Pure" political offenses include treason and sedition and are non-extraditable. The alleged murders happened during a political uprising. Although Terraq's political motivations do not absolve him of accountability, they affect his right to a fair trial and must be considered.

The U.N. panel of experts accused Terraq of personally killing the Mayor of Telfin and ordering the torture of two ethnic Remorrans that resulted in their death. These constitute political incidents because they occurred during a political revolt whose objective was to transform the Remorran dominated power structure into one dominated by Nylesians. The Mayor openly opposed the NPA and his death occurred in furtherance of a bona fide political power struggle. In the Castioni case, a British Court refused to extradite a fugitive to Switzerland for killing a state council member during the course of a politically motivated riot because his conduct met the requirements of the Political Incidence Test.

The charges regarding Terraq's alleged ordering of torture causing the death of two Remorrans are similar to the Artukovic case. Artukovic ordered the slaughter of more than 200,000 people in concentration camps in the former Yugoslavia. From 1951 to 1959, U.S. courts refused to grant the former

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67. See, e.g., Quinn, 783 F.2d at 795-96.
69. See, e.g., Gatti, 14 Ann. Dig. at 145-46.
70. Comp. ¶ 33.
71. See supra note 65.
72. Comp. ¶ 33.
73. Comp. ¶ 21.
74. Comp. ¶ 9.
75. In re Castioni, 1. L.R.Q.B. 149 [1891].
76. Id. at 150, 153.
Yugoslavia's request for extradition because the complaint failed to demonstrate that Artukovic committed "murder" and, alternatively, because such conduct fell within the scope of the Political Incidence Test. Pursuant to a renewed extradition request charging him with "war crimes," a U.S. court ultimately extradited Artukovic to the former Yugoslavia in 1986, but the court acknowledged that Artukovic's right to a fair trial was a factor in deciding whether to extradite. About 45 years had elapsed between the time Artukovic was initially charged with murder and his extradition. The passage of time and the subsequent change in the former Yugoslavia's political climate significantly decreased the likelihood of an unfair proceeding.

The political character of Terraq's alleged crimes in this case, combined with the highly charged political climate in Remorra, ensure that Terraq will be denied a fair trial. His political motivations impact his right to a fair trial.

C. **As an Enemy of All Humanity, Terraq Injured the International Community and Should Be Held Accountable Before ICTFY.**

The decision to extradite a fugitive must also consider the substantial interest of the international legal order to make sure that serious atrocities are punished. The U.N. expert panel branded Terraq as an enemy of all humanity for violating international humanitarian law. The Security Council unanimously adopted the panel's report accusing Terraq of expelling Remorrans from their homes in Telfin; setting them out to sea without food, water or fuel; killing the Mayor of Telfin; ordering the torture of Remorran prisoners that caused their deaths; and seizing weapons and food from Remorran homes in Telfin. As an enemy of all humanity, Terraq injured not only Remorra, but the entire international community, and should answer for his actions before an international tribunal. Universal crimes that shock the conscience of the international community do not lie within the exclusive jurisdiction of any one state. If Remorra's objective is lasting peace, a neutral disposition of justice is critical to its goal. Accordingly, the best interest of

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80. *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. (Cal.) 1986).
82. *Comp. ¶ 21.
83. *Comp. ¶¶ 20-22.
both the international community and Remorra demands that Terraq obtains a fair proceeding before ICTFI, an international trier of fact in a neutral location.\textsuperscript{6} In light of Arden’s compliance with international law, questions of state responsibility and reparation do not arise.

III. ARDEN HAS NO DUTY TO MAKE REPARATIONS TO REMORRA.

The duty to make reparations for international law violations is only triggered when an act or omission of a state, direct or imputable, breaches an international duty, the breach causes injury, and, in the case of injury to individuals, local remedies are exhausted.\textsuperscript{7} Here, Arden has violated no international duty;\textsuperscript{8} this Court should decline to award compensatory damages.

A. International Law Does Not Require Reparations for International Law Violations Resulting in Direct Injury to States Absent Actual Damages.

"[T]here is no compelling authority to support the claim that a mere breach of international law without injury to nationals or material damage to the state should be met by an award of damages by a tribunal."\textsuperscript{89} Although some publicists suggest that “a government is always entitled to some damages . . . irrespective of whether the breach has caused any actual material damage or pecuniary loss[,]”\textsuperscript{90} they disagree as to a state’s right to reparations absent actual loss.\textsuperscript{91} “Moral” or “political” damages are difficult to ascertain and rarely awarded.\textsuperscript{92}

The crystallization of international law requires both repeated conduct and \textit{opinio juris}.\textsuperscript{93} Persistent objection by one or more states prevents conduct from

\textsuperscript{66} Clar. \S 15.

\textsuperscript{88} See supra part I.B-C.
\textsuperscript{89} Christine Gray, \textit{Judicial Remedies in International Law} 91 (1987); see Parry [1956] 2 Hague Recueil des Cours 653, 657, 671-95.
\textsuperscript{91} Gray, supra note 89, at 85-92.
\textsuperscript{92} See Corfu Channel, 1949 I.C.J. at 44-7 (sep. op. J. Alvarez); Gray, supra note 89, at 84; Brownlie on State Responsibility, supra note 90, at 236.
crystallizing. Because no custom exists in this regard, this Court should decline awarding such damages.

B. Remorra Cannot Seek Representative Damages Because It Cannot Prove the Nationality of the Individuals Harmed or the Extent of the Harm Suffered.

Before it can provide diplomatic protection, a state must prove that the person concerned is its national. This Court has dismissed claims when a state could not prove that the individual was its national. Nationality is determined by domestic law with one caveat—the determination must not violate international law. Citizenship is traditionally determined by descent from a national or by birth within state territory. With regard to state succession, the successor states “determine to what extent former nationals of the extinct state acquire their nationality.” Such determination is binding, so long as a genuine link exists and the successor states provide for the possibility of naturalization for those having a substantial connection with the territory.

Here, Remorra and Nylesia properly provided for citizenship by place of birth and naturalization within five years. By the middle of the 20th century, a large number of ethnic Remorrans had migrated to the inland capital of Nylar, where they gradually took economic and political control of Integra. Although during the war many Remorrans fled to former, traditionally Remorran areas, Nylar, their birthplace, was included within the new territory of Nylesia. Upon the facts of the Compromis, one may infer that many ethnic Remorrans are Nylesian citizens. Remorra’s inability to prove the Remoran citizenship of all of the harmed individuals makes it virtually impossible to prove the extent of the harm suffered.

Restitution remains the accepted basis for damages in international law. When damages are asserted, the Court must determine “the extent of the

94. Carter & Trimble, supra note 93, at 143.
98. Nottebohm, 1955 I.C.J. at 56; Brownlie, supra note 93, at 387.
99. Oppenheim, supra note 22, § 63.
101. Comp. ¶ 17.
102. Comp. ¶¶ 6-8.
103. Comp. ¶¶ 4, 14, 21.
To make this determination, a claimant must demonstrate an actual loss reasonably certain and ascertainable. In *Mavrommatis Palestine Concessions*, this Court's predecessor dismissed the claim for indemnity because no loss had been proved. This Court has awarded damages in only two cases involving claims for non-material harm: the *S.S. Wimbledon* and *Corfu Channel* cases--both of which involved substantial evidence of actual harm. Evidence of actual damages stemming from Arden's alleged breach of international law is at best inferential. Because Remorra cannot establish actual loss caused by Arden, this Court cannot award Remorra compensation.

C. **Punitive Damages Are Not Commonly Awarded in International Law.**

Punitive damages conflict with the principles of restitution and sovereignty, and "imposition of such damages goes beyond the jurisdiction conferred on the ICJ." International tribunals traditionally decline to impose punitive damages. Although regional and domestic tribunals award modest moral or non-pecuniary damages, these awards do not begin to reach the amount requested by Remorra. An award of US$100 million would be excessively punitive and should be denied.

D. **The Requested Damages Are Inappropriate and Premature.**

As the adjudicative arm of the United Nations, this Court must enforce the spirit of the U.N. Charter and support the Security Council’s decision to establish ICTFI. In establishing ICTFI, the "Council struck a meaningful

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113. See *supra* part III.C.
blow against impunity.”\textsuperscript{114} Awarding damages so Remorra can establish a Truth Commission will constitute a ruling that ICTFI was improperly established. Indeed, withdrawal of support will be a license “to commit war crimes with impunity.”\textsuperscript{115}

Apart from the Truth Commission in El Salvador,\textsuperscript{116} Truth Commissions have been “resolutely domestic”\textsuperscript{117} and have never been funded by a third-party or awarded by an international tribunal. “Truth commissions have the greatest chance of success in societies that have already created a powerful political consensus behind reconciliation.”\textsuperscript{118} Here, the lack of political consensus within Remorra indicates that a Truth Commission is premature. The Remorran people thirst for a criminal prosecution.\textsuperscript{119} Not until its prayer for relief does Remorra offer the Truth Commission as an option. As ICTFI is valid and the Truth Commission lacks consensus, Remorra’s request must be denied.

IV. ABSENT CLEAR EVIDENCE REGARDING THE ORIGIN OF AND TITLE TO THE BANK FUNDS AND ACCOUNTING, ARDEN MUST PROTECT THE FUNDS.

A. The Conflicting Evidence in the Compromis Does Not Establish a Clear Duty on Arden’s Part to Transfer the Funds or Accounting to Remorra.

The Compromis fails to delineate from whom the Nylesian separatists, associated with the NPA, obtained the US$20 million, later diverted to Arden. The money may be private property seized during the war,\textsuperscript{120} war booty,\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{115} Goldstone, \textit{supra} note 114, at 499.
  \item \textsuperscript{118} Goldstone, \textit{supra} note 114, at 496.
  \item \textsuperscript{119} Comp. ¶¶ 23-25.
  \item \textsuperscript{121} See Hague Regulations, \textit{supra} note 120, arts. 4, 14, 53; \textit{Oppenheim on War}, \textit{supra} note 120, § 139.
\end{itemize}
legitimate war contributions,\textsuperscript{122} property of a \textit{de facto} provisional government,\textsuperscript{123} or property of an ethnic people seeking self-determination.\textsuperscript{124} In addition, if collected for a public purpose, the bank accounting may be viewed as state archives.\textsuperscript{125}

If this Court deems the funds private, Arden may have a duty to transfer them to ICTFI, in light of the Yugoslavian and Rwandan tribunals, which enable the return of property and proceeds to their rightful owners.\textsuperscript{126} If this Court deems the funds public, under the broad definition of state property,\textsuperscript{127} Arden must protect them under principles of state succession. Although few well established principles of international law apply to state succession,\textsuperscript{128} "state property located in third countries must be distributed equitably among the successor states in accordance with an agreement to be reached among them."\textsuperscript{129} Similarly, the Austrian Supreme Court recently held that surrendering property to only one successor state amounts to an expropriation without compensation.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{122} Hague Regulations, \textit{supra} note 120, arts. 49-51; \textit{Oppenheim on War}, \textit{supra} note 120, ¶¶ 146-48; \textit{I. Vetek v. N. Durnbacher & Co.}, 4 I.L.R. 566, 566-67 (Hung. S.Ct. 1927).
\item \textsuperscript{123} International Law Commission Draft Articles on Succession of States: Succession in Respect of Matters Other than Treaties, March 24, 1970, art. 8, cmt. § III(E), (F), U.N.Doc. A/CN.4/226, (Mohammed Bedjaoui, Special Rapporteur) [hereinafter State Succession Articles]; \textit{Oppenheim}, \textit{supra} note 22, ¶ 167; \textit{see Irish Free State v. Guaranty Safe Deposit Co.}, 222 N.Y.S. 182, 188 (1927).
\item \textsuperscript{125} Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, April 8, 1983, art. 20, 22 I.L.M. 306 (1983) [hereinafter Property Convention]; State Succession Articles, \textit{supra} note 123, art. 7, cmts. II, III(B).
\item \textsuperscript{126} Rwandan Tribunal Statute; \textit{supra} note 14, art. 23(3); Yugoslavian Tribunal Statute, \textit{supra} note 14, art. 23(3); Charter, \textit{supra} note 2, arts. 25, 29, 48, 49, 103.
\item \textsuperscript{127} \textit{See Property Convention, supra} note 125, art. 8; State Succession Articles, \textit{supra} note 123, art. 1, commentary; P. K. Menon, \textit{The Succession of States in Respect to Treaties, State Property, Archives, and Debts} 79-82 (1991); Lillich & Weston, \textit{supra} note 95, at 122; \textit{see also supra} notes 36-40.
\item \textsuperscript{128} International Conference on the Former Yugoslavia Documentation on the Arbitration Commission under the UN/EC (Geneva) Conference: Advisory Opinions Nos. 11-15 of the Arbitration Commission, 32 I.L.M. 1586, Question 4, ¶ 1 (1993) [hereinafter FYAC]; Menon, \textit{supra} note 127, at 79; \textit{Oppenheim, supra} note 22, ¶ 68.
\item \textsuperscript{129} FYAC, \textit{supra} note 128, at Question 6, ¶ 1; \textit{see Property Convention, supra} note 125, art. 18; \textit{Republic of Croatia v. Girocredit Bank A.G. Der Sparkassen}, 36 I.L.M. 1520, 1529 (Aust. Sup. Ct. 1997); \textit{see also Oppenheim on War, supra} note 120, ¶ 316.
\item \textsuperscript{130} \textit{Girocredit}, 36 I.L.M. at 1529; FYAC, \textit{supra} note 128, at Question 6, ¶ 4.
\end{itemize}
Both Remorra and Nylesia have interests in the funds and accounting, whether deemed public or private. Absent clear evidence regarding the origin of and title to the bank funds and accounting, Arden must protect these funds. Lacking any clear international duty to send the funds and accounting to Remorra, Arden may properly uphold its domestic laws.

B. Arden Has No Duty to Provide the Funds or Accounting to Remorra.

Arden does not wish to keep the money for its own purposes, but it is not bound by international law to deliver the accounting or funds to Remorra. Arden is not a party to any international agreements regarding the disclosure of private bank information in civil, criminal or tax contexts. Although several states have signed treaties proscribing illicit drug transfer and related money laundering, customary international law does not require such disclosure. Moreover, numerous states have enacted bank secrecy laws prohibiting the disclosure of private bank information. Even existing mutual assistance treaties give broad discretion in refusing or postponing disclosure.

Under international law, states have a sovereign right to decide what laws to enact within their own territories. As present state practice is inconsistent and no applicable international law obligations exist, Remorra’s accounting and funds request must be denied.

Absent admission of responsibility, ratification, adoption, or lack of due diligence, states are not responsible for the acts of private parties. Arden has


135. U.N. Drug Convention, supra note 132, arts. 7(12), 7(15), 7(17); European Money Laundering Treaty, supra note 132, arts. 9, 18(1)-(8).


137. See U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 56-7; Corfu Channel, 1949 I.C.J. at 18, 21; Restatement, supra note 2, § 702, cmt. N, and reporter’s note
Neither condoned, ratified nor been complicit as an "accessory after the fact"\textsuperscript{138} in Terraq's actions. Instead, Arden has detained Terraq and intends to transport him to ICTFI.\textsuperscript{139} Arden pursued possible claims regarding the suspicious funds and is now acting under court order in compliance with certain provisions of its bank secrecy laws, enforced by the privately-owned bank.\textsuperscript{140} The actions of Terraq and the bank cannot be imputed to Arden.

C. Arden Can Decline Recognition and Enforcement of the Default Judgment.

Individuals have a duty to exhaust local remedies before a state can institute international proceedings on their behalf.\textsuperscript{141} Arden originally impounded the questioned accounts as suspicious. Remorra then failed to come forward when Arden advertised the accounts\textsuperscript{142} and brought no claim for the accounts within Arden. Remorra cannot now claim the funds. Furthermore, absent a treaty obligation, international law requires no state to recognize or enforce foreign judgments.\textsuperscript{143} Indeed, under principles of comity, states may decline to enforce foreign judgments that violate international law, conflict with their fundamental public policy principles, or represent the public law of a foreign state, such as revenue, penal or confiscatory legislation.\textsuperscript{144}

Arden and Remorra are not parties to any international agreements regarding the recognition of foreign judgments or legal instruments. Here, the Remorran court entered a default judgment only 21 days after proceedings were instituted, indicating a lack of fairness to Terraq and implicating public policy concerns. Thus, Arden may decline recognition and enforcement of the default judgment against Terraq.

V. CONCLUSION AND PRAYER FOR RELIEF.

\textsuperscript{11} Brownlie on State Responsibility, supra note 90, at 161-62; see also Orentlicher, supra note 45, at 2583.


\textsuperscript{139} Comp. ¶ 29, 45.

\textsuperscript{140} Comp. ¶ 40; Clar. ¶ 4.

\textsuperscript{141} Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 27; C. F. Amerasinghe, Local Remedies in International Law 45 (1990); Trindade, supra note 87, at 7-13; Oppenheim, supra note 22, § 153.

\textsuperscript{142} Comp. ¶ 39.


\textsuperscript{144} See Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 27, 29 I.L.M. 1413, 1424 (1990); Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, art. 2(h), 19 I.L.M. 1224 (1979); In re Grand Jury Proceedings, Marsoner v. United States, 40 F.3d 959 (9th Cir. (Ariz.) 1994) (Pregerson, J., dissenting); Oppenheim, supra note 22, §§ 113, 143.
For the reasons stated above, Arden respectfully asks this Honorable Court to declare and adjudge that:

(1) Arden's decision to surrender Terraq to ICTFI and its jurisdiction over Terraq are supported by the U.N. Charter and customary international law;

(2) The 1965 Extradition Treaty between Arden and the former Integra is no longer in effect, and that Arden's refusal to extradite Terraq to Remorra is consistent with international law;

(3) Arden has no duty to make reparations to Remorra or fund a Truth Commission; and

(4) Under international law, Arden need not transfer the funds or accounting to Remorra or recognize the US$20 million default judgment rendered in Remorra.

Respectfully submitted,

Agents for Arden