INTERNATIONAL PRACTITIONER’S NOTEBOOK

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I. INTRODUCTION

In discussing the justice processes used in Indonesia and East Timor to hold individuals accountable for serious violations of international law committed in East Timor, it is important to emphasize that the problems are rooted in politics not the rule of law. Political influence is what I'm going to focus on because it goes to the core of the problems in Indonesia and East Timor and provides a painful example of what can happen when a justice process becomes deeply politicized.

Indonesia is a case study of what can go wrong when a country is prematurely entrusted with the responsibility to try individuals for crimes it is nowhere close to acknowledging. Indonesia also provides an important example for the International Criminal Court and the principle of "complementarity," and the real problems that can be encountered when an offending state is given first (and perhaps only) crack at prosecuting offenders it really wants to protect, not prosecute.

And, I'm going to talk about East Timor—a case study of what can happen when a legal system is created on a rickety foundation, in which genuine political will and necessary resources are lacking and make the process vulnerable to influence and manipulation for broader geo-political interests. East Timor is also a place where cries for justice from the population are loud—they want Indonesian leaders to be held accountable, and yet East Timor's political leaders prefer to override these demands in favor of what they hope will become a strong economic and political relationship with the country's former occupier.
At the end of my talk, I would like to have persuaded some of you to contact the United Nations Secretary-General and to ask him to establish a high-level international review panel of between three and five judges and international law experts to review not what happened in East Timor (the crimes are well-documented), but to review what did not happen and to make recommendations for redressing these omissions.¹

II. BACKGROUND

East Timor occupies half an island; the other half, West Timor, is part of Indonesia’s vast archipelago. East Timor had been a Portuguese colony from the 16th century but in July 1975, Portugal finally withdrew. Five months later, on December 7, after months of fighting among various Timorese political parties, Indonesia launched a full-fledged attack, which resulted in the territory’s occupation by Indonesian forces for the next twenty-four years. East Timor was and remains almost 95% Catholic and the population speaks a local language, Tetum, and over thirty very distinct local dialects, but also relies heavily on Bahasa Indonesian (learned during the occupation).²

During Indonesia’s twenty-four-year occupation, as much as one quarter of East Timor’s population of about 800,000 was killed by security forces or died as a result of starvation or abusive conditions. Torture, rape, disappearances and other forms of degradation and domination were prevalent throughout the period. The Timorese fought a guerilla war with an underground political movement aimed at securing its independence.

In 1998, the political tides in Indonesia changed and its longtime authoritarian President Suharto resigned May 20, 1998, amid sustained popular and violent protests. Vice President Habibie was sworn-in the same day and one month later, he reopened the subject of East Timor by offering to grant it limited autonomy. This offer quickly led to renewed negotiations between Indonesia and Portugal (with East Timor’s pro-independent movement represented by the Portuguese delegation), and by late January 1999, President Habibie indicated that Indonesia would withdraw from East Timor if the people voted against increased autonomy, in favor of independence. Yet, as political agreements were being negotiated, the Indonesian security services began to train and equip local militias to intimidate and terrorize the population.

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¹ A fax can be sent to United Nations Secretary-General Kofi Annan at 212 963-4879. The estimated cost for a three-person panel to operate with staff support and travel to the region over a nine-month period is approximately $700,000.

² Portuguese and Tetum were adopted as East Timor’s official languages following its independence but as a practical matter, Bahasa Indonesia is widely used. The issue of language has created tension especially between the ruling elite, many of whom spent substantial time in Portugal or Mozambique during the occupation and do not speak Bahasa, and the younger generation who do not speak Portuguese.
On May 5, 1999, a series of three agreements were signed. The first agreement outlined the terms of a popular referendum in which the people of East Timor could vote for more autonomy within Indonesia, or reject the offer of autonomy, placing East Timor on the path toward independence. A United Nations presence was contemplated under either outcome to ensure a smooth transition from the vote to implementation. The second agreement addressed security concerns and gave Indonesian police sole responsibility for maintaining law and order while calling on the armed forces and police to maintain neutrality. The third agreement set forth modalities for conducting the vote, including a referendum target date of August 8, 1999.

These landmark agreements included a tight timeline for United Nations action. On June 11, 1999, the Security Council established UNAMET (United Nations Mission in East Timor) and rapidly deployed a small contingent of personnel to register voters, ensure the popular referendum would be conducted in a free and fair manner, and provide an objective assessment of the security situation.

Security matters were a serious concern and hundreds of East Timorese were killed as Indonesian security forces formed local militias to intimidate citizens who favored independence. In 1999, there were two periods of heightened violence instigated by Indonesian security forces and militias. The first period began in late January 1999 and culminated in April 1999 before the May 5 agreements. It was evidenced by murder, torture, rape and displacement. The second period began right after the referendum vote on August 30 when violence was at a low, but constant boil for five days. Then on September 4, 1999 when the referendum results were announced and more than 78% of the population opted for independence, violence exploded. For the next two weeks, the Indonesian military unleashed its security forces and home-grown East Timorese militias in an impressively synchronized offensive that United Nations employees described as nothing short of a "scorched earth" policy.

By the time the 1999 violence ended, about 80% of the territory's infrastructure was destroyed, hundreds of thousands of people were displaced including nearly 200,000 who were pushed across the border into West Timor, around 1,300 were dead, women had been raped and the entire population was absolutely terrorized. I first went to East Timor one year later, in September 2000, and I was shocked by the near total destruction of not only the capital Dili but also other towns and villages I visited. This easily compared to the worst devastation I saw during the wars in Croatia and Bosnia, Vukovar and the frontline areas in Sarajevo and Mostar.

III. ESTABLISHING THE INDONESIAN AD HOC HUMAN RIGHTS COURT

As a result of this gratuitous violence and Indonesia's brutal and retaliatory actions, there was hot discussion in capitals around the world and among human rights advocates and lawyers as to how Indonesia could be held to account for the serious violations of international law perpetrated by its forces and persons acting under its authority. At that time, the focus was on crimes committed in 1999 when the violence was perceived as an enormous slap to the international community after, against better judgment the Indonesian military had been entrusted to do what it said it would do—provide security. At the time, many talked about establishing another ad hoc international criminal tribunal similar to those of the former Yugoslavia and Rwanda to try top-level Indonesian offenders. However, there was little political appetite. Those Tribunals were expensive, relatively slow moving, and politically cumbersome to negotiate. Where, for example, would a Tribunal for East Timor be seated? What would be its temporal jurisdiction? Would it go back to the time of occupation and possibly, implicate the United States, or would it go back further to crimes committed during East Timor's brief civil war and point to individuals now in positions of power? It was also an election year in the United States and pushing for an international ad hoc criminal tribunal to try Indonesian generals would likely have created a political backlash from Indonesia's powerful United States lobby.

Predictably, the idea of an ad hoc court was not popular with the Indonesian military and political leaders. They said they would not send their generals to a foreign court and that they could be trusted to try them themselves along with others responsible for the violence. So, late in 1999 after Indonesia had withdrawn from East Timor and the United Nations had begun to establish its mission to help the territory recover and move toward statehood, the

international community embraced the idea of creating two parallel justice systems. One, in Indonesia to try high-level Indonesian officials and another in East Timor, under United Nations-auspices as part of the United Nations’ transitional administration, to focus primarily on East Timorese offenders. It seemed at the time to be the most viable political solution.

And this could have been a rather elegant solution, given genuine political will. However, Indonesia was defiant and manipulative all along the way. Throughout the process, it acted only when pressured and then only did the bare minimum to deflect pressure until the next time—they took a hide-and-seek approach to delivering justice. Mostly, Indonesia did the hiding and the international community did the seeking, but sometimes the international community hid, too.

First, Indonesia tried to avoid establishing a judicial process all together, but pressure was applied, and the ad hoc Human Rights Court in Indonesia was established. Then, the mandate was severely restricted to cover only crimes committed after August 1999. Again, pressure was applied, and the mandate was expanded to include two distinct months (April and September) of 1999 and three municipalities (not all thirteen). One strategy reportedly used by the Secretary-General with the Indonesians was to tell them that if their process were a failure there would be more pressure on the United Nations to sponsor its own tribunal. The underlying message, of course, was for the Indonesians to do just enough to prevent any momentum from building for another ad hoc international court.

When Indonesian prosecutors finally issued indictments, eighteen individuals were charged, including some important military and police commanders, but notably lacking from the list was General Wiranto, Defense Minister and Commander of the Indonesian Armed Forces during the relevant time (and now a Presidential candidate). His indictment had been anticipated after he was identified by Komnas-HAM, a governmental human rights body, as being most responsible for the violence in 1999 in an excellent report issued on January 31, 2000. When trials finally began in 2002 there were many problems, among which, witnesses and judges were intimidated by the presence of military officers and militia members in the gallery who made menacing comments; Indonesian prosecutors, some believing that the military were heroes, failed to present all available evidence; prosecutors often recommended below-minimum standard sentences; judges were poorly trained, lacked resources and were unable to exert adequate control in the courtroom.

In the end, the trials also produced a distorted legal record of events. The official court record portrays the violence in East Timor as a purely East Timorese conflict in which Indonesia benevolently intervened to separate two fighting parties. After the first two verdicts were announced in August 2002, the Secretary-General felt compelled to release a statement and clarify that there had not, in fact, been irregularities in the United Nations’ vote-counting which Indonesian judges, prosecutors and defendants stated had contributed to the widespread violence.9 At the same time, the United States also issued a statement in which it pronounced its disappointment that “prosecutors in these cases did not fully use the resources and evidence available to them from the United Nations and elsewhere.”10 In the verdicts of the six people charged, five were acquitted and one was convicted. Those acquitted were all members of Indonesia’s security services, four in the army and one in the police.11 The conviction was of the former civilian governor of East Timor, Abilio Soares, who himself was Timorese, not Indonesian. He was sentenced to three years for murder and persecution as crimes against humanity.

Of the eighteen individuals tried by the Indonesian Human Rights Court, twelve were acquitted, and six convicted with shockingly low sentences. All convicted remain free pending appeal even though only one has actually filed an appeal. The last trial resulted in the three-year sentence of General Damiri who at the time oversaw all military operations for East Timor from his base in Bali. Not only did the prosecution recommend he be acquitted but he missed four consecutive hearings during his trial—he was busy with other matters. Where? In Aceh province, where he was overseeing the government’s brutal clampdown on pro-independence supporters.12 He, too, remains free pending an appeal, which has not been filed.

IV. THE SPECIAL PANELS IN EAST TIMOR

I am reluctant to be too critical of the East Timorese judicial process because for a long time it seemed like a hopeful and novel approach to resolving some of the tough issues, and there have been some very dedicated people working to ensure the process moved ahead and victims were heard. Two years ago I would have been extremely upbeat, today I am less so. But there is some good news coming out of the trial process in East Timor although the people of East Timor are still far from achieving the justice they deeply desire and deserve.

Despite being chronically under-resourced, the prosecution unit set up in East Timor under United Nations direction has accomplished a lot in its short and difficult life. As of December 2003, the Unit has filed 81 indictments with the Special Panels charging a total of 369 people. Of those indicted, 281 accused remain at large and are presumed to be in Indonesia, including across the border in West Timor. Forty-six accused have been convicted and sentenced to terms ranging between four and thirty-four years, one has been acquitted.\footnote{Tim Alfa Militiamen Found Not Guilty of 1999 Murder of Los Palos King but Convicted of Violence Against Property or Persons U.N. Serious Crimes Unit Press Release, (Dec. 15, 2003) (on file with author).}

In October 1999, the United Nations established its transitional administration to help East Timor on its way toward independence (which it declared in May 2002). In March 2000, the United Nations’ mission in East Timor passed a regulation that listed crimes over which the District Court in Dili, East Timor’s capital, would have exclusive jurisdiction. It listed genocide, war crimes, crimes against humanity, and certain “ordinary” crimes (namely murder, sexual offenses and torture).

The Regulation stipulated that special panels of judges, composed of both East Timorese and international judges, could be established to hear these cases. It also clarified that forming such panels did not preclude the jurisdiction of an international tribunal for East Timor in the event such a tribunal was established.

Three months later, in June 2000, the Special Panels were formed. They are composed of one East Timorese and two international judges. There are now two such panels and they have jurisdiction to try the serious crimes mentioned above committed prior to October 25, 1999, the date the United Nations’ mission was established.

The temporal jurisdiction of the panels is an example of one-way accountability efforts in East Timor have been undermined. While the panels have the authority to look back at crimes committed before October 25, 1999, the prosecution unit has repeatedly focused on crimes committed solely in 1999, claiming it only has jurisdiction over this period. The United Nations’ hired
personnel in the Unit decided early on that it would investigate ten priority cases focusing on serious events that occurred in 1999. In 2003, the Unit completed its investigations and indictments on these cases. But rather than pursuing some of the pre-1999 cases, the Unit has now busied itself with indicting crimes that occurred in every district in 1999, regretfully ensuring it has no time or resources to look back in time.

The Unit estimates that 1,300 people were killed in 1999 and that at least one individual could be indicted for each murder. But to what end? What, in fact is the purpose of indicting hundreds of individuals if a serious effort is not made to ensure they end up in custody? This has been another anomaly to the process in East Timor. Even though the United Nations’ transitional administrator for East Timor managed early on to secure a Memorandum of Understanding (MOU) with the Indonesian government to cooperate with the Unit and to extradite people to East Timor, no pressure was ever applied and the MOU became meaningless after the first United Nations mandate expired at the time East Timor gained its independence.

In February 2003, the prosecution received its biggest disappointment when, after years of work, it issued its highest-level indictment against eight top-ranking Indonesians, including General Wiranto. Of those indicted, five had been nominally prosecuted in Indonesia’s ad hoc Human Rights Court, including two who were acquitted and three who were sentenced to between three and five years by the Indonesian court. The United Nations immediately distanced itself saying it was not a United Nations’ indictment but one issued by the East Timorese government.

The Unit was devastated by this response, since the Secretary-General himself in April 2002, just ten months earlier, in his report to the Security Council stated that the Serious Crimes Unit would “focus its investigations on ten priority cases and on those persons who had organized, ordered, instigated or otherwise aided in the planning, preparation and execution of the crimes.”


Given the clarity of this statement it was a surprise to the Unit, the East Timorese government and those of us advocating justice for East Timor, when the Secretary-General’s office backed away from its previous support.

Despite its best efforts, there are several indications that the Unit has continued to face tremendous political pressure from the United Nations, friendly governments, Indonesia and even the East Timorese government, to curb the Unit’s work. Being a United Nations-established and United Nations-supported body it relies entirely on allocations made to it. The United Nations’ current mandate expires in May 2004 and discussions are underway about the level to which the Unit will continue to receive support. In October 2003, it appeared almost certain the mandate of the Prosecution section and judges panels would be extended. It is less clear now.

V. CONCLUSION

Indonesia and East Timor have a lot to teach us about how things can get off track if political interests trump the genuine desire to uncover the truth and hold individuals accountable for serious international crimes. The same potential for abuse and manipulation exists within the International Criminal Court, which relies heavily on the principle of “complementarity,” the principle that gives States first chance to investigate and prosecute individuals believed to be responsible for serious violations of international law. Holding such trials is difficult under any circumstances, but it is particularly difficult for countries emerging from years of bitter-armed conflict and oppression.

It is critical that no one hide behind a country’s promises if there is no reason to believe the promise is being made in good faith. It is not difficult to judge sincerity—actions do speak louder than words. No one was surprised that Indonesia made a mockery of the justice process it established but you will still find people who say, “but we cannot really judge the process until all the appeals have been completed.” Well, what if the appeals are never filed, should we continue to deceive ourselves into believing for the next five, ten, fifteen years that Indonesia is on the brink of making good on its broken promises? Misplaced trust in such circumstances is damaging on multiple levels. There is a real fear that half-measures in justice only sow the seeds of future dissent by producing a false historic record and creating deep-seated resentment and anger.

16. On December 2, 2003, the South China Morning Post reported that Eurico Guterres, head of the notorious Aitarak militia in East Timor, had recently formed a militia in Papua despite his 10-year conviction by the Indonesian ad hoc Human Rights Court. Following his conviction, he has remained free pending an appeal, which has not been filed. Further, the article revealed that Timbul Silaen, former Indonesian chief of police in East Timor in 1999 whose acquittal by the Jakarta court was widely criticized, will head up the police in Papua, replacing outgoing police chief, Budi Utomo. See Marianne Kearney, Timor’s Guterres Forms Papua Militia, SOUTH CHINA MORNING POST, Dec. 2, 2003, available at http://iasnt.leidenuniv.nl:8080/DR/2003/12/DR_2003_12_03/2 (last visited Jan. 24, 2004).
among the victimized populations. Serbia is a good example. Policy makers currently point to Serbia as a perfect candidate for national trials, yet neither the government, nor its citizens are yet willing to acknowledge any serious level of responsibility for the wars that tore through that region in the 1990’s.

            Such actions also undermine confidence (including investor confidence) in not only a country’s legal system but in its political system and in its ability to deal fairly and create a stable environment over the long-term.

To try to offset some of the damage done in Indonesia and East Timor, there is a push, as I mentioned at the beginning, to create a high-level review commission comprised of between three and five judges and international law experts to review the legal processes employed in Indonesia and East Timor.

It was an effort initiated here in New York by the International Center for Transitional Justice, Human Rights Watch, Etan, Amnesty International and others working with Sergio de Mello, East Timor’s first transitional administrator, who was also guiding this process. Since his unfortunate death in Iraq, the effort to form the commission has moved to the Secretary-General’s Office, but it has not been received energetically.

Frankly, evidence indicates that the Secretary-General and many other political leaders, including the United States administration, would like to see justice for East Timor and Indonesia taken off the table especially given the war on terrorism and Indonesia’s important role in that fight. We must ensure this does not happen. It is challenging to weigh immediate political exigencies with the long-term commitment required in seeing through a justice process. Holding abusers accountable for serious violations of international law has become a tool political leaders can use. Once employed, there must be a long-term and steady commitment to seeing the process through—anything short, sends a confusing message and provides an opportunity for hardliners to undermine the peace process, obfuscate the truth, and ultimately create future instability.

In one of Judge Patricia Wald’s cases before the United States Court of Appeals for the D.C. Circuit, she eloquently warned that “pragmatism should not be allowed to trump principle or the soul of a nation will wither.”

Here I believe we are considering the essence of international justice and the risk of undermining its credibility over the long-term by politicizing the process. The United Nations sees a role in justice for itself in the future but the organization must do right by the processes it has already begun in order to ensure a solid foundation is established upon which we can build with confidence.

The subject matter of this Panel is the “free transfers” provision that the United States government has recently been inserting into the bilateral free trade agreements that it has been negotiating with a number of countries. Such a provision appears in the investment chapter contained in the most recent free trade agreements, namely with Singapore and Chile, and the Fact Sheet on United States-Singapore free transfers (which may be found at www.ustr.gov) states that “retaining the principle of free transfers sends a strong signal to the markets that the U.S. and Singapore support the free flow of capital and recognize its importance in economic development.” That Fact Sheet also provides that “The free transfers provision of the Singapore FTA meets an important Trade Promotion Authority... objective—‘freeing the transfer of funds relating to investments.’”

The background to these transfer provisions is important to consider. We all know that there is an important linkage between both trade in goods and services and payments for those goods and services, and that payments are made in currency. Thus the GATT and WTO efforts at liberalization of trade are paralleled by the IMF Agreement provisions outlawing restrictions on payments for current transactions. Equally, when an investor wants to take out of the host country dividends or interest on a foreign direct investment, the investor needs to be allowed to convert the host country currency dividends or interest into a currency that the investor needs.

Now, it is possible to extend these concepts further: if what one is trying to create, as the European Community is in the process of doing, is an integrated
financial market, it is necessary to provide for free convertibility for short term investments, or what we call “portfolio investments.” However, for a legal system to provide that currency will be freely transferable not only for current payments (as is the obligation of most parties to the International Monetary Fund Agreement), but also for all capital investments whether short term or long term, is a bit more problematic for the host government. Macroeconomic management may require the ability to staunch, extreme, and sudden capital outflows.

This problem does not arise in the case of foreign direct investment, which by definition involves control of a host country enterprise. The foreign investor cannot in any event instantaneously withdraw his investment since the investor will want to get the control premium on resale of the investment as well as any appreciation. However, in the case of short term investments in debt or equity, so-called “hot money flows,” the investor wants assurance that it can take its money and run at the first sign of economic difficulty of the host country. There is considerable academic writing today on this phenomenon of herd behavior in the case of short-term capital inflows. It is this desire on the part of portfolio investors to have convertibility at the very moment that a better return is sighted elsewhere that may be considered to necessitate the inclusion in any transfer provisions in a treaty of a safeguards clause.

It may be noted that the grandparent of all investment agreements with a free transfer clause, the aborted Multinational Investment Agreement which was being drafted under the auspices of the OECD (the “MAI”), in its last draft of the definition of “investment” (which was highly inclusive as is the definition in the most recent United States bilateral Free Trade Agreements, covering not only direct investment but also all forms of intangible property), contained a footnote to the definition that said: “The Negotiating Group agrees that this broad definition of investment calls for further work on appropriate safeguard provisions.”

However, the United States-Chile and United States-Singapore free trade agreements’ transfer provisions do not include any safeguard clauses. What I wanted to tell you, as an introduction to the Panel, is the history of the European Community’s handling of capital controls in the process of their creation of their financial single market, as I think that history is rather enlightening. In the process of creating a “single market” as the European Community’s economic integration process is called, a detailed history of the liberalization of inter-member state capital movements is given in Bermann, Goebel, Davey, and Fox, European Union Law, 2nd Ed., in their Chapter thirty two on Free Movement of Capital and the Integrated Financial Market. I cannot give here all of that detail, but very briefly, by 1988, after the Commission’s 1985 White Paper on Completing the Internal Market urged greater liberalization of capital movements, the Community enacted Directive 88/361 to implement then Article 67
of the Treaty of Rome. Briefly, that Directive required abolition of all restrictions on movements of capital taking place between persons resident in the member states. However, its Article 3 provided that “where short-term capital movements of exceptional magnitude impose severe strains on foreign exchange markets and lead to serious disturbances in the conduct of a member state’s monetary and exchange rate policies,” the Commission, after certain consultations, might authorize the member state to take protective measures, “the conditions and details of which the Commission shall determine.” In short, a safeguard clause was provided, but the measures taken by the states in an emergency would be overseen by the Commission. Paragraph two of Article 3 permitted the member state itself to take the protective measures “on grounds of urgency should those measures be necessary.” In this case, the Commission was to decide whether the member state might continue to apply the measures, or whether it should amend or abolish them, and in any event, the period of application of the protective measures was limited to six months.

Now with the introduction of the Euro for twelve of the fifteen member states, and a unified control of monetary policy for those twelve states, the Treaty was amended by the Maastrict Agreement to impose an absolute prohibition of all restrictions on the movement of capital, not only between member states, but also between member states and third countries. However, the Council was given authority in Article 57 to adopt measures on the movement of capital to or from third countries “involving direct investment... the provision of financial services or the admission of securities to capital markets.” Equally, Article 59 gives the Council the power to take “safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.”

What then of restrictions on capital movements imposed by member states not forming part of Euroland? Article 56 of the Treaty would seem to forbid them without any safeguard provision whatsoever. However, it may be noted that the earlier Directive permitting the use of safeguards has not been repealed and conceivably could be applied by the three outsiders. It will be extremely interesting to see what the situation is for the newly acceding ten member states who surely will not at first become part of the European Monetary Union. Will they be required to completely liberalize capital movements in accordance with Article 56? Presumably, however, Directive 88/361 remains on the books, and in any event, Article 59 of the Treaty continues to allow the Council, after consulting the European Central Bank, to take safeguard measures with respect to any difficulties that the new member states might experience with respect to their currencies from inflows or outflows from third countries. Thus, the European Union has not opted for the kind of free transfers provisions that the United States has negotiated with Singapore and Chile.
USING FREE TRADE AGREEMENTS TO CONTROL CAPITAL ACCOUNT RESTRICTIONS: SUMMARY OF REMARKS ON THE RELATIONSHIP TO THE MANDATE OF THE IMF

Deborah E. Siegel

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I. INTRODUCTION

The United States recently signed separate Free Trade Agreements (FTA’s) with Singapore and Chile. The agreements contain similar chapters on investment rules. These chapters seek to increase investment between the signatories through the articulation of strong disciplines, including by providing for free transfers of funds related to covered investments. This is a laudable goal insofar as increased trade and investment flows can be beneficial and clear rules on transfers prevent arbitrary administration of exchange transactions. Nonetheless, the FTA’s blanket prohibitions on capital restrictions, even in the context of an economic and financial crisis, raises concerns about the ability of signatories to manage macroeconomic imbalances and consistency with the work of the International Monetary Fund (IMF). Furthermore, the “cooling off” provisions of the dispute resolution provisions—while innovative—are not a substitute for clear legal rules on a balance of payments safeguard and consistency within the IMF Articles of Agreement. This note discusses how the rules of these investment chapters overlap with the law and work of the IMF, particularly in the context of managing economic and financial crises that affect its membership and the international community writ large.¹

II. INCREASED PROMINENCE OF INVESTMENT AGREEMENTS

While the investment rules covered in these FTA’s are similar in many respects to the disciplines contained in Bilateral Investment Agreements (BIT’s), it is significant that they are not stand-alone BIT’s. The FTA’s in which they are included necessarily cover a range of commercial transactions that is broader than BIT’s. Indeed, in order to be consistent with the most favored nation requirement of the WTO Agreements, the FTA’s are required to cover “substantially all trade” (General Agreement on Tariffs and Trade (GATT), Article XXIV.) Thus, these agreements are likely to have significantly more impact in increasing commercial activity between the parties than would a stand-alone BIT.

Use of investment agreements for a wide range of transactions has already begun to expand. Traditional BIT’s include a broad definition of investment that allows for evolving coverage of new instruments even though they originally focused in practice on foreign direct investment and (somewhat later) financial instruments associated with an enterprise. Depending on the text of the agreements, investors in “hot money” transactions (e.g., high yield overnight deposits and other derivative financial products) could seek protections of the investment rules. Two features of the recent FTA’s accentuate this phenomenon—their public notoriety and their explicit coverage of various financial products as investments. It is possible that this visibility will attract speculative capital flows more than under a traditional BIT, as well as legal action under the investor-state arbitration rules should recourse to capital controls or other measures arise in the context of economic or financial sector crises.

An increasing number of regional or bilateral agreements are including chapters with investment rules. The United States has stated, moreover, that it intends to “raise the bar” in terms of scope and level of commitment in such agreements. Still, recent experience has highlighted the unexpected nature of economic and financial crises. Thus, even for relatively stable countries like Singapore and Chile, the potential liability associated with the prohibition on any exchange controls, even temporary controls in the context of a crisis, is worrisome. To the extent that these provisions serve as models for future agreements with higher risk countries, this concern is more pronounced and could potentially interfere with the support that the international community expects from the IMF.

III. IMF MANDATE ON RELATED MATTERS

The rules in investment agreements overlap with the mandate of the IMF in several ways. Although the Fund is best known for its financing function, it also has important regulatory powers. The purposes of the IMF include promoting international monetary cooperation and assisting in the establishment
of a multilateral system of payments in respect of current international transactions (IMF Articles of Agreement, Article I, paragraphs (i) and (iv)). To this end, members are prohibited from imposing restrictions on the making of payments and transfers for current international transactions without the approval of the IMF (Article VIII, Section 2(a)), with a limited exception related to restrictions existing at the time the country joined the IMF (Article XIV). This area of the IMF’s mandate constitutes the IMF’s jurisdiction; refraining from such restrictions constitutes an obligation of members, for which they could be subject to sanctions from the IMF. The Fund may also ask a member to restrict capital transfers.

The overlap between the investment chapters’ and the Fund’s jurisdiction extends beyond the FTA’s coverage of current account payments and transfers (e.g., interest and dividends). The definition in the IMF Articles of “current international transactions” is not limited to the prevalent concept of payments and transfers for trade in goods and services, but extends to transactions covered in the investment agreements that would be considered “capital” in other contexts. Such transactions include moderate amounts for amortization of principal on debt instruments and for depreciation of direct investments (Article XXX(d)).

The IMF Articles authorize the IMF to “approve” restrictions on payments and transfers for current international transactions that are subject to its jurisdiction when these restrictions are needed for balance of payments reasons. This power in the Articles reflects the recognition of the membership that it may be necessary to impose restrictions in times of severe balance of payments crisis. The IMF has established policies on criteria for approval of restrictions which require, besides that these restrictions be necessary for balance of payments reasons, that they refrain from discriminating among IMF members and be temporary; approval is usually for one year. Restrictions imposed for national security reasons are subject to a separate approval procedure (Decision 144-(52/51)).

Management of the capital account and the control of the outflow of foreign exchange is, of course, also important in the IMF’s financing function. Another purpose of the IMF is to make available temporary balance of payments financing in times of balance of payments difficulties and in support of programs of macroeconomic stabilization and structural reform (Article I, paragraph (v)). The availability of IMF resources normally plays a catalytic role for financing from the rest of the international community.

Financing alone is rarely a solution, however, and indeed may not stop the hemorrhaging associated with an economic and financial crisis. Thus, in cases of severe balance of payments crisis, it may be necessary for the country to impose exchange restrictions on a temporary basis to safeguard its balance of payments. Nonetheless, the IMF’s discussions with the member will focus on
the fact that the circumstances giving rise to the crisis will normally require the member to adjust its underlying economic policies over the medium or long term. This understanding will be reflected in the conditionality associated with the IMF’s financial support. However, even if adjustment measures are undertaken immediately (and others will take time to implement) they are unlikely to have their intended effect right away. Thus, should a circumstance arise where it is appropriate for the member to impose exchange restrictions, the key point is the temporary nature of such restrictions, as prolonged reliance on restrictions will both delay recovery and make the implementation of the necessary reforms more painful.

There are three key provisions in the IMF Articles relevant to the potential for temporary restrictions on foreign exchange outflows. The first is Article VIII, Section 2(a) which, as noted above, contemplates approval for restrictions on payments and transfers for current international transactions (as defined under Article XXX(d)). The approval function under Article VIII, Section 2(a) is not limited to countries receiving Fund financing and serves as an exception to the obligation to refrain from such restrictions.

The other two provisions related to the possible imposition of restrictions on foreign exchange outflows are contained in Article VI of the IMF Articles of Agreement. Under Section 3, restrictions imposed on capital transactions do not require the IMF’s approval. However, according to Section 1 of that Article, under a provision designed to safeguard its resources, the IMF may “request” that a member using IMF resources impose capital controls to prevent a large or sustained outflow of capital. The scope of this latter provision is broad in the sense that it applies to any capital outflow; in other words, it is not limited to the payments and transfers for capital transactions defined as “current” in Article XXX(d). The legal status of the request is not an obligation. The member is not required to impose the restrictions or be faced with breach of obligation; rather the request is a condition for Fund financing, in that failure to comply could lead to a declaration of ineligibility to use Fund resources.

The IMF’s surveillance function also comprises the review of a member’s capital account policies. Under Article IV of its Articles, the IMF exercises surveillance over members’ economic, financial, and exchange rate policies. Conducting surveillance is an obligation of the Fund, as well as of the member. Surveillance involves comprehensive discussions of each member’s economic policies as well as member’s exchange and payments system, especially with a view to the effect on its exchange rate. IMF surveillance has given increasing attention to capital account issues, as capital flows are increasingly important means of allocating savings, promoting growth, and facilitating balance of payments adjustment. Capital account restrictions may also feature surveillance in any case where a country’s use of capital restrictions is directed at attempting to support inappropriate exchange rate policies.
IV. PROBLEMS WITH INCONSISTENT APPROACHES

The absence in either of the two FTA’s of a balance of payments safeguard or a reference to consistency with the IMF’s Articles raises important concerns with respect to the work of the Fund.

First, from a jurisdictional perspective, the FTA’s could give rise to inconsistent rights and obligations vis-à-vis the IMF Articles of Agreement. To the extent that an FTA covers transactions that would be defined as “current” payments and transfers under the IMF’s Articles (Article XXX(d)), they overlap with IMF jurisdiction under Article VIII, Section 2(a). For example, the FTA’s require the signatories to permit transfers comprising dividends, interest, royalty payments, management and other fees, payments made under a contract entered into by the investor or the covered investor, including payments (e.g., amortization) made pursuant to a loan agreement, which would all be subject to the IMF’s jurisdiction.

In the event of a financial crisis in which the signatory may be forced to impose restrictions, it may consider restrictions on countries that are not FTA signatories, in order to avoid acting inconsistently with the FTA prohibitions. But, restrictions on payments and transfers for current international transactions are subject to approval by the IMF and one condition for such approval is nondiscrimination among members of the Fund. Because a restriction by an FTA country against non-FTA countries would discriminate among the Fund’s membership, it could not be approved under the IMF’s policies and would therefore be inconsistent with the member’s obligations under Article VIII, Section 2(a).

Conversely, the parties to the FTA agreement could be subject to inconsistent treaty provisions if a restriction were approved by the IMF but were not permitted under the FTA agreement. This could happen if the FTA does not permit an IMF member to exercise its right to impose a restriction that is consistent with the Fund’s Articles (e.g., one approved under Article VIII, Section 2(a) or maintained under Article XIV). This inconsistency could be avoided in treaty drafting. For example, when the work of the World Trade Organization was expanded to include service transactions, the General Agreement on Trade in Services (GATS), was drafted to include exceptions to the transfer obligation for measures imposed consistently with the IMF’s Articles.

Second, the absence of a balance of payments safeguard is particularly striking in view of the IMF’s financing function. Because of Article VI, Section 1 of the Fund’s Articles described above, the FTA’s create a risk that in complying with its obligations under the FTA, a member could be rendered ineligible to use the Fund’s resources under the Fund’s Articles. Chile and
Singapore are relatively mature markets with a solid record of macroeconomic and financial sector management and, given the availability of more sophisticated and less costly policy tools, are unlikely to resort to capital control measures. Nonetheless, despite improvements in crisis prevention analysis, a risk remains that economic and financial crises may emerge in countries where they are not anticipated. Moreover, given that these provisions are likely to serve as models for future agreements, the implications are different for other emerging and developing countries with limited capacity to absorb balance of payments or financial system shocks.

A precedent for including a balance of payments safeguard in an FTA is found in the North American Free Trade Agreement (NAFTA, among the United States, Canada, and Mexico), and in the investment context specifically, in the draft Multilateral Agreement on Investment negotiated (but not concluded) under the aegis of the OECD. The GATT and the GATS also include safeguard provisions calling for consultation with the IMF. While employing different styles, these agreements address the problem by balancing authority to impose controls in appropriate circumstances with disciplines on their duration and rules such as nondiscrimination. Furthermore, in order to ensure consistency between those treaties and the work of the IMF, the GATS (Article XI) acknowledges the authority of the IMF to make a request for a member to impose capital controls, although the Fund has never found it necessary to do so in practice. The GATS rules providing for unrestricted payments and transfers related to the covered services were written to expressly exclude controls imposed at the “request” of the IMF—a reference to Article VI, Section 1 of the IMF’s Articles.

Third, the pressure on an FTA signatory to accept the draconian provisions in the style of the Chile and Singapore investment chapters in order to conclude the FTA may also be counterproductive in the context of the IMF’s surveillance function. Surveillance serves as a key instrument in the IMF’s ongoing dialog with members in the evolution of their macroeconomic and exchange rate policies and may include the pace and sequencing of liberalization of the economy. These comprehensive consultations serve an important role in crisis prevention analysis. Importantly, this discussion takes place in the context of the member’s overall macroeconomic environment rather than the more limited market opening perspective that tends to drive bilateral trade and investment agreements.

Another speaker at this conference proffered the “cooling off” period provided in the dispute settlement provisions of the two FTA’s in response to these potential inconsistencies. While a detailed discussion of the dispute settlement rules are beyond the scope of this article, the key point is that a signatory country could still be held liable to investors for even temporary restrictions that were imposed in connection with resolution of an economic and
financial crises. The “cooling off” period delays when a claim may be initiated, but the treaty continues to hold the signatory liable if a panel determines that any restrictions imposed “substantially impede transfers” and the liability applies retroactively even if the restrictions have subsequently been removed. A helpful, but not dispositive, discussion of this standard is contained in a letter from United States Under Secretary for International Affairs, John B. Taylor to the Managing Director of Singapore’s Monetary Authority, Koh Yong Guan (reportedly available on the USTR website). This letter articulates the United States government’s agreement to a “rebuttable presumption” that certain forms and effects of restrictions “will be deemed not to substantially impede transfers” including, for example, that the controls be nondiscriminatory. Nonetheless, this letter does not bind panels, is likely to be ignored by investors bringing claims under the investor-state arbitration, and does not fully address the point that restrictions may indeed need to have substantial effects in order to serve their purpose.

V. CONCLUSIONS

The provisions in the United States-Chile and United States-Singapore FTA’s that disregard potential need for a temporary safeguard and the related role of the IMF are unnecessarily severe in that the contrary approach would not detract from the goals of these investment agreements. When the potential for exchange restrictions arises, the IMF does not treat the restrictions as a solution to the problem; rather, it is based on the recognition that the restrictions may be necessary as a temporary matter while adjustment measures have a chance to have their intended effect. Indeed, the general obligations under IMF jurisdiction are to refrain from exchange restrictions and to the extent that such restrictions are approved, IMF policy requires them to be temporary and nondiscriminatory. As reflected in conditionality accompanying its financial support, the IMF policies recognize that over the longer term, the external environment that necessitated restricting the outflow of foreign exchange will usually require the member to adapt by introducing corrective macroeconomic and, in some cases, structural reforms, rather than relying on exchange controls.

Other international treaties serve as useful models of agreements that take these issues into account. Both the GATT and the GATS contain a balance of payments safeguard in similar form as well as a deference to IMF jurisdiction (GATT, Articles XII, XV, and XVIII; GATS, Articles XI and XII). The draft MAI did so at the time that negotiations were terminated for other reasons (Draft MAI, Section IV). These provisions were accepted by the United States. An alternative approach is represented by NAFTA, which, like the FTA’s, is not a multilateral agreement. Given the increased prominence of investment agreements and their inclusion in FTA’s, as well as the importance of the issues
to the international community, a meaningful dialog with the IMF and its staff should be encouraged in order to ensure consideration of the issues in a broader context than bilateral market access negotiations.
I am most honored to introduce this panel titled African Countries at the Crossroads of Human Rights Development, the Rule of Law, and Economic Priorities. Africa is often unfairly viewed as a monolith, when, in reality, it is the home of numerous distinct peoples and cultures. Africa’s place in the history of mankind as the foundation of civilization is clouded by the brutal conflict, neglect, and economic disaster that has taken place there over the past decades. This panel will focus on the status of human rights conditions, economic obstacles, and constitutional achievements in particular African countries.

However, to truly begin such a discussion regarding Africa, we must first address the tacit comparative analysis between Africa and America which takes place all too often. This introductory essay asks the question: Are we fair in our assessment of Africa? This question is asked because it appears that too many scholars have forgotten America’s early history when analyzing Africa’s current political, social, and economic circumstances. It is easy to provide an international assessment of Sub-Saharan Africa, as a region prone to violence and devoid of the Rule of Law. But, this paper proposes that the present image of America held stable by its adherence to the Rule of Law, i.e. constitutionalism, may not be a historically accurate one by which emerging African nations should be judged.

The modern African conundrum has been of war and deprivation both natural and otherwise juxtaposed with great potential and rich resources. After a devastating period of economic, social and political colonialism, African countries emerged as independent states. One imagined that as Ghana, the first Sub-Saharan country to demand and receive independence from its colonial power marked its independence in a bloodless transition in 1959, other African nations would follow suit in similar manner. History has shown that this was

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not to be the case. For any number of valid reasons, war and conflict have haunted Africa’s emerging nations.

These countries gained independence with constitutions utilized for the purpose of guidance and protection. Initially, the constitutions of the colonial powers fell away to amendments which were scrapped for new constitutions drafted to recognize the unique experience of the emerging nation state. Yet, violence continued. It is assumed that a constitution acts as a shield and buttress against civil war, economic depression, international conflict, political oppression, human rights abuses, corruption, and coups.

In this post-cold war era, America’s global influence has been to pronounce the Rule of Law as a goal for all countries seeking international respect. The Rule of Law is most often evidenced in a document deemed a constitution setting forth governmental responsibilities, individual rights, and societal protections. The document would also contain the basic structure and procedures for addressing grievances. It is not unusual for a newly independent country to inherit the constitution of the existing colonial power or have it foisted upon it. America was no different. Political conflicts lead to the scrapping of the old document in favor of a new constitution which takes into account such issues as lessons learned: protections for political minorities and institutional checks and balances. Newly emerging African nations followed this well-established constitutional path. Yet, abuses continue: war, man-made famine, economic upheaval, political oppression, and corruption have come to describe modern Africa. Adherence to the Rule of Law has become analogous with western economic and political stability. Once the constitution is in place prosperity will soon follow. However, the simplicity of the image belies the economic upheaval, civil war, and racial oppression that remain a part of America’s relatively short history. Multiple wars, political strife, riots, assassinations, uprisings, and international consternation are often ignored in the face of America’s present day success. Even in this country of overlapping constitutional protections, the history of America is a bloody one. The economic success of this country along with the longevity of its Constitution has overshadowed the turbulence that remains a part of American history.

Early America adopted much of its laws from English common law as well as the laws of other former colonial powers such as France, Spain, and The Netherlands. It was not until 1787 that representatives of the thirteen independent colonies met in Philadelphia, Pennsylvania, to draft a constitution. After two years of struggling over language, structure, and the intricacies of shared power, the United States Constitution was ratified in 1789. That Constitution and its ten Amendments, ratified in 1791, were greatly influenced by power struggles between the colonists and Britain’s King George. The Articles of the

\[2. \text{GHANA CONST. (1992).}\]
United States Constitution set forth the structure of powers of the legislative, executive, and judicial branches. The ten Amendments to the Constitution were drafted to protect individuals suspicious of government. This Bill of Rights provides for the freedom of speech, the press, assembly, religious practices, and of protest against governmental actions real and imagined. The Fourth, Fifth, and Sixth Amendments provide for protections of individuals in criminal proceedings against unreasonable government searches and seizures, double jeopardy, and self-incrimination. Trials are a public affair. An individual has a right to confront witnesses, consult counsel, and receive effective representation at no cost if one is unable to afford an attorney.

Each state of the United States has its own constitution. Each individual state constitution sets forth individual rights and protections in further detail. For nearly two centuries the United States Supreme Court would apply the protections of the Bill of the Rights only to the federal government. The states protected its citizens as each state saw fit to do so. The United States Supreme Court incorporated the protections and freedoms found within the Bill of Rights into the due process and equal protection clauses of the Fourteenth Amendment thus extending these provisions to the states. Yet, the courts’ dockets are brimming with cases claiming constitutional violations.

The present image of American stability belies a history of conflict. America did not gain its independence from British rule in a bloodless transition. The war for American independence from Great Britain took place between 1776 and 1783. Following on the heels of the War for Independence, America fought the British again in the War of 1812 during which the capital city was burned to the ground. Although there were skirmishes with outside nations, American expansionism brought wars with Native American nations which would ultimately result in the loss of over half of the Native American population in North America.

The Mexican-American War was fought between 1846 and 1848 during which the United States believed that an expansion into Mexico was justified as part of a Manifest Destiny or divine ordination. The Civil War, 1861-1865, remains the bloodiest of all American wars. This war between the states was fought to define the future economic, political, and social control of this nation. More American lives were lost during this war than all of the wars from colonial times to present. Two hundred thousand lives were lost in a single battle.

The economic structure of the American South was destroyed during the Civil War. Atlanta, a prized city today, was burned to the ground in 1864. One should examine post-war reconstruction with an eye towards the American South. Decades of economic struggle were required before the South began to recover from the devastation of war. Even today, the American South lags behind the North in certain areas of advancement such as public education. Southern rebel cities such as Charlotte, Memphis, and Birmingham, once
centers of racial conflict, are thriving in the new millennium. However, these economic and political changes have taken well over a century to occur. Race riots and rebellions against racial oppression have taken place in America’s North as well as the South for over two hundred years. The most recent one in Michigan in 2003.

America is comprised of many different ethnic groups, religious beliefs, and nationalities. However, the melting pot theme of American co-existence has been challenged even at its inception. Africans were introduced to the English colonies as early as 1619. The Africans in America were reduced to slavery as an economic measure first and foremost. The early Americans required labor to produce tobacco and other crops. Europeans attempted to enslave the Native Americans. The Native Americans could not withstand the diseases brought by the Europeans. While the African withstood the European’s diseases, they found it difficult to hide in foreign terrain familiar to the escaped Native American. The African in America remained either enslaved or without the rights of the white man. The Civil War brought a close to slavery in America. However, the racial oppression of Blacks was not condoned by culture. An interpretation of the Constitution by our United States Supreme Court would institute racial apartheid in America for nearly fifty years. The terrorist organization known as the Ku Klux Klan was formed in 1868; the same year Blacks were given equal protection under the laws. Blacks received the right to vote in 1870. However, racial terrorism preventing them from exercising their political rights for nearly a century. Approximately 5,000 Black men, women, and children have been murdered in the United States by lynching (hung, burned alive, shot, dismembered).

Federal, state, and local governments would enact laws to relegate Asians to a non-citizen labor class. The United States Supreme Court upheld the placing of persons of Japanese descent into internment camps during World War II, 1942-1946, based on fears of disloyalty following the bombing of Pearl Harbor by the Empire of Japan. The information forming the basis for this imprisonment was found, decades later, to be untrue. Prisons and jails are filled with a number of Blacks and Latinos disproportionate to their population. Over

5. Plessy v. Ferguson, 163 U.S. 537 (1896) (separate but equal is upheld by the United States Supreme Court); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (racial separation in public schools is inherently unequal).
6. U.S. CONST., amend. XIV (1868) (equal protection under the law was given to all persons).
7. Black males were given right to vote. U.S. CONST., amend. XV (1870).
two million people are incarcerated in America’s prisons and jails. America is the only industrialized Western nation with a death penalty, a disproportionate number of whom are people of color. As of this writing, there are approximately 3,700 people on death row awaiting a sentence that may include death by lethal injection or the electric chair. Such a death sentence is sanctioned by the United States Constitution. Yet, the world squirmed upon hearing that Ms. Amina Lawal of Nigeria had been sentenced to death by stoning.

The argument in this essay is quite simple. A constitution may offer guidance and a level of security, but, it cannot prevent sin. Mistakes, horrible actions, greed, murder, and willful destruction will take place. However, it is not inevitable. The frequency with which it takes place undermines any optimism to the contrary. Nation-building takes time. The first English settlement in North America was formed in 1620 in Jamestown, Virginia. Too many people have fought, died, or were sacrificed for the nation the world has come to know as the United States of America. It is a country that continues to struggle with its rule of law, minority rights, economic challenges, and political forces. The United States Constitution is under siege following the events of September 11, 2001. The American response to this act of terrorism was disappointingly common—as common as any emerging nation.

The youth of African governments and their constitutional ambitions should be viewed in historical context that takes into consideration these important factors. Additionally, the centuries of displacement wrought by the slave trade must be considered. One must be mindful of the deeply rooted influence European colonial powers played in African colonies concerning all areas political, economic, and cultural development. The relatively short time frame in which African countries have gained independence must be considered. One must also take into account the continued influence of American, European, and South African leaders in newly formed African countries. Events that are indeed brutal and perplexing are, unfortunately, not unique to Africa. Sadly, it may be part of a natural post-independence experience. One need only look at the American post-independence experience to at least consider the possibility of such a premise.

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10. For an examination of the influence of Europe on Africa from a pre-colonial period through the initial stages of African independence, see WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1982).
The human rights of people with disabilities traditionally have been ignored in mainstream international human rights theory and practice and in the work of international institutions. Today, however, a small but rapidly growing transnational advocacy network of disability activists is emerging to challenge this neglect around the effort to develop an international convention on the rights of people with disabilities.

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1. For an extensive study of this and other issues pertaining to the rationale for an international convention on the human rights of persons with disabilities, See NAT’L COUNCIL ON DISABILITY, A WHITE PAPER: UNDERSTANDING THE ROLE OF AN INTERNATIONAL CONVENTION ON THE HUMAN RIGHTS OF PEOPLE WITH DISABILITIES 41-43, 58 (2002).
The inclusion of this panel topic in the program for the International Law Weekend is significant for two reasons. First, it should be noted that disability as a topic historically has been marginalized in the study and practice of international law and in the international human rights law field in particular. In fact, disability has remained largely invisible—one need only look at the leading texts on international human rights law to discover this invisibility, though the convention drafting process we are focusing on today represents an important step toward integrating disability into the mainstream of international human rights law.

Second, in general, disability has not been regarded as a human rights issue. Rather, disabled people, instead of being seen as claimants of their own rights, are regarded instead as objects of pity, people whose lives need fixing or who are in need of help in the most paternalistic sense. This has had very disturbing consequences, with serious and systemic violations across the full spectrum of human rights, going unnoticed, unreported, and unaddressed. Mainstream human rights groups have not integrated disability in their work, although Human Rights Watch and Amnesty International have publicly acknowledged their historical neglect and have committed to addressing this gap through undertaking reporting on human rights violations against people with disabilities. Treaty bodies have not integrated disability into their monitoring process in any ongoing and consistent fashion—notwithstanding some particularly good work by the Committee on Economic, Social and Cultural Rights in General Comment 5.

This panel is significant for a second reason. As the program title suggests, international law is in a period of crisis, and indeed, the need for more human rights standard setting is being called into question even by scholars and practitioners in the international human rights field. The Geneva-based International Council on Human Rights Policy has a forthcoming study which is looking precisely at the question of whether the focus of the human rights movement should be in a new standard setting or whether primary attention should be directed toward implementation of existing standards. This is of both

2. As an example, one of the leading textbooks in the international human rights law field, contains no index entry for “disability,” “people with disabilities” or similar terms, in contrast to multiple entries for other minority groups. See HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (2d ed. 2000).

3. For more on traditional models of disability, see GARETH WILLIAMS, Theorizing Disability, in DISABILITY STUDIES 123 (Gary L. Albrecht, et al. eds., Sage Publications 2001).


practical and theoretical consequence for those of us working in the area of
disability rights.

I will begin my presentation by reviewing where we are in terms of NGO
participation to develop a convention on the human rights of people with dis-
abilities. I will then draw some conclusions about modalities of NGO participa-
tion and their implications both for international law and for the success of the
treaty process in general. I will then, time permitting, review some of the key
issues on convention content that are likely to come under consideration in the
months ahead.

II. NGO PARTICIPATION IN THE PROCESS TO DEVELOP AN
INTERNATIONAL CONVENTION ON THE HUMAN RIGHTS OF PERSONS
WITH DISABILITIES—WHERE WE ARE

The Mexican initiative which launched the process to develop a new
convention on the rights of people with disabilities, introduced two years ago
before the UN General Assembly,7 came as a surprise to the NGO community
and, in particular, those working on issues relating to the rights of people with
disabilities. While the surprise was welcomed, much work needed to be done
in order to mobilize the disability community from around the world and to
bring it together in some coordinated way to participate meaningfully in the
process and ensure its success.

The international disability community has historically been disparate and
divided, working only in the informal sense within the UN system. The NGO
focal point on disability within the UN system has been the International
Disability Alliance (otherwise referred to as IDA), a loose federation of seven
international disabled people’s organizations: Disabled Peoples’ International,
Rehabilitation International, the World Network of Users and Survivors of
Psychiatry, the World Blind Union, Inclusion International, the Deaf Blind
Federation, and the World Federation of the Deaf. Together, IDA has followed
disability issues within the UN system, has participated in the monitoring of the
non-binding UN Standard Rules on the Equalization of Opportunities for People
with Disabilities,8 and served as that instrument’s Panel of Experts, as appointed
by the UN Special Rapporteur on Disability. This group has not worked closely
with mainstream human rights organizations.

There have been major challenges to coordination given the fact that the
IDA has worked largely as an isolated entity and on a separate track from

7. For a copy of the UN General Assembly Resolution creating the Ad Hoc Committee, see Com-
prehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons
mainstream human rights organizations and indeed other groups whose participation is thought necessary to achieve success in a human right standard setting process. It was not at all clear that a broad, cross-disability NGO grouping could be formed at all, much less achieve the level of coordination and consensus necessary to push a process to develop an international treaty forward. However, having said that, during the first two sessions of the Ad Hoc Committee, some major and unprecedented successes were achieved:

- NGOs lobbied hard for access to and meaningful participation in the first session of the Ad Hoc Committee in July-August 2002. They succeeded in winning a decision on access for ECOSOC accredited groups as well as a separate process for non-ECOSOC accredited groups.9 The modalities of participation were also quite generous—fears that the process would be restrictive because it was a UN General Assembly Ad Hoc Committee (as opposed to a process convened under a UN structure more favorable to NGOs) turned out to be unfounded.10 NGOs enjoyed generous rights of participation as observers, with the right to submit written statements as well as to make oral interventions, a right that was supported by the Chair of the Ad Hoc Committee, Ambassador Gallegos from Ecuador.

- NGOs produced joint statements and provided a daily Disability Negotiations Bulletin11 which formed the political messaging and NGO information platform for the process. At one point during the first week of the first Ad Hoc Committee Session when negotiations threatened to break down, a strongly worded open letter to delegates in the Bulletin was acknowledged by government delegates to have had significant impact in turning things around. This was a positive meeting, although no definitive decision was made to pursue a treaty.

During the second Ad Hoc Committee session, these forms of participation continued, with disabled activists from both the developed and developing countries participating in far greater numbers than the previous year.


NGOs worked hard to broaden participation, bringing disability activists from around the world to New York. Landmine Survivors Network partnered with Disabled Peoples International to train disabled activists from all regions of the world to participate in the two week Ad Hoc meeting. This significantly broadened participation by NGOs from the developing world. All in all, there were hundreds of NGOs registered to participate. Within one day of the commencement of the session, the Ad Hoc Committee made the decision to move ahead to develop a convention, and the attention shifted to the process by which a convention would be elaborated. The rest of the two week period was a long and difficult negotiation regarding the structure of a working group which would be tasked with developing a negotiating text for the third session of the Ad Hoc Committee. NGOs were divided on many aspects of these issues, as were governments. In the end, NGOs successfully lobbied for seats for 12 NGO participants on the Working Group. Furthermore, these participants would be selected by NGOs themselves. The seven IDA groups plus five regional representatives were selected. Procedures for participation in the Working Group will be in accordance with procedures already established for NGO participation in the Ad Hoc Committee. This entire scenario is totally unprecedented in international human rights standards setting process, even more inclusive that the Rights of the Child Convention process, which represented a high mark of NGO participation in the human rights sphere.

I have just returned from a regional meeting in which the NGO representative from West Asia—Adnan Al Aboudy, who is the Director of Landmine Survivors Network's Jordan Network - convened a broad consultation of experts and advocates from his region in order to develop a regional contribution to the Working Group meeting in January.¹²

III. NGO POSITIONING IN RELATION TO SUBSTANTIVE ISSUES CONCERNING THE ELABORATION OF A CONVENTION

The main focus during the first two meetings of the Ad Hoc Committee mandated to consider proposals for the elaboration of an international convention on the rights of persons with disabilities has been to convince governments of the need for a specialized convention on the human rights of people with disabilities. The central objective of NGO lobbying, therefore, has been to set forth a clear rationale for the treaty, addressing, for example, the point that absent a specialized convention, disability will not be successfully integrated into the UN human rights system, the international human rights movement, or the work of other important actors such as development organizations.

Now that we do indeed have a process to develop a convention, NGOs engaged in the process are starting to articulate more concrete positions on the content of a convention. Regional meetings, engaging both governments as well as non-governmental actors, are likewise engaging in more substantive elaboration of what the content and structure of a new convention might include.

As I mentioned earlier, I just returned from a meeting in Jordan—a Roundtable Expert Dialogue and Regional Consultation on Issues related to the Drafting of an International Convention. The purpose of this meeting was to examine some of the key substantive issues at this early stage of the negotiation process. Hosted by Landmine Survivors Network in cooperation with the Jordanian National Disability Council, the meeting brought together some 50 disability activists—people with disabilities who represent some of the NGO leadership within the Middle East. This group, several of whom attended the second session of the Ad Hoc Committee this past June, participated in a human rights training session for two days, the outcome of which was an NGO statement of issues relating to the content and structure of a new convention. This training session was followed by a two-day consultation and roundtable dialogue which included NGO activists, as well as governmental participants from around the region, representatives from both the UN Department for Economic and Social Affairs (which serves as the Secretariat for the Ad Hoc process) and the Office of the High Commissioner for Human Rights, the Special Rapporteur on Disability, representatives from Amnesty International and Human Rights Watch, and leaders from disability and development organizations, such as Action on Disability and Development in the United Kingdom. The two events marked the first time that the region had brought together groups from disability, human rights and development communities for

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the common purpose of pursuing a dialogue on strengthening the content of human rights law to make effective the enjoyment of human rights by people with disabilities. This meeting looked at the following issues:

- **Core guiding principles and objectives to support the elaboration of an international convention on the rights of people with disabilities.** There is as yet no consensus on the precise objectives and core principles that form the foundation for the convention. What is interesting from a legal standpoint is that some emerging positions on this issue support the elaboration of sections in the operative part of the convention setting forth the objectives—the purpose for the convention—as well as a section on guiding principles. This mirrors the approach we see particularly in international environmental agreements and indeed other framework conventions developed in the last ten years. The content of disability guiding principles—such as participation, non-discrimination, autonomy, international cooperation—will be highly significant not only in terms of the development of more precise substantive obligations in the civil, political, economic, social and cultural realm, but also in terms of providing a basis for the interpretation and progressive development of the convention by a treaty monitoring body, treaty bodies of other principal human rights conventions, and indeed by international tribunals.

- **The elaboration of an implementation system in a new convention.** Major questions which will be the focus of the negotiations in the years ahead will be:
  
  i) What is the relationship between the UN Standard Rules and its voluntary monitoring system and a new system of implementation?

  ii) What will be the role of the UN Special Rapporteur on Disability and a new convention?

  iii) What will be the impact on the development of a monitoring system in a new convention of the current effort to reform the human rights treaty bodies? On this last point, Australia has come out strongly opposed to a new treaty monitoring body, and in fact has continued to argue that the human rights of people with disabilities could best be addressed not in a specialized convention, but in a protocol to an existing human rights convention. This approach makes little sense as a practical or theoretical matter, and the NGO community has rejected any attempt to annex and further marginalize disability rights within the human rights law system generally.
The integration of disability and development in a new convention. Attention was focused not on the inclusion of the right to development in a new convention as a few have suggested, but rather how barriers to implementation by developing countries in particular might successfully be addressed within the context of an implementation system. One concept to consider is the incorporation of supporting measures of implementation akin to the kind of provisions we have seen successfully incorporated into international environmental law agreements, such as a provision to support public education and awareness-raising through training. Such measures are understood within the disability content and the UN Standard Rules as a precondition to the equalization of opportunities for people with disabilities. Other examples of supporting measures would include information gathering, information exchange, and the formation of technical advocacy bodies that might support, for example, the elaboration of guidelines and technical assistance on accessibility standards. The issue of development is likely to be contentious and yet it need not be a huge barrier to success of the future negotiations if understood in the context of measures to support implementation.

IV. Conclusion

For the momentum generated by the United Nations General Assembly to be productively maintained and utilized, the process by which the convention on the rights of persons with disabilities is developed must continue to be inclusive of people with disabilities, including the most marginalized groups. The current effort is notable for its generous rights of participation among NGOs, particularly in view of the decision to give 12 seats on the Working Group that will formulate a negotiating text to NGO representatives, and represents a further progressive development in international law-making.
LITIGATING HUMAN RIGHTS ABUSES IN UNITED STATES COURTS: RECENT DEVELOPMENTS

Elizabeth F. Defeis*

During the last quarter of a century, litigation in United States courts to address human rights abuses that occur beyond the shores of the United States has increased dramatically. Although lawsuits have been successful, recovery at least in monetary terms has been meager. In addition, there has developed a concentrated strategy to limit access to United States courts for purposes of addressing human rights violations committed abroad.

What can be done to strengthen the rule of law and provide a forum for addressing human rights abuses? Clearly, an amendment to the Foreign Sovereign Immunities Act to permit suits against state actors accused of human rights abuses would be the most effective mechanism. However, apart from this, several other options remain, including suit pursuant to the Alien Tort Claim Act, the Torture Victim Protection Act, and the Antiterrorism and Effective Death Penalty Act of 1996. These comments provide an overview of the legislative mechanism available to address human rights abuses.

The most utilized legislative device for reaching human rights abuses is the Alien Tort Claims Act. In 1789, the First Congress of the United States in 1789 drafted legislation that was to have a profound impact on international law and human rights. The Alien Tort Claims Act (ATCA), enacted as part of the First Judiciary Act that district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. Despite its importance today, the legislative history of ATCA remains unclear. Some scholars, judges, and the Bush administration have urged that the act should be construed narrowly. They argue that the Act was designed solely to address piracy or violations of diplomatic immunity and does not confer a private right of action. However, there is scant empirical evidence to support either a narrow or a broad reading of the statute.

For almost 200 years, the ATCA lay dormant. In 1980, however, a decision by the Second Circuit Court of Appeals in Filartiga v. Penna-Irala.

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2. 630 F.2d 876 (2d Cir. 1980).
reviewed the statute and concluded that it provided a basis for domestic litigation to address human rights abuses committed abroad.

The facts of the case are well known. In 1979 Dolly Filartiga filed suit in the federal district court of the Eastern District of New York alleging that Americo Pena-Irala a police official in Paraguay had tortured and murdered her brother in Paraguay for the political activities of his family. The lawsuit was brought under the Alien Tort Claims Act. The district court dismissed the action on jurisdictional grounds, holding that the term “law of nations,” as employed in ATCA, excludes the law that governs a state’s treatment of its own citizens. The plaintiff appealed the district court’s ruling to the Court of Appeals for the Second Circuit.

In a groundbreaking ruling, the Second Circuit reversed the district court and held that the lawsuit could proceed. After reviewing United Nations resolutions, numerous international, regional, and national sources of law, the Second Circuit held that torture was firmly prohibited by international law. It stated: “In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations. This violation can occur regardless of the nationality of the parties.”

Accordingly, the Court of Appeals held that “whenever an alleged torturer is found and served with process by an alien within our borders, the Alien Tort Claims Act provides federal jurisdiction.” When the case was remanded, Pena-Irala defaulted and the district court entered a judgment in favor of the Filartiga family and awarded $10 million in damages. Efforts to collect the judgment have been unsuccessful.

Since 1980, victims of human rights abuses have filed an increasing number of lawsuits seeking civil remedies for injuries that occur outside the United States. The plaintiffs are from countries such as Argentina, Bosnia, Burma, Chile, China, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, Nigeria, Paraguay, and the Philippines and defendants include companies such as Coca-Cola for activities in Columbia, Chevron Corporation in Nigeria, and Exxon Mobile Corporation on behalf of Indonesian villagers. These cases allege numerous violations of international law, including arbitrary detention, forced disappearance, torture, extra judicial killing, genocide, war crimes, and crimes against humanity. Several of the lawsuits have resulted in substantial damage awards.

3. *Id.* at 878.

4. *Id.*
Cases involving the ATCA are pending in the federal courts at the appellate and district court levels and in December 2003 the Supreme Court granted certiorari in Sosa v. Alvarez-Machain, a case that might well resolve the jurisdictional issues arising under the ATCA.

The Sosa case involved the kidnapping of a Mexican Doctor, Humberto Alvarez-Machain by Mexican officials in Mexico at the behest of the US Drug Enforcement Administration. He was then taken to Texas for trial for the torture and murder of a DEA Agent. In his first appeal to the US Supreme Court, Alvarez-Machain challenged the jurisdiction of the District Court on the grounds that the kidnapping violated the terms of the extradition treaty between Mexico and the United States and also that it violated international law. The Supreme Court rejected the jurisdictional challenge and noted that although the kidnapping might well have violated international law it did not violate the terms of the extradition treaty. Alvarez-Machain was then tried and acquitted in the Texas Court. He subsequently brought two lawsuits, one against the United States and federal agents for false arrest and the other against his Mexican kidnapper, Jose Francisco Sosa under the ATCA. The District Court awarded him a judgment of $25,000 against Sosa and the award was upheld by the Ninth Circuit Court of Appeals. The United States Government filed a brief urging the Supreme Court to grant Certiorari arguing that the Ninth Circuit’s broad reading of the ATCA was “fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches.” The Government requested the Court decide, “Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdictions granting provision that does not establish private rights of action.”

Pending in the federal appellate court is the case of Doe v. UNOCAL. Over ten years ago, the Burmese military cleared out entire villages to make way for oil pipelines. Several human rights groups alleged that the villagers that were displaced were forced to work against their will, and were raped or tortured if they refused. However, rather than suing the Burmese government in Burma, the victims sued in the United States, under the Alien Tort Claims Act. The suit alleged that UNOCAL, an American oil company, was responsible for hiring the Burmese military to provide security during the construction of the Yadana pipeline project. A federal trial court dismissed the case on the

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8. Id.
ground that there was not a close enough nexus between the oil company and the abuses. However, a three-judge panel of the Ninth Circuit held that UNOCAL could be found liable if the company aided and abetted the Burmese military in committing human rights abuses. This standard was a more lenient standard of proof than that offered by the trial court, which required that the villagers prove that the company actually directed the abuses. In February 2003, the Ninth Circuit court of appeals in San Francisco decided to rehear the appeal before the full eleven-judge Court.

The government filed a brief in the case on behalf of UNOCAL, stating that if the case were allowed to go to trial, it would interfere with American foreign policy, and may disrupt the war on terrorism. As argued in the Sosa case, the government argues that the ATCA merely confers subject matter jurisdiction and does not imply a private right of action. Rather, they argue that the act should be limited to the narrow class of cases involving piracy or diplomatic immunity.

Indeed, in virtually all the pending ATCA cases, the government has filed briefs putting forward this position. For example, the United States filed a Statement of Interest in a case now pending in the United States District Court for the Southern District of New York. In re South African Apartheid Litigation,\(^\text{10}\) was brought by victims of apartheid in South Africa seeking compensation for human rights abuses suffered under the apartheid regime. Both the present government of South Africa and the United States have intervened urging the court to dismiss the suit. The United States noted that the Government has a substantial interest in the proper interpretation and application of the ATCA because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the Nation’s foreign policy. It noted further that “the government of South Africa has, on several occasions and at the highest levels, made clear that these cases do not belong in United States courts and they threaten to disrupt and contradict its own laws, policies, and processes aimed at dealing with the aftermath of Apartheid as an institution.”\(^\text{11}\) Presumably, the case will not be decided until the Supreme Court renders its decision in the Sosa case. In a further effort to limit liability of United States companies doing business abroad, in May 2003, President Bush signed Executive Order 13303 which limits the applicability of the ATCA and immunizes oil companies operating in Iraq from the execution of any judgment against Iraqi petroleum products. However, the order does not apply to other activities in Iraq.

Although the Alien Tort Claims Act has been the principal mechanism for litigating violations of human rights in United State courts, its reach is limited.

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11. Id.
The act applies to lawsuits filed by foreign nationals but not United State nationals and does not provide jurisdiction for lawsuits against foreign governments. In response to these jurisdictional limitations, Congress passed the Torture Victim Protection Act (TVPA) and an amendment to the Foreign Sovereign Immunities Act (FSIA).

The Torture Victim Protection Act supplements the remedies available under ATCA. It establishes civil liability for acts of torture and extra judicial killing committed abroad. According to the Senate report accompanying the TVPA, torture violates standards of conduct accepted by virtually every nation, and prohibition of such actions has attained the status of customary international law. The TVPA was not intended to replace ATCA, rather, it was designed to work in conjunction with that statute.

The TVPA differs from ATCA in several respects. Unlike ATCA, the TVPA is not limited to plaintiffs who are foreign nationals but allows United States citizens to sue for damages as well. However, the TVPA allows only civil actions for torture or extra judicial killing. ATCA contains no such restriction. The TVPA also contains two additional restrictions. First, a plaintiff must exhaust adequate and available remedies in the place in which the conduct giving rise to the claim occurred. Second, no action shall be maintained unless it is commenced within ten years after the cause of action arose. This provision may be tolled, however, for good cause.

In 1994, in the implementing legislation for the Convention Against Torture, the federal criminal code was amended to provide that any United States national or person physically located within the United States could be held criminally liable for torture that he or she commits against anyone anywhere. However, no criminal action has been brought under the law notwithstanding the presence of torturers within the United States (many of whom have been defendants in ATCA suits) and despite the fact that under the Torture Convention the United States is obliged to prosecute or extradite any torturers within its territorial jurisdiction.

Although the Alien Tort Claims Act and the Torture Victim Protection Act authorize civil actions against public officials and private individuals, they do not provide jurisdiction for actions against foreign governments. The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in United States courts. Under the FSIA, a foreign state is presumed to be immune from suit unless one or more of the codified exceptions to immunity apply. These exceptions include cases of waiver, commercial activity, and certain claims in tort and property.

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13. Id. § 1602.
14. Id. § 1350.
Shortly after the passage of the FSIA, the United States Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.*,\(^\text{15}\) held explicitly that the FSIA was the sole basis for obtaining jurisdiction over a foreign government in the courts of the United States. The Court ruled that even if the case involves a violation of an international law, the cause of action must fit within one of the specific exceptions of the FSIA in order for the Federal courts to have jurisdiction.

In order to circumvent the unambiguous language of the *Amerada Hess* case to allow suits against the foreign governments for alleged human rights abuses, several creative arguments have been developed over the years. Some have been based upon a *jus cogens* exceptions to immunity. For example, in *Princz v. Federal Republic of Germany*,\(^\text{16}\) an American citizen who survived the Holocaust sued the Federal Republic of Germany to recover money damages for injuries he suffered, and slave labor he performed, while a prisoner in Nazi concentration camps. The Plaintiff argued that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. It argued that a foreign state that violates these fundamental requirements of international law thereby waives its right to be treated as a sovereign. The court, however rejected this argument and held that an implied waiver depends upon the foreign government’s having at some point indicated its amenability to suit. However, there was a strongly worded dissent by Judge Patricia Wald. She argued that Germany implicitly waived its immunity by engaging in atrocities in this case. Reminding the court that American law incorporates international law, Judge Wald concluded that as a matter of proper statutory construction, the only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret the act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

Earlier, the Ninth Circuit had also rejected the *jus cogens* argument. The 1992 case of *Siderman de Blake v. Republic of Argentina*,\(^\text{17}\) involved allegations of official torture against the government of Argentina. The plaintiffs argued that *jus cogens* norms enjoy the highest status within international law, and thus prevail over and invalidate other rules of international law in conflict with them. Since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. The Ninth Circuit agreed that official torture is a violation of the *jus cogens* principle of international law. However, it found no implied waiver of the FSIA. The court noted that the FSIA contains no exception to immunity

\(^{15}\) 488 U.S. 428 (1989).


\(^{17}\) 965 F.2d 699 (9th Cir. 1985).

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based on *jus cogens*. It held that if violations of *jus cogens* committed outside the United States are to be exceptions to the immunity, Congress must make them so.

Several other lower court cases have been based on the *jus cogens* exception to the immunity. However, all were dismissed for lack of jurisdiction. Thus, it seems clear that absent congressional action, the FSIA cannot be implemented to sue foreign government for human rights abuses no matter how egregious. Congress did however act in a limited instance to compensate victims of terrorism, and enacted the Antiterrorism and Effective Death Penalty Act of 1996. This Act amended section 1605 of the FSIA by adding a new subsection, which created a new exception to foreign sovereign immunity. Under this section United States nationals may bring suit against foreign sovereigns for personal injury resulting from torture, extra judicial killing, air sabotage, hostage taking or provision of material support or services for such an act, if the foreign state is designated as a state sponsor of terrorism.  

This amendment to the FSIA followed the original drafting pattern used in the FSIA, and simply added an additional exception to the original five exceptions. Although very broad, this exception has several limitations on its applicability. The amendment will apply only if the foreign state is designated as a state sponsor of terrorism by the State Department. Even if a state is so designated, courts will deny jurisdiction if the victim was not a national of the United States or if a plaintiff cannot show that the offending state was afforded a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.

In 1997 the amendment itself was amended to accommodate the victims of the Lockerbie tragedy. An American citizen sued under the Act claiming damages on behalf of his wife, a UK citizen who died in the crash. Although the sponsors of the law claimed that the exception was meant to apply if either the victim or the survivor is an American citizen, the language of the statute required both the victim and the survivor to be American citizens. An amendment to the amendment adopting the either/or language and allowing the case to go forward was passed on April 24, 1997.  

In the last five years, judgments under the Act have brought verdicts of hundreds of millions of dollars and more than $200 million have been paid from frozen assets and from the United States, which has a right to recover from those assets. A consolidated suit against Osama bin Laden, Al Qaeda, Afghanistan and the Taliban, Iraq and Sadam Hussein based upon the September 11th attacks was brought in the Southern District of New York. The Court dismissed the claim against Saddam Hussein. However, the court ruled that the survivors of

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persons who were killed in the World Trade Center terrorist attack had presented enough evidence, "albeit barely," to be awarded $104 million in damages against the state of Iraq, Osama bin Laden, and his terrorist network.²⁰

The court, addressed what it described as several "novel" issues concerning the Foreign Sovereign Immunities Act and civil recovery under the Antiterrorism Act, the so-called Flatlow Amendment. The two cases joined under Smith v. The Islamic Emirate of Afghanistan²¹ sought to show through the opinions of experts, including former CIA Director James Woolsey Jr., that Iraq helped train Al Qaeda terrorists, and provided them with safehouses and forged documents.

A default judgment in favor of the families of the victims was granted and in accordance with the statute and an inquest was held. The court decided that the attack on the World Trade Center met the definition of "international terrorism" in the Antiterrorism Act, and then turned to the standard of proof required against the Iraqi defendants under the FSIA, which states that, "[n]o judgment by default shall be entered by a court of the United States... against a foreign state... unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."²²

Without a Second Circuit case expressly defining the meaning of the phrase "evidence satisfactory to the court," the court noted that other courts hold conflicting views about the appropriate standard. While some courts have required "clear and convincing evidence," the court applied a more relaxed standard, which it said is "a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff." The court then addressed that section of the Foreign Sovereign Immunities Act known as the Flatlow Amendment, which withdraws sovereign immunity for cases of state-sponsored terrorism. It noted that the amendment, while providing a cause of action against foreign officials or employees whose state has sponsored acts of terror "does not expressly provide a cause of action against the foreign state itself." Nevertheless, the court held that the Flatlow Amendment provides a cause of action against a foreign state. In turning to the issue of whether the World Trade Center attack was perpetrated by Al Qaeda with the aid of material support from Iraq, the court viewed the testimony of experts and concluded: "Although these experts provided few actual facts of any material support that Iraq actually provided material support, their opinions, coupled with their qualifications as experts on this issue, provide a sufficient basis for a reasonable jury to draw inferences which could lead to the conclusion that Iraq provided material support to Al Qaeda."²³

²¹ Id.
²³ The Islamic Emirate of Afghanistan, 262 F. Supp. 2d at 232.
The decision represents only the first chapter in litigation seeking to hold foreign states responsible for the events of September 11th.

One concern facing lawyers representing the families of those who died in the World Trade Center attack is collecting damages. President George W. Bush has decided that most of the $1.8 billion in frozen Iraqi assets in the United States should go toward rebuilding Iraq, with about $300 million of that money set aside for prisoners of the regime who were used as human shields. However, the plaintiffs are seeking to collect from the billions of dollars allegedly stolen by the Hussein family and other Iraqi officials.

An amendment to the FSIA similar to the 1996 Anti-terrorism Act addressing the concerns regarding the scope of the FSIA to cover *jus cogens* violations as well as gross human rights violations is warranted. Such an exception would be a narrow one and would apply only to the most grave human rights abusers. Although several legislative proposals have been introduced to amend the FSIA to add an exception for immunity in cases of human rights violations they have not been acted upon.

Similarly, while the ATCA has been effectively used to address human rights abuses committed abroad, serious questions have been raised concerning whether the act itself is merely a jurisdictional statute or whether it confers a private right of action. In addition, national security and foreign relations concerns have raised questions implicating the political question doctrine and separation of powers issues. These concerns, coupled with the ever-expanding scope of the ACTA and the desirability of addressing human rights abuses should be the starting point for critical analysis in this area.
PREVENTING GENOCIDE: THE ROLE OF THE UNITED NATIONS

Ambassador Stanislas Kamanzi*
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I. INTRODUCTION

I would like to start with a self explanatory and worthwhile quote from His Late Majesty Haile Selassie which reads as follows: “Throughout History it has been the inaction of those who could have acted, the indifference of those who should have known better, the silence of the voice of justice when it mattered most, that has made it possible for evil to triumph.”

His Majesty Haile Selassie pointed this out on October 4th 1963, and forty years later we have on the agenda a theme which would not be taking such a great amount of time, should those words have been given due attention by the international community, and more specifically by the United Nations, which is the major international institution advocating brotherhood, justice, equity and solidarity; indeed advocating for humanity altogether. Instead, history witnessed, very recently, the world’s sheer indifference to a genocide that took

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place in my country, Rwanda, which claimed within only a hundred days, the lives of a million people, and brought suffering to those who survived, be they those targeted by it or some of those who, under different circumstances carried it out. Rwanda’s genocide took place a few decades after millions of heartfelt “never again”s had been pledged by the international community following the Holocaust.

II. RWANDA’S UNFOLDING GENOCIDE BENEATH THE GAZE OF THE INTERNATIONAL COMMUNITY

Rwanda’s genocide took place as a culmination of developments that could have left nobody with the least doubt that this tragedy was approaching the near horizon. Being on the ground, the UN was aware of it. Those countries who happened to own the most sophisticated information techniques and the indisputable right to monitor on a daily basis the various crises occurring in different corners of the planet, and which handle the destiny of the world through the United Nations’ decision-making spheres were well informed of its probability.

The genocide occurred as those who were carrying it out were endowed with the privilege of sitting on behalf of Rwanda as a non-permanent member of the Security Council. Together with their fourteen fellow-members, they debated whether what was happening in Rwanda was genocide or simply civil or tribal conflict, as some revisionist tendencies still put it.

This leads me to ask whether the UN really plays a significant role in preventing genocide or at least in mitigating its impact when it is taking place. Considering the above and the latest Security Council’s shortcomings in decision-making on sensitive security matters, one would be skeptical of the capacity of the United Nations to play an efficient role in preventing human catastrophic conflicts including genocide. No matter the UN Charter provisions, no matter the goodwill of some enlightened men and women and no matter the issuance of strong resolutions, that time when humankind will be totally immune from such barbaric and inhumane acts as genocide has not yet come!

III. HOW THE UN MIGHT PREVENT GENOCIDE

To adopt a more optimistic note and try to stick to my theme, I would like to advance some ideas on what I think should be the role of the UN in preventing genocide.

1. Preventive Justice

The UN should first and foremost put a serious emphasis on preventive justice. Coming back to the case of Rwanda, it is true that the ICTR was set up
to judge those suspected for having committed genocide in Rwanda. But how many genocide perpetrators have been judged so far? How many are still at large and how many enjoy protection from powerful countries where they have been gratified with safe haven? How long did it take to the United Nations to find out that the ICTR was an unproductive heavy machine run by a careless engineer, under exorbitant costs?

There is, in this regard, a need to ensure that exemplary justice is made both for the sake of the victims, and also to deter those likely to easily respond to the sirens of genocide for various motives. It is then the role of the UN to ensure that international law is duly used for that purpose, notwithstanding some hegemonic and political interests.

2. National Sovereignty

During the 58th ordinary session of the UN, delegations took turns at the podium to request profound reforms within the UN. The UN functions under an array of principles stemming from the core essence of the UN Charter. These principles include the principle of non-interference in a sovereign nation’s matters no matter the circumstances. The principle has the merit of preventing abusive interventionism but it also—and this needs to be underscored—has in most of the situations favored those totalitarian governments with no concern at all for basic human rights.

The Rwandan genocide was easily carried out as a result of this principle. Eminent diplomats from the most human rights sensitive and democratic countries would surprisingly argue that a non-interference policy was the most advisable, especially in a country where their national interests were not at stake.

It is in this regard that the UN has to play a crucial role. In the envisaged reforms, provisions for an indisputable “responsibility and right to protect” for international community members, and the “right to be protected” for the would-be victims, should more than ever be set forth in the UN texts. The relevant regulations should be enforced on a “beyond borders” basis. The principle of sovereignty should no longer matter as long as ruthless leaders threaten human lives.

It is incomprehensible that, at the dawn of the twenty-first century, when the world is aiming at a fair share of the economic benefits of globalization, under the steadfast lead of the United Nations, the same United Nations fail, just for the sake of complying with what has frequently become a deliberately abused principle of national sovereignty, to ensure a share of the natural global values inherent to humankind.
3. **UN Reform**

The United Nations can efficiently handle genocide prevention if some conditions were fulfilled within its superstructure. I would suggest, among others, the following:

1. **Establishment of an early-warning mechanism within the United Nations**

   This mechanism would help maintain a special focus on geographical areas with looming genocidal conflicts so as to mobilize resources to counter any escalation in this respect, through conflict prevention and resolution processes, in close interaction with the involved parties.

2. **Vertical and horizontal exchange of information**

   UN agencies in member states are in a position to monitor the socio-political developments in those countries facing such grave crises as genocide. There should be mechanisms of regular and fast transfer of information to the UN's headquarters. Within the headquarters there should also be mechanisms for exchanging this information amongst the UN technical departments in order to provide decision-making organs with sound information to rely on.

3. **The integrity of the UN personnel**

   UN personnel should truly subscribe to moral and ethical obligations compelling them to give due and independent consideration to the information on hand in order to bring wise and positive guidance to the decision-making process.

4. **Emphasis on the moral and ethical motivation in decision-making processes**

   Almost ten years after the 1994 Rwandan genocide took place, the world again witnessed with dismay in the course of 2003 how the trustee of the security of the world, the Security Council, has failed. It could not come up with adequate decision-making that would quickly put an end to grave human suffering owing to differences of political views and considerations. In this regard, I would suggest that a move be made so that a moral and ethical rational prevails over any other interests.

**IV. CONCLUSION**

The complexity and the sensitivity of the issues I have raised should encourage further exchanges of views in a broader framework. There is a need
to make sure that the world achieves a significant step forward so that we can claim for all time “never again.” The challenges are immense but not insurmountable.
Arbitration is the preferred method of settling commercial disputes internationally. While there are many reasons, a large body of practice and law provide a certainty and finality that are missing even in transnational judicial determinations. The United States is not a party to any treaty on the enforcement of judgments. Not only is the United States not a party to any multilateral convention on the enforcement of judgments, it is not even a party to any bilateral convention on the enforcement of judgments.

There have been two major developments concerning international commercial arbitration over the past year. The first concerns the unauthorized practice of law and the second concerns interim measures of protection.

I. UNAUTHORIZED PRACTICE OF LAW

This issue first arose in Hong Kong in the late 1980s. The outcry was so strong that Hong Kong felt it necessary to “clarify” that non-Hong Kong counsel could appear in Hong Kong arbitrations.\(^1\)

A number of United States jurisdictions had considered whether or not appearing as an agent for a party in an arbitration (usually a domestic arbitration) constituted the practice of law. The older the case was, the more likely the jurisdiction would find it did not constitute the practice of law.

This issue was first considered in the United States Court of Appeals for the DC Circuit.\(^3\) The District of Columbia Motor Club (actually a Connecticut corporation) was the local representative of the American Automobile

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1. After this article was written, the Illinois Appellate Court ruled that representing a party to an arbitration does not constitute the practice of law. Colmar, Ltd. v. Fremantlemedia N. America, Inc., 801 N.E.2d 1017 (Ill. App. 2d 2003).
Association. As part of their membership services to some 29,000 local members, the motor club attempted to do two things: to amicably adjust claims for property damage to automobiles for or against a member where the amount in controversy does not exceed $100; and to resolve such claims by arbitration if two members were involved.

Members “consulted” a layman at the Motor Club concerning claims for damages to their automobiles sustained in accidents. If the member so requested, the Motor Club endeavored to collect the claim by writing to the other person involved in the accident, stating the amount of damages, presenting the claim, and requesting an answer relative to adjustment, or else the name of the insurance carrier. If no response is received, the Motor Club sends a follow-up letter concluding as follows:

Unless we hear from you within the coming week, we shall be obliged to advise our member that apparently no amicable settlement can be made of this matter, and to place the case in the hands of his counsel. We trust that such action will not be necessary, and that the matter may be amicably adjusted.

If a response is received, the Motor Club will discuss the accident either with the third person or with his insurer. “Such discussion includes such subjects as right of way, provisions of traffic regulations, who is at fault, contributory negligence . . . and the like. If a settlement is made, the Motor Club’s employee fills out release forms for signature of the proper party. If no amicable settlement can be reached, the member is so informed and advised to get his own attorney or to proceed in the small claims court. If two members of the Motor Club are involved in the same accident and consult the Motor Club, the two claims are submitted to arbitration.

The local bar association brought suit to enjoin this unauthorized practice of law. While the appellate court agreed there was an authorized practice of law, the court noted that simply representing a party to an arbitration did not constitute the practice of law.

4. Id. at 23.
5. Id.
6. Id. at 24.
7. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. Id. at 25.
Williamson v. John D. Quinn was cited with approval in a study by the Association of the Bar of the City of New York that representing a party in an arbitration did not constitute the unauthorized practice of law. The court mentioned a number of factors in its decision that representing a party to an arbitration does not constitute the practice of law:

1. An arbitration record is less complete than a court record.
2. The rules of evidence do not apply.
3. The usual court procedures common to civil trials (such as discovery) are absent or curtailed.
4. The procedure is informal.

This case was cited with approval in another federal case where an attorney not admitted in New York (but who had a New York office) was allowed to cover attorneys' fees for an arbitration conducted in Mexico City. New York law seems fairly clear: a foreign lawyer may represent a party in an arbitration. Regrettably, this marked the high water point of this school of thought.

In a case that received much attention at the time, California held that representing a party to an arbitration constituted the practice of law. This case arose in the context of a legal malpractice action and prevented a law firm from recovering fees for substantial work performed in connection with an arbitration to be held in California. California then adopted a procedure to allow out-of-state counsel (but only from the United States) to easily obtain permission to represent a party to an arbitration. Counsel from other countries still may not represent clients in arbitrations held in California.

The Arizona Supreme Court then held that representing a party to an arbitration constituted the practice of law. Arizona defines the practice of law as:

17. Id.
19. Id. at 7, citing CAL. CT. R. 983.4.
20. Id.
customarily given and performed from day to day in the ordinary practice of members of the legal profession.\textsuperscript{22}

Given the fact Creasy was a disbarred lawyer, the Arizona Supreme Court found conducting a cross-examination during an arbitration clearly constituted the unauthorized practice of law and violated their disbarment order.\textsuperscript{23}

The next case where representing a party was held to constitute the practice of law was The Florida Bar v. Rapoport.\textsuperscript{24} Rapoport was a member in good standing of the District of Columbia Bar and represented a variety of clients in federal securities arbitrations (and advertised for such cases in Florida newspapers).\textsuperscript{25} Ruling that \textit{Florida Bar re Advisory Opinion on Nonlawyer Representation},\textsuperscript{26} was directly on point, the Florida Supreme Court ruled that Rapoport was not authorized to represent clients in securities arbitrations within Florida.\textsuperscript{27}

The Connecticut Bar Association's Unauthorized Practice of law committee recently issued informal opinion 2002-02, holding that it would be an unauthorized practice of law for an attorney admitted only in New York to represent a party to a domestic arbitration held within Connecticut.\textsuperscript{28} However, a statute mandates the opposite conclusion concerning \textit{international arbitrations}—representing a party to an international arbitration does not constitute the practice of law within Connecticut.\textsuperscript{29}

With this background, foreign counsel will have to be careful about appearing in arbitrations within the United States even if local counsel is employed. Very often unauthorized practice of law statutes are criminal statutes that can have very unfortunate effects.

\begin{itemize}
  \item \textsuperscript{22} Id. at 217.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} 845 So. 2d 874 (Fla. 2003).
  \item \textsuperscript{25} Id. at 875.
  \item \textsuperscript{26} The Florida Bar re: Advisory Opinion-Nonlawyer Representation Sec. Arbitration, 696 So.2d 1178 (Fla. 1997).
  \item \textsuperscript{27} Id. at 877.
  \item \textsuperscript{29} CONN. GEN. STAT. §§ 51-88 (2003).
\end{itemize}
II. INTERIM MEASURES OF PROTECTION

Arbitration awards are generally enforced under the 1958 New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards.\(^3\) For arbitral awards under Inter-American system, the enforcement mechanism can be found in the 1975 Panama Inter-American Convention on International Commercial Arbitration.\(^3\) Each of these two conventions also provides a mechanism for enforcing agreements to arbitrate. Similar mechanisms are found in UNCITRAL's 1985 Model Law on International Commercial Arbitration.\(^3\) However, none of these legal documents provide a mechanism for enforcing interim measures of protection (sometimes called "IMPs").

The arbitration rules promulgated by the American Arbitration Association's International Centre for Dispute Resolution,\(^3\) the International Chamber of Commerce,\(^3\) the London Court of International Arbitration,\(^3\) and Chicago International Dispute Resolution Association,\(^3\) and UNCITRAL's ad hoc rules\(^3\) all provide for interim measures of protection. Everyone is certain the arbitral tribunal may issue such orders, but no one has described what they are in any detail, the circumstances for their issuance, or how they are to be enforced.

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There are several different categories of interim measures of protection:

1. Preservation of evidence.
2. Preserving the status quo while the arbitration proceeds.
3. Ensuring the ultimate award will be effective (commonly called a prejudgment remedy in the domestic context).

While interim measures of protection are more commonly used in commercial arbitration, they are generally applicable to any kind of arbitration. In each and every commercial dispute, there is a concern about whether or not the ultimate judgment will be paid. In each and every arbitration, there are two parties to the transaction that cannot be parties to the arbitration: the taxman and the bankruptcy trustee.

It is hornbook law that third parties cannot be bound by an arbitrator's decision. This means an interim measure of protection issued by an arbitral tribunal (without more) is often useless (especially against the taxman and the bankruptcy trustee).

The procedure for issuing an interim order of protection under the American Arbitration Association rules, International Chamber of Commerce rules, London Court of International Arbitration rules, and the Chicago International Dispute Resolution Association rules is not clear. Whether or not interim measures of protection can be used to secure future arbitration awards is unclear. The only clear point is the arbitral tribunal may issue interim measures of protection.

The standards for judicially issued prejudgment remedies vary from court to court, even in the United States. Some legal systems require only probable cause. Some legal systems require exigent circumstances. Judicial prejudgment remedies are not entitled to full faith and credit recognition even within the United States, suggesting they will be even more difficult to enforce internationally than judgments.

Even if an arbitral tribunal issues an interim measure of protection, it is uncertain if a court will enforce it or how a court should enforce it. It is even uncertain how the arbitral body itself will enforce it. The dividing line between court order and arbitral tribunal ordered interim measures of protection is not clear even in the 1985 UNCITRAL Model Law.

Recognizing the importance of this topic, UNCITRAL has begun deliberating. At the present time, it is unclear what UNCITRAL is actually deliberating. Only after the final text is concluded is it likely that the parties

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38. See e.g., CONN. GEN. STAT. §§ 52-278 (2003).
39. Compare UNCITRAL Model Law, supra note 36, at art. 9, with UNCITRAL Model Law, id., at art. 17.
Lowry

will have decided if this will be an amendment to the 1958 New York Convention,\textsuperscript{40} an interpretive document for the 1958 Convention\textsuperscript{41} or an amendment to the UNCITRAL Model Law.

UNCITRAL has been working from the following text:\textsuperscript{42}

Enforcement of interim measures of protection

(1) Upon an application by an interested party, made with the approval of the arbitral tribunal, the competent court shall refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if:

(a) The party against whom the measure is invoked furnishes proof that:

(i) [Variant 1] The arbitration agreement referred to in article 7 is not valid

(ii) [Variant 2] The arbitration agreement referred to in article 7 appears to not be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the arbitral tribunal in accordance with article 16 of this Law;

(iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

40. This will undoubtedly create some transition issues between states that adopt the amendment and states that do not.

41. This document would be effective immediately and would not require any action on the part of the present States Parties to adopt it. However, these is some question of how far a new concept may be placed in an old document before it becomes clear to everyone the “interpretation” is really a disguised amendment.

(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal;

(b) The court finds that:

(i) The measure requested is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

(ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

(2) Upon application by an interested party, made with the approval of the arbitral tribunal, the competent court may, in its discretion, refuse to recognize and enforce an interim measure of protection referred to in article 17, irrespective of the country in which it was ordered, if the party against whom the measure is invoked furnishes proof that application for the same or similar interim measure has been made to a court in this State, regardless of whether the court has taken a decision on the application.

(3) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension, or amendment of that measure.

(4) In reformulating the measure under paragraph (1) (b)(i), the court shall not modify the substance of the interim measure.

(5) Paragraph (1) (a)(iii) does not apply

[Variant 1] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.

[Variant 2] to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

[Variant 3] if the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17 (2), the interim measure of protection can be effective only if the enforcement
order is issued by the court without notice to the party against whom the measure is invoked."

The casual reader should remember first drafts are never quite as good as final drafts. Undoubtedly the negative pregnant of the first section of this draft will be fixed before it reaches its final form.

The first feature of section 1 is the requirement the arbitral tribunal must "approve" the application for interim measures of protection. The concept of allowing the arbitral tribunal to consider the question of interim measures of protection before a court seems appropriate, as long as the arbitral tribunal has been established. A request for interim measures of protection should not be denied or delayed simply because the arbitral tribunal had not been appointed yet.

The latter part of section 1 refers to recognizing and enforcing an interim measure of protection. This suggests the arbitral tribunal has actually issued an order for an interim measure of protection. But what happens if the tribunal orders an interim measure of protection but does not approve the application to the court to confirm it? Does this deprive the court of jurisdiction? Apparently it does under this draft.

Why should there be a two-step process when a single step would be preferable? The simplest procedure should be preferred to promote the economical enforcement of interim measures of protection ordered by arbitral tribunals. If an arbitral tribunal orders an interim measure of protection, it should be assumed the tribunal has no objection to a court enforcing that order. If the tribunal objects to a court enforcing the order, the tribunal may terminate, suspend or amend its order at any time.

It should be noted that the application to enforce can be made to the court by any "interested party." Presumably this definition is somewhat broader than simply a "party" to the arbitration. It seems possible a third party may try to enforce an interim measure of protection under some very rare circumstances. 43

Under certain circumstances, an interim measure of protection should not be enforced. The first is when the arbitral tribunal has no jurisdiction. Lacking jurisdiction, the tribunal should not have issued the order in the first place. The question is who should determine the jurisdiction of the arbitral tribunal.

Under international arbitration, the doctrine of "competence-competence" receives great support. The arbitral tribunal has the competence to determine its own jurisdiction. This means variant 2 of subsection 2 will undoubtedly receive a great deal of support.

The next major area of concern is the level of due process afforded the defendant (although an interim measure of protection could be awarded against

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43. Possibly a third party stakeholder might in the context of an interpleader.
a plaintiff). If a party is not afforded an opportunity to present its case (because it was issued *ex-parte* improperly\(^4\) or was not aware the tribunal had been appointed\(^5\)), the interim measure of protection should not be enforced. Under such circumstances, the matter should be referred back to the arbitral tribunal for further proceedings.

There is a further level of inquiry under section 5 about the arbitral tribunal’s authority to issue *ex-parte* interim measures of protection. Virtually everyone agrees interim measures of protection should be able to issue *ex-parte* orders of interim protection. The question is under what circumstances are *ex-parte* orders appropriate. The three variants under section 5 try to provide that guidance. Time will tell which one is adopted.

A court should not enforce an interim measure of protection if it is not within the power of the court.\(^6\) If the court feels it can do so, the court may reform the interim measure of protection so it will (i) conform to its own procedural laws and (ii) not violate the enforcing court’s state’s public policy.\(^7\) Such a reformation should not change the essential substance of the arbitral tribunal’s order.\(^8\)

In short, UNCITRAL’s initial draft is a good attempt to modify the Model Law to show when (and how) a court should enforce an interim measure of protection order by a tribunal. While it is far from perfect, it will provide the courts with explicit guidance on how they should evaluate requests to enforce interim measures. Once these legal issues are resolved, the number of applications to courts will undoubtedly increase.

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\(^5\) *Id.* at 15.

\(^6\) *Id.* at 17.

\(^7\) *Id.*

\(^8\) *Id.* at 14.
A GLOBAL CONVENTION ON CHOICE OF COURT AGREEMENTS

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I. INTRODUCTION

A Special Commission of the Hague Conference on Private International Law will meet during the first nine days of December 2003 to consider a Draft Text on Choice of Court Agreements. That text was prepared by an informal working group in March of 2003, and is the fruit of nearly a decade of negotiations.¹ Those negotiations originally sought a rather comprehensive convention on jurisdiction and the recognition and enforcement of judgments, with a preliminary draft convention being prepared in October 1999, and further revised at the first part of a Diplomatic Conference in June 2001. When it became clear that some countries, particularly the United States, could not agree to the convention being considered, negotiations were redirected at a convention focused on bases of jurisdiction upon which consensus could be achieved. The result is now a text limited to one basis of jurisdiction; that is the consent of the parties.

While the current Draft Text is more limited in its scope and effect than drafts previously considered, it offers the possibility of both realistic success

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in its conclusion and adoption, and a foundation from which to consider possible future work on multilateral harmonization of jurisdiction and the enforcement of judgments. I will briefly review the substance of the Draft Text in order to explain its purpose, recognize its limits, and acknowledge issues yet to be decided. This review supports the conclusion that the Draft Text presents a workable foundation for a very useful convention.

II. THE DRAFT TEXT RULES

The Draft Text is perhaps most easily understood if one thinks of it as the litigation counterpart to the New York Arbitration Convention. Like the New York Convention, this treaty would establish rules for enforcing private party agreements regarding the forum for resolution of any resulting disputes, and rules for recognizing and enforcing the decisions issued by the chosen forum. Thus, a Hague Choice of Court Convention would serve the business world by providing for choice of court agreements, a measure of predictability similar to that now provided for arbitration agreements under the New York Arbitration Convention. Exclusive choice of court agreements in business-to-business contracts would be honored by courts in contracting states, and the resulting judgments would be enforced.

Article 1(1) begins the process of defining the scope of the convention by providing that it “shall apply to agreements on the choice of court concluded in civil or commercial matters.” This sets the basic focus of the convention on one basis of jurisdiction: choice of the court by the parties involved. Article 1(2) takes a carve-out approach to the scope issue by listing types of contracts to which the convention does not apply. Article 1(3) is similar in approach, listing exclusions from Convention coverage in terms of subject matter of the dispute. Of these exclusions, the most important is that found in Article 1(2)(a), which limits the Convention to business-to-business choice of court agreements by excluding coverage of consumer contracts. This is done by adopting language very close to that found in Article 2(a) of the U.N. Sales Convention, stating that the Convention shall not apply to agreements in which at least one party is a consumer (“acting primarily for personal, family or household purposes”).

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3. Hague Conference, supra note 1, at 1(2)(b) (explaining that the other type-of-contract exclusion from scope is found in art. 1(2)(b), which excludes “individual or collective contracts of employment.”).

The Draft Text deals with both exclusive and non-exclusive choice of court clauses. Article 2(1)(b) creates a presumption that if you list only one court or country, the clause is exclusive. This is important to enforcement of the agreement, because only exclusive choice of court clauses are entitled to Convention enforcement under Articles 4 and 5. This changes in the Article 7 rules, however, where judgments emanating from courts taking jurisdiction on the basis of any valid choice of court agreement (exclusive or non-exclusive) are entitled to recognition and enforcement under the Convention.

The Draft Text creates three basic rules upon which the operation of the Convention turns. They are:

1) The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;
2) If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case; and
3) A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States.

Article 4(1) sets out the basic rule that the court chosen by the parties in an exclusive choice of court clause “shall have jurisdiction:”

If the parties have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

This rule applies only to international business-to-business contracts containing choice of court agreements. Thus, Article 4(2) provides that the rule does not apply “if all the parties are habitually resident” in the Contracting State in which a case is brought, and they have “agreed that a court or courts of that same Contracting State shall have jurisdiction to determine the dispute.”

There is no explicit rule providing whether or not a court which is chosen in an exclusive choice of court agreement may decline to hear the case based on discretionary grounds such as forum non conveniens. The Secretariat’s Report states that one of the Convention’s “three aims” is that “the chosen court has to hear the case.”5 This, however, is inconsistent with the explicit language

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of Article 5 that allows a court not chosen in such an agreement to hear the case if “the chosen court” has “declined jurisdiction.” Thus, the explicit language of Article 5(c) would suggest that such discretionary doctrines are not affected by the Draft Text.

Article 4(3) does make clear that Convention rules govern only in personam jurisdiction, and that private parties cannot create subject matter jurisdiction that does not otherwise exist in a national legal system. Thus, for example, parties cannot agree to submit a dispute to a specialized court when only the local courts of general jurisdiction have subject matter jurisdiction over the type of dispute in question within the chosen legal system.

While Article 4 serves to tell the chosen court how to respond to an exclusive choice of court agreement, Article 5 provides the rule applicable in courts that are not chosen. Thus, a court in a Contracting State that is not selected in an exclusive choice of court agreement “shall decline jurisdiction or suspend proceedings.” The only exceptions to this rule occur when:

(a) that court finds that the agreement is null and void, inoperative or incapable of being performed;
(b) the parties are habitually resident in that Contracting State and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State; or
(c) the court chosen has declined jurisdiction.

The Draft Text includes no general public policy exception to enforcement of a choice of court agreement. This is consistent with the structure of the New York Arbitration Convention, which provides no public policy exception in its Article II obligation of Contracting States to recognize arbitration agreements, but does have an Article V public policy exception to the Article III obligation to recognize and enforce the resulting arbitral awards.

The second exception to deference by a derogated court to the chosen court is the counterpart to the Article 4(2) domestic case rule for chosen courts. Thus, Article 5(b) allows a court not chosen to determine that the case is a local matter within the Contracting State in which that court sits, and thereby refuse

6. Id. at 18.
7. One might argue that the chosen court’s Article 4(1) authority to determine that “the agreement is null and void, inoperative or incapable of being performed,” or the domestic case exception under Article 4(2), constitute explicit Convention rules by which the chosen court could “decline jurisdiction.” This runs counter to the explicit language of the text, however, since these are exceptions to jurisdiction under the Convention and not authority to decline jurisdiction that otherwise exists.
to respect the choice of the parties in the choice of court agreement. This can occur, however, only if “all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State.”

Article 7 provides the basic rule on recognition and enforcement of a judgment issued by a court of a Contracting State, and for which jurisdiction was founded on a choice of court agreement. Such a judgment “shall be” recognized and enforced. Unlike the language of Articles 4 and 5, the terms of Article 7 do not limit the recognition and enforcement obligation to judgments resulting from exclusive choice of court agreements, but authorize recognition and enforcement under the Convention of judgments resulting from all choice of court agreements. The definitional provisions of Article 2(1) operate to mean that Contracting States are obligated to enforce judgments resulting from both exclusive and non-exclusive choice of court agreements. This result is intentional. Rules obligating courts to respect non-exclusive choice of court agreements would have been much more complex and difficult at the Article 4 and 5 stage.

While the scope of the general recognition and enforcement rule is broader than the general jurisdictional rule, it is also subject to more exceptions. Here, there arises, again, a basic issue of definition and structure. Article 7(1) provides an exhaustive list\(^\text{10}\) of grounds for refusing recognition and enforcement if the judgment is based on an exclusive choice of court agreement. Article 7(2) then provides additional grounds for refusal if the judgment is based on “a choice of court agreement other than an exclusive choice of court agreement.” This reflects the fact that the general rule on recognition and enforcement found in Article 7(1) applies beyond the types of cases emanating from Article 4 jurisdiction under the Convention.

The list in Article 7(1) includes grounds for non-recognition that should seem familiar to anyone accustomed to the Brussels Convention and Regulation, the New York Arbitration Convention, or the U.S. Uniform Foreign Money-Judgments Recognition Act. A court in a Contracting State may refuse recognition or enforcement if:

\[\text{(a) the court addressed finds that the choice of court agreement was null and void;}\]

\[\text{(b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not}\]

\(^{10}\) Hague Conference, \textit{supra} note 1, at 20 (explaining that recognition or enforcement may be refused “only” if one of the listed grounds is satisfied. Note, however, that courts “may” refuse recognition and enforcement under this provision, meaning that non-recognition is not mandatory if one of the listed grounds is satisfied).
notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense;

(c) the judgment was obtained by fraud in connection with a matter of procedure;

[(d) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed;] or

(e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.\textsuperscript{11}

The Article 7(2) grounds for non-recognition represent an acknowledgment that non-exclusive choice of court agreements may produce parallel proceedings resulting in inconsistent judgments. Thus, non-recognition may be allowed where contrary obligations exist as a result of parallel proceedings.

While the provisions of paragraphs (1) and (2) of Article 7 allow non-recognition, they do so only in limited circumstances. Paragraph (3) follows by strengthening the effect of the original judgment, providing that the court asked to recognize and enforce a judgment cannot review the merits of the decision in the originating court.

The Draft Text changes the result in earlier drafts on the issue of validity of a choice of court agreement. There was the belief within the Working Group that incorporation of a choice of law rule in the text would tip the balance on things like shrink-wrap contracts. Thus, there is no provision allowing a contract to be held void, for example, if its terms are "manifestly unjust," and there is no choice of law rule. What we have is the rule that a choice of court clause shall be enforced unless the clause is null and void. This approach was taken from Article II(2) of the New York convention, and a court will apply its own rules on validity. This rule is found in 3 places: Article 4 (for the court chosen), Article 5 (for courts not chosen), and Article 7 (for the recognizing court). In each instance, the court has to decide the validity of the agreement under the law it deems to be applicable. Thus, while "formal" validity of a clause is governed by Article 3, substantive validity is left to the court seized in each of the three possible situations.

III. CONCLUSION

With over 130 Contracting States, the New York Convention has had a significant impact on dispute resolution practice in international transactions. The existence of a system that supports the enforcement of both agreements to arbitrate and the resulting arbitral awards adds predictability and efficiency that cause business parties often to favor arbitration over litigation. The availability of a convention that would do for litigation what the New York Convention has

\textsuperscript{11} Id.
done for arbitration would serve to place litigation and arbitration on a more
equal footing in global commerce, thus allowing parties to transnational
transactions the opportunity to select the form of dispute resolution based on
its individual merits.

The March 2003 Draft Text on Choice of Court Agreements offers a
framework for the negotiation of a workable Hague Convention. Such a
convention would both present a valuable opportunity to place litigation on a
more equal status with arbitration for international private dispute resolution,
and serve as a foundation for discussion and development of further progress
in the realm of cross-border jurisdictional practice in national courts. Thus, it
seems that the Draft Text can bring the focus of jurisdiction and judgments
work at the Hague Conference into the realm of the possible, building on the
consensus that does exist for a convention dealing with jurisdiction and the
recognition and enforcement of judgments. It offers a valuable opportunity that
brings with it few, if any, disadvantages.
PREEMPTION IN THE 21ST CENTURY: WHAT ARE THE LEGAL PARAMETERS?

Paul R. Williams,* Scott R. Lyons,** & Tali Neuwirth***

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I. INTRODUCTION

In September 2002, President Bush and his national security team released the annual review of the United States' National Security Strategy. The review departed from earlier reviews in that it embraced the use of preemptive strikes against rogue states which possess or seek to possess weapons of mass destruction and which harbor or support terrorist organizations.1

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1. "We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends." Press
On March 19, 2003, the United States, together with nearly thirty coalition partners, initiated a successful military campaign to liberate Iraq from the regime of Saddam Hussein. Many commentators view the liberation of Iraq as the first use of the doctrine of preemption against a state, which was perceived to possess the ability and the motive to either use weapons of mass destruction or transfer those weapons to terrorist organizations for use against the United States or its allies.

While there has been significant political discussion as to the utility and/or risks associated with the doctrine of preemption, the legal debate has to date been fairly limited. Legal commentators have either criticized the doctrine as illegal, or have sought to provide a legal justification for the doctrine. Few if any have sought to define the legal parameters of the doctrine.

The purpose of this article is to help define the appropriate legal parameters for use of the doctrine.\(^2\) While the traditional *Caroline* criteria remain relevant for conventional preemption, it is necessary to develop a refined set of criteria for the use of preemptive force against rogue states, which possess weapons of mass destruction and harbor or support terrorist organizations.

When developing the parameters for the modern doctrine of preemption it is important to bear in mind that the doctrine, as set forth in the National Security Strategy, applies only to rogue states, which possess or seek to possess weapons of mass destruction, and which harbor or support terrorist organizations. To be subject to preemptive military action, a state must possess all three of these characteristics. It is important, however, to also note that once a doctrine is established, the requirements for its use may quickly become elastic, to the point that one or more of these characteristics may be deemed sufficient to invoke preemption. In this case, the criteria would of course need to be heightened, and thus it is important to develop criteria, which may be more stringently applied in the event the doctrine is more liberally applied then currently envisioned.

To accomplish the objective of defining parameters for the modern doctrine of preemption this article will first review the strategic rationale for preemption, and a detailed definition of the modern doctrine. This will be followed by a review of the United States' government's legal rationale and a review of the emerging legal debate before discussing the applicable parameters. The article will conclude with the argument that in order to guard against the unwarranted application of the doctrine a specific set of clearly defined criteria

\(^2\) This article is an expanded version of a presentation delivered as part of a panel discussion at the 2003 Annual Meeting of the American Branch of the International Law Association. The panel was organized and chaired by Professor Ved Nanda of Denver University's School of Law.
must be developed for its use. The article then proposes that in order to be consistent with the intent of the National Security Strategy and to comply with general norms of international law, a state must demonstrate before it undertakes the use of preemptive military force that its actions are necessary in light of the certainty of attack, the opportunity for successful preemption, and the failure of peaceful multilateral efforts. The use of force also must be grounded in legitimacy, be collectively supported, and be proportionate.

II. THE RATIONALE FOR A MODERN DOCTRINE OF PREEMPTION

As set forth in the National Security Strategy, the evolution of the doctrine of preemption arises from the radical transformation of the post cold-war security environment and the perceived need to counter the threat posed by terrorist organizations and rogue states who may possess or seek to possess weapons of mass destruction, or who may be able to inflict substantial harm through unconventional attacks such as those of September 11, 2001.

The necessity of preemption is heightened by 1) the nature of weapons of mass destruction, which can “be easily concealed, delivered covertly, and used without warning,” and 2) the covert nature of terrorist’s attacks and the resulting inability to predict when and where an attack may take place. As explained in the Security Strategy,

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first.

The necessity for the doctrine is also derived from the fact that the targets of terrorist attacks are primarily civilian populations. Moreover, given the nature of terrorist organizations and rogue states deterrence cannot be relied upon as an effective means of defense.

Finally, the doctrine is a natural outgrowth of the increasing inability of international organizations to muster the political will among their member states to prevent crimes against humanity or to neutralize terrorist organizations. Similarly, international law has been slow to adapt to changing

4. Id.
6. The most recent examples include the inability of both the United Nations and the European
international norms, such as humanitarian intervention,⁷ and to the increased organizational and technical sophistication of terrorist organizations. In fact, even if international organizations were able to muster the political will to confront terrorism in a more aggressive manner, there is little indication that terrorist organizations or rogue states respond to the types of inducements or sanctions employed by international organizations.

The recent decision of Libya to cease its attempts to acquire nuclear weapons and other weapons of mass destruction, and to open its facilities to inspection by American and British, as well as international inspectors, is perceived as providing additional support for the utility of the modern doctrine of preemption.

III. DEFINING THE MODERN DOCTRINE OF PREEMPTION

The essence of the doctrine as set forth in the National Security Strategy is that because the United States can no longer solely rely on a reactive posture it may act preemptively to forestall or prevent hostile acts by rogue states which possess or seek to possess weapons of mass destruction, and harbor or support terrorist organizations.⁸

The doctrine also includes a commitment to undertake proactive counter-proliferation efforts such as detection, active and passive defenses, and counterforce capabilities, which are to be fully integrated into defense policy. This is to be coupled with strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction through diplomacy, arms control, and cooperation with other states.

7. In the case of the humanitarian intervention in Kosovo, it was carried out without United Nations' approval, and with minimal actual political and military support from NATO member states other than Great Britain and the United States. Moreover, the international community largely responded to the humanitarian intervention with the argument that while the use of force to prevent crimes against humanity and genocide in this case was illegal, it was legitimate.

8. The National Security Strategy also identifies these states as frequently possessing the additional criteria of brutalizing their own people, displaying no regard for international law and rejecting basic human values. National Security Strategy, supra note 1, at 14.
multilateral export controls, and interdiction. Finally, the National Security Strategy identifies the need to undertake effective consequence management to respond to the effects of WMD use in order to minimize the effects of their use and to dissuade terrorists from their use.

Other chapters of the National Security Strategy set forth a plan for strengthening alliances, promoting human dignity, working to defuse regional conflicts, promoting global economic growth, and expanding and deepening the process of democratization. All of these initiatives are interrelated and to the degree they are successful they reduce the actual need to undertake preemptive action against rogue states possessing WMD.

Unfortunately, many critics of the modern doctrine of preemption fail to acknowledge that the doctrine is set forth within the broader approach of increasing efforts at counter-proliferation, strengthening alliances, and reducing the causes of conflict. Similarly, critics fail to acknowledge that the doctrine is applicable in only the most narrowly tailored circumstances involving rogue states, terrorists and weapons of mass destruction and thus invoke the slippery slope argument that the National Security Strategy will lead to the increased use of preemption between states with long running conflicts such as China/Taiwan, and North Korea/South Korea, or “the renewed drug trade in Afghanistan infiltrating Iran, or the occupation of uninhabited nominally Spanish islets in the Strait of Gibraltar by Moroccan forces.”

There is, of course, a legitimate concern that once established the doctrine will be stretched to apply to cases such as India/Pakistan or the Arab states and Israel. To guard against the unwarranted evolution of the doctrine it is necessary to articulate a precise legal rationale and legal criteria for determining when preemptive action is appropriate.

IV. LEGAL RATIONALE

While legal rationales are not customarily provided as part of the National Security Strategy, it is important when developing a new or evolved doctrine for

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9. To accomplish this objective since May 2003 the United States has led efforts to establish the Proliferation Security Initiative (PSI). The PSI is an alliance of like-minded states that have agreed to strengthen existing international security agreements, increase intelligence sharing and undertake coordinated interdiction efforts. For more on the PSI, see Berman, supra note 5.


the United States’ government to subsequently issue a legal rationale. The role of a legal rationale is to provide some justification for the evolved doctrine, to provide parameters so that the doctrine is appropriately applied by the government, and so that an unreasonably expanded version of the doctrine is not used as a pretext for illegitimate acts by other governments.

The National Security Strategy does briefly articulate a foundation for the modern doctrine of preemption by noting that “for centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”\(^{14}\)

The National Security Strategy further notes that “Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat, most often visible mobilization of armies, navies, and air forces preparing to attack.”\(^{15}\) The Security Strategy then argues that the concept of imminent threat must be evolved to reflect the capabilities and objectives of rogue states and terrorists that seek to attack by unconventional means.\(^{16}\)

Presumably, the Department of State should have followed up the National Security Strategy with a formal document defining the evolved concept of imminent threat and a set of legal criteria, which could be used to determine when a preemptive strike might be legally appropriate. Rather, the Legal Advisor for the Department of State has made publicly available a Memorandum of Law addressed to a joint roundtable of experts from the American Society of International Law and the Council on Foreign Relations.\(^{17}\) The Legal Advisor and the Assistant Legal Advisor for Political/Military Affairs also published their views in the American Journal of International Law under the title, *Preemption, Iraq, and International Law.*\(^ {18}\)

The ASIL-CFR Memorandum seeks to lay the foundation for an articulation of the new parameters for the use of preemptive force. In the memorandum, the Legal Advisor argues that “in the era of weapons of mass destruction, definitions within the traditional framework of the use of force in self-defense and the concept of preemption must adapt to the nature and capabilities of today’s threats.”\(^ {19}\) The Legal Advisor defines the traditional framework as permitting the preemptive use of proportional force only when it is necessary,
with the concept of necessity including “both a credible, imminent threat and the exhaustion of peaceful remedies.”

The Legal Advisor argues that imminence should be viewed in terms of urgency rather than timing of the response. The Legal Advisor argues further that the credibility of the threat must be based on the capacity of the state or terrorist organization to carry out the threat and upon an assessment of the intent of the state or terrorist to act. By example, the Legal Advisor argues that the use of force to change the governing regime in Afghanistan was a legitimate use of preemption to prevent and deter an imminent attack. Here the attack of September 11 was viewed as “establishing that the enemy intended to attack again.” So long as the enemy maintained its capacity to attack, the United States was entitled to take preemptive action.

In sum, the Legal Advisor concludes that,

The United States reserves the right to use force preemptively in self-defense when faced with an imminent threat. While the definition of imminent must recognize the threat posed by weapons of mass destruction and the intentions of those who possess them, the decision to undertake any action must meet the test of necessity. After the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.

The AJIL article asserts that the United States’ action against Iraq was not illegal preemption as:

1) One of the primary objectives of the action was to preempt Iraq’s possession and use of weapons of mass destruction;
2) There were substantial risks associated with “allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction;”
3) Past actions of Iraq over a protracted period of time indicated that it posed a threat;
4) The act of preemption represented an “episode in an ongoing broader conflict initiated – without question – by the opponent;” and
5) The use of force was consistent with previous resolutions of the Security Council.

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20. *Id.*
21. *Id.* The Legal Advisor also cited the “record of past support for the rebels,” which was relied upon by the British in justifying their attack on the Caroline. *Id.* at 2.
22. *Id.*
While the article addresses the criteria of intent and capability, it does not clearly address the criteria of imminence/urgency as outlined in the ASIL-CFR memorandum.

V. RECENT COMMENTARY

As is to be expected recent scholarly commentary on the modern doctrine of preemption encompasses a range of diverse views. Some commentators argue that the doctrine is patently illegal and that it is the obligation of lawyers to denounce the doctrine as such. 24 Others assert the doctrine may be legal, but it is politically unwise and the White House should undertake a slow retrenchment from the doctrine, 25 or that it should devote its efforts to revitalizing the United Nations Security Council, 26 or to a reinterpretation of the United Nations Charter which will permit the use of force against states which fail to prevent terrorists from conducting operations from their territory. 27 Still others fear that the use of the doctrine will erode the integrity of the United Nations' system and its ability to prevent future conflicts, 28 or worse, that it will lead to a "period defined by the geopolitics of raw power and militaristic influence." 29 Finally, many commentators embrace the modern doctrine of preemption as a reasonable evolution of the Caroline doctrine and seek to refine the criteria by which it is applied. 30

While many of the criticisms against the modern doctrine of preemption are well reasoned and must be taken into account as the doctrine is further refined, it is important to avoid an overly rigid interpretation of existing international law, which might prevent the reasonable development of a doctrine

26. See Stromseth, supra note 13, at 638.
27. See, e.g., Gardner, supra note 11.
29. See, e.g., Kelly, supra note 12, at 3.
necessitated by the dramatic change in the ability and intent of rogue states and terrorists to use weapons of mass destruction.

Unfortunately, in the 1990's, while some commentators were welcoming the return to strict legal limits on the exercise of power by the United States and its European allies, the overly ridged interpretation of certain fundamental principles of international law produced dire consequences. For instance, an overly aggressive application of article 2(4) of the United Nations Charter coupled with the collective passivity of Europe, and to a certain extent the United States, facilitated Slobodan Milosevic's genocide against the people of Bosnia, kept the international community at bay during the massacres of nearly 2 million people in Sudan, and allowed the Hutu to massacre nearly a million Tutsi in Rwanda. The strict adherence to article 2(4) also cooled the willingness of states to take action against the Taliban regime and Al Qaeda despite the gross human rights violations of the former, and the efforts of the latter to train nearly 35,000 terrorists.

In the case of Yugoslavia, the ridged adherence to 2(4) in the face of state sponsored genocide and crimes against humanity came to a close when the United States and its NATO allies, without United Nations Security Council approval, undertook a humanitarian intervention in Kosovo to prevent the genocide of Kosovo Albanians by Serbian forces.

The initial response by legal commentators was less than satisfactory. Many commentators simply declared the humanitarian intervention to be illegal. Others attempted to preserve the sanctity of an outdated legal regime by declaring that while the humanitarian intervention was illegal it was legitimate. If in fact the humanitarian intervention was illegal, then the fault lies with outdated international law and not with the effort to use force to prevent genocide. Such expedient attempts to find legitimacy where legality is denied in fact erode the force and effect of legal constraints.

In crafting a response to the modern doctrine of preemption, legal commentators should bear in mind the lessons from these earlier conflicts. First, an overly strict adherence to legal norms may produce highly dangerous consequences, and those norms may therefore be in need of modernization. For example, in the case of modern preemption, if it is illegal to use force to preempt a rogue state and/or terrorist organization from using weapons of mass destruction against civilian populations, then it is international law, which is in need of repair.

Second, just as national security doctrines must evolve to effectively confront new threats to national and international security, so to must international law evolve to constrain and guide the use of these new doctrines. In these circumstances, the role of lawyers is not merely to pronounce on legality and

31. See Franck, supra note 24, at 609-10.
illegality, but to develop parameters to ensure the application of new doctrines consistent with the fundamental objectives of international law and to guard against the erosion of legitimate limits on the new doctrine.

The remainder of this article is dedicated to developing a set of clear legal criteria by which to determine when it is legal to use force to preempt the use of weapons of mass destruction by rogue states and/or terrorist organizations.

VI. THE LEGAL PARAMETERS OF THE MODERN DOCTRINE OF PREEMPTION

President Bush, in the National Security Strategy appropriately recognized that while the United States must "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries... the United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression." In order to prevent the preemption from being used as a pretext for aggression it is necessary that the criteria be grounded in the basic principles of the Caroline doctrine and that they be clearly articulated.

As set forth in the now famous Webster letter, in order for a preemptive attack to be considered legitimate, the attacking state must demonstrate that its actions were necessary in light of the imminence of attack; it had no other choice of means; it had no time to deliberate; the extent of the attack was not excessive or unreasonable.32

The parameters for the modern doctrine of preemption must reflect that serious threats are now posed by entities other than another state's armed forces or an organized militia with a clear command structure. These threats are also directed not against a state's armed forces or state institutions, but instead involve the likelihood of purposeful attacks against civilians with no objective other than to cause massive casualties. These threats are compounded by advances in technology and the nature of the opposing forces, which have the effect of further eclipsing the traditional legal doctrines applicable to preemptive self-defense.

Guided by the Caroline precedent it is reasonable to consider that in order for a preemptive attack against rogue states, which possess weapons of mass destruction and which harbor or support terrorist organizations to be considered

32. These elements are encapsulated in what has become known as the "Caroline incident," named after the now infamous Caroline dispute of 1837. The cause of the dispute was the British attack and destruction of an American steamer, which was being used to ferry supplies to a group of armed Canadian insurgents rebelling against the British Crown. The British claimed that their actions were preemptive and necessary under the traditional doctrine of self-defense. Secretary of State Daniel Webster stated that in order for the British to defend their actions as preemptive they were required to demonstrate that they met the criteria noted in the text above. See Letter from Daniel Webster, U.S. Secretary of State, to Henry S. Fox, Esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), reprinted in 29 BRITISH & FOREIGN STATE PAPERS, 1812-1934, at 1129, 1138 (British Foreign Office 1857).
legitimate, the attacking state must demonstrate that its actions were necessary in light of the certainty of attack, the opportunity for successful preemption, and the failure of peaceful multilateral efforts. The use of force also must be grounded in legitimacy, be collectively supported, and be proportionate.

A. Certainty of Attack

The central principle of Caroline, that of imminence—is no longer entirely applicable in the case of rogue states and terrorist organizations cooperating in the pursuit of weapons of mass destruction. Terrorist attacks, by their nature are inherently imminent as they may occur at anytime—without warning. A more feasible criterion may be certainty of attack based on past practice.

The practicality of the “imminence” criteria is substantially limited by the fact that terrorist attacks are not preceded by the traditional indicators such as the mobilization of forces or the fueling of missiles. Similarly, terrorists do not follow the traditional escalation timeline of peacetime to crisis situation to conflict. Compounding this development are radical changes in technology, which have enabled terrorist organizations to develop the capacity to inflict massive causalities without warning. Given that Al Qaeda has openly expressed its intent to continue to wage a war of terrorism against the United States and its allies, and the inherent ability of terrorist organizations to strike without warning, the criteria of imminence lack substantial utility. A more useful criterion would be that of “certainty of attack.”

The certainty of attack may be determined by a combination of essential factors such as the global reach and capacity of the terrorist organization, the high probability of attack based upon past practice, a manifested intent to injure, the likely magnitude of harm and credible intelligence showing an escalating threat.\(^{33}\) It may also be necessary to limit the determination of certainty to the foreseeable future.

B. Opportunity for Successful Preemption

A second criteria related to the original element of imminence would be the opportunity for successful preemption. Because of the nature of terrorist operations, a state may be unable to take legitimate preemptive action once the threat is imminent because it may have no means for locating or physically

\(^{33}\) Michael Waltzer, in a Cold War context, defined when “first strikes” were legitimate by indicating that imminence of attack was less important than “sufficient threat.” Sufficient threat was characterized by “a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.” See MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 81 (3d. ed., Basic Books 2000) (1977).
preventing the attackers from carrying out an attack using weapons of mass destruction. In such cases, it is reasonable to allow a state to defend itself when the opportunity for successful preemption arises.\textsuperscript{34}

The opportunity for successful preemption is influenced by the nature of the entity against which preemption is being used. Rogue states given their static nature tend to present a wide opportunity for preemptive action, thus increasing the importance of the certainty of attack and the failure of peaceful multilateral efforts. Terrorist organizations, which operate covertly, present a more narrow opportunity for successful preemption and thus preemptive action may be appropriate when a lower threshold is reached concerning the two other criteria.

C. Failure of Peaceful Multilateral Efforts

Whereas the \textit{Caroline} doctrine requires a determination of no other choice of means for preventing an attack, the nature of a terrorist attack with weapons of mass destruction requires a more precise criteria such as a more long term failure of peaceful multilateral efforts. The failure of peaceful multilateral efforts may be judged by the extent to which the state relying upon preemptive action has undertaken to invoke multilateral mechanisms to prevent the proliferation of WMD and to resolve conflicts which give rise to the potential use of these weapons. Efforts at creating multilateral coalitions to impose economic and diplomatic sanctions are also relevant. It is important, however, to acknowledge the unfortunate prevalence of collective passivity in the face of grave international threats.\textsuperscript{35} In the face of collective passivity, a state should not be barred from taking preemptive action.

D. Grounded in Legitimacy

The preemptive action must be grounded in legitimacy as evidenced by support in United Nations Security Council resolutions or in the resolutions of relevant regional bodies.\textsuperscript{36} While direct and explicit authorization by the United Nations Security Council for preemptive force is the most clear basis for preemptive action, such authorization is seldom available due either to the circumspect manner in which the United Nations Security Council addresses issues, or to collective passivity as discussed above. It is however, necessary for the preempting state to have a solid legitimate claim to preemptive action other than its own unilateral determination of a threat.

\begin{itemize}
  \item \textsuperscript{34} See Yoo, supra note 30, (proposing the criteria of “window of opportunity”).
  \item \textsuperscript{35} See Wedgwood, supra note 30.
  \item \textsuperscript{36} See Taft IV & Buchwald, supra note 18.
\end{itemize}
Once peaceful measures are exhausted, there still remains the necessity of a multilateral component. Collective support requires the preempting state to find support among other states, either political or military support, before undertaking a preemptive action. While the condition of near universal multilateralism, such as through the United Nations or the Security Council, is ideal it is not the only option. Multilateral institutions are subject to political motivations even in the face of undeniable threats to civilian populations. The requirement of collective support establishes a threshold that requires widespread recognition of the necessity and acts against politically motivated unilateralism, without subjecting the determination to a formulaic process.\textsuperscript{37}

F. Proportional Response

Proportionality remains a fundamental rule governing all legal use of force. While the traditional definition from the law of war does not directly apply when using force against terrorist organizations, the underlying principles still apply.\textsuperscript{38} The preemptive use of force must entail the minimum force necessary to neutralize the threat.

VII. CONCLUSION

Through the end of the Cold War, threats were posed by state-to-state conflict with clear timelines for escalation and attack and guidelines for legitimate use of force. With the threat changing to non-state actors and states that support them, there is a change of circumstances and a shift in doctrine as evidenced by the 2002 National Security Strategy. To minimize the danger that the modern doctrine of preemption may be used as a pretext by some states for aggression, it is necessary to apply clearly specified criteria. These criteria require that in order for a preemptive attack against rogue states which possess or seek to possess weapons of mass destruction and which harbor or support terrorist organizations to be considered legitimate, the attacking state must demonstrate that its actions were necessary in light of the certainty of attack, the

\textsuperscript{37} See id.

\textsuperscript{38} Proportionality measures governing the law of war are explicitly detailed in Protocol I to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (entered into force Dec. 7, 1978). The principle of “proportionality” effectively requires that the anticipated loss of life and property damage resulting from the use of force not be excessive compared to the military objective. The “precautionary” principle requires that all possible precautions be taken to minimize civilian loss of life and damage to civilian objects. These principles are combined with the principle of “humanity” which prohibits unnecessary destruction of property or weapons that cause unnecessary suffering.
opportunity for successful preemption, and the failure of peaceful multilateral efforts. The use of force also must be grounded in legitimacy, be collectively supported, and be proportionate.
THE INTERNATIONAL WHALING COMMISSION:
CHALLENGES FROM WITHIN AND WITHOUT

Howard S. Schiffman*

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I. INTRODUCTION

Despite the growing number of international organizations dedicated to the conservation and management of living marine resources, very few generate the controversy of the International Whaling Commission (IWC). The IWC remains an explosive point of friction between the deeply committed anti-whaling forces, on the one hand, and the handful of remaining stalwart whaling states and their supporters, on the other. As the organization approaches its sixtieth year of operation it is useful to review where it has come from to better understand where it may be going. Equally as important is a discussion of some of the key challenges, both internal and external, that the IWC presently faces.

This paper addresses these issues. While this work is neither a complete review of the history of the IWC nor a comprehensive survey of its institutional strengths and weaknesses, it will provide an overview and a context as to where the IWC sits as an international resource management organization. What will the IWC most likely have to reconcile in the early years of the 21st Century to remain a critical regulatory body and a legitimate forum in the future?

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II. A SHORT HISTORY OF THE IWC

The IWC was the product of the 1946 International Convention for the Regulation of Whaling (ICRW). Before the ICRW, the dreadful mismanagement of cetaceans (whales, dolphins, and porpoises) by the nations of the world, and more specifically the whaling industry, resulted in the collapse of almost all commercially valuable whale stocks. To be clear, the ICRW was an agreement among whaling states for whaling interests. Even though the convention purported to manage a marine resource, the ICRW could not be confused with what we would today call an environmental agreement. The last paragraph of the preamble leaves no mistake about its purpose: "[h]aving decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry[.]"

Despite this attempt to place some regulation and oversight around whaling practices, under the guiding hand of the IWC important whale populations continued to decline at alarming rates. For decades, the member states of the IWC met annually and set unsustainable quotas that did little more than guarantee short-term profits for whalers. Partly because of the abject failure of the IWC to achieve its objectives and partly because of the growing global environmental consciousness of the 1960s and 1970s, a movement took hold to end commercial whaling.

By 1982 the membership of the IWC had grown to thirty-seven members. Many of these newer members were not whaling states at all. Rather, they joined the IWC at the urging of save-the-whales activists simply to vote against the practice of commercial whaling. At the annual meeting in 1982 the IWC voted to impose a moratorium on commercial whaling that fully took effect in 1986. The moratorium was largely justified by its advocates on the scientific uncertainly surrounding the population assessments of key stocks. The moratorium remains in effect. As certain stocks have undoubtedly recovered, however, the pressure to lift the moratorium grows with each passing year. The moratorium on commercial whaling affects neither scientific research whaling nor aboriginal subsistence whaling both of which are provided for under

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3. ICRW, supra note 1, at pmbl.

4. Id. at art. VIII.

5. Id. at sched., para. 13; Article 1(1) elevates the Schedule to an integral part of the ICRW. Id. at art. 1(1).
separate provisions of the ICRW. Both scientific research whaling and aboriginal whaling remain contentious issues in the IWC (discussed below).

The annual IWC meetings remain grinding plates of controversy as Japan, Norway, Iceland, and most recently some newer members (as of November 2003 the membership of the IWC had grown to fifty-one states) seek leverage to reverse the moratorium. The battles within the IWC do not occur in a vacuum. Rather, they must be understood against the backdrop of wider tensions between utilization and conservation of living marine resources. To add to the mix, concern for animal rights and welfare constitute an important part of the debate. The modern law of the sea is a good point of departure to understand these controversies.

III. WHALES, UNCLOS, AND INTERNATIONAL ENVIRONMENTAL LAW

The status of whales in international law took on a new and more thoughtful dimension with the conclusion of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS is one of the most significant achievements of the United Nations. It provides a comprehensive framework for the modern law of the sea and mandates the proper conservation and management of marine resources. More importantly, with regard to the status of whales UNCLOS recognizes marine mammals as a special resource deserving of additional consideration. Specific provisions of UNCLOS are devoted to the conservation, as opposed to the utilization, of marine mammals in a state’s waters. Article 65 of UNCLOS provides:

> Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management, and study.\footnote{7. Id. at art. 65 (emphasis added). Article 120 extends this status to the high seas. See id. at art. 120.}

The applicable provisions of UNCLOS may be viewed as the lex specialis most directly addressing the status of cetaceans under the law of the sea today. This contrasts with the treatment of other living marine resources, such as fish,

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where provisions favoring consumption and utilization balance more general obligations to conserve those resources.

Article 65 is relevant to the role of the IWC in that it mandates states to, "work through the appropriate international organizations for their conservation, management and study." While the IWC is not mentioned by name its long history allows one to conclude that the drafters of UNCLOS had it in mind. Significantly, however, the use of the plural "organizations" also indicates that additional organizations, present or future, may have been contemplated as well.

The favorable treatment of cetaceans in UNCLOS should also be understood in the context of the rise of international environmental law that largely began with the Stockholm Conference of 1972. Significantly, the commencement of the negotiation of UNCLOS was rather contemporaneous with Stockholm and its immediate aftermath. While UNCLOS is a comprehensive document addressing virtually all aspects of ocean usage it is also undeniably an environmental treaty with articles requiring the control of pollution, sustainable utilization of resources, and general obligations to protect and preserve the marine environment.

Whales are a vanguard species in the environmental movement because of their intelligence, beauty, and communal lifestyle. The fact that they are considered to be a consumable resource by some ignites passionate debate about ethics, animal rights, human rights, cultural preservation, cultural relativism, and resource utilization. Although discussion about these issues is not limited to cetaceans and arises elsewhere within the framework of international environmental law, it is hard to find another species where the volume of the debate is as loud.

Concern for the protection of whales is not limited to whaling. Whales, like all marine species, are susceptible to pollution.8 Recent scientific evidence suggests specific vulnerabilities of cetaceans to the effects of global warming.9 In addition, the collapse of key fish stocks upon which cetaceans feed complicates their management. The ability, not to mention the willingness, of the IWC to address these problems will be a significant challenge in the future.

IV. THE IWC TODAY: A HOUSE DIVIDED

At the present time the IWC is truly divided over the character and role of the organization. Norway, Iceland, and Japan clearly favor a resumption of consumptive use of cetaceans. On the other hand, many more members oppose

whaling and the consumptive use of cetaceans in the first instance. These states, and the environmental non-governmental organizations supporting their efforts, proceed not only from a resource management prospective but also from an ethical standpoint. This perspective views whales and dolphins as special creatures deserving of special protection. Anti-whaling advocates often point to their sentience, intelligence, and communal lifestyles to justify a higher conservation status.

This battle between stalwart whalers and passionate conservationists is not new to the IWC. This was certainly present in the drive for the moratorium in the early 1980s and seems to be at play as the pendulum swings back in favor of some consumptive use. As one examines the dispositions of the IWC’s newest members such as Mongolia and some small island states that have traditionally not expressed much interest in whaling issues, one is left to wonder if pro-whaling interests have not borrowed a page from the conservationists’ playbook? Norway, Japan, and Iceland remain the whaling stalwarts but it does appear as if they have successfully recruited some allies into the IWC to shift debate in their favor.

With the new membership alignment in mind, it is helpful to review the most contentious issues on the IWC agenda. Although the overall strategic goal of the pro-whalers is the ultimate repeal of the moratorium on commercial whaling, the issues receiving the most attention continue to be: scientific research whaling, aboriginal whaling, and, in 2002, the re-entry of Iceland.

A. Scientific Research Whaling

As noted above, the ICRW allows member states to unilaterally grant their nationals permits to catch whales for the purpose of scientific research. The limits of this provision have been seriously tested in recent years by Japan. Japan maintains large-scale research of whaling programs in Antarctica and the North Pacific. These programs remain controversial and have raised objections by the IWC. Over the years the IWC has issued over thirty resolutions suggesting limits on the use of scientific permits and, in many cases, expressed concern about the value and methods of Japan’s programs in particular. Most recently, in Resolution 2003-3 the IWC called upon Japan to halt its research whaling activities in the Southern Hemisphere or replace it with non-lethal research methods. This follows similar resolutions in previous

10. ICRW, supra note 1, at art. VIII.
years and feeds the concerns of those who see aggressive research whaling as an excuse to hold the place of the commercial whaling industry until the moratorium can be repealed.  

B. Aboriginal Whaling

Another major point of contention in recent years has been the issue of aboriginal whaling rights. Many opponents of whaling consider the issue of aboriginal whaling to be a proxy for the debate on commercial whaling while the moratorium is in effect. To be sure, a genuine and good faith debate is underway as to the extent of the rights of certain native tribes around the world to conduct sustainable subsistence whaling. The IWC presently recognizes several such claims.

Perhaps the most controversial aboriginal claim is that of the Makah Tribe of Washington State. The United States government recognized the whaling rights of the Makah in the 1855 Treaty of Neah Bay. Although the Makah abstained from whaling activities for approximately 70 years, the tribe decided to revive its traditional whaling practices after the gray whale was removed from the endangered species list of the Endangered Species Act in 1994. Although the United States government has long since eschewed commercial whaling it was nevertheless sympathetic to the Makah’s claim as it has been to those of other Native American tribes. In the mid-1990s the United States tried to secure a quota of gray whales for the Makah in the IWC.

Because other IWC members were fearful that additional aboriginal quotas would create a loophole for Japan and Norway to claim rights for “community based” whalers the United States was initially unsuccessful in its attempts to secure a gray whale quota for the Makah in the IWC. In 1997 the United States and Russia submitted a joint proposal for the aboriginal quota of pacific gray whales. Until this point only the Russian Chukotka tribe enjoyed an aboriginal quota for grays. This bilateral arrangement also included sharing the quota on bowhead whales enjoyed by Alaskan natives. Ultimately, because of the bilateral deal between the United States and Russia and how they presented the quota request, the IWC never formally recognized the Makah quota. The IWC effectively side-stepped this issue by simply specifying that the aboriginal quota for Eastern North Pacific Gray Whales may be “taken by those whose traditional, aboriginal, and subsistence needs have been recognized.”

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15. *Id.* (presently listed for the years 2003-2006).
Conspicuously, the Makah were never identified by name as a beneficiary of the quota. This created an uproar among anti-whaling advocates who claimed such specific recognition by the IWC was necessary for the quota to be consistent with the ICRW and international law in general. The better legal interpretation is probably contrary. The fundamental characteristic of international environmental law embodied in Principle 21 of the Stockholm Declaration recognizes the primary right of states to exploit their own resources pursuant to their own environmental policies. On the other hand, shifting the focus from international law to domestic, was the Makah hunt even consistent with United States law? At the present time, this is still rather unclear.

In 1999, the Makah resumed the hunt and succeeded in killing a young gray whale. This mobilized the anti-whaling forces to seek remedies in United States courts. In addition to questions raised under international law, United States law also presents obstacles to the Makah continuing the hunt. The Ninth Circuit has ruled that the government’s Environmental Assessment for the Makah hunt does not satisfy the requirements of the National Environmental Policy Act (NEPA) and the Marine Manual Protection Act (MMPA). At the present time the prospects for future Makah hunts remains uncertain.

The Scientific Committee of the IWC is currently in the process of developing new management regimes for aboriginal subsistence whaling. Aboriginal whaling, like scientific research whaling, is an ideological battleground during the time of the commercial moratorium. The volume of the debate over these issues has more to do with their ability to keep the IWC focused on the consumptive use of cetaceans than the relatively modest number of whales taken by these activities.

C. The Re-entry of Iceland to the IWC

In 1992 Iceland left the IWC exasperated by the fact that whaling interests were no longer adequately represented in the organization. Iceland decided to return in 2002 and was successful in doing so with a reservation to the moratorium. Iceland’s re-entry was not only controversial but it represented something of a strategic shift in how pro-whaling states view the IWC and its potential to preside over a resumption of the consumptive use of cetaceans. Abandoning the IWC in favor of the establishment of some consumptive

17. See Anderson v. Evans, 314 F.3d 1006 (9th Cir. 2002), amended by 350 F.3d 815 (9th Cir. 2003); Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000).
friendly organizations, was, and still is to a certain extent, a possible strategy for whaling states.

Should whaling states reject the IWC entirely to seek newer consumptive friendly organizations this would be viewed with great disfavor by states with which they share common interests in many other areas. It perhaps could be seen as derogation from the duty to cooperate in the conservation of cetaceans as required by UNCLOS.\textsuperscript{19} Although the North Atlantic Marine Mammal Commission (NAMMCO) is sometimes mentioned as a potential forum to put forward a consumptive regulatory framework in competition with the IWC, it is highly unlikely to do so.\textsuperscript{20} First, it is most doubtful whether NAMMCO is organizationally empowered to enact any regulation at all.\textsuperscript{21} Second, its history indicates that, thus far anyway, it is content to concentrate on scientific research and not the direct management of marine mammal resources.

Iceland's return in 2002 suggests that, at least in the short term, the IWC will be the forum where the future battles between consumption and conservation of cetaceans will be waged. With the most recent additions to the membership of the IWC the odds are more even. With the undeniable increase in the populations of certain key species the arguments for sustainable whaling likewise improve. On the other hand, in the highly polarized arena that is the IWC nothing is so certain.

\textbf{D. The Berlin Initiative}

Despite the factors indicating apparent gains by pro-whaling interests, at the IWC's annual meeting in 2003 it adopted the so-called "Berlin Initiative" by a vote of twenty-five to twenty with one abstention.\textsuperscript{22} This resolution establishes a "Conservation Committee," which will be comprised of all IWC members. The Conservation Committee will prepare and implement the "Conservation Agenda" of the IWC. Environmental NGO's like Greenpeace are excited about the prospect of a "Conservation Agenda" within the IWC.\textsuperscript{23} Pro-whaling states are naturally skeptical.\textsuperscript{24}

\textsuperscript{19} See Howard S. Schiffman, \textit{The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources}, in Burns & Gillespie, supra note 8, at 173-76.

\textsuperscript{20} See id. at 176-85.

\textsuperscript{21} See id. at 176-77.


For the time being the Berlin Initiative and the rather predictable controversy surrounding it simply serves to highlight the continued tensions within the IWC. It raises important questions about the future of the IWC as an intergovernmental organization and whether or not it will have the confidence of its members, including a measure of respect from pro-whaling states, going forward. Without this confidence, we will likely see issues of cetacean management devolve to other international organizations. Some of these organizations will have a conservation focus and some a consumptive-friendly focus. This decentralization of cetacean management will certainly not foster the international cooperation on this issue envisaged by UNCLOS.

V. CONCLUSION

Will the IWC permit some form of commercial whaling in the near future or have the status of whales as intelligent, sentient creatures overtaken by arguments for their consumptive use? The future of cetaceans is in many ways bound up with the future of the IWC itself. The IWC remains a house divided and there are no signs of genuine reconciliation anytime soon. The issues of scientific research whaling and aboriginal subsistence whaling are mere reflections of the deep ideological divisions between pro-whaling and anti-whaling advocates. Whether or not the IWC continues to function as a premier institution in international resource management remains to be seen.

UNCLOS provides the legal framework within which cetacean conservation and management needs to proceed. States on both sides of the ideological divide need to cooperate to fulfill these objectives. The alternative, that is, continued rancor, risks squandering what has already been achieved in the recovery of key species. Whatever challenges the IWC faces today are actually far less daunting than those it faced before the days of the moratorium.

Whales are a vanguard species among wildlife resources and the IWC is a vanguard organization in international resource management. From an institutional perspective, whether or not the IWC is successful will tell us a great deal about international environmental law and its institutions in the 21st Century. For the sake of present and future generations, one can only hope that all IWC member states understand their responsibilities to successfully meet these challenges.
I. INTRODUCTION

My task is three fold. I shall first give a very brief introduction to the topic of self-determination within the general jurisprudence of the proliferation of international dispute settlement mechanisms. Next, I shall explore why this proliferation of fora has not occurred for settling claims to self-determination. Finally, I want to suggest a particular mechanism for the settlement of self-determination claims that may, in the long term, prove successful.

II. SELF-DETERMINATION

Much, perhaps too much, has been written about the topic of self-determination. We have moved from Woodrow Wilson’s pronouncement at the conference to confirm the Treaty of Versailles\(^1\) on through tomes of scholarship on the definition of who, or which groups, have a right to claim self-determination,\(^2\) to

\(^1\)Full text of Treaty of Versailles, June 28, 1919 (including original text of each of the 440 treaty articles), Department of History at the University of San Diego, at http://history.acusd.edu/gen/text/versailles/treaty/vercontents.html (last visited Mar. 16, 2004). See also EDWARD MANDELL, WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, 407 (Charles E. Merrill ed. 1921) and NATIONAL SELF-DETERMINATION AND SECESSION 2-3 (Margaret Moore, ed., Oxford Univ. 1998).

long discussions on the content of the right. Internal and external self-determination, measures of autonomy versus secession have all been extensively canvassed. The only principles that can be asserted with any confidence in this area are that colonial peoples, and peoples living under foreign occupation, have a right to rule themselves. Beyond that, all is political will, supported sometimes by sections of world opinion. That there have been successful claims to self-determination, even secession, which represents the far end of the self-determination graph has not done much to move any part of the norm toward acceptance, except the colonial or foreign occupation rule. East Timor fought a bloody war and gained independence from Indonesia. Eritrea has fought several bloody wars with Ethiopia and has gained independence, but Biafra was not successful in gaining independence from Nigeria despite thousands of deaths. Dozens of other groups dare not raise their claims.

In spite of all of the accumulated scholarship, groups that claim self-determination have very few fora in which to present their claims. War is often the only alternative. The Supreme Court of Canada did render a thoughtful judgment on the legality of Quebec’s claim to secession but that decision was only what the Canadians call a reference opinion, and what we would call an advisory opinion, rendered after a request by the Canadian authorities. The purpose of this panel is to examine possible fora and mechanisms for resolving

3. For history and content of right of self-determination, see DOV RONEN, THE QUEST FOR SELF-DETERMINATION, 1-70 (Yale Univ. Press 1979).
11. WILLIAM ZARTMAN, ELUSIVE PEACE: NEGOTIATING AN END TO CIVIL WARS 103 (Brookings Institution 1995).
claims to self-determination, short of war. I think it is not unreasonable to suppose that, for example, if the Kosovars had been able to present their claims to self-determination in a recognized settlement mechanism, perhaps only at the level of the restoration of the autonomy they had previously enjoyed, such a process may have prevented the bloody conflict in Serbia/Montenegro/Kosovo. If that supposition is true, and could reasonably be expected to be replicated many times over for other self-determination claims, finding settlement fora becomes an enterprise of huge and worthwhile consequences.

III. PROLIFERATION OF INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

There has been much scholarship on the proliferation of international dispute settlement mechanisms. I refer to the numerous books, periodical articles, and studies that address the phenomenon of the recent proliferation of international courts and other international dispute settlement mechanisms. There is a wonderful two-volume book, now in its second edition, published by the Max-Planck Institute called Dispute Settlement in Public International Law, written by Karin Oellers-Frahm and Andreas Zimmerman. These two volumes set out to provide a comprehensive account of all the available dispute settlement mechanisms for interstate disputes. The book also contains all of the relevant instruments creating the settlement mechanisms. The mechanisms described range from the weakest systems, such as a reporting obligation, to the most formal, such as a full-fledged court, and everything in between. The table of contents alone runs to eighteen pages. Another good source for viewing the developments in this area can be found at the web site of the Project on International Courts and Tribunals put out by New York University.

The scholarship addressing the proliferation of international dispute settlement fora falls into several categories. The international relations scholarship tends to ask why these new institutions have been thrown up at this particular time. They develop a theory of legal and institutional change and try to fit the phenomenon with the framework of a theory of change.

The legal scholarship tends to be either descriptive, that is, it details, sometimes *ad nauseam*, how the particular institution was created, the scope of its remit, and the problems that may be anticipated in its operations. Sometimes the legal scholarship is anxious about the complications of too many fora. Where these two lines of scholarship, international relations and international law come together is where they ask what effect the proliferation phenomenon will have on the theoretical framework of their particular discipline. Here the general and common theme has been the demise of the state-centered sovereignty system. The frequently observed exponential rise in transnational movement of peoples, goods, and services has resulted in both the inability of purely national institutions to accommodate such transnational activity and has exposed the limits of a separate sovereignty system. The creation of institutions to deal with transnational activity is seen as a direct functional outgrowth of the movement and communications revolution.

At this point, the scholarship settles down into three main categories. First, there are the zealous internationalists who welcome the creation of virtually any new international institution with joy, see it as one more step on the road to global governance and are entirely happy with the nails being driven into the coffin of sovereignty. At the other end of the spectrum are the die-hard nationalists, who resist all new international regimes, whether in the form of multi-lateral treaties, such as the Kyoto Protocol, or the establishment of new institutions, such as the International Criminal Court. This group tends to come from those who live in economically and militarily powerful states and for whom the old state sovereignty system meant “winning.” This group rightly understands that the creation of international mechanisms that its country does not (either entirely or perhaps even partially) control means the end of its

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21. Id.


dominance over preferred outcomes to any dispute that may arise.\textsuperscript{26} They write vehemently about the illegitimacy of such institutions and resist participation in such international regimes.\textsuperscript{27} In the middle of these two groups, the internationalists and the nationalists, with their very different approaches towards the appropriate basis and scope of international law, are the groups I will call the "cautionaries." They observe the phenomenon of proliferation of international settlement mechanisms but tend to concentrate on recounting the flaws of such mechanism and pointing out what these mechanisms cannot be expected to do.\textsuperscript{28} On the whole, I think they represent the group that suspects they have seen the future in such institutions, but are not sure they like the future because they recognize that the old mold—the state centered system—is waning. The uncertainty of what will rise in its place troubles them.

Some areas of international law now have a choice of dispute settlement mechanisms and those mechanisms are already working well. For example, if we take continental shelf disputes: such disputes can be settled between states diplomatically, via arbitration, at the ICJ or at the International Tribunal for the Law of the Sea. In the area of international commercial dispute resolution there are a plethora of venues available.\textsuperscript{29} The scholarship in this area is already well into methods for assessing preferences in terms of procedural rules, substantive rules and enforceability.\textsuperscript{30}

Just as I believe that law and settlement systems within a state reduce the likelihood of civil disturbances within the state, so I believe that the availability of well established and respected institutions for the settlement of international disputes, including claims to self-determination, makes it a lot less likely that we shall see wars breaking out. The issues that have settlement mechanisms in place seldom give rise to armed conflict. Because of the variety of available

\textsuperscript{26} Jed Rubenfeld, \textit{The Two World Orders}, 27 \textit{WILSON Q.} 22, 25 (2003):

Our willingness to promote and sign on to international law would be second to none—except when it came to any conventions that might require a change in U.S domestic law or policy. The principal organs of U.S foreign policy... emphatically resisted the idea that international law could be a means of changing internal U.S law.


\textsuperscript{30} \textit{Id.} (quoting United Nations Convention on Contracts for the International Sale of Goods (CISG) art. 7, 19 I.L.M. 671, 672 (opened for signature Apr. 11, 1980)).
settlement mechanisms for continental self delimitation disputes, it is now much less likely that there will be wars over such disputes.

IV. CAUSES OF ARMED CONFLICT

Another favorite topic of both international relations, and lately international law, is examining the causes of war and asking whether anything reduces the likelihood of conflict. This is, of course, of crucial importance to self-determination claims because they so often result in bloodshed. The much-touted “findings” of some scholars is the observation that democracies never fight each other. These scholars have elaborate definitions of conflict and what counts as a democracy. Having observed this “fact,” they then set about proselytizing for democracy.

Now, democratic governance usually implies a whole series of beliefs in the worth of the individual, transparency of governmental structures, various individual freedoms, and restrictions on governmental excesses all of which certainly have value in themselves, although some of the newer democracies challenge these linkages. The jury is still out on whether democracy, as such, will ultimately reduce interstate conflict particularly where some democracies seem trigger-happy in starting wars with non-democracies whenever they like. A much more convincing argument about reducing conflict is that international dispute settlement mechanisms reduce the likelihood of interstate conflict. As the availability of dispute settlement mechanisms grow, so the likelihood of conflict shrinks. Now, it may well be that such institutions are more likely to be established if the basic governmental structure of states is democratic and, if that is so, we should encourage democracy for that reason, as well as all the other reasons, but I think it takes more than mere democracy to create international settlement mechanisms.

What it takes, fundamentally, is a belief in international settlement with international rules. This means a fundamental belief that nationally cabined rules will not work. The question then arises as to why claims in certain well established areas of international law, such as self-determination, have virtually no place to be resolved in (other than inhospitable national courts) and what would be the outcome if there were some place to take such claims.

V. THE LACK OF SETTLEMENT MECHANISMS FOR SELF-DETERMINATION CLAIMS

First, why is there such a dearth of settlement fora for claims to self-determination? My guess is that because claims to self-determination strike directly at the heart of the state sovereignty system, they will be among the last to find a hospitable forum for settlement. Many international issues are necessarily transnational and thus create pressure for international settlement mechanisms. Environmental concerns need to be settled internationally because environmental problems are no respecters of national borders.

One of the difficulties for peoples' claims to self-determination is that “peoples” always live within a state. Even if a people live in several states, such as the Kurds, each one of them lives within a state. Each state can then see the “problem” of self-determination as an intra-state problem, entirely within the state's domestic jurisdiction. The state exists to control and regulate the life of the people and resources within its jurisdictions. The prospect of relinquishing control over peoples and resources is the prospect of dismembering the existing state. This prospect is unwelcome to all states and their resistance to agreeing to participate in fora that may result in the loss of their very limbs is not surprising. The ultimate question here is whether territorial integrity/sovereignty trumps self-determination of peoples or vice-versa: whether we are willing to adapt our legal rules to restrain the tyranny of the majority within the state, as we do in our national system for certain subjects, or whether we will reduce claims of self-determination to the age-old law of the jungle: might is right. To ask the question should be to answer it. Will nation states allow a question they perceive as intra-national to be resolved by international standards and international institutions?

VI. CHALLENGING PROPOSAL

I want to propose what I see as the mechanism that holds out the best hope of success for providing a peaceful resolution to claims for self-determination, though I confess it is a distant dream. I refer to the drafting of a treaty defining the right of self-determination, defining to whom the right applies, and creating, within the four corners of the proposed treaty, a mandatory dispute settlement mechanism. Clearly, states would have to agree to such a treaty. That may seem unlikely at the moment. It took at least 50 years to establish the International Criminal Court. Criminal trials were seen as the prerogative of states and the whole notion of the existence of international crimes was hotly disputed. But we have to start somewhere and the treaty route may hold the most promise.
RESOLVING INDIGENOUS CLAIMS TO SELF-DETERMINATION

Lorie M. Graham

Let us put our minds together and see what kind of future we can build for our children.

-Hunkpapa Lakota Leader, 1876

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I. INTRODUCTION

The right of self-determination is vitally important to indigenous peoples. Self-determination is closely linked to cultural survival, economic development, and the realization of other basic human rights. This right has gradually achieved firm recognition in international law. At present, however, there is no specific forum or process for resolving indigenous claims to self-determination. Indeed, none of the instruments that reference the right to self-determination, such as the International Covenant on Civil and Political Rights, provide specific remedies for addressing violations of this right. Moreover, there are no definitive definitions regarding the contours of this right that could help guide

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the resolution of such claims. Thus, the focus of this paper is twofold: to analyze some of the more difficult issues that a dispute resolution mechanism might face in addressing indigenous claims to self-determination and to articulate an optimal process or forum for resolving such claims.

Part II of the paper addresses the threshold issue of the meaning of the phrase "indigenous self-determination." Much has been written on what the right of self-determination encompasses and who is entitled to that right. National courts, human rights bodies, and states have similarly expressed their views on the meaning and scope of this term. This section explores the meaning of self-determination for indigenous peoples and the challenges that indigenous peoples have faced in having their right to self-determination recognized.

Part III of this paper analyzes the issue of development and control of lands and resources by indigenous groups. While closely linked to Part I, this issue merits a separate section because of its significant potential for derailing attempts to resolve indigenous claims to self-determination. Yet it is a key aspect of indigenous self-determination in that it is fundamental to the cultural, physical, economic, and political survival of indigenous groups.

Part IV of this paper examines the self-determination experiences of some indigenous groups in the Americas. The legal contours of self-determination are continuously shaped by the realities of practice. Thus, examination of the experiences of groups struggling for the realization of this right is an important step in the creation of any effective dispute resolution mechanism. Within the context of these cases, the section also analyzes some existing fora for addressing indigenous human rights claims and analyzes how these fora might be adapted to better address self-determination claims.

Part V summarizes my findings regarding the appropriate fora for resolving indigenous claims to self-determination, as well as factors that may be crucial to the resolution of such claims.

II. UNDERSTANDING INDIGENOUS SELF-DETERMINATION

Before we can attempt to articulate a process for settling claims of self-determination, we need to understand what that phrase might mean to those asserting it. The circumstances, needs, and concerns of indigenous peoples are


4. See infra notes 26-48 and accompanying text.
as diverse as the communities that they embody. Yet, in the past several decades, indigenous groups from around the world have come together in a variety of forums to discuss and articulate a vision of indigenous self-determination—what that phrase might mean to culturally distinct groups of peoples and how it might play out in individual cases. While the scope of this paper does not provide an opportunity to fully explore this effort, this section highlights some key aspects of this movement, which should inform any process designed to resolve future claims.

A. Indigenous Peoples

A major question that may arise in the context of resolving indigenous claims to self-determination is how to define “indigenous peoples.” While controversy surrounds the use and application of the word “indigenous,” some common elements can be discerned both from scholarship as well as international, regional, and state practices: groups with distinct cultures, histories, and connections to land (spiritual and otherwise) that have been forcibly incorporated into a larger governing society. S. James Anaya in his book *Indigenous Peoples in International Law* explains the relevance of these elements:

> [T]he term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.\(^5\)

The UN Draft Declaration on the Rights of Indigenous Peoples, which will be discussed shortly, emphasizes above all the importance of self-identification.\(^6\)

The Chairperson-Rapporteur to the UN Working Group on Indigenous Populations has similarly emphasized the importance of flexibility in defining

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the term "indigenous." Yet she also suggests some possible factors "relevant to the understanding of the concept of 'indigenous:'"

a) Priority in time, with respect to the occupation and use of a specific territory;
b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws, and institutions;
c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
d) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not conditions persist.8

If a state accepts the "indigenousness" of a particular group, than this is not a particularly difficult issue for any forum designed to resolve self-determination claims. However, a number of countries, particularly in Asia, have consistently denied the existence of such groups within their borders. Therefore this may well be a serious hurdle for some groups.

A tremendous amount of scholarship has also been devoted to the question of who are "peoples" entitled to the right of self-determination. Few today can dispute the notion that "peoples" include sub-national groups that are part of a larger territorial sovereign unit.9 Just as international law has evolved from being solely concerned with the rights and duties of sovereigns to include the individual and collective rights of human beings, so too has self-determination evolved into a legal precept benefiting "human beings as human beings and not sovereign entities as such."10 Of course that doesn't address the more difficult question of what groups constitute "peoples" for purposes of exercising a right

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7. In her working paper on the concept of "indigenous people," Chairperson-Rapporteur Daes states that "the concept of 'indigenous' is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world. However, greater agreement may be achieved with respect to identifying the principal factors which have distinguished 'indigenous peoples' from other groups in the practice of the United Nation system and regional intergovernmental organizations." Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous peoples," Comm. on Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, 14th Sess., UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter Working Paper Daes].


10. See, ANAYA, supra note 5, at 76, 77-80.
to self-determination. Factors commonly referenced, but by no means exclusive, include: common racial, ethnic, linguistic, religious or cultural history; some claim to territory or land; and a shared sense of political, economic, social, and cultural goals. Indigenous groups often meet each criterion. Yet this definition of peoples fails to fully contemplate the essence of the phrase "indigenous peoples." Another factor often overlooked but nevertheless germane to addressing indigenous claims to self-determination is the role of history. This historical undertaking requires both an inward examination that allows Native peoples to reconstitute their own histories and identities and an outward examination that acknowledges and addresses the wrongs that accompany indigenous claims to self-determination.

B. Self-determination

Another key step in the resolution of indigenous claims to self-determination is to better define what is meant by the term "self-determination." While the term has often been equated with secession, we know that its meaning

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11. The early origins of the concept of self-determination are well articulated: from the Marxist precepts of class liberation, to the Wilsonian ideals of democracy and freedom, through its incorporation into the United Nations Charter. The push for decolonization in the 1960s shed new light on the right of self-determination, focusing on its humanistic components. By 1970, we see a shift in legal doctrine with the inclusion of the right of self-determination in the Declaration on Principles of International Law Concerning Friendly Relations, which envisions both a collective right to fully participate in the political life of a nation and some form of relief for those who are denied full participatory rights. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the U.N.G.A. Res. 2624, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 [hereinafter Declaration on Friendly Relations] (1970). Within the international human rights movement, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights states that "all peoples have the right of self-determination." See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (Annex to G.A. Res. 2200, 21 GAOR, Supp. No. 16, at 490, U.N. Doc. A/6316 (1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); G.A. Res. 2200, 21 GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1976) [hereinafter ICCPR]. This includes the right to "freely determine their political status," to "freely pursue their economic, social, and cultural development, and to "freely dispose of their natural wealth and resources." Id. As the Canadian Supreme Court in its 1998 opinion on the secession of Quebec noted, "the existence of the right of the people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law." See REFERENCE RE SECESSION OF QUEBEC, 2 Can. S.C.R. 217, at para. 111 (1998), citing e.g. A. Cassese, Self-Determination of Peoples: A legal reappraisal 171-72 (1995). Critics of group rights generally and the right of self-determination for subnational groups in particular highlight the potential for political instability and violence as a reason for opposing such a right. However, this focus tends to miss the mark. The claims exists; violence and instability can be reduced by providing groups with peaceful and effective processes for addressing alleged violations. Indeed, situations such as East Timor, Kosovo, Eritrea, and Chechnya may have taken a different less violent course had international procedures and institutions been in place to address these claims early on.
is much more nuanced than that, especially where indigenous peoples are concerned. The UN Draft Declaration on the Rights of Indigenous Peoples is a good place to start, since it reflects indigenous peoples’ own stories and own struggles for recognition of rights that are essential to their very survival.\textsuperscript{12}

The UN Draft Declaration embodies what is meant by the phrase “indigenous self-determination,” in that it specifies various freedoms, conditions, and rights necessary for culturally distinct peoples to be fully in control of their own destinies.\textsuperscript{13} As Professor Anaya suggests, these rights, conditions, and freedoms fall within several normative categories: non-discrimination, respect for cultural integrity, control over lands and resources, social welfare and development, and self-government.\textsuperscript{14} Adoption of the Draft Declaration by the General Assembly

\begin{enumerate}
\item The Draft Declaration includes an express recognition of the right of self-determination, but doesn’t stop there. It addresses a number of important collective rights, such as protection against genocide and ethnocide, protection of socioeconomic rights, including the right to own, possess or use lands and natural resources, as well as the right to autonomy or self-government. \textit{See U.N. Draft Declaration, supra} note 12, at arts. 1-36.
\item \textit{See ANAYA, supra} note 5, at 97-125. Critics who oppose indigenous self-determination might contend that many of these norms are readily achievable irrespective of any recognition of a separate group right. It is true that nondiscrimination, respect for culture, right to welfare and development, and protection of property are already an integral part of conventional and individual human rights law. However, this analysis fails to recognize the inextricable link between each of these norms and the norm of self-government, as well as the collective nature of the right of self-determination. It is through the process of political autonomy that indigenous peoples reclaim control of their land and natural resources, rebuild their social and economic infrastructure, protect their way of life, and enhance their democratic participation in the larger society. The U.N. Draft Declaration on Indigenous People Rights offers the clearest written articulation of this interrelationship between the right of self-determination and other important human rights. The preamble to the 1992 Indigenous Peoples Earth Charter illustrates further the meaning of indigenous self-determination:

\begin{verse}
We the indigenous peoples walk to the future in the footprints of our ancestors. From the smallest to the largest living being, from the four directions. From the air, the land and the mountains, the creator has placed us, the indigenous peoples upon our mother earth. The footprints of our ancestors are permanently etched upon the lands our peoples. We, the indigenous peoples maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use our own ways to raise and educate our children, to our own cultural identity without interference. We continue to maintain our rights as people despite centuries of deprivation, assimilation, and genocide. We maintain our inalienable rights to our lands and territories, to all our resources—above and below—to our waters. We assert our ongoing responsibility to pass these on to our future generations. We cannot be removed from our lands. We, the indigenous peoples, are connected by
\end{verse}
\end{enumerate}
would provide guidance to any process designed to resolve future claims. This is no easy task, however, given the opposition to this document by some states, particularly to the notion of self-determination. The next section provides further analysis of this opposition. By examining the current debates surrounding the draft declaration we can gain a clearer picture of the kinds of issues that a dispute resolution forum will be faced with resolving. For instance, how does secession relate to the right of self-determination, how does one bridge the ideological divide between individual and group rights, and to whom and under what circumstances does the right to development attach vis-à-vis the right to self-determination?

C. Controversy Surrounding the Adoption of the UN Draft Declaration

In the past several decades, indigenous peoples have garnered international support for their rights to live and develop as distinct communities. Their efforts have brought about significant changes in both conventional and customary international law. For instance, in 1982, the United Nations Economic and Social Council, along with the United Nations Human Rights Commission authorized the formation of a Working Group on Indigenous Populations, made up of five experts from the Sub-commission on the Prevention of Discrimination and Protection of Minorities. The Working Group’s original mandate was the development of international standards concerning the rights of indigenous populations. In 1993, a Draft UN Declaration on the Rights of Indigenous Peoples was completed and subsequently adopted by the Sub-commission. That same year, the General Assembly proclaimed the International Decade of the World’s Indigenous People. These two events are conceptually linked in that adoption of the Declaration by the General Assembly is a major goal of the Decade.

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the circle of life to our lands and environments.

We, the indigenous peoples, walk to the future in the footprints of our ancestors.

15. See infra notes 26 and accompanying text.


18. In 1995, the Commission on Human Rights established an open-ended, inter-sessional working group to consider the various provisions of the draft declaration. Upon completion of its work, the group will send its draft to the Commission. If the Commission is satisfied, the draft will be approved by the Economic and Social Council, which will in turn submit it to the Third Committee. Upon approval by the Third Committee, it will be submitted to the General Assembly for final adoption. The goal was to finish this work by the end of the Decade in 2004, but for reasons discussed later in this paper this is not likely to occur.
The Draft Declaration represents a monumental achievement for indigenous peoples. As Professor Turpel notes:

First and foremost, it represents a remarkable feat of international legal drafting by Indigenous peoples, human rights experts, and State representatives. This kind of power-sharing of the pen is dramatic because Indigenous peoples and their governments have been virtually shut out of the institutions of the United Nations, relegated to the status of 'individuals' or 'non-governmental organizations.'

In fulfilling its mandate to facilitate and encourage dialogue between Governments and indigenous peoples, the working group reached out to large numbers of indigenous nations and organizations—many of whom played a pivotal role in the drafting of the declaration. For reasons more fully explored in Part III, this kind of participation by indigenous groups in the design and implementation of any future dispute resolution mechanism cannot be undervalued. As Professor Robert Williams' suggests "the Working Group's Draft provides one important measure of the power of indigenous peoples' own stories to transform legal thought and doctrine about the rights that matter most to them." As noted earlier, the draft declaration specifies important freedoms, conditions, and rights necessary for distinct peoples to be fully in control of their own destinies. Yet it is not a one sided agreement but rather represents—in the

20. The current working group on the draft declaration is similarly designed to provide for significant participation by indigenous groups, even those lacking consultative status with the Economic and Social Council.
22. Part I of the U.N. Draft Declaration affirms the right of non-discrimination, full participation in the life of the State, and self-determination generally. Article 3 of this part mirrors the language found in the Covenant on Civil and Political Rights and the Covenant on Economic, Cultural, and Social Rights that indigenous peoples "have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Part II addresses collective rights to live as distinct peoples, including protection against genocide and ethnocide. Part III protects the cultural, spiritual, and linguistic identities of indigenous peoples. Part IV addresses education, labour, and communication rights. Part V and VI focuses primarily on development and socioeconomic rights, including the right to own, possess, or use indigenous lands and natural resources. Part VII focus on certain political rights, including the right to determine citizenship and maintain institutional structures. Most notably Article 31 states that:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government, in matters relating to their internal and
words of Chairperson-Rapporteur Erica-Irene Daes—"a fair balance between the aspirations of indigenous peoples and the legitimate concern of States." 23 Indigenous organizations and representatives have expressed support for the declaration in its current form, with a willingness by many to consider changes that strengthen and clarify the original text, are non-discriminatory, and are consistent with international law. 24 States involved in the working group consultations have had varying views on the Draft Declaration. Some have expressed a willingness to accept the declaration as it currently stands, including Article 3. 25 However, several prominent states have expressed strong opposition to key aspects of the declaration. 26 By far the most controversial aspect of the declaration is its use of the terms "peoples" and "self-determination."

For instance, the United States' position on the declaration has remained fairly constant during the past eight years: indigenous peoples are not "peoples" who are entitled to the full panoply of rights associated with the right of self-determination. In its 1995 Statement on Article 3, the U.S. stated that "there [are] no international practice[s] or international instruments that recognizes indigenous groups as peoples in the sense of having the legal right of self-determination." 27 In 1998 it articulated its objections in somewhat broader terms contending that "no international practice or instrument recognizes sub-

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27. See id.
national groups as having the legal right of self-determination"\(^\text{28}\) and further that the United States has "concerns about adopting a declaration which suggests that all indigenous groups have a right to be sovereign, independent states."\(^\text{29}\) In the 2002 working group consultation, the United States shifted its position somewhat arguing for the adoption of a right of "internal self-determination."\(^\text{30}\) However, the United States is not alone in its objections. Other Western countries with significant indigenous populations have expressed similar concerns.\(^\text{31}\) In particular they cite concerns over what impact the full realization of indigenous self-determination would have on the territorial integrity and political unity of sovereign and independent states. This rhetoric is neither surprising nor new. States have had a long history of arguing against self-determination claims on the basis of territorial sovereignty, and much scholarship has been written on this issue. On closer examination, however, these objections by states appear somewhat specious.\(^\text{32}\) Yet without a strategy for addressing these fundamental objections no amount of process will help to resolve disputes over the right to self-determination. Thus, the next two subsections as well as Part II offers an analytical framework for addressing those objections.

1. The Right to Secession

Many of the states that oppose the use of the terms "peoples" and "self-determination" do so on the grounds that it would signify some right to secession. The comments of the United States quoted above clearly signify this concern. However, these comments suggest a fundamental misunderstanding about the "substantive" and "remedial" aspects of indigenous self-determination,\(^\text{33}\) as well as a desire to apply different international standards where indigenous peoples are concerned.

As suggested by Professor Anaya, substantive self-determination includes the right to participate "in the creation of or change in institutions of government" as well as the right "to make meaningful choices in matters touching upon all spheres of life on a continuous basis" such as economic, cultural, and social development.\(^\text{34}\) "The substance of the norm," however, "must be distinguished from the remedial prescriptions that may follow from a violation

\(^{28}\) See id. After Kosovo, it is difficult for the U.S. to continue to make such a claim regarding sub-national groups.

\(^{29}\) See id.


\(^{32}\) See infra notes 33-49 and accompanying text.

\(^{33}\) See ANAYA, supra note 5, at 80-85.

\(^{34}\) Id. at 81-82.
of the norm."  Secession is only one possible remedy to a violation of the right of self-determination and a limited one at that. Traditionally, secession was seen as the primary remedy for undoing colonization. It has also been considered an appropriate remedy in cases of alien occupation or subjugation. The more recent trend has been to apply that remedy to denials of self-determination involving serious human rights violations. The Canadian Supreme Court in its decision on the possibility of secession for Quebec summed up the right of secession as follows:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social, and cultural development.

This interpretation is further supported by the United Nations’ 1970 Declaration on Friendly Relations, which suggests limitations on the territorial integrity and sovereignty of a state when that state fails to conduct itself “in compliance with the principle of equal rights and self-determination of peoples.” Indeed, during the December 2002 working group consultations, Norway proposed amending the UN Draft Declaration to include an express reference to the 1970 Declaration on Friendly Relations:

BEARING IN MIND that nothing in this Declaration may be used to deny any peoples their right of self-determination, yet nothing in this Declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent State conducting themselves in compliance with the principle of equal rights and self-determination of peoples.

The Norway proposal merely reflects current law on the balance between the remedy of secession for violations of the right of self-determination and the protection of territorial integrity of existing states that meet their obligations of a government representing the whole people. However, its incorporation in the declaration is viewed by some as problematic in that it suggests a stagnation of the right of self-determination that is not applicable to other peoples entitled to

35.  Id. at 80.
37.  See supra note 11.
the same right. Self-determination is a dynamic legal norm that is continuously shaped by the realities of practice. Such changes should inure equally to the benefit of all who are entitled to exercise that right.\textsuperscript{39}

Moreover, it is important to remember that indigenous self-determination embodies something much more than a claim to secession; in its fullest sense, it embodies the right of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies and under conditions of equality. If these rights are honored, secession becomes a moot point. Given the limited legal and practical reach of the remedy of secession perhaps something more fundamental is at issue here. Progress toward the adoption of the draft declaration seems to be stalled, in part, as a result of some perceived conflict between individual and group identities.

2. The Individual v. The Group

The 2002 working group consultation proceedings suggest an ongoing struggle between the affirmation of individual rights and recognition of group rights generally. While the draft declaration guarantees basic human rights of all individuals, such as the right of non-discrimination, it covers much more than that—at its core is the recognition of a set of collective rights that are essential to the survival of indigenous peoples as peoples. A 1988 working group report notes that “the harsh lessons of past history showed that recognition of individual rights alone would not suffice to uphold and guarantee the continued dignity and distinctiveness of indigenous societies and cultures.”\textsuperscript{40} The UN Draft Declaration reflects this view. For instance, Article 7 provides for protection against “ethnocide” and “cultural genocide,” including any act that deprives indigenous peoples of “their integrity as distinct peoples.” Other articles recognize collective rights to land, culture, education, language, and institutions of government.\textsuperscript{41}

However, it is because of its strong affirmation of group rights that I believe the document is perhaps meeting so much resistance. It has fallen victim to the longstanding ideological debate over whether group rights are a proper subject matter of human rights. There are both philosophical and political strands to this debate, which is centered on the liberal democratic

\textsuperscript{39} As of August of 2003, progress had not been made on the approval of the self-determination articles. The 9th Intersessional Working Group on the UN Draft Declaration was to be held in the fall of 2003, where further progress on the declaration may have been made.


\textsuperscript{41} See, e.g., U.N. Draft Declaration, supra note 12, at arts. 8, 12, 13, 14, 15, 25, 26, 27, 28, 29, 30, 31, 32.
principles of individual rights.\textsuperscript{42} In short, that we are all entitled to be treated as individuals apart from our race, ancestry, ethnicity and so on, and that to acknowledge group rights in their fullest sense is to create a political quagmire that will lead to social and civil unrest. Of course the reality of the situation is that collective rights are already very much a part of international law, from the United Nations Charter to the International Covenants on Civil and Political Rights as well as Economic, Social, and Cultural Rights. As Professor Thomas Pogge argues group rights "are at the very heart our international order."\textsuperscript{43}

Yet representatives from various states continue to deny the existence of collective rights—a resistance which is reflected in the working group proceedings. As of August 2003 only two of the forty five articles of the UN Draft Declaration had been approved, both dealing with principles of individual rights and equality: Articles 5 which states that "every indigenous individual has the right to a nationality," and Article 43 which states that "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."\textsuperscript{44} Moreover, during the September 2002 informal inter-sessional consultations some states expressed concern "over collective (rather than individual) rights to land" articulated in Article 26 of the declaration.\textsuperscript{45} Similar concerns were expressed regarding the "collective" intellectual property rights articulated in Article 29.\textsuperscript{46} And while there seems to be a general consensus that indigenous peoples "need to be protected from genocide or racial hatred," several states continued the debate over "the issue of a collective identity/rights v. individual identity/rights" when discussing Article 7 on the right to be protected against ethnocide.\textsuperscript{47} One state went as far as to denounce any claim to group rights, stressing that "human rights belonged to individuals." Several others agreed "that the individual should be the focus and principle beneficiary of human rights."\textsuperscript{48} Contrast this with comments from an Indigenous Peoples Preparatory Meeting at the 1989 Working Group session that:

The concept of Indigenous peoples' collective rights is of paramount importance. It is the establishment of rights of peoples as groups, and not merely the recognition of individual rights, which is one of the


\textsuperscript{43} THOMAS W. POGGE, \textit{GROUP RIGHTS AND ETHNICITY, ETHNICITY AND GROUP RIGHTS} 187, 192-93 (Will Kymlicka & Ian Shapiro eds., 1997).

\textsuperscript{44} See, e.g., U.N. Draft Declaration, \textit{supra} note 12, at arts. 5, 43.


\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.}
most important purposes of this Declaration. Without this, the Declaration cannot adequately protect our most basic interests.\textsuperscript{49}

Since self-determination is a collective right of peoples, the difficult question for the resolution of future claims is how to close the ideological divide between individual and group rights. A partial answer to that question lies with a better understanding of what aspects of group rights states are concerned with (beyond secession). The proceedings surrounding the Draft Declaration suggest that states are particularly concerned with indigenous peoples’ collective exercise of development, of land and resource rights.

3. Development

For indigenous peoples the right to development, including control over land and resources, is critical to their survival as distinct peoples. Yet the right to development remains a major point of contention for many states. Given both the complexity and importance of this issue to the future resolution of indigenous claims to self-determination, it is dealt with in more depth in the following section on the economics of self-determination.

III. THE ECONOMICS OF SELF-DETERMINATION

One reason why the issue of development may be so controversial is because it is inextricably linked to the right of self-determination. For instance, both human rights covenants link the right of self-determination to the right of peoples to “pursue economic, social, and cultural development,” to dispose of their “natural wealth and resources,” and to maintain their “own means of subsistence.”\textsuperscript{50} Article 55 of the UN Charter similarly links the “right of self-determination” with the promotion of “higher standards of living, full employment, and conditions of economic and social progress and development.”\textsuperscript{51} This linkage is an important one particularly where indigenous peoples are concerned, and is best summed up in a recent UN study on lands and indigenous peoples:

[A] number of elements ... are unique to indigenous peoples:

i) a profound relationship exists between indigenous peoples and their lands, territories, and resources;

\textsuperscript{49} Indigenous Peoples’ Preparatory Meeting, Comments on the First Revised Text of the Draft Declaration on Rights of Indigenous Peoples (July 28, 1989), quoted in Williams, supra note 21, at 686.

\textsuperscript{50} See ICCPR, supra note 11, at art. 1; ICESCR, supra note 11, at art. 1.

ii) this relationship has various social, cultural, spiritual, economic, and political dimensions and responsibilities;

iii) the collective dimension of this relationship is significant; and

iv) the inter-generational aspect of such a relationship is also crucial to indigenous peoples' identity, survival, and cultural viability.  

For many indigenous nations, land is a major economic resource and in some cases serves as the primary means of subsistence. Equally important to the economic stability and growth of indigenous communities is the ability to control other forms of property, such as cultural and intellectual property rights. However, the right of development is not just a matter of economics, but one of personal survival. Native peoples from around the world continue to confront serious issues of poverty and its social consequences. As Professor Anaya notes with respect to indigenous peoples worldwide, “the progressive plundering of indigenous peoples’ land and resources over time” along with systemic “discrimination” have “impaired or devastated indigenous economies and subsistence life, and left indigenous peoples among the poorest of the poor.” Control over economic resources provides a basis on which to reverse these socio-economic trends.

There is also a strong connection between indigenous cultures and socioeconomic rights. This connection is reflected in some recent UN human rights decisions, such as Lubicon Lake Band v. Canada, in which the Human Rights Committee found that the cultural survival of Lubicon Lake Band of Cree Indians was tied to its ability to control natural resource development on its ancestral lands. Economic self-sufficiency provides indigenous peoples with the freedom and ability to practice their cultures and to preserve and enhance those cultures. Yet culture is more than just an end goal; it is itself a “critical factor” in the development process in that it “informs and legitimizes

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54. *See ANAYA, supra note 5, at 108.*

conceptions of self, of social and political organization, of how the world works, and how the individual and group appropriately work in the world.\textsuperscript{56}

Economic self-sufficiency is similarly connected to political self-determination. It is through the exercise of self-government that indigenous peoples are able to maintain and strengthen the institutions upon which strong economies are built. As one economist notes in relation to the experiences in Latin America and Asia, "the key to economic growth is not [just] resources, it’s institutions. It’s things like stability in government, clear rules governing contracts and effective institutions." Finally, you have an issue of participation—indigenous peoples seek to be actively engaged in any decision-making process that affects their economic rights, especially natural resource development decisions that are being made by states and third parties claiming rights through a state.

The UN Draft Declaration encompasses many of these ideas on economic control, protection, enhancement, and participation. The Preamble to the Covenant recognizes "the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories, and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies."\textsuperscript{57} It further notes "that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs."\textsuperscript{58} While development rights are dealt with primarily in Articles 21-30, a number of other articles touch upon those rights demonstrating their broad reach.

At the 2002 working group consultations, key development articles were discussed and debated. While some states expressed support for these articles, a number of states expressed reservations.\textsuperscript{59} Some purportedly went as far as to suggest that the economic aspects of the right of self-determination may not apply to indigenous peoples.\textsuperscript{60} Others took a less draconian view, focusing on the breadth of the articles and their impact on third party rights.\textsuperscript{61}


\textsuperscript{57.} See U.N. Draft Declaration, supra note 12, at Annex I.

\textsuperscript{58.} Id.


\textsuperscript{60.} See Report of The Teton Sioux, supra note 24, at 7.

\textsuperscript{61.} Article 26 provides for the right of indigenous peoples to "own, develop, control, and use the lands and territories, including the total environment of lands, air, waters, coastal seas, sea-ice, flora, and fauna and other resources which they have traditionally owned or otherwise occupied or used." Several states were concerned that the language was "extremely broad and did not recognize the rights of other parties."
State resistance to indigenous peoples' rights to land and resources is not limited to the UN Draft Declaration. Many current disputes between states and indigenous groups center on this issue. For instance, the San Andres Accords, which are negotiated peace accords between the Zapatistas and Mexican government, are close to collapse because Congress chose to remove the provisions that provide for local indigenous control of land and resources. Many of the cases that end up before international bodies deal with similar issues. One example would be the recent decision by the Inter-American Court of Human Rights involving the Awas Tingni of Nicaragua’s Atlantic Coast, in which the Court held that the Awas Tingni had the right to demarcation and protection of their traditional and customary lands under the American Convention on Human Rights. Several other major cases involving the issue of the economic rights are working their way through the Inter-American human rights system—cases which could in theory change the legal landscape with respect to the legitimacy of a state’s resistance to international recognition of indigenous rights to land and resources.

However, this resistance may not be completely muted by judicial or quasi-judicial decisions if we do not understand what lies at its core. Why are some states so opposed to the notion of indigenous development when as a practical matter it would help to alleviate the dire poverty that exists in many native communities? A partial answer may lie in the fact that economics has historically played a crucial role in the process of state-making (particularly control of
major economic exchanges within a defined territory) and thus may be viewed by some states as a backdoor to eventual secession and independence.\textsuperscript{66} It also may be that indigenous peoples' right to development is caught up in the debate regarding possible linkages between human rights law and international economic and trade law.\textsuperscript{67} Indigenous peoples' rights have been primarily the province of international human rights law, whereas the right to development has often taken shape within the contours of the policies of the Bretton Woods system. This system led to the creation of a separate set of international bodies and instruments, such as the World Bank, the International Monetary Fund, the General Agreement on Tarriffs and Trade, and more recently the World Trade Organization.\textsuperscript{68} Human rights advocates have spoken out against the threats that globalization may pose to non-trade rights.\textsuperscript{69} Until perhaps more recently, however, the law of trade and economics has remained separate from other non-trade concerns such as human rights, labor, and the environment.\textsuperscript{70} As Professors Chinkin and Wright explain

[d]evelopment, as channeled through the financial, monetary, and trading wings of the Bretton Woods system, had tended to entrench and extend a Western free market economic model. This capitalist model depends on growth and expansion, the proliferation and export of First World technology, the gearing of developing economies to servicing First World industrial needs, and the exploitation of Third World economic and social structures.\textsuperscript{71}

Human rights, on the other hand, have often been invisible in this free market system of rules and institutions.

However, in the UN Draft Declaration, indigenous peoples' rights to self-determination are connected to development rights, which are in turn connected to other important human rights, such as the right to be free from environmental degradation, the right to a basic standard of living, the right to subsistence, and


\textsuperscript{70} See, e.g., Dillon, supra note 67.

\textsuperscript{71} See Chinkin & Wright supra note 67, at 306.
the right of equality, to name a few.\textsuperscript{72} These connections may be perceived by some states as significantly impacting the larger debate over whether trade and economic law should be linked to non-economic concerns. A related issue is the impact that this linkage may have on multinational corporations doing business with nation-states, particularly since the Draft Declaration requires states to consult with indigenous peoples prior to commencing any development project that affects their lands, territories, and resources.

Each of these concerns can be answered in turn. It is important to note that the Draft Declaration is not a declaration of absolutes. In the words of Professor Robert Williams, it does "delegitimise the five-hundred-year-old legacy of the European doctrine of discovery" by recognizing indigenous peoples' right to occupy and control traditional lands and resources.\textsuperscript{73} Yet states also retain a large measure of control over key economic resources.\textsuperscript{74} This does not mean that states can ignore the concerns and rights of indigenous peoples with respect to the development of those resources. States must protect indigenous peoples' "total environment," seek their "free and informed consent," and provide them with "just and fair compensation" prior to moving forward with any project affecting indigenous lands and resources.\textsuperscript{75} In this way, we see a clear link between the economic rights of the state and the human rights concerns of indigenous peoples—linkages which are already occurring in other aspects of international economic and trade law.

One example would be the World Bank's decision to adopt a "holistic approach to development" that takes into consideration "the interdependence of all elements of development—social, structural, human, governance, donors, environmental, economic, and financial."\textsuperscript{76} Beginning in 1982, the World Bank issued its first policy directive on "Tribal People in Bank-financed Projects," which focused on protecting tribal land rights and health services. This policy was strengthened in 1991 with the development of Operational Directive 4.20, which was designed to promote "the rights of indigenous peoples to participate in, and benefit from, [World Bank] development projects."\textsuperscript{77} These newer

\begin{thebibliography}{99}
\bibitem{72} See U.N. Draft Declaration, \textit{supra} note 12.
\bibitem{73} See Williams, \textit{supra} note 21, at 691.
\bibitem{74} See \textit{id.}; see also U.N. Draft Declaration, \textit{supra} note 12, at art. 30.
\bibitem{75} \textit{id.}
policies and directives are more in line with conventional and emerging customary law regarding indigenous rights to lands and natural resources, as well as rights to self-determination.\textsuperscript{78}

In sum, given the importance of development rights to the cultural, political, and social survival of Native peoples it is unrealistic to believe that any dispute resolution process will be able to adequately address indigenous claims to self-determination if no strategy is in place to resolve these complementary economic claims. While we may be tempted to try to separate these rights in the way that they have been historically separated into economic/trade law and human rights law, the trend in international law is to develop policies and instruments that recognize their co-dependence. States who are negotiating or addressing the self-determining rights of indigenous peoples should therefore adopt similar approaches.

IV. EXPLORING MECHANISMS FOR RESOLVING INDIGENOUS CLAIMS

Thus far the paper has attempted to better define what is meant by indigenous self-determination, while at the same time identifying and analyzing some of the major hurdles to resolving claims to self-determination, such as the issue of control of land and resources and the right to development. This section explores actual processes or mechanisms that may be used for resolving such claims. It includes an analysis of some of the mechanisms already in use by indigenous groups in their struggle for self-determination and then distills from these experiences a list of factors that may be helpful to the resolution of future of claims. The focus here is on the indigenous peoples of the western

\textsuperscript{78} See, e.g., Anaya & Williams, supra note 62. For instance in its concluding observations to Canada, the U.N. Hmn. Rts. Comm. noted the important link between indigenous peoples’ rights to land and resource allocation and the right to self-determination. See Concluding Observations of the Human Rights Committee: Canada, U.N. GAOR, Hum. Rts. Comm., 65th Sess., U.N. Doc. CCPR/C/79/Add.105 (1999). In regard to the “aboriginal peoples” of Canada, the “Committee emphasize[d] that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.” Id. at para. 8. It further noted that the “practice of extinguishing inherent aboriginal rights” to lands and resources was “incompatible” with article 1 of the Covenant on Civil and Political Rights. Id.
hemisphere, although many of the points are applicable to indigenous groups elsewhere in the world.

While the draft declaration does not establish its own dispute resolution mechanism, it does envision the establishment of "mutually acceptable and fair procedures, such as negotiations, mediation, arbitration, national courts, and international and regional human rights review and complaint mechanisms" for the resolution of disputes with States.79 Many of these mechanisms are already being used by indigenous groups in their struggle for self-determination, with varying degrees of success. The following sections analyze the strengths and weaknesses of some of the more readily used mechanisms.

A. UN Human Rights Committee

The Human Rights Committee has been the most active UN treaty-based body to address indigenous people’s claims to self-determination. The two mechanisms in which this right has been explored are the state reporting procedures of the ICCPR and the individual complaint procedures under the Optional Protocol. Through its reporting procedures, the Committee has urged a more comprehensive reporting of actions taken by states to implement Article 1 of the ICCPR as it applies to those nations’ aboriginal peoples.80 This is an important concession in terms of official recognition by a UN body that the right applies to those groups. However merely requesting that a government pay closer attention to the implementation of this right does little to ensure that the right is actually honored. If a government chooses to ignore the recommen-


80. Like most UN human rights treaty regimes, the ICCPR requires state parties to submit periodic reports on the measures taken to give effect to the rights recognized in the treaty. See ICCPR, supra note 11, at art. 40. The Committee is then required to study the reports and offer comments to the state parties. In its 1984 general comment on the right to self-determination, the Committee noted in particular the persistent failure of states to meet their reporting obligations under Article 1. See The Right of Self-Determination of Peoples (Art. 1): 13/03/84, CCPR General comment 12, para. 3. The Committee stressed the need for states to provide information on each paragraph in article 1, including information on the political, economic, social and cultural aspects of the right of self-determination. Id. In recent concluding observations to reports submitted by Canada, Norway and Mexico, the U.N. Human Rights Committee emphasized the importance of this concept as it applies to those nations’ aboriginal peoples. See Concluding Observations of the Human Rights Committee: Canada, U.N. GAOR, Hum. Rts. Comm., 65th Sess., at paras. 8. U.N. Doc. CCPR/C/79/Add.105 (1999); Concluding Observations of the Human Rights Committee: Mexico, U.N. GAOR, Hum. Rts. Comm., 66th Sess., at para. 19, U.N. Doc. CCPR/C/79/Add.109 (1999); Concluding Observations of the Human Rights Committee: Norway, U.N. GAOR, Hum. Rts. Comm., 67th Sess., at paras. 10, 17, U.N. Doc. CCPR/C/79/Add.112 (1999).
dations of the Committee, the reporting procedures of the ICCPR provide no real means of enforcement.\textsuperscript{81}

Thus, indigenous groups have turned to yet another ICCPR mechanism to assert violations of that right—the complaint procedure adopted under the Optional Protocol. This strategy has brought about mixed results. One example would be the Lubicon Lake Band of Cree Indians case in which Canada was accused of violating the First Nation’s right to self-determination when it allowed oil and gas exploration on the Band’s aboriginal lands.\textsuperscript{82} The Human Rights Committee dismissed the self-determination claim, noting that the optional protocol was designed to address complaints based on violations of individual and not group rights.\textsuperscript{83} In the end, the Committee did allow the submission under Article 27, the rights of persons, in community with others, to enjoy their own culture—demonstrating an important link between cultural integrity rights and the right to self-determination.\textsuperscript{84}

Yet similar to the Committee’s reporting procedures, the enforcement aspects of the Protocol are almost non-existent. In the Lubicon case, it’s been 20 years since the Committee’s decision against Canada and the dispute is still ongoing. Thus, while the Human Rights Committee has been willing to identify what amounts to self-determination violations (or more appropriately violations of important norms associated with that right), it can offer very little in the way of ensuring that this right will be ultimately realized.

\section*{B. Inter-American System}

As an alternative, indigenous peoples have taken their claims to regional bodies—such as the Inter-American Commission on Human Rights and the Inter-American Court. Unlike the Human Rights Committee, the Commission has demonstrated a willingness to entertain claims filed by indigenous groups for violations of group rights. It has also shown a strong interest in mediating disputes between indigenous groups and member states. However, much like the Human Rights Committee, this system has built procedural and substantive limitations.

For instance, in a case involving the Miskto Indians of the Atlantic Coast of Nicaragua, the Commission refused to entertain a \textit{direct} claim for a violation of the right to self-determination, equating that right with decolonization

\begin{footnotesize}
\begin{itemize}
\item[81.] This is a criticism that is often voiced in relation to the human rights treaty system generally. On the other hand, reporting under the UN human rights treaty regime does offer a quasi-public forum for making the world aware of lack of compliance by a state. Yet the process offers no immediate relief to groups being denied their right to self-determination.
\item[82.] See Lubicon Lake Band, \textit{supra} note 55, at para. 2.1.
\item[83.] See \textit{id.} at para. 13.3.
\item[84.] See \textit{id.} at para. 13.4.
\end{itemize}
\end{footnotesize}
In the end, the report actually supports indigenous self-determination, or the norms that surround indigenous self-determination, in that it called for an institutional reordering of the Nicaraguan state to protect the group integrity and development rights of the Miskito Indians. The decision also helped to bring about negotiations between the Nicaraguan government and indigenous leaders. However, as the following discussion shows, another shortcoming of the present system is the issue of compliance.

Since the Miskito case, the Inter-American Commission has received a number of petitions that address key aspects of the right of self-determination. One such case, The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, also involved the Indians of the Atlantic Coast of Nicaragua. The Inter-American Commission expressed concern with Nicaragua's continued failure to demarcate and protect Awas Tingni traditional land and resource rights. Thus, the case proceeded, upon submission by the Commission, to the Inter-American Court on Human Rights. The Court ruled in favor of the Awas Tingni Community. It was a seminal decision in that the Court included

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86. See Mikito Report, supra note 85, at Part Three, Conclusions and Recommendations.

87. See The Case of the Mayagna (Sumo) Awas Tingni Cmtv. v. Nicaragua, Inter-Am C.H.R., Judgment of Aug. 31, 2001, http://www.law.arizona.edu/Journals/AJICL/AJICL2002/col191.htm (last visited Feb. 18, 2004). See also, Anaya & Grossman, supra note 64. In 1995, the Awas Tingni community had submitted a petition to the Inter-American Commission seeking assistance in the recognition of their rights to lands that they had historically occupied and which were essential to their survival. The Nicaraguan government had refused to demarcate Awas Tingni communal lands as required by domestic law and had in fact offered logging concessions on parts of that land to a foreign company, leading the Awas Tingni to seek relief before the Commission. The petition alleged, among other things, violations of the right to property under the American Convention on Human Rights as well as violations of the right to cultural integrity under article 27 of the ICCPR. See S. James Anaya, The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Governmental Neglect in Nicaragua, 9 ST. THOMAS L. REV. 157 (1996). See generally Li-ann Thio, Battling Balkanization: Regional Approaches Toward Minority Protection Beyond Europe, 43 HARV. INT'L L.J. 409, 435-36 (2002).

88. Anaya & Grossman, supra note 64, at 8. See also Anaya, supra note 87.

communal property rights within the tenure of property protected under regional human rights law. As noted in Section III of this paper, a major stumbling block to the resolution of indigenous self-determination claims centers around assertions of rights to lands and resources. This case helps bring clarity to the scope of those rights as they exist within the Inter-American human rights regime.

With that said, states like the United States (who are not subject to the Inter-American Court's jurisdiction) tend to ignore such decisions, despite their importance in articulating general human rights obligations applicable to all OAS member states. One recent example would be a case involving the Western Shoshones of Nevada and two of its elders, Carrie and Mary Dann.\textsuperscript{90} The United States is ignoring a decision by the Commission that U.S. claims to Western Shoshone lands are illegal under international law and that the United States has used illegitimate means to assert ownership over those lands.\textsuperscript{91} Since the Commission's decision is not legally binding (in the same way that a decision from the Inter-American Court would be), it appears that the United States will have the last say on what happens in this matter, leaving the Shoshones with no further regional or international recourse.\textsuperscript{92}


\textsuperscript{91} The case has a long and complicated history. In short, the Western Shoshones maintain that they have never relinquished aboriginal title to certain lands and resources and that the US is claiming rights to those lands and resources as a result of a process that illegally discriminates against Native Americans, denying the Dann sisters and other Shoshones basic due process rights as well as rights to property and non-discrimination—key aspects of indigenous self-determination. After several years of review and communications with the parties, the Commission ruled in favor of the Dann sisters. In order to come in compliance with its human rights obligations, the Commission recommended that the United States (1) provide the Danns and other Shoshone members with an equitable remedy for determining their land rights (which may include adopting appropriate legislation or other such measures) and (2) review its laws, procedures, and practices to ensure that the property rights of Indigenous persons are determined in accordance with the rights established in the American Declaration. See Dann Report supra note 90. Throughout the proceedings, the United States has denied not only the substantive claims but the Commission's jurisdiction to hear such claims. The United States' defiance has been most evident in its continued confiscation and sale of livestock that the Dann sisters were grazing on aboriginal lands and its attempt to move forward on the distribution of funds for those lands based on what the Commission found to be an illegitimate and discriminatory process. See, e.g., Report by Amnesty International on the Western Shoshone case, at http://www.amnestyusa.org/justearth/indigenous_people/western_shoshone.html (last visited Feb. 24, 2004).

\textsuperscript{92} The United States is not a party to the American Convention and has not accepted the jurisdiction of the Inter-American Court. Thus the decision of the Commission is non-binding. The Commission could take additional measures such as attempting to verify compliance or holding additional hearings, but the United States does not seem amendable to any services the Commission may have to offer in resolving this dispute.
It is worth noting that there are other ways in which alleged violations of indigenous self-determination have been dealt with in the Inter-American system. This includes country studies, on-site investigations, and even a Proposed American Declaration on the Rights of Indigenous Peoples. The Commission has the power to initiate country studies and, with the permission of the state, on-site investigations relating to human rights violations. In the last several years, the Commission has focused more closely on the indigenous human rights issues in its country reports. This heightened attention has led to increased awareness and in some cases the taking of positive steps by the affected country in protecting the group rights of indigenous populations within their borders.

The Commission has also prepared, at the request of the OAS General Assembly, a Proposed American Declaration on the Rights of Indigenous Peoples. Similar to the UN draft declaration, the American declaration was prepared in consultation with indigenous groups and OAS member states, and is now under review by a working group established by the General Assembly. Interestingly enough, the right to "self-determination" is not explicitly mentioned in the draft American declaration. Perhaps this is intentional as a means of avoiding the issues that have bogged down the U.N. Draft Declaration process. The OAS Declaration has been criticized by some for the lack of proper input by indigenous groups and because of concerns that it waters down the rights articulated in the U.N. Draft Declaration. And it may well be true that some of the provisions of the OAS Declaration in its current form are weaker than its UN counterpart. At its core, however, it attempts to do much of what the UN Declaration does with respect to recognizing and upholding the various norms essential to realizing the right to indigenous self-determination. For instance, Article XV mirrors in many respects the language found in the two UN human rights covenants that "indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual, and cultural development."

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93. The Commission has reported on situations involving indigenous peoples in Guatemala, Paraguay, Ecuador, Colombia, Peru, and Brazil to name a few. See http://www.cidh.oas.org/publi.eng.htm (last visited Mar. 17, 2004). The Commission's annual reports have similarly focused on the human rights conditions of indigenous peoples throughout the Americas. See id.


In sum, the Inter-American system has been utilized by indigenous peoples of the Americas to assert their rights to cultural integrity, land and resources, non-discrimination, and greater political autonomy—all key norms associated with the right of self-determination. Moreover, the General Assembly, the Inter-American Commission, and the Inter-American Court have all shown a willingness to extend a measure of group protection to indigenous peoples, although there has been some reluctance to do so within the express framework of the internationally prescribed right to self-determination. In addition, the Commission has shown a strong interest in mediating disputes between indigenous peoples and member states. Yet cases like the Western Shoshone demonstrate the limits of the Inter-American system (at least as it is currently structured) in providing lasting remedies to indigenous peoples. These limitations have substantial consequences for indigenous peoples who are already struggling to survive on the edges of society.

C. State Systems

This is not to say that all states are ignoring the important changes which are occurring regionally and internationally. States throughout the Americas, and the world for that matter, are well aware of the momentum that has been created in the area of indigenous rights and international law and are responding through their own systems of law, again with varying degrees of success. This section will highlight some of those changes, from constitutional and legislative reform to negotiated settlements. However, not all of these changes have led to improved conditions for indigenous peoples, even within states that have taken substantial steps to conform domestic law to international law and practice. Thus this section will also explore some of the shortcomings implicit in any process that leaves resolution of indigenous self-determination claims to states without proper regional or international oversight.

In Latin America during the '80s and '90s many countries amended their constitutions in ways that offered greater protection to the rights of indigenous peoples. Of all the constitutional changes Colombia’s is perhaps the most comprehensive providing for the right of self-government within indigenous territories, which includes among other things, the right to administer justice, levy taxes, and regulate resources. This decentralized system of government places control at the community level allowing for self-determination to take hold in accordance with indigenous customs and traditions. With respect to natural resource development by the state, the indigenous communities are guaranteed the right of meaningful consultation and protection against further development.

97. See, e.g., Anaya & Williams, supra note 62 at 59-64; Wiessner, supra note 96, at 74-89.
98. CONSTITUCION POLÍTICA arts. 246-47, 285-87 (Colom.).
derogation of their economic, social, and cultural integrity rights.\textsuperscript{99} It similarly provides protection for the cultural identity and diversity of Colombia's indigenous peoples, through such things as the recognition of Native languages and control over education.\textsuperscript{100} Unfortunately, Colombia's civil war has prevented indigenous peoples from realizing most of these rights.

Many other Latin American countries have taken constitutional steps to protect the political, social, economic, and cultural rights of indigenous peoples, each with a varying degree of success often tied to the larger political and economic stability of the country. For instance, the 1998 Ecuadorian Constitution recognizes the collective rights of indigenous people to "maintain and develop their spiritual, cultural, linguistic, social, political and economic traditions," including protection of their community lands from seizure or taxation.\textsuperscript{101} Like the Colombian constitution, the indigenous peoples of Ecuador have the right to be consulted regarding non-renewable resource exploration and exploitation and to benefit from those activities. They also retain certain rights to renewable resources found on their lands and to the promotion of indigenous "bio-diversity management, traditional forms of social organizations, and collective intellectual property."\textsuperscript{102} With respect to self-government, Article 224 provides for the establishment of indigenous territorial districts with the eventual development of "autonomous [governing] entities."\textsuperscript{103} Yet political unrest and economic degradation, particularly in Ecuador's Amazon region, continue to threaten the cultural and economic traditions of Ecuador's indigenous peoples. It similarly struggles with the issues of under-representation of indigenous groups in national and regional politics.\textsuperscript{104}

Nicaragua is yet another example of a country that has undergone major legal reform that has yet to be realized in practice. The Nicaraguan Constitution guarantees, among other things, the land and resource rights of indigenous peoples based on their traditional and customary patterns of use and occupancy.\textsuperscript{105} Legislation adopted in 1987 went even further, establishing autonomous political regions for the indigenous communities of the Atlantic Coast.\textsuperscript{106}

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\item It at art. 330.
\item Id. at art. 246.
\item CONSTITUCION Ch. 5, art. 84 (Ecuador).
\item See Anaya & Williams, supra note 62, at 62.
\item CONSTITUCION art. 225 (Ecuador).
\item CONSTITUTION POLITICA arts. 89, 180 (Nicar.).
\end{enumerate}
However, the *Awas Tingni* case demonstrates Nicaragua’s failure to implement these constitutional and legislative changes, most notably in its refusal to demarcate and protect indigenous lands and culture.

One place outside Latin America where constitutional reform has made a difference in some cases is Canada. A well-known example is the 1993 Nunavut Land Claims Agreement between the Inuit people and the Canadian government. The Premier of Nunavut has stated that prior to the passage of

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107. In the 1980’s Canada underwent important constitutional reform, which included added protections for the rights of Canada’s aboriginal peoples. See generally, Anaya & Williams, *supra* note 62, at 65; Wiessner, *supra* note 96, at 66-71. The 1982 Constitution Act recognized and affirmed “The existing aboriginal and treaty rights of the aboriginal peoples of Canada.” Can. Const. (Constitution Act, 1982) pt. II (Rights of Aboriginal Peoples of Canada), sec. 35(1). In addition, Section 25 of the Canadian Charter of Rights and Freedoms recognized that the rights and freedoms articulated therein “shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada.” While the Constitution does not expressly discuss indigenous self-government or political self-determination, such rights are an inherent part of the aboriginal and treaty rights recognized under the Constitution. Realization of aboriginal or treaty rights to lands and resources, to improved socio-economic conditions, and to cultural survival is all inextricably linked to the ability of indigenous peoples to govern themselves and to determine their own destiny in accordance with their traditions and cultures.

108. *See* Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada, at http://www.tunngavik.com/site-eng/nlca/nlca.htm. (last visited Mar. 17, 2004). The story of the Inuit people and their encounter with the Europeans is a familiar one. See Premier Paul Okalik, *Nunavut-North America’s Newest Democracy*, available at http://www.gov.nu.ca/Nunavut/English/premier/press/nand.shtml (last visited Mar. 17, 2004). Europeans began to arrive in what is now Nunavut in the 1600s, looking for a passage to Asia. What they found were small nomadic villages that followed the migration routes of the caribou and other animal herds. They were a self-governing people who managed their own lands and resources according to their own laws and customs. And while encounter brought changes in their lives, they held fast to their way of life until the early 1960s when the Canadian government decided to move the Inuit from a land-based economy to a community-based one. It was then that most of the cultural upheaval occurred, as the Inuit people were forced to adopt a foreign system of government and lost control over their lands and resources. However, the 1970s brought about renewed activism and interest in indigenous rights leading to a number of aboriginal groups being formed in Canada, particularly around the issue of land and resources. In 1971 a national Inuit organization was formed to protect the interest and rights of the Inuit people. This renewed interest in the protection of indigenous rights was aided by a number of important court decisions, most notably *Calder v. Attorney General for British Columbia*, in which three of the seven judges supported the claims of the Nisga’a people regarding their aboriginal ownership of lands. Although the Nisga’a Indians technically lost the case, with three judges concluding that their rights had been extinguished and one dismissing on procedural grounds, it signaled a change in the Court’s thinking on aboriginal rights. This provided the impetus necessary to push the Canadian government toward negotiation of outstanding aboriginal claims. It was during this time that the Inuit began to push for recognition both of their self-governing rights and their rights to land and resources. In 1975, they presented a draft land claims agreement to the Canadian government and open discussions regarding the establishment of a public government. However, it wasn’t until 1982, with the passage of the Constitution Act and Charter that things really began to change for the Inuit people. As earlier noted, these constitutional changes offered a measure of legal security for the Inuit people which allowed for them to move forward with settlement. In 1985, the federal
the 1982 Canadian Constitutional Act there was "little incentive to negotiate and sign a land claims when a subsequent government had the power to overturn that agreement, if it so chose."\textsuperscript{109} The Land Claims Agreement provides for "constitutionally-protected rights to land, money, renewable resources, and social and political development."\textsuperscript{110} The Agreement also establishes an arbitration board to resolve certain claims arising under the agreement. The most well known aspect of the agreement, however, was the eventual establishment of Nunavut, a new Canadian territory. The Inuit people chose to exercise their right to self-determination through a public government structure. Yet eighty-five percent of the population of Nunavut is Inuit and, not surprisingly, Inuit worldviews have strongly influenced government operations and policies.

Other First Nations have negotiated agreements with Canada that similarly provide for a measure of self-government and control over lands and resources. Each accord varies, depending on the circumstances and needs of individual nations. For instance, the Sechelt Indian Band in British Columbia chose a municipal form of government under the Sechelt Self-Government Act,\textsuperscript{111} which transfers certain local powers to the band as well as ownership rights to some 2500 acres of original reserve land. Other powers, such as police and court, remain with the federal government. Another example would be the Nisga'a Final Agreement,\textsuperscript{112} which establishes ownership and self-government rights to some 1900 square kilometers of land in the lower Nass Valley of British Columbia. This includes all subsurface and timber resources located on those lands, as well as a host of other rights relating to wildlife and fisheries. In terms of self-government, the agreement provides for the establishment of a central government and four village governments and includes the right to police themselves and establish their own court systems. Individuals who are not Nisga'a citizens, but who lived on Nisga'a lands, have the right to be consulted or participate in some capacity regarding decisions that affect their rights. Their rights are similarly protected by the Canadian Constitution and the Canadian Charter of Rights and Freedoms.

The above examples demonstrate that Canada has had some success in addressing the self-determining right of aboriginal peoples through treaty-type negotiations and agreements. This process has been greatly aided not only by government announced its support for a new northern territory providing the last important component to the realization of the Inuit peoples' right to self-determination.


110. \textit{Id.}


the constitutionalization of indigenous rights but by the willingness of the Supreme Court to begin to adapt Canadian law to contemporary human rights law on indigenous peoples. Yet there are still a number of outstanding claims in Canada, many of which are stalled as a result of an inability to reach agreement regarding the control of natural resources and development. Lubicon Lake, discussed earlier, is a perfect example. Situations like that of Lubicon Lake, and even some of the cases in Latin America, would benefit tremendously from the establishment of an international body that was empowered to mediate claims that have failed to reach a negotiated settlement within a given period of time. This proposal is discussed in more detail in the final section of this paper.

Similar issues arise in the context of the United States, which has officially recognized and supported the policy of self-determination since the 1970s. The United States has, in the past twenty years, negotiated new land and self-government agreements with a number of indigenous nations. Yet a major shortcoming of these negotiated settlements is that US domestic law is so lopsided in favor of federal “plenary power” that this may have precluded a fair and balanced settlement with respect to the rights of certain tribes. This is especially true if the tribe was claiming rights to lands rich in natural


114. Since the early 1970s, the legislative and executive branches of the United States government has recognized and supported a policy of self-determination for indigenous nations or Indian tribes located within its exterior borders. However, this has not always been the case. Between 1778 and 1871 the United States entered into some 800 treaties with Indian nations, about half of which were ratified by the Senate. These treaties, at least in the eyes of Native nations, were considered solemn, government-to-government exchanges designed to ensure the sovereign rights of tribes to their lands and territories. However, formal treaty making with tribes ended in 1871 and with the push westward increased pressure was placed on Indian nations to “assimilate” and adopt the ways of the dominant society. Perhaps the worst of the federal policies during this time with respect to the self-determining rights of Indian nations was the allotment policy which promoted the break up of communal land into individual parcels and the sale of so-called “excess” land to non-Indians. 1934 ushered in a new era of self-government for tribes in the United States with the passage of the Indian Reorganization Act. This law was designed to improve the deplorable economic conditions of tribes and their citizens by supporting tribal self-government. However, by the 1940s we were seeing a reversal of this support for tribal self-government toward policy of termination. It was during this time that the Indian Claims Commission Act took effect, creating a special forum for the settlement of indigenous group claims against the United States. While the ICC could have been a useful mechanism for bringing justice to the indigenous peoples of the United States for violations of their aboriginal and treaty rights, it was from the outset tainted by the policy of termination. The 1970s were a turning point in federal/Indian relations, with the adoption of the policy of self-determination. This has been accomplished through a series of laws that touch upon key aspects of the right to indigenous self-determination, such as education, Indian child welfare, cultural rights, self-government, and economic development.


116. In addition, current federal practice does not always conform itself to either domestic or international norms on the rights of indigenous peoples, as evidenced by the recent Inter-Commission decision involving the Western Shoshone.
resources. Perhaps even more disturbing is the recent trend in the United States Supreme Court to cut back on the self-determining rights of tribes within their own sovereign borders. Indian nations in the United States retain and exercise a large degree of self-determination perhaps more so than any other country where indigenous peoples reside. However, since these rights have been subject to legislative and judicial abrogation, indigenous nations in the United States are in a very precarious situation, always uncertain of what future policies or decisions may bring their way. An international forum for exploring and resolving indigenous claims to self-determination could be a valuable tool for United States tribes, if for no other reason than it would help to level the playing field somewhat.  

D. United Nations Permanent Forum on Indigenous Issues

One such forum that might be able to assume that responsibility in the future is the newly created United Nations Permanent Forum on Indigenous Issues. A discussion regarding the creation of this forum began at the Vienna


118. The United States Constitution denotes Indian tribes as one of three types of sovereigns that Congress has the power to regulate commerce with, and while one might think that such constitutional recognition would include the right not to interfere with the internal affairs of a tribe, the courts to date have not read such a limitation into the United States commerce clause. Long ago the United States Supreme Court proclaimed Indian nations to be “domestic dependent nations,” whose powers are subject to the “plenary power” of Congress. See, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). According to the U.S. Supreme Court, Congress has both the power to abrogate treaties with Indian nations and pass laws that affect their internal rights and interests so long as those laws are rationally related to Congress’ unique trust obligation toward tribes. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974). Thus, unlike the situation that now exists in Canada, the rights of indigenous peoples in the United States have never been constitutionalized, at least not to point where they are insulated from legislative or judicial reform. Yet during the early years of the self-determination, the US Supreme Court advanced a rather robust definition of tribal sovereignty. It reaffirmed their status as self-governing political entities with distinct sovereign powers, such as the power to raise revenue, enact and enforce laws, remedy disputes, and conduct government-to-government relations with the US and other domestic governmental bodies. See, e.g., United States v. Wheeler, 435 U.S. 313 (1978); McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164 (1973). The Court also recognized an important limit on the exercise of the federal government’s plenary power, stating that the power was “not absolute” but rather needed be judged against the federal government’s unique trust obligation toward Indian nations. See, e.g., Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977). Yet in the last few years the US Supreme Court has been moving in the opposite direction providing less protection to tribes and actively engaging in what some have referred to as “judicial termination.” See, e.g., Nevada v. Hicks, 533 U.S. 353 (2001).

119. The problem of course lies with getting countries like the United States to sign on to such a process. As earlier noted, an important step would be to reach some agreement on the UN draft declaration, particularly around the issue of what the right of self-determination entails for Native peoples.

120. For more information on the United Nations Permanent Forum on Indigenous Issues, see http://www.unhchr.ch/indigenous/ind_pfii.htm (last visited Mar. 9, 2004). Any process designed to resolve
Conference on Human Rights and, after many years of consultation with indigenous groups, was finally established by the Economic and Social Council in 2002. The Forum provides advice and information to the Council on indigenous issues relating to “economic and social development, culture, the environment, education, health and human rights.”

More specifically, it is empowered to:

- “provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations . . . [;]

indigenous claims to self-determination should keep the following two things in mind: First, it is important to create a space in which native peoples voices can be heard. Secondly, in formulating such a process it would be valuable to look not just at existing western processes but also at indigenous processes involving dispute resolution. Many state and international processes through procedural or evidentiary requirements have excluded valuable information and suppressed indigenous voices. Yet resolution of indigenous claims to self-determination cannot come about without taking into account both the historical realities and the goals and aspirations of Native peoples. The processes of storytelling and listening cannot be undervalued as means of collecting this information and creating pathways to justice. Recall, for instance, the case involving the Western Shoshone and two of its tribal members, Carrie and Mary Dann before the Inter-American Commission on Human Rights. The case reached a regional human rights body because there was no competent domestic forum in which the Shoshone and other Indian nations could articulate their own stories regarding the historical and contemporary wrongs committed by the United States government. And it is not only in domestic processes that this is an issue. It has come up for instance in the context of discussions regarding the UN Draft Declaration, in particular around Article 36 which deals with the recognition and enforceability of Indian treaties and other related agreements. Article 36 provides for the enforceability of treaties in accordance with “their original spirit and intent,” which means looking beyond the text to other relevant information that would help shed light on what the parties intended when they signed the agreement. Some states have advocated for the removal of this language, despite objections from indigenous groups that such a change might preclude indigenous knowledge such as oral history from being considered in the interpretative process. See Informal Consultations 2002, supra note 25. Cf. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1110. (Supreme Court of Canada overturned a lower court’s ruling on the inadmissibility of oral history to establish aboriginal land occupancy. The Court further noted that in relation to the disposition of indigenous lands and resources there “is always a duty of consultation . . .” And in some cases this duty “will be significantly deeper than mere consultation.” It may “require the full consent of an aboriginal nation.”). This brings us to the second issue regarding the value of exploring indigenous processes to ensure that the self-determination mechanisms provide the greatest opportunity for indigenous participation and input. An extensive exploration of the key aspects of these processes may be helpful in ensuring meaningful participation. While it is beyond the scope of this paper to undertake such an examination, one ancient method of dispute resolution that might be looked at is tribal peacemaking. While the process varies from nation to nation depending on custom and culture, tribal peacemaking in general entails a “form of horizontal justice” in which non-adversarial strategies are employed to bring about “conciliation and the restoration of peace and harmony.” See William Bradford, “With a Very Great Blame on Our Hearts”: Reparations, Reconciliation, and An American Indian Plea for Peace and Justice, 27 AM. INDIAN L. REV. 1, 164 (2002); see also Phyllis Bernard, Community and Conscience: the Dynamic Challenge of Lawyers’ Ethics in Tribal Peacemaking, 27 U. Tol. L. REV. 821 (1996).

The Forum is made up of sixteen members, eight of whom are nominated by governments and elected by ECOSOC, and eight of whom are appointed by the President of ECOSOC following formal consultations with governments on the basis of consultations with indigenous representatives. Each member serves in his or her personal capacity as an independent expert for a term of three years. One of the most positive attributes of the new forum is its level of openness. For instance, when the Permanent Forum held its first annual session in May of 2002, over 1000 indigenous representatives from around the world were present. The 2003 session was attended by some 1,800 individuals from 500 different indigenous nations and organizations. Over seventy states and a number of UN agencies including the World Bank also participated in the session.

In 2003, the Forum did debate whether to make indigenous self-determination the focus of its 2004 annual session. Ultimately, the Forum tabled that issue for another year, deciding instead to focus on the rights of indigenous women. Given the Forum’s reluctance to tackle the self-determination issue, the question remains how useful it will be, or can be, in resolving these types of claims. The fact that a permanent forum even exists in the UN is an important first step. Not only does it create a mechanism for allowing indigenous peoples to participate in formal decision-making at the UN, it also sends a message that indigenous issues are matters of international (and not just domestic) importance. Additionally, the Forum’s mandate appears broad enough to allow for the development of future procedures designed to address issues that directly affect the self-determining rights of indigenous peoples. Indeed, many of the issues that the Forum is charged with addressing—economic and social development, culture, the environment, education, health, and human rights—encompass key aspects of indigenous self-determination. Yet it is too early in the Forum’s history to know exactly what particular functions or levels of processes it will assume in relation to the realization of this right. The next section offers some thoughts on what role the Forum might play in the future resolution of these claims.  

122. The Forum is not the only UN non-treaty based process available to indigenous peoples. Other processes beyond the Permanent Forum include the UN Working Group on Indigenous Populations, which is charged both with standard-setting duties as well as the task of reviewing national developments regarding the promotion and protection of indigenous peoples’ rights. See Fact Sheet No. 9 (Rev. 1), The Rights of Indigenous Peoples, Introduction at http://www.unhchr.ch/html/menu6/2/fs9.htm. (last visited Feb. 24, 2004). Although the Working Group’s mandate does not authorize it to examine specific complaints, some have
V. SUMMARY

An abundance of activity around indigenous peoples' rights has unfolded at the UN and elsewhere during the last 25 years, culminating in the creation of a Permanent Forum. The question that remains then, is whether these processes are sufficient to address disputes over indigenous self-determination or whether something more can be done to help bring about the realization of the norms associated with that right. None of the processes reviewed thus far are designed specifically to hear claims of self-determination and many, like the Human Rights Committee and the Inter-American Commission, have foreclosed the possibility of an indigenous group invoking that principle directly. Additionally, state constitutions or agreements generally do not reference the right. Yet the norms that surround indigenous self-determination—control of lands and resources, protection of culture, social and economic development, and some form of autonomy or self-governance—have been the focal points of many of the claims that have worked themselves through domestic, regional, and international channels. Thus, self-determination, as a practical matter, has been at the heart of most of these cases even if the term itself has been rarely invoked.

In terms of the success of the various processes in resolving actual disputes, there appears to be no single factor that is likely to bring about a resolution. Yet the above cases do suggest some common factors that seem to aid the process:

- increased activism and mobilization by indigenous groups;
- domestic constitutional (and judicial) reform that recognizes and solidifies the rights of indigenous peoples;

suggested that "an informal complaint procedure has emerged de facto in the deliberations of the UN Working Group." ANAYA, supra note 5, at 159. This is due in part to the openness of the Working Group's public sessions, in which indigenous communities and organizations are allowed to speak freely and offer written submissions for further consideration. Id. The Working Group also receives written material from governments, specialized agencies, intergovernmental organizations and NGOs, and can conduct visits to individual countries to gain to collect and disseminate information. In addition to the Working Group a number of studies have been prepared for the Economic and Social Council on key issues affecting indigenous peoples, such as the study on treaties and agreements with indigenous peoples and the study on the protection of the heritage of indigenous peoples. See Fact Sheet No. 9 (Rev.1), The Rights of Indigenous Peoples, Introduction, at http://www.unhchr.ch/html/menu6/2/fs9.htm (last visited Feb. 24, 2004). More recently a Special Rapporteur was appointed by the Commission on Human Rights to study "the situation of the human rights and fundamental freedoms of indigenous people." See ANAYA, supra note 5. The Special Rapporteur's mandate includes, among other things, the power to receive information and communications on alleged indigenous human rights violations, to conduct fact-finding missions relating to those violations, and to formulate recommendations on measures that can be taken to prevent and remedy those violations. Additional complaint procedures that have been utilized by indigenous groups to address alleged violations of human rights include ECOSOC Resolutions 1235 and 1503 procedures. See ANAYA, supra note 5, at 160-61.
a state’s willingness to partake in meaningful dialogue, particularly on such thorny issues as control of land and resources; and some type of quasi-judicial/mediation procedure to ensure a proper balance of power among the parties, especially in the area of follow-through.

Another consistent theme that seems to emerge in many of the cases previously discussed is the usefulness of negotiated settlements. States seem more amenable to such a process and, if done in a manner respectful of indigenous views and objectives, it creates the space necessary to ensure that all interested parties have a voice in the final agreement. Additionally, a negotiation model seems better suited to address the many complexities that surround indigenous claims to self-determination. However, many of the cases also suggest that negotiated settlements without sustained regional or international oversight may prove to be difficult.

This brings us back to the issue of the Permanent Forum and what role it could play in the future resolution of indigenous claims to self-determination. As currently formulated, the Forum has the power to provide “advice” and “information” on indigenous issues. However, indigenous groups would be better served by the creation of a formal mediation or even perhaps an arbitration mechanism within the Forum itself. The body could be charged with several functions, such as assisting with the drafting of bilateral agreements or serving as formal mediator, particularly where bilateral talks have failed to bring about a timely resolution. The difficulty, of course, lies with getting parties to partake in such a forum. Perhaps they would be more amenable to such a process, if it lacked binding authority as is the case with the UN Human Rights Committee. Then again, such a body may suffer from the same deficiencies as other UN human rights mechanisms. In the beginning it would be helpful to make the process voluntary and even non-binding until states and indigenous nations are comfortable with the Forum’s ability to resolve such claims in a fair and objective manner. Ultimately, however, it may be useful to institute a binding dispute resolution mechanism that steps in and resolves or helps to resolve claims that have not been settled within a reasonable period of time. The Forum would be empowered to issue binding decisions, including articulating appropriate remedies for addressing both past and ongoing violations of the right to self-determination.

In closing, the late Ingrid Washinawatok once wrote that the United Nations is a place of talk and discussion, not necessarily a place of resolution.
The struggle for indigenous peoples then is how to transform this system into one that not only “talks about” justice, but also “dispenses” it. An international self-determination forum that is designed to assist in the negotiation of claims between indigenous peoples and nation-states would be a step in the right direction. A structure for such a forum has already begun to unfold with the creation of the Permanent Forum on Indigenous Issues. Yet the scope of the Forum’s powers as it relates to the development of agreements between these two parties will need to be clarified. In terms of the substantive rights that will inform such a dialogue, many have already been articulated in various international and regional human rights instruments and through state practices, and can be further clarified and enhanced with the adoption of the UN Draft Declaration on the Rights of Indigenous Peoples.
I. INTRODUCTION

The right to self-determination of peoples, alongside the equality of nations, large and small, has been recognized as a basic norm of international law. It is mentioned in the Charter of the United Nations, and has been afforded a special place of prominence in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights. It features prominently in the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 and the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations of 1970. On the regional level, it has been endorsed by no less than the Helsinki Final Act of 1975.

II. THE RIGHT TO SELF-DETERMINATION

There are few concepts in international law that have been distorted as much as the right to self-determination in attempts to afford credibility to group-
related aspirations. This is partly due to the fact that the right to self-determination over time acquired different shades of meaning that are not always clearly distinguished or evaluated in their proper historical context.

The idea of a right to self-determination of peoples originally emerged from socialist economic thought. Lenin (1870-1924) and Joseph Stalin (1879-1953) invented the concept in the early parts of the twentieth century to explain the standing of political communities within the over-arching and universal economic structures of communism. The prominence of the right to self-determination in international law has been attributed to the American President, Woodrow Wilson (1856-1924), whose Fourteen Point Address of January 8, 1918 has been cited as “transforming self-determination into a universal right.” President Wilson included in those Fourteen Points one that proclaimed, “[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose title is to be determined.” This statement has come to be regarded as the basis of the League of Nations policy for dealing with the subordinate communities of the world empires that were defeated and dissolved through World War I.

The substance of the right to self-determination has not remained static. In fact, four quite different meanings of the right to self-determination can be distinguished, depending in each instance on the nature and disposition of the peoples claiming that right.

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Initially, when World War I was drawing to a close, the idea of self-determination of peoples was advanced to legitimize the disintegration of the Ottoman, German, Russian and Austro-Hungarian empires, and within that context the right to self-determination vested in “ethnic communities, nations or nationalities primarily defined by language or culture” whose right to disrupt existing States derived justification from its substantive directive: self-determination here denoted the right of “peoples” in the sense of (territorially defined) nations to political independence.

Following World War II, the emphasis of the concept of self-determination shifted to the principle “of bringing all colonial situations to a speedy end,” the repositories of the concerned right in this sense were colonized peoples, and the substance of their right denoted political independence “of peoples that do not govern themselves, particularly peoples dominated by geographical distant colonial powers.”


14. It should be noted, though, that even then secession from existing empires was not a right in itself. In the advisory opinion of the International Committee of Jurists in the Aaland Island Case it was pointed out that “the right of disposing of national territory” was essentially an attribute of sovereignty and that “Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation.” Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations O.J. (Supp. 3) at 5 (1920). It was only when “the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by applying the normal rules of positive law” that “peoples” may either decide to form an independent State or choose between two existing ones. Id. at 6. In such circumstances, when sovereignty has been disrupted, “the principle of self-determination of peoples may be called into play”: new aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilization, may surface and produce effects which must be taken into account in the interests of the internal and external peace of nations. Id.

15. Western Sahara, 1975 I.C.J. 1, 31 (May 22); see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (June 21) (holding that the right to self-determination was applicable to “territories under colonial rule” and that it “embraces all peoples and territories which ‘have not yet attained independence’”).

In the 1960’s, yet another category of “peoples” came to be identified, namely those subject to racist regimes, and here the concept substantively signified the right of such peoples to participate in the structures of government within the countries to which they belong: the “self” in self-determination was no longer perceived to be territorially defined sections of the population in multinational empires, and did not only comprise peoples under colonial rule or foreign domination, but also came to be identified with the entire community of a territory where the social, economic, and constitutional system was structured on institutionally sanctioned racial discrimination.

Finally, the right to self-determination has been extended to national or ethnic, religious and linguistic minorities within a political community whose particular entitlements are centered upon a right to live according to the traditions and customs of the concerned group. In terms of the Covenant on Civil and Political Rights, self-determination as currently perceived thus entails the following principle: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities similarly speaks of “the right [of national or ethnic, religious and linguistic minorities] to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”

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17. The linkage within the confines of the right to self-determination of systems of institutionalized racism and colonialism or foreign domination may be traced to the United Nations General Assembly’s Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965, in which the United Nations demanded of all States to respect “the right to self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms,” and to this end proclaimed that “all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.” Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965).

18. This development was probably prompted by the claim of South Africa that the establishment of independent tribal homelands as part of the apartheid policy constituted a manifestation of the right to self-determination of the different ethnic groups within the country’s African population. Not so, responded the international community. The tribal homelands were a creation of the minority (white) regime and did not emerge from the wishes, or political self-determination, of the denationalized peoples themselves.


The repositories of a right to self-determination are “peoples.” According to Yorum Dinstein, peoplehood comprises two elements: an objective component, designated by the factual contingencies upon which the unity of the group depends; and a subjective component, constituted by a certain state of mind—the consciousness of belonging, and perhaps the will to be associated with the group.21

The concept of “peoples” is not territorially defined. On September 30, 1996, the Governor in Council of Canada referred numerous questions pertinent to the secessionist policy of Quebec’s ruling Party to the Supreme Court of Canada for its opinion.22 Those questions included one inquiring whether or not there is a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect secession of Quebec from Canada unilaterally. The Canadian Supreme Court for several reasons answered this question in the negative.23 It should be evident to everyone that the inhabitants of Quebec, being composed of a variety of ethnic or cultural, religious and linguistic population groups, do not constitute a people as defined in international law, and for that reason alone cannot claim a right to self-determination. Sections of the population of Quebec, united by a common ethnic extraction, cultural heritage, religious affiliation, or linguistic preference could of course lament the denial of their right to self-determination on the grounds that they are not permitted to accede to a life-style dictated by their national or ethnic, religious or linguistic identities. But that is de facto not the case—at least not as far as (Francophone) Quebecois are concerned.

In virtue of the right to self-determination, governments, through their respective constitutional and legal systems, are required to secure the interests of distinct sections of the population that constitute minorities in the above sense. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities clearly spells out that obligation: protect, and encourage conditions for the promotion of, the concerned group identities of minorities under the jurisdiction of the duty-bound State;24 afford to minorities the special competence to participate effectively in decisions pertinent to the group to which they belong;25 do not discriminate in any way against any person on basis of his/her group identity,26 and in fact take action to

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23. *Id.; see also van der Vyver, Self-Determination and the Peoples of Quebec*, supra note 11.
25. *Id.* at art. 2.3.
26. *Id.* at art. 3.
secure their equal treatment by and before the law.\textsuperscript{27} The Declaration further provides that, "[s]tates shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions, and customs, except where specific practices are in violation of national law and contrary to international standards."\textsuperscript{28}

It is submitted that the national-law limitation is to be conditioned by the international-standards criterion: it presupposes municipal regulation that remains within the confines of international standards and does not place undue restrictions upon the group interests of minorities.

The Council of Europe's \textit{Framework Convention for the Protection of National Minorities} specified minority rights in much the same vein: it guarantees equality before the law and equal protection of the laws;\textsuperscript{29} States Parties promise to provide, "the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."\textsuperscript{30} States Parties recognize the right of persons belonging to a national minority, "to manifest his or her religion or belief and to establish religious institutions, organizations and associations,"\textsuperscript{31} and the Framework Convention guarantees the use of minority languages, in private and in public, orally and in writing.\textsuperscript{32}

Failure of national systems to provide such protection to sectional interests of peoples within their area of jurisdiction, or merely the perception of being marginalized, must be seen as an important contributing cause of the tireless aspirations toward the establishment of homogenous States for sections of the political community with a strong group consciousness: the Muslim community of Kashmir, the Basques in Northern Spain, the Hindu factions in Sri Lanka, the Catholic minority in Northern Ireland, the Christian community in Southern Sudan, the Kurds in Iraq and Turkey, people of Macedonian extraction in Florina (Northern Greece), and many others.

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at art. 4.1.
\item \textsuperscript{28} \textit{Id.} at art. 4.2.
\item \textsuperscript{30} \textit{Id.} at art. 5.1.
\item \textsuperscript{31} \textit{Id.} at art. 8.
\item \textsuperscript{32} \textit{Id.} at art. 10.1; see also the European Charter for Regional Minority Languages, 1992 E.T.S. 148 (1992), \textit{available} at www.conventions.coe.int/treaty/en/Treaties/Html/148.htm (last visited Feb. 18, 2004).
\end{itemize}
III. SELF-DETERMINATION AND A RIGHT TO SecessION

It must be emphasized, though, that the right of peoples to self-determination does not include a right to secession. Not even in instances where the powers that be act in breach of a minority’s legitimate expectations. Three compelling arguments are decisive in this regard:

- The right to self-determination is almost invariably mentioned in conjunction with the territorial integrity of States, and reconciling the two principles in question necessarily means that self-determination must be taken to denote something less than secession.
- The right to self-determination vests in a people, while a new State created through secession is essentially territorially defined (it is a defined territory that secedes from an existing State and not a people).
- The right to self-determination is a collective group right (entitlements included in that right can be exercised by individual members of the concerned group, either individually or collectively) while a right to secede is an institutional group right (where permissible, the decision to secede must be taken by a representative organ of the territorially defined group on behalf of the group as a whole).

General definitions of the right to self-determination, such as the one contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples proclaiming the right of peoples to “freely determine their political status” and the right to “freely pursue their economic, social, and

33. See VAN DYKE, supra note 10, at 88; Berman, supra note 13, at 87; Emerson, supra note 12, at 464-65.
34. See, e.g., Final Act of the Conference on Security and Co-operation in Europe, supra note 6, at arts. IV (territorial integrity) and VIII (equal rights and self-determination of peoples).
35. According to Hermann Mosler, “States are constituted by a people, living in a territory and organized by a government which exercises territorial and personal jurisdiction.” H. Mosler, Subjects of International Law, VII ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 442, 449 (R. Bernhardt ed., Elsevier, North Holland 2000) (1984). Karl Doehring defined a State in international law as “an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals.” K. Doehring, State, in X ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 423 (R. Bernhardt ed., 1987); Herman Dooyeweerd defined the foundational function of a State in terms of “an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries.” H. DOOYEWEERD, III A NEW CRITIQUE OF THEORETICAL THOUGHT 414 (1969) (maintaining that the leading or qualifying function of the State finds expression in a public legal relationship which unifies the government, the people and the territory constituting the political community into a politico-juridical whole). Id. at 433ff.
36. See Dinstein, supra note 21, at 109 (noting that peoples seeking secession must be located in a well-defined territorial area in which it forms a majority).
Cultural development should not be seen as a general sanction of a right to political independence but must be limited and understood in the context of the subject-matter of the document from which they derive: peoples subject to colonial rule or foreign domination do have a right to political independence; national or ethnic, religious and linguistic minorities in an existing State do not. The definition of self-determination in international instruments including in that concept the right of peoples "freely to determine their political status and freely pursue their economic, social and cultural development" was similarly not intended to undermine the rule of international law proclaiming the territorial integrity of States. The United Nations' 1993 World Conference on Human Rights said it all when the right of peoples to "freely determine their political status, and freely pursue their economic, social and cultural development" was expressly made conditional upon the following proviso:

This [definition of self-determination] shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

The Supreme Court of Canada in a judgment pertaining to the legality of cession from Canada of the province of Quebec—should a majority of the residents of that province through a referendum seek to effect the severance of that territory from Canada—summarized as follows the distinction between self-determination (referred to in the judgment as "internal self-determination") and secession (referred to in the judgment as "external self-determination"):

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40. See van der Vyver, supra note 11.
The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of a right to unilateral secession) arises in only the most extreme of cases, and then, under carefully defined circumstances.41

There are many compelling reasons why the destruction of existing political communities harboring a plural society should be avoided at all costs: a multiplicity of economically non-viable states will further contribute to a decline of the living standards in the world community. The perception that people sharing a common language, culture or religion would necessarily also be politically compatible is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict. Movement of people within plural societies across territorial divides has greatly destroyed ethnic, cultural, or religious homogeneity in regions where it might have existed in earlier times, and consequently, demarcation of borders that would be inclusive of the sectional demography which secessionists seek to establish is in most cases quite impossible. Affording political relevance to ethnic, cultural, or religious affiliation not only carries within itself the potential of repression of minority groups within the nation, but also affords no political standing whatsoever to persons who, on account of mixed parentage or marriage, cannot be identified with any particular faction of the group-conscious community, or to those who—for whatever reason—do not wish to be identified under any particular ethnic, religious or cultural label. In consequence of the above, an ethnically, culturally, or religiously defined State will more often than not create its own “minorities problem,” which—because of the ethnic, cultural or religious incentive for the establishment of the secession State—would almost invariable result in profound discrimination against those who do not belong, or worse still, a strategy of “ethnic cleansing.”

Secession is indeed sanctioned by international law—not under the rubric of a right to self-determination but as a permissible political strategy in its own right. The restructuring of national borders is sanctioned by international law in two instances only: (a) if a decision to secede is “freely determined by a people”42—that is, a cross-section of the entire population of the State to be

41. REFERENCE RE SECESSION OF QUEBEC, supra note 22, at para. 1R6.
42. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, supra note 5. Providing, under the heading, “The Principle of Equal Rights and Self-Determination of Peoples:” “The establishment of a sovereign and independent State, the free association or integration with an independent State or the
divided and not only inhabitants of the region wishing to secede; and (b) if, following an armed conflict, national boundaries are redrawn as part of the peace treaty. On the first basis alone, could the United Nations find peace with the reunification of Germany, the break-up of the Soviet Union, and parting of constitutional ways of the Czech Republic and Slovakia. The secession of Eritrea from Ethiopia exemplifies the second principle. The disintegration of the former Yugoslavia represents a complicated conglomera-
tion of both principles.

IV. ENFORCEMENT OF THE RIGHT TO SELF-DETERMINATION

The primary responsibility to secure the right to self-determination of national or ethnic, religious or linguistic sections of the population within a political community vests in the legislative and executive authorities of the State. Failure of a government to secure that right can possibly provoke the following responses within the international community of States.

Should the Security Council of the United Nations be persuaded that denial of the right to self-determination to a people, and the responses of that people, take on such proportions as to constitute a threat to international peace and security, it can, pursuant to powers vested in it by Chapter VII of the UN Charter, take a decision to that effect and mandate action to bring an end to the situation at hand as it may find expedient, including sanctions of all kinds and, emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”

43. See CASSESE, supra note 12, at 359-63.

44. It should be specially noted that the USSR Constitution expressly guaranteed the right of each Republic to secede from the Union. SSSR [Constitution] art. 72, available at http://www.departments.bucknell.edu/russian/const/77cons03.html (last visited Feb. 18, 2004).

45. Lee Buchheit specified, as elements for legitimizing secession in any given case, that the section of a community seeking partition should possess a distinct group identity with reference to, for example, cultural, racial, linguistic, historical or religious considerations; those making a separatist claim must be capable of an independent existence, including economic viability (but bearing in mind international aid programs that might help a newly established political entity over its teething problems); and the secession must serve to promote general international harmony, or at least not be disruptive of international harmony or disrupt it more than the status quo is likely to do. LEE BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 228-38 (New Haven: Yale Univ. Press 1978).

46. The Constitution of Yugoslavia authorized secession of its constituent republics. F.R. YUGO. (1946) art. 1; see also F.R. YUGO. para. I, Introductory Part (Basic Principles) (1963) (depicting Yugoslavia as “a federal republic of free and equal peoples and nationalities” united “on the basis of the right to self-determination, including the right of secession”); and id. at art. 1; F.R. YUGO., para. I, Introductory Part (Basic Principles) (1974) (referring to “the right of every nation to self-determination” and “the brotherhood and unity of nations and nationalities”). However, the disintegration of the federation did not occur in accordance with the procedures prescribed for the exercise of the constitutional right to secession, and furthermore included territorial gains through conquest and ethnic cleansing.
in extreme circumstances, even armed intervention.⁴⁷ Relying on the Security Council to take action would require quite exceptional circumstances. The Security Council does not readily invoke its Chapter VII powers, its punitive powers can only be applied to States, and the five Permanent Members (China, France, Russia, the United Kingdom, and the United States) can exercise their power of veto in the Council to protect themselves or their allies from condemnation and retributive action.

If denial of the right to self-determination constitutes a consistent pattern of gross and reliably attested violation of human rights and fundamental freedoms, the matter may be taken under advisement by the Human Rights Commission under the public procedure provided for in Resolution 1235 of 1967 of the Economic and Social Council of the United Nations⁴⁸ or the confidential procedure provided for in Resolution 1503 of 1970 of the Economic and Social Council.⁴⁹ All Member States of the United Nations are subject to the procedures provided for in ECOSOC Resolutions 1235 and 1503 since those procedures stem from the solemn pledge of Member States, in terms of Articles 55 and 56 of the UN Charter, “to take joint and separate action in cooperation with the [United Nations] Organization” for the achievement of “universal respect for and observance of, human rights and fundamental freedoms for all without distinction based on race, sex, language or religion.”⁵⁰ The proceedings can be set in motion by any person or group of persons who can be reasonably presumed to be victims of “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms,” or who has direct and reliable knowledge of such violations.⁵¹ A complaint can also be lodged with the Secretary-General of the United Nations (to be transmitted to the Human Rights Commission) by a non-governmental organization (NGO) acting bona fide in accordance with recognized principles of human rights, which does not entertain political stands hostile to the principles contained in the UN Charter, and which has direct and reliable knowledge of such violations.⁵² The procedures are aimed at persuading the culprit State to desist from the offensive action, and can also prompt the appointment of a special rapporteur to investigate and report on the situation prevailing in the defendant State.

⁴⁷. U.N. CHARTER, supra note 1, at arts. 39-42.
⁵⁰. U.N. CHARTER, supra note 1, at art. 56 (read with art. 55(c)).
⁵². Id.
States Parties to an international covenant or convention may be subject to procedures designed to bring their violations of the treaty provision relating to self-determination to a peaceful settlement, but subject to the constraints applying to the particular covenant or convention. However, procedures provided for in international instruments for accosting States that violate the right to self-determination of a people under their jurisdiction provide cold comfort to victims of such violations. The *Covenant on Economic, Social and Cultural Rights* only makes provision for periodic reports of States Parties on measures adopted and progress made in achieving the rights enunciated in the Covenant. The *Covenant on Civil and Political Rights* entails a similar reporting obligation, but also contains facultative provision for an inter-state adversarial procedure and under its First Protocol in addition makes provision for an individual complaint procedure. The United States has submitted itself to the inter-State adversarial procedure but has not ratified the First Protocol.

Should denial of the right to self-determination amount to the intentional and severe deprivation of fundamental human rights contrary to international law by reason of the political, racial, national, ethnic, cultural, religious, or gender-based identity of the group or collectivity, or on other grounds that are universally recognized as impermissible under international law, the individual responsible for the deprivation may possibly be prosecuted in the International Criminal Court for the crime of persecution, or in a national court with power to exercise universal jurisdiction in the particular case.

The exercise of jurisdiction by the ICC is subject to all kinds of limitations. The Court's jurisdiction may be triggered by the Security Council of the United Nations, a State Party, or the Prosecutor acting *proprio motu*. The exercise of jurisdiction by the ICC in cases of Security Council referrals are not subject to

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55. *Id.* at art. 41.
58. The ICC Statute defines "gender" as "the two sexes, male and female, within the context of society. The terms 'gender' does not indicate any meaning different from the above." This, rather silly, definition was inserted in the Statute as a compromise with the Holy See and certain Arab States with intent to preclude the persecution of Gays and Lesbians from the reach of ICC jurisdiction.
60. Drafters of the ICC Statute operated under a resolve to include within the subject-matter of the ICC only crimes designated as such in customary international law, and one may therefore safely assume that the crimes over which the ICC can exercise jurisdiction are indeed customary-law crimes and therefore subject to universal jurisdiction.
further constraints, but a Security Council referral can be vetoed by any of its Permanent Members. In cases of State Party referrals, there is a further constraint: the ICC can only exercise jurisdiction in the matter if the State of which the perpetrator is a national (the national State) or the State on whose territory the crime was allegedly committed (the territorial State) has either ratified the ICC Statute, or has on an *ad hoc* basis agreed to the exercise of jurisdiction by the ICC in the particular case under investigation. Investigations conducted by the Prosecutor *proprio motu* are also only feasible if the national State or the territorial State has either through ratification of the ICC Statute or a special declaration agreed to the exercise of jurisdiction by the ICC. But here, yet a further constraint applies: the decision of the Prosecutor to conduct an investigation must be approved by a three-judge Pre-Trial Division of the ICC.

The United States has not ratified the ICC Statute. It is bound to veto a Security Council referral accosting an American national of acts of persecution. If an American national were to be suspected of persecution in a country other than the United States and that other country has either ratified the ICC Statute or has agreed on an *ad hoc* basis to the exercise of jurisdiction by the ICC in the particular case under investigation, then that person can be prosecuted in the ICC, provided the ICC can lawfully acquire custody of the suspect. If there is an extradition treaty in place between the United States and that other State, the latter is given a judicial discretion to either extradite the perpetrator to the United States or to surrender him or her for trial in the ICC, taking into account the respective dates of the request for extradition and the request for surrender to the ICC, the fact that the perpetrator is an American citizen, and the nationality of the victim(s) of the crime. Unconditional preference is given to status-of-forces agreements mandating a State where American troops have been deployed to surrender any of those troop to stand trial in the United States for crimes committed in the other State.

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62. However, the Security Council cannot confer powers on the ICC that the ICC does not have by virtue of its Statute. The ICC can, for example, only prosecute persons over the age of 18 years, it only has jurisdiction in respect of crimes committed after July 1, 2002, it cannot exercise jurisdiction while a State with a special interest in the matter is willing and able to investigate the alleged crime and, if appropriate, bring the perpetrator to justice. The Security Council cannot instruct the ICC to deviate from any of these restrictions. 

63. ICC Statute, supra note 59, at arts. 12(2) and (3).

64. *Id.*

65. *Id.* at arts. 15(3) and (4).


67. The duty to cooperate with the ICC to bring the perpetrator of a crime within the Court’s jurisdiction is based, in accordance with the Vienna Convention on the Law of Treaties, on state consent. ICC Statute, supra note 59, at arts. 86, 87(1)(a), 89(1).

68. *Id.* at art. 90(6).

69. *Id.* at art. 98(2).
States can in all cases foreclose the exercise of jurisdiction over any of its nationals by self-conducting a bona fide investigation into the alleged crime.\textsuperscript{70} As far as ICC jurisdiction is concerned, it is in the present context important to note that cultural genocide—deliberate efforts of persons in authority to destroy a particular culture—is not included in the concept of "genocide" as a crime that can be prosecuted in that tribunal.\textsuperscript{71} The definition of "genocide" in the ICC Statute\textsuperscript{72} is founded on the one in the \textit{Convention on the Suppression and Punishment of the Crime of Genocide,}\textsuperscript{73} and that definition cannot be extended by the ICC through analogical interpretation.\textsuperscript{74} A proposal to include cultural genocide in the Convention definition of "genocide" was deliberately rejected by the \textit{ad hoc} Committee on Genocide responsible for its drafting.\textsuperscript{75} Furthermore, the only category of acts of genocide under which cultural genocide could possibly come into play is the one consisting of deliberately inflicting on an ethnical group conditions of life calculated to bring about its physical destruction in whole or in part. "Physical destruction" means the destruction of the group by causing the death of members of the group. Destroying a culture without killing members of the group united by a common cultural extraction does not fall within the ordinary meaning of "physical destruction".\textsuperscript{76}

\section*{V. Conclusion}

It is the sovereign right of States to regulate their internal affairs in accordance with national predilections, but States ought to do that within the

\begin{itemize}
\item \textsuperscript{70} \textit{Id.} at art. 17(1).
\item \textsuperscript{72} ICC Statute, \textit{supra} note 59, at art. 6.
\item \textsuperscript{74} ICC Statute, \textit{supra} note 59, at art. 22(2).
\item \textsuperscript{76} \textit{See, e.g.,} Steven R. Ratner, \textit{The Genocide Convention After Fifty Years,} 92 AM. SOC’Y OF INT’L. PROC. 1, 2 (1998); Julio Barboza, \textit{International Criminal Law,} 278 RECUEIL DES COURS 9, 59 (1999); van der Vyver, \textit{Cultural Identity as a Constitutional Right in S. Afr.,} \textit{supra} note 11, at 64-66.
\end{itemize}
confines of their obligations under international law. As far as the right to self-determination of peoples is concerned, the United States has a fairly good record, but not one that is entirely beyond reproach.

In 1998, the United Nations Special Rapporteur on Religious Freedom, Prof. Abdelfattah Amor of Tunisia, conducted an informal investigation in the United States into compliance in this country with the subject-matter of his brief. Although the state of religious freedom in the United States is by and large satisfactory, the Special Rapporteur found causes for concern in this regard in respect of members of the Arab community being singled out for special scrutiny at airports (which is not a matter of self-determination) and insensitivity of American authorities to the spiritual values of Native Americans (which does implicate the right of Native Americans as a people to self-determination).

The right to self-determination recognizes in broad outline the fact of ethnic, cultural, religious and linguistic diversities within a political community (pluralism) as a salient fact that ought to be accommodated in the political structures and legal arrangements of the State. However, it is equally important that group alliances based on a common ethnic extraction, cultural heritage, religious conviction, or linguistic identity ought not to be afforded a role within the body politic beyond the distinctive attribute that constitutes the bond between members of the group.

It is of the essence of the right to self-determination that the relevance of group interests is to be cut down the size, dictated by the nature of the group. The protected interests of a cultural group are to be confined to cultural interests, of a religious group to matters of religion, and so on. To afford political representation in the structures of government to a cultural or a religious group, would amount to affording to those latter modalities that qualify the group a pertinence beyond the confines of its true (and useful) destination in the aggregate of human society.

Enforcement of the right to self-determination through international mechanisms is problematic, but not hopeless. Existing retributive procedures by and large culminates in no more than international condemnation. However one should not underestimate the long-term potential of international censure

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77. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331 (stating that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

78. The visit to the United States was “informal” because the American government declined to invite Prof. Armor to conduct an investigation in the United States. He came to the country as the guest of several NGOs and was offered the facilities of a number of Law Schools to conduct an in loco investigation.

for bringing recalcitrant States to their senses. International reprobation seldom renders immediate results, but if the condemnation remains widespread and pressures persist, they are bound to have effect in the long run. Governments do not like to be seen to be violators of international standards of human rights protection.
I. INTRODUCTION

There are currently over fifty sovereignty-based conflicts throughout the world, and nearly a third of the Specially Designated Global Terrorists listed by the United States Treasury Department are associated with sovereignty-based conflicts and self-determination movements.² To date, the “sovereignty first” international response to these conflicts has been unable to stem the tide of violence, and in many instances may have contributed to further outbreaks of violence. To remedy this, the international community is utilizing an evolving process where sovereignty exists as a spectrum with a range of varying sovereign statuses as part of that continuum.

Under the doctrine of earned sovereignty, there are three core elements and three optional elements. The core elements of shared sovereignty, institution

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1. This article is an expanded version of a presentation delivered as part of a panel discussion at the 2003 Annual Meeting of the American Branch of the International Law Association. The panel was organized and chaired by Professor Valerie Epps of Suffolk University Law School, Boston, Massachusetts.

building and final status necessarily exist in order to guide the sub-state structure from the intermediate phase through discussions of final status. The optional elements—conditional sovereignty, phased sovereignty, and constrained sovereignty—provide suggestions for shared sovereignty during both the intermediate phase and final status.

Earned sovereignty is a conflict resolution process that creates an opportunity for the parties to agree on basic requirements that the emerging entity must meet during an intermediate phase in order to attain or discuss final status. Rather than forcing the negotiating parties to determine during negotiations whether the sub-state entity may or may not be capable or allowed to exist as an independent state, earned sovereignty allows the parties to make evaluations of the effect of independence on the parent state as well as emerging state’s success at meeting certain benchmarks before determining final status. The core elements of earned sovereignty—shared sovereign power, institution building, and final status—form the structure of this process. An emerging state will gain varying external and internal powers as it progresses in institution building throughout intermediate status where sovereign rights are shared with the parent state or third party, which will finally lead to a pre-determined or future determined final status. The optional elements of this process provide options for intermediate status—conditional and phased—as well as for final status—constrained sovereignty.

The process of earned sovereignty has evolved without name or structure through its use by international negotiators and state parties to agreements. State parties to peace agreements have already used this process in an attempt resolve the conflicts in Kosovo, Northern Ireland, Bosnia, Serbia/Montenegro, East Timor and Papua New Guinea. Presently negotiators have proposed similar solutions for the Western Sahara and the Israel/Palestine conflicts, and the involved parties have been discussing similar proposals for Sri Lanka, Somalia, and Kashmir.

The purpose of this article is two-fold. It attempts to first define and add structure to this evolving process and second to spur interest and debate among those involved in the field. Section one provides an overview of the different core and optional elements that make up the earned sovereignty process. Section two outlines fundamental principle that sovereign authority and functions are both plentiful and severable as internal and external autonomous rights rather than an all or nothing grant of independence. The need for monitoring and enforcement bodies is then detailed in section three of the article.
II. ELEMENTS OF THE PROCESS

As stated above, the earned sovereignty process allows the parties to negotiate for individual rights that the sub-state entity will possess in different forms of shared sovereignty until they meet the conditions for final status or until final status is determined. Therefore, earned sovereignty is characterized as encompassing six elements—three core elements and three optional elements.

A. Core Elements

The first core element is shared sovereignty. In each case of earned sovereignty the state and sub-state entity may both exercise sovereign authority and functions over a defined territory. In some instances, international institutions may also exercise sovereign authority and functions in addition to or in lieu of the parent state. In rare cases, the international community may exercise shared sovereignty with an internationally recognized state.

The resolution of the conflict in East Timor provides an appropriate illustration of shared sovereignty. East Timor came under United Nations supervision after it rejected via referendum a proposal, which would have provided for autonomy within Indonesia. In light of the violent response by Indonesian military forces and paramilitary groups in East Timor, Indonesia was forced to recognize the right of East Timor to independence, and the United Nations replaced Indonesia as the authority responsible for the management of sovereignty during the transition to full independence for East Timor. During the period of shared sovereignty, United Nations officials headed the ministries of Internal Security, Justice, Political Affairs, Constitutional and Electoral Affairs, and Finance, while East Timorese headed the ministries of Internal Administration, Infrastructure, Economic Affairs, Foreign Affairs, and Social Affairs. The National Consultative Council was chaired by the United Nations Transitional Administrator and comprised of three United Nations officials and over a dozen East Timorese appointed by the United Nations Administrator.

The second core element of earned sovereignty is institution building. This element is utilized during the period of shared sovereignty prior to the determination of final status. Here the sub-state entity, frequently with the assistance of the international community, undertakes to construct institutions for self-government and to build institutions capable of exercising increasing sovereign authority and functions.

The suggested Roadmap for Peace in Israel and Palestine is centered on the need for institution building. The Roadmap requires comprehensive institution building prior to any further discussions of Palestinian provisional statehood. The Roadmap provides that the Quartet will assist the Palestinians in constructing a number of institutions necessary for assuming greater attributes of sovereignty. In particular the Roadmap provides for the restructuring of
security services, the establishment of an Interior Ministry, the appointment of an interim prime minister or cabinet with executive decision-making capacity, the adoption of a Palestinian constitution, and the creation of an election commission.

The final core element of earned sovereignty is the determination of the final status of the sub-state entity and its relationship to the state. The parties may agree upon final status during the initial negotiations, but it may also be determined at a later, agreed upon date. This flexibility in final status decisions allows the parties to wait to discuss final status until either the parties and violence has subsided or until the parties meet certain conditions agreed upon in the initial agreement. In some instances, such as East Timor the final status is determined during the initial stages of the process, whereas in others such as Kosovo it occurs after a period of shared sovereignty and institution building.

At some point during the process of earned recognition, it will be necessary to determine the final status of the sub-state entity. The options for final status range from substantial autonomy to full independence. While the nature of final status is frequently determined by a referendum, it may also be determined through a negotiated settlement between the state and sub-state entity, often with international mediation. Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition.

Kosovo and East Timor represent both routes for determining final status. In the Rambouillet Accords, the final status of Kosovo was to be determined three years later by an international conference, which would take into consideration the will of the people for independence. On the other hand, the East Timorese rejection by referendum of the proposal for autonomy within Indonesia settled the question of final status in favor of total independence for East Timor.

B. Optional Elements

The first optional element is phased sovereignty. Phased sovereignty entails the accumulation by the sub-state entity of increasing sovereign authority and functions over a specified time period prior to the determination of final status. In order to enhance the relationship between shared sovereignty and institution building some earned sovereignty agreements have incorporated the element of phased sovereignty. Phased sovereignty involves the measured devolution of sovereign functions and authority from the parent state or international community to the sub-state entity during the period of shared sovereignty. The negotiating parties may correlate the timing and extent of the devolution of authority and functions with the development of institutional
capacity and/or conditioned on the fulfillment of certain conditions such as democratic reform and the protection of human rights.

The Bougainville Agreement, which ended the conflict between the Bougainville sub-state and Papua New Guinea, implements the optional element of phased sovereignty. The Agreement gives heightened autonomy for Bougainville with the gradual grant of increasing control over a wide range of powers, functions, personnel and resources based on guarantees contained in the National Constitution.

The second optional element is conditional sovereignty. Conditionality may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or it may be applied to the determination of the sub-state entity's final status. In either case, the sub-state entity is required to meet certain benchmarks before it may acquire increased sovereignty. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability.

The case of Kosovo provides the most detailed example of conditional sovereignty. In 2002, the United Nations Security Council adopted a proposal by UNMIK identified as "standards before status." In brief, the United Nations had determined that before Kosovo could undertake final status negotiations to secure independence it must meet a number of standards or benchmarks. According to UNMIK, the general prerequisites of the standards before status approach required the parties to fully comply with and implement Resolution 1244 and the Constitutional Framework, which included multi-ethnicity, acceptance, security, and fairness under normal conditions. Specifically, the benchmarks covered the areas of functioning democratic institutions, rule of law, freedom of movement, refugee returns and reintegration, economic reform and development, property rights, dialogue with Belgrade, and the responsible operation of the Kosovo Protection Corps.

The last optional element, constrained sovereignty, involves continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and/or military presence, and limits on the right of the state to undertake territorial association with other states. The Dayton Accords, which ended the Bosnian conflict, were structured around the concept of constrain sovereignty. The Dayton Accords required many of the sovereign authorities and functions of the independent state of Bosnia to be

managed by an internationally appointed High Representative for an indeterminate period. The Accords also provided for the deployment of international military forces to maintain internal security. While conditionality is not explicit, the pattern of practice in Bosnia indicates that the international civilian authority will be discontinued only upon such a time as Bosnia can adequately function as an independent state.

III. SOVEREIGNTY AS A BUNDLE OF RIGHTS

In order to best utilize the process of earned sovereignty, which allows for negotiation on individual sovereign rights and responsibilities, the international community has begun to re-shape the historical concept of sovereignty. There are several different meanings of the term sovereignty. In the context of this discussion, sovereignty is concerned with establishing the status of a state entity in the international system as well as determining its internal governing rights. Under the conventional view, an entity qualified as a sovereign state if it had a territory, a population, a government, and international recognition. If an entity did not qualify as a sovereign state, it was deemed a dependent or subordinate territory of a sovereign state. Thus, an entity was either sovereign or it was not. There was no concept of an intermediate status such as that suggested by earned sovereignty.

States perceive sovereignty as a "ticket of general admission to the international arena." A sovereign state is accepted as an equal of other states. It is entitled to political independence, territorial integrity, and virtually exclusive control and jurisdiction within that territory. The state's sovereign acts are generally immune from civil suit in other states, its representatives are entitled to diplomatic immunity from both civil and criminal actions, and its ruler is entitled to absolute head of state immunity. It can enter into agreements with other States. It can be a member of international organizations. Dependent or subordinate territories, in contrast, do not customarily possess any of these rights in the international system.

The international community's unwillingness to consider partially sovereign options for conflict resolution has hindered diplomats in their effort

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5. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9-25 (Princeton Univ. Press 1999) (explaining the four meanings of sovereignty that Krasner describes, we are concerned here with what Krasner labels "International Legal Sovereignty").
6. Id. at 14-15.
8. KRASNER, supra note 5, at 20-21.
to construct creative means for resolving conflicts involving attempts at self-determination or secession. For example, one scholar argues that the Western powers’ inability to move beyond this black and white perception of sovereignty was partly responsible for both Bosnia’s collapse.\textsuperscript{10} The adoption of historical conceptions of sovereignty was disastrous in the Yugoslavia negotiations because the opposing parties were unable to move beyond the preservation of Yugoslavia as a state. This perception has also made it difficult to resolve conflicts in Sierra Leona and Chechnya. Moreover, the ability to move beyond the statist/secessionist norm may aid in the resolution of self-determination conflicts, which are spawning ground of terrorist movements. Terrorism is a mechanism too frequently used by self-determination and thus solving these sovereignty-based conflicts may in turn reduce terrorism.

To remedy this, it is necessary for the international community to further develop sovereignty existing as a spectrum and to recognize a range of varying sovereign statuses and rights as part of that spectrum. The international community must therefore recognize that states have both external and internal powers, which are made up of individual rights that are both plentiful and severable. The external sovereign rights may include:

1) The right to territorial integrity;
2) The right to defend the state through the use of force;
3) The right to govern by establishing, applying and enforcing law;
4) Eligibility for international organizations;
5) The capacity to act as a legal entity for owning, purchasing transferring property, etc.;
6) Grant of sovereign immunity for noncommercial activities and consular relations;
7) Capacity to sign international agreements;
8) The duty to respect other nations; and
9) The obligation to abide by international law.

A state or sub-state’s internal governing rights may consist of:

1) Taxation;
2) Determining governing structures and political policies;
3) Providing for social welfare;
4) Regulating the judicial system;
5) Creating internal law; and
6) Managing state infrastructures.

The concept of earned sovereignty enables negotiation on each of these points. As an example, the intermediate phase entity may not have the capability to defend itself externally or have a grant of sovereign immunity, but it does have the legal right to govern itself, lay taxes and law, to be represented in international organizations, and to sign international agreements. With this in mind, the importance of using new concepts of sovereignty becomes apparent. Negotiations that would normally be shut down by the first mention of independence may now proceed as a negotiation for individual sovereign rights without the weight of the term "independence." Thus, the parties may discuss those external and internal rights that the new entity will possess as well as those that will not be granted to the new entity. In the end, the term independence is irrelevant. The importance is placed instead on the individual rights possessed by the new entity.

IV. ENFORCEABILITY/MONITORING

The key to any successful negotiation is the ability to enforce and monitor the implementation of the agreement. Earned sovereignty is unique in that it inherently entices compliance. Through the use of the optional elements, the state must comply with the agreement before it will gain further internal or external sovereign rights and responsibilities. Because of this concept’s nature, however, monitoring and enforcement play an important role. Regional or international monitoring groups, or a combination of the two, are necessary for the optional element of phased sovereignty in order to guarantee that both parties meet their stated agreements for the sovereign powers delegated in the next phase of sovereignty. Conditional sovereignty will require a monitoring agent who will determine whether the parties have met the specified conditions. Although the monitoring/enforcement body is not as involved for constrained sovereignty agreements, a body is needed to assure that the parent state is not denying the sub-state entity its guaranteed rights under the agreement.

Earned sovereignty naturally facilitates enforcement and monitoring by setting specific guidelines. The guidelines provide the monitoring group with a symbolic checklist for determination of the success or failure of each tenet of the agreement.

In many situations, the parties decide that objectives of a monitoring mechanism are best met when the monitors are international. In these cases, the monitoring mechanism might be the United Nations, a regional body such as the Organization of American States or the Organization for Security and Cooperation in Europe, an ad hoc group of nations, or combinations of the above. Papa New Guinea provides an example of this because the international Truce Monitoring Group and the presence of a United Nations Political Office for Bougainville augment the domestic mechanisms.
V. CONCLUSION

There are currently over thirty active civil wars in the world, the resolution of which generally results in the extermination or expulsion of the losing party. The resolution of these conflicts stops the constant cycle of violence. Thus, the changing face of international conflicts necessitates the exploration and development of evolving conflict resolution processes such as earned sovereignty. No longer do states fight wars until one-side surrenders. The new self-determination conflicts last for decades where neither side will give up because each side in the conflict has valid concerns and plenty of financial backing. While it is not always difficult to get the conflict parties to sit at the negotiating table, it is often hard to keep them there. The consideration of sovereign rights as individual negotiating points as well as the ability to consider and discuss the core and optional elements allows for flexibility in negotiation to combat this problem.
IMPACT OF SARBANES-OXLEY ON MULTIPLE LISTED CORPORATIONS: CONFLICTS IN COMPARATIVE CORPORATE LAWS AND POSSIBLE REMEDIES

Dr. Sabyasachi Ghoshray*

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I. INTRODUCTION

In the summer of 2002, the United States Congress adopted the Sarbanes-Oxley Act of 2002 as a response to the widely-publicized financial scandals involving the corporate giants Enron, WorldCom, Tyco and others. This sweeping legislation was designed to ensure the personal liability of corporate officers for the accuracy of financial disclosures relating to public companies. The Sarbanes-Oxley Act (Sox) applies to issuers of securities that are required

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to file reports under the U.S. Securities Exchange Act of 1934 (Exchange Act). Sox will also affect over a thousand foreign companies with share listings in the U.S., as failure to comply with the laws could lead to the de-listing of firms whose shares are traded there. To a large extent, companies are flying blind because neither the Securities and Exchange Commission nor the Public Company Accounting Oversight Board has issued final regulations in some of the sections. In trying to address many key issues surrounding the current crisis of confidence in the U.S. system of corporate governance and financial reporting, Sox has created quite a gray area in its interpretation, and the legal experts, auditors, and corporate executives are scurrying to find some conclusive guidance.

Against this backdrop, this paper examines the impact of Sox as it relates to foreign listed companies or multiple-listed non-U.S. companies, as a result of legislations proposed or passed in countries outside the U.S. We will focus on some of possible conflicts between the Act and comparative corporate governance regulations, and the challenges and opportunities arising for legal scholars in the U.S. and abroad as a result of the legislation. Although this study does not propose a complete exemption for foreign issuers from coverage of the proposed rule, and questions whether such an exemption would be consistent with the policies underlying the Sarbanes-Oxley Act. However, we must investigate the scope of either a complete or broader exemption from the requirements for foreign issuers.

Given the present scope of the Act in its proposed format, would the proposals conflict with local law or local stock exchange requirements? Are the problems that the proposals are intended to address dealt with in alternative ways in other jurisdictions? Would any foreign issuers not consider a listing solely because of these requirements? Would any foreign issuers that currently maintain a U.S. listing seek to de-list their securities because of these requirements? This paper attempts to address some these important issues of today.

A. Background Conflict with Foreign Corporations

To understand the impact of Sox on foreign company, we must fully recognize the scope of the Act as it relates to a non-U.S. company. Sox’s plethora of new reporting and corporate governance requirements are targeted to all reporting entities comprising of both U.S. companies and foreign private issuers filing registration statements to offer securities to the U.S. public as per the requirements of the Exchange Act. In this context, a foreign private issuer is defined in SEC Rule 3b-4, and generally includes any corporation or other organization in corporation or organized under the laws of any foreign country unless it meets the following two conditions:
More than 50% of its voting securities are directly or indirectly held of record by residents of the United States; and any one of the following applies:

- The majority of the executive officers or directors are United States citizens or residents,
- More than 50% of the assets of the issuer are located in the United States, or
- The business of the issuer is administered principally in the United States.

A foreign private issuer with 500 or more shareholders worldwide may not have made a public offering of its shares in the U.S. or listed in the U.S., but could have 300 or more shareholders in the U.S. as a result of private placements to U.S. residents or U.S. residents purchasing its shares in foreign markets. Such a company would nonetheless have to register its shares with the SEC and become a Reporting Issuer unless it takes advantage of the exemption by SEC Rule 12g3-2(b). Several hundred companies have taken advantage of this exemption, of which the SEC periodically publishes a list of exempt companies.

Although Sox does not spell out all of the stringent corporate governance measures the companies are grappling with, it manages to impose a wide range of compliance through mandated SEC and stock exchange regulations. Except for some relaxation on reporting frequency, the provisions of Sox as it stands today does not make major distinction between U.S. and foreign issuers of securities. U.S. companies file annual reports on Form 10-K, quarterly reports on Form 10-Q, and form 8-K reports to report certain specified events. Most foreign private issuers file annual reports with the SEC on Form 20-K, or in the case of larger Canadian companies, Form 40-K and do not file quarterly reports or Form 8-K reports (although some foreign companies voluntarily file on Forms 10-K, 10-Q, and 8-K, generally in order to provide a body of disclosure documents comparable to those of their U.S. business competitors). Since much of the information to be reported under Sox is required to be included in these filed reports, foreign private issuers generally are required to provide information annually, whereas U.S. companies (and foreign private issuers that voluntarily report on U.S. company forms) provide various types of information sooner or more frequently. Form 6-K reports, by which foreign private issuers furnish certain information to the SEC, are not quarterly or periodic reports are not "filed". Consequently, various requirements under Sox that apply to periodic or quarterly reports filed with the SEC do not apply to reports on Form 6-K.

Therefore, Sox is generally applicable to all companies required to file reports with the SEC under the 1934 Act ("reporting companies") or that have a registration statement on file with the SEC under the 1933 Act, in each case
regardless of size (collectively "public companies"). Some of the Sox provisions apply only to companies listed on a national securities exchange1 ("listed companies"), such as the New York Stock Exchange ("NYSE"), or the NASDAQ Stock Market ("NASDAQ"), but not to companies traded on the NASD OTC Bulletin Board or quoted in the Pink Sheets or the Yellow Sheets. Small business issuers that file reports on Form 10-QSB and Form 10-KSB are subject to Sox generally in the same ways as larger companies although some specifics vary (references herein to Forms 10-Q and 10-K include Forms 10-QSB and 10-KSB). Sox and the SEC’s rules there under are applicable in many, but not all, respects to (i) investment companies registered under the Investment Company Act of 1940 (the “1940 Act”) and (ii) private issuers domiciled outside of the United States (the “U.S.”; “foreign issuers”). The rules applicable to these entities differ in a number of respects from those applicable to other entities, but the differences are generally not discussed herein.

B. Accountant Registration with the Public Company Accounting Oversight Board

Section 101 of the Sarbanes-Oxley Act mandates the creation of the Public Company Accounting Oversight Board (PCAOB). The PCAOB is a private-sector, non-profit corporation, created by the Sarbanes-Oxley Act of 2002, to oversee the audits of public companies in order to protect the interests of investors and further the public interest in the preparation of informative, fair, and independent audit reports. The objective of this five-member board is to oversee the auditing of public companies. The PCAOB is expected to regulate public accounting firms that prepare audit reports for the companies that fall under the Exchange Act as defined earlier. The issue becomes thorny as according to the provisions of Sox, a foreign public accounting firm that prepare or furnish audit reports for an issuer and a U.S. public accounting firm is treated the same. This therefore, makes it illegal for a foreign accounting firm to participate in the preparation and issuance of audit report of an issuer without having been registered with the PCAOB. Not only does this impose restriction on activities of foreign accounting firms but also cause concern with respect to encroachment of PCAOB in their business practices, a theme we will explore in additional detail. Thus, among Sox’s plethora of stringent requirements, the ones that we recognize as stumbling blocks for foreign companies to overcome are:

- Registration requirement with the PCAOB duplicates regulatory boards in other major capital markets. Regulations related to PCAOB are also at odds with those regulatory entities.
Compels auditor independence by restricting listed activities, without developing equivalence in corporate governance activities in some of the major economies.

Sox's auditor rotation rules differ from the approach in other vital countries, and reasonable people could disagree about optimal details.

As the corporate governance and transparency requirement of Sox unfolds for the foreign issuer of securities, we find an evolving cascade of conflicts in comparative governance, contradictions in corporate laws in differing jurisdictions. In the following we present some specific examples as to how Sox has unleashed a reign of legal dilemma and provide some suggestions to overcome those conflicts.

II. LEGAL CONFLICTS WITH THE EUROPEAN UNION IN RELATION TO REGISTRATION WITH THE PCAOB

The Sarbanes-Oxley Act has given the PCAOB a wide latitude as the U.S. government tries to enforce corporate governance by forcing compliance. However, the statute forgot to take into account that there are well recognized limits on the outreach of U.S. law and non-U.S. law. Because according to the 3rd Restatement on Foreign Relations Law of the United States, one country’s law can only compel a person in another country to perform an Act “to the extent permitted by the law of his home jurisdiction”. As a result, we are confronted with several areas of conflict between the comparative corporate governance regulations, some of which we will identify below.

Mandated by a European Directive, there already exists an effective, equivalent registration requirement in all the 15 Member States for all EU auditors. Although the public oversight systems in which these registration requirements are embedded varies as per the different legal traditions of the Member States, but they are fully functional and provide adequate corporate governance guidance. The PCAOB proposals therefore add an unnecessary, expensive second layer of regulatory control for those EU Audit firms that will be subject to registration with the PCAOB. Additionally, Sox’s mandate on EU audit firms to register with PCAOB in order to provide audit services to EU and other companies could cause them to infringe on EU and other European national laws. This is an area that needs to be further developed in order to avoid future international relations quagmire. An effective way to circumvent this issue would be to mutually recognize each other’s corporate governance regulations, and work towards a framework of equivalence, which can gradually be ratified by both jurisdictions. Anything short of this process would develop an ambience of retaliatory measures so often repeated in the international arena. For example, the EU might impose legislations whereby U.S audit firms would
have to register with all the Member States and be subject to oversight mechanisms by an EU equivalent of PCAOB.

Additionally, Sarbanes-Oxley Act of 2002 was crafted as a response to multi-billion dollar financial loss. Naturally, the overarching reach of the Act brings with it a significant number of new reporting and corporate governance requirements, that are both cumbersome and costly. The PCAOB registration process is no exception. Because of the additional cost and time involved in dealing with an added layer of governance, the smaller EU firms might very well decide not to register with the PCAOB, and thus lose business. Regardless, the chain of events would put the European firms in a competitive disadvantage with respect to their U.S. counterparts, which might eventually have a negative impact on financial markets.

Therefore, the SEC while finalizing the PCAOB rules must take into consideration these apparent conflicts with other jurisdictions. Corporate governance by compliance in this era of globalization should also not forget the accepted principles of international law. Additionally, the sweeping reforms in U.S. corporate governance in the form of Sox can be seen as a harbinger of things to come in the global arena. As we discuss this, the EU policy making board is hard at work implementing corporate governance changes, which the SEC must recognize and amend sections of Sox as it sees fit. After all, harmonization is the hallmark of globalization, and for all the economies to work in unison we must respect each other’s laws and adjust ours accordingly. Therefore, the best approach to deal with this situation is to grant a moratorium for all the EU audit firms requiring registering with the PCAOB. This will allow the EU corporate governance reform process to go through and pave the way to establish a mutually accepted approach based on equivalence principle mentioned earlier.

Finally, this sentiment was expressed in a memorandum written to the Chairman of the U.S. Securities and Exchange Commission concerning the Public Company Accounting Oversight Board’s (PCAOB) forthcoming rules on foreign auditor registration and oversight. The memorandum contends that the European Union supports the broad aims of the Sarbanes-Oxley Act, but expresses their concern about the draft PCAOB rules, discussed in Washington DC at the March 31, 2002. The consensus among the European Union is that the contents of the PCAOB draft rules and the registration requirements they contain will cause major difficulties for European audit firms.

III. AUDIT COMMITTEE INDEPENDENCE AND RESPONSIBILITIES

Section 301 of Sox imposes on SEC to direct the U.S. national securities exchanges and the NASD to prohibit the listing of any issuer’s security if that issuer does not have an Audit Committee comprised entirely of independent
Furthermore, the new listing standards must make explicit that it is the audit committee’s responsibility to appoint, compensate and oversee the work of the external auditor and that the audit committee is empowered to engage independent advisors. Let us focus on this issue of auditor’s independence that has come under the microscope as having conflicts with comparative corporate government legislations in other parts of the World.

A. Conflict with Russian Law under Section 301 of the Sarbanes-Oxley Act of 2002

Sarbanes-Oxley Act prohibits the listing of securities of an issuer if the issuer does not meet the following criteria: (i) the issuer’s audit committee members are “independent” as defined by the statute as being unaffiliated with the issuer and not receiving any compensatory fee from the issuer other than for service as a director; (ii) the issuer’s audit committee has established procedures for addressing complaints relating to audit issues and permitting employees to anonymously submit concerns regarding accounting or auditing matters; (iii) the issuer’s audit committee is responsible for the appointment, compensation and oversight of auditors’ and (iv) the issuer’s audit committee has the authority to engage advisors and determine compensation for auditors and advisors. The requirement that all members of the audit committee also serve on the board of directors (see Section 10A (m)(3)(A) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”)), directly contradicts Section 85.6 of the Russian law governing joint stock companies (the “JSC Law”), which prohibits members of the audit committee from serving on the board of directors as it states: “Members of a company’s auditing commission/internal auditor may not simultaneously be members of the company’s board of directors/supervisory board or hold other positions in the company’s governing bodies.” In this context, a joint stock company is similar to an American corporation in many respects. Under current Russian law, all Russian companies whose shares are publicly traded are open joint stock companies. Such companies generally use the abbreviation “OJSC” or sometimes simply “JSC” to indicate their corporate form. Other designations arising under earlier legislation governing similar entities are also still seen, including “OAO” and “AO”.

Another area of conflict comes in with the interpretation of audit committee as per the intent of Sox. Section 205 of Sox defines the audit committee as being “established by and amongst the board of directors of an issuer” and further specifies that, in the absence of such a committee, the term refers to the “board of directors”. However, under the JSC Law, the members of the audit committee are elected by the company’s shareholders, not by the board of directors. The term Russian for “auditing commission” is revizionnaya komissiya, which could be translated as “inspection commission” as per the
Russian Federation Law on Joint Stock Companies, Section 85.6 (law N. 208-FZ of 26 December 1995, as amended) (the “JSC Law”) our discussion herein assumes that, for purposes of compliance with the Act, Russian companies will treat the *revizionnaya komissiya* as the equivalent of an audit committee and that it is the activities of this body which must be brought into harmony with the Act. This has already caused confusion when compared with the provisions of Section 301. Given the fact that, the consequences of non-compliance with the provisions of various sections of Sox are severe, we are at a crossroads as how to deal with situations under Russian law referred here (Section 48.1, pt. 10 and Section 85.1 of the JSC Law give further explanation). This then again calls for revising parts of Section 301, as anything short of that will Russian issuers already listed in the U.S. to lose their listings. Another consequence will be flow of capital away from the already besieged U.S. capital markets. Under applicable Russian law, a Russian company now must be listed on a Russian domestic stock exchange before it can receive permission from the Federal Commission on the Securities Market of Russia for an overseas listing.

It is to be further recognized that the spectacular financial debacles of U.S. corporate giants has caused widespread recognition of enhanced governance and transparency in Russian corporate sector. This prompted the Russian Federal Commission on the Securities Market to adopt a model Code of Corporate Governance. Under its broad provision, the major Russian stock exchanges will be required under penalty of delisting their listed companies to adopt their own codes of governance, with the implied expectation that they track the model as closely as possible in the U.S. Finally, given the fact that Russian corporate governance and transparency is still in its infancy compared to that of U.S., attention must be given as to the evolution of this concept in Russia. In the end, it is incumbent upon the SEC to modify its requirements to accommodate some of the conflicts between Russian law and Sox so as to prevent capital flow away from the U.S.

**B. The Conflict with German Corporate Law**

Like their European counterparts, German law presents formidable challenge for the German companies to be fully compliant with the broader provisions of Sox. The asymmetry between Sox and German commercial code makes it virtually impossible to be compliant in both jurisdictions. For example, Section 301 of Sox stipulates that a company’s Audit Committee be directly responsible for the appointment, compensation, and oversight of the company’s auditor. On the contrary, German law imposes on the shareholders to appoint the auditor at their annual general meeting. How can we then prevent a German company issuing shares to U.S. public from being fined by the regulatory authorities in Germany or, even from being delisted from Dax?
1. Dual Board System and Audit Committee Independence

To understand why it is difficult to implement Sox directives on audit committee independence, we take a closer look at Germany’s two-tier board system. In the German two-tier system of corporate governance, the Management Board is responsible for running the company and a Supervisory Board that is responsible for the appointment and oversight of the Management Board. German law requires companies with more than two thousand employees to have at least six staff representatives and six shareholder representatives on the Supervisory Board. Given that Audit Committee members are typically drawn from the Supervisory Board, the Audit Committee definitely lacks the independence called for in Sarbanes-Oxley.

Thus, the governance in the German company is divided between the Vorstand (a management board comprising the corporate officers) and the Aufsichtsrat (a supervisory board comprising inside directors, outside directors, and employee and labor union representatives). Since Sox requires a completely independent audit committee, difficulty arises as to how to account for that independence. If the Vorstand is considered to be the board of directors for the purpose of U.S. law, the Aufsichtsrat might come close to achieving independence requirements of the audit committee. However, if German Law’s requirement of Aufsichtsrat’s employee representation is to be complied with, it is probably not possible to exclude employee representation entirely from any Aufsichtsrat audit committee. Therefore, without making any adjustment to the SEC requirements, it is virtually impossible to have full compliance in both jurisdictions.

2. Duty Assignments and the Whistle-blowing Process

Sarbanes-Oxley requires the audit committee to appoint auditors, determine their compensation, oversee their activities, and decide what non-audit services they may perform. The German stock corporation law (Aktiengesetz) assigns the appointment responsibility directly to the shareholders, although the Aufsichtsrat selects the auditors to propose to the shareholders and negotiates the terms of engagement. While the Aufsichtsrat could exercise some of the auditor oversight functions contemplated in Sarbanes-Oxley, the German Commercial Code requires the Vorstand to review and comment on the audit report. This presents a legal dilemma under the Aktiengesetz whether the Aufsichtsrat can undertake the responsibility of negotiating non-audit services, or whether this function must legally go to the Vorstand.

A significant reform envisioned in Sarbanes-Oxley is the whistle-blowing protection accorded to employees. The U.S. requirement for direct audit-committee supervision of the whistle-blowing process comes in conflict with the
German law. Because, German law is allows the audit committee to review auditor interim reports and statements of critical accounting prior to the review by the Vorstand. There is no requirement of an audit committee to supervise the whistle-blowing process directly. Again this conflict can be resolved if SEC allows the Aufsichtsrat to act as a general supervisory authority for U.S. law purposes. There are other aspects of German practice and U.S. law that appear incompatible, or have not been given enough time to determine if achieving compliance under both jurisdictions is feasible. One thing is thus for certain, that SEC must provide more time to German issuers to come up with structural requirements that allow them to be compliant in their home jurisdiction as well.

IV. CONCLUDING REMARKS

Sarbanes-Oxley Act was developed, keeping in mind, among other things, the theme of globalization in the capital markets. Although globalization is continuously striving towards achieving convergence in corporate governance across all economies and capital markets, a fundamental lesson in history is amiss here. It is a given fact that all corporate philosophies are borne out of historic domestic traditions, which in turn define the legal governance structure. Therefore, whenever, a newer norm is to be instituted the historical context and corporate norms provide organic resistance to the changes. Sox’s attempt to export unadulterated U.S. corporate philosophies not only evokes national sentiments but also provokes widespread international criticism. The legal conflicts and contradictory governance issues suggest that Sox fails to harmonize corporate norms by not balancing differing jurisdictional requirements.

Problem lays in the fact that, legislative intent and resulting corporate requirements are distinctly Anglo-American. This is not just a simple matter of conflict of laws, as law comes from distinct philosophies and cultures. As we find, in some cases there are direct conflicts, such as with German commercial codes, which are embedded in very different cultural norms. Even when Sox is addressing inadequacies in some corporate governance, we find them very difficult in its applicability, such as, in case of Russia. These two provides two extreme examples, as the conflicts with other jurisdictions fall somewhere in between.

The hastily crafted provisions of Sarbanes-Oxley Act are perceived as overwhelmingly overbearing for home corporations. Because Sox is enacted with only one agenda in mind, that of maximizing shareholder profits, it comes in as out of place with some corporate governance regulations. For example, in Japan, the goal is expanding power, size and market share, goals stringent provisions of Sox may not advance. In Germany, the focus is survival, and as a result, we find the statutes of Sox probably are in sharp contradictions with German laws. We must keep in mind, that overemphasis on audit and control
might stymie the goal of expansion of capital markets. And, that is perhaps what the foreign corporations are worried about.

The Sarbanes-Oxley Act of 2002 applies not only to American issuers but also to foreign issuers subject to SEC reporting requirements under the 1934 Act. However, as we have shown in the preceding paragraphs, for many non-U.S. corporations, the fit is either superfluous or conflicting. In response to embarrassing breakdown of corporate governance norms driven by unbridled executive greed, the government hastily crafted a legislation more to save face than with much forethought. As a result, this has become nothing more than a naked exporting of U.S. corporate norms by fiat, threatening other nations bearing competing conceptions of corporate performance and ways to manage, measure, and supervise it.

Finally, globalization is nurtured via increasing interdependence of national economies. It is bolstered by cross-border financing and inter-flow of capital markets. Its dominant theme is a move toward open economy and political liberalism, which must be brought forth gradually. Sox’s goal of exporting unadulterated U.S. corporate norms might cause backlash against this process. To prevent this, SEC must recognize comparative corporate governance regulation in other countries and work toward modification of Sox based on the principle of equivalence and reciprocity.
Webster’s dictionary defines “diverge” as “to go in different directions from a common point or from each other; as opposed to converge.” The noun “divergence” is defined as the act or state of diverging or branching off; a going farther apart; deviation or departure from a norm; difference.” The nature of the divergence between the United States and European Union (EU) has been described variously. In my own writings, I have observed, “there tends to be little about which the United States and Europe agree upon these days.” Others have framed the predicament more fancifully. For example, Washington Post correspondent David Ignatius has likened the overall state of relations between the United States and Europe to “a marriage that has gotten out of sync,” warning that if the divergence widens, “both sides will soon find themselves on very unstable ground.”

Robert Kagan draws an analogy with romance gone sour in his book Of Paradise and Power: America and Europe in the New World Order. “The danger,” he writes, “is that the United States and Europe could become positively estranged,” meaning shrill and indifferent toward one another. (Emphasis added.) Thomas L. Friedman of The New York Times has gone so far as to assert that the U.S. is virtually at war with France, declaring, “France is not just our annoying ally. It is not just our jealous rival. France is becoming our enemy.” A transatlantic public opinion poll published in the September 4, 2003 edition of The Washington Post confirms that, at the very least, Americans and Europeans have different social and cultural values.

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More so than in the past? Probably. Why? There are any number of explanations. *The Economist*, for example, cites demographic trends on one side of the Atlantic; political developments on the other. In its June 9, 2001, edition, *Economist* editors wrote:

The United States is a very different place from Europe, and the differences will grow. Demographically, Americans are increasingly Asian and Latino, less inclined when looking “home” to turn to Europe. Their affection for guns, religion, the death penalty and genetically modified crops seems strange to Europeans. Just as baffling to Americans is Europeans’ toleration of high taxes, fussy regulation and indulgent state help for idlers and unfortunates. While Americans remain individualistic citizens of a nation-state at the height of its power, Europeans are absorbed in an unprecedented enterprise of union-building. Good luck to them, Americans may say. Let them sort out their Balkan backyard.

Broadly speaking, what is it that Americans and Europeans tend to misunderstand or not like about each other? From the American perspective, rightly or wrongly, critics tend to view the EU as, among other things, unappreciative of the American largesse that helped rebuild Europe after World War II; socialistic in orientation, at the expense of individualism and personal freedom; disdainfully weak militarily, morally irresponsible, and unwilling to bear a fair share of the collective defense burden; and a potential competitor on the world stage, especially on the economic front.

The concern over Europe as a potential competitor is somewhat ironic since Americans tend to underestimate the extent to which Europe has already achieved superpower status politically and economically. On the one hand, as Joseph S. Nye, Jr. points out in his book *The Paradox of American Power: Why the World’s Only Superpower Can’t Go It Alone*, the United States is more powerful than any nation in recent history and plays the central role in globalization. On the other hand, as Nye makes clear, the EU is the closest thing to an equal of the U.S. and thus a potential challenger. Europe’s military capability is comparatively minuscule, but the economy of the EU is roughly equal to that of the United States. Moreover the EU’s population is larger, and the EU’s share of world exports considerably exceeds that of the United States.

In addition, the EU is simultaneously widening and deepening. A 10-nation expansion to 25 total members is scheduled for 2004. Cyprus and Malta will join the EU along with eastern European states—Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia, and Lithuania—that were part of the former Soviet bloc. Meanwhile, European leaders are drafting and debating a new constitution that will modernize and cement their political union. Bolder ambitions for a broadened world role will likely ensue.
In fact, many Europeans have already developed a strong desire to compete with the U.S. at the superpower level, or at least diffuse or counter-balance American military supremacy. At this point in their historical development, Europeans tend to stress the limits of military power, emphasizing instead the more enduring influence of what Nye refers to as “soft” power. Exercising soft power means co-opting rather than coercing others, by setting an example politically, morally, and economically that they will choose to emulate. In this regard, Europeans do not believe that American behavior sets a good example for the rest of the world to follow.

Like many who live outside the United States, Europeans find what has been called American “exceptionalism” dubious and misguided. Francis Fukuyama, professor of international political economy at the Johns Hopkins University School of Advanced International Studies, described the American sense of exceptionalism in a September 11, 2002, op ed piece for *The Washington Post*. He wrote:

Americans believe in the special legitimacy of their democratic institutions and indeed believe that they are the embodiment of universal values that have significance for all mankind. This leads to an idealistic involvement in world affairs, but also a tendency for Americans to confuse their national interests with universal ones.

Europeans equate American exceptionalism with imperialism and neocolonialism because, in their view, it leads the U.S. to behave the way that empires do. The U.S. is seen as arrogating to itself an ultimate right to act unilaterally in regard to essential matters, to go its own way and make its own rules in the world. Or, as Dimitri K. Simes, president of the Nixon Center in Washington, D.C., explained in the November/December 2003 issue of *Foreign Affairs*, “empires generally expect neighboring states and dependencies to accept their power and accommodate to it. This often contributes to a sense that the imperial power itself need not play by the same rules as ordinary states and that it has unique responsibilities and rights.”

Europeans also fear the erosion of their culture and traditions—American “cultural imperialism”—as an unwelcome consequence of globalization. As for their political orientation, Europeans in fact seem to be more socialistic, and secular, than Americans, especially at a time when the U.S. seems to be experiencing, especially in the south, resurgent Christian fundamentalism.

European resentment of the U.S. often takes the form of personal animosity toward President Bush. Take, for example, Ignatius’s report on demonstrations against the President’s visit to London in the *Washington Post*’s November 21, 2003 edition. Ignatius wrote that his European critics “see in Bush all the things they don’t like about America—arrogance, belligerence, boorishness, self-
absorption.” The article quotes one 23-year-old British protestor’s description of Bush as “ignorant, stupid, war-happy and disgraceful,” calling him “just as bad as dictators in other countries.” Later in the piece, a London professor asks rhetorically, “how does one discuss global politics with the rancher from Texas?” The professor declares, “frankly, he [Bush] doesn’t care much about what the rest of the world thinks.”

European disagreements with America encompass a wide gamut, from world governance to human rights and the environment. Certain policies strike Europeans as especially egregious. These include the way in which the U.S. has allegedly minimized the role of the U.N. and the collective security framework; American opposition to the International Criminal Court (ICC); U.S. abrogation of the Nuclear Non-proliferation Treaty (NPT) in favor of space-based missile defense; and U.S. rejection of the Kyoto protocol on global warming.

Europeans are most notoriously at odds with the U.S. over the invasion of Iraq, objecting to the so-called Bush doctrine, which emphasizes preventive war and American unilateralism in the wake of the September 11, 2001 terrorist attacks. From their perspective, the United States was all too willing to bypass the U.N. on Iraq, and they are suspicious of American motives for the Iraq invasion.

The President’s domestic critics share similar sentiments about the Bush doctrine. For example, in the November 1, 2003 edition of The Economist, Harold Hongju Koh, professor of international law at Yale Law School and former secretary of state for human rights in the Clinton administration, tries to mollify America’s overseas critics by distinguishing what Koh calls “American national culture” from the policies of the current administration. According to Koh, “each prong of the Bush doctrine places America in the position of promoting double standards, one for itself, and another for the rest of the world.” He writes:

People living outside America sometimes suggest that the reason [for the Bush doctrine] is rooted in the American national culture of unilateralism, parochialism and an obsession with power. With respect, let me urge you to see it differently. The Bush doctrine, I believe, is less a broad manifestation of American national culture than of shortsighted decisions made by a particularly extreme American administration.

Meanwhile, the United States and European Union are locked in an array of WTO disputes that my scholarship has characterized collectively as an escalating trade war. These include, among other things, disagreements over tax breaks given to American foreign sales corporations (FSCs); the European import ban on genetically modified, or biotech, crops, referred to derisively in
Europe as “Frankenfoods”; and government subsidies to Boeing to finance the development of a new jet that will compete with Europe’s Airbus. A long-running dispute over the European banana import regime has apparently been resolved. So has a bitter controversy over U.S. retaliatory tariffs on imported steel, which the Bush administration has rescinded.

Nevertheless, ongoing friction over trade has led at least one observer to express concern for the long-term health of the multilateral trading system, the regime put in place under the GATT rubric after World War II that has since evolved into the WTO. According to Bernard K. Gordon, professor of political science emeritus at the University of New Hampshire, the U.S. has embraced a policy of economic “regionalism” that emphasizes bilateral or regional trade pacts with smaller states, like the proposed Free Trade Area of the Americas (FTAA), over comprehensive trade reform or liberalization in the global context. In Gordon’s view, regionalism poses a long-term threat to the WTO’s relevance and viability.

To Gordon’s consternation, however, U.S. trade representative Robert Zoellick is an ardent regionalist. Apparently, Zoellick regards regional alternatives to the WTO as bargaining chips the U.S. can use to force concessions from the Europeans in upcoming WTO talks. In an article for the July/August 2003 edition of Foreign Affairs, Gordon quotes a letter Zoellick sent him in late 2001, outlining the American strategy. Zoellick wrote:

I believe a strategy of trade liberalization on multiple fronts—globally, regionally, and bilaterally—enhances our leverage and best promotes open markets. As Europeans have pointed out to me, it took the completion of NAFTA [North American Free Trade Agreement] and the first APEC [Asia-Pacific Economic Cooperation] Summit in 1993-94 to persuade the EU to close out the Uruguay Round. I favor a “competition in liberalization” with the U.S. at the center of the network.

Gordon, for his part, fears that a rising tide of Asian regionalism will propel China into the role of a global trade hegemon. This would not only diminish American stature and influence in Asia, which is crucial to American interests, but globally, as well. In other words, Gordon’s worry is that under a regionalist regime, China, not the United States, will become the center of the network to which Zoellick refers.

Others have suggested that divergence between the United States and Europe is less consequential than on the surface it may seem. As my fellow panelist Peter K. J. Berz, first secretary for trade, Washington, D.C. delegation of the European Commission, will point out, the U.S. and EU are engaged together in commerce worth some $2 billion a day, roughly three-quarters of a
trillion dollars annually. The total, combined amount in dispute between the two sides at the WTO represents a relatively miniscule fraction of this amount. Moreover, mechanisms for consultation, information exchange, and joint cooperation have been institutionalized at all levels across the entire spectrum of American-European interests and relations. The WTO dispute settlement process itself offers a constructive forum for airing and resolving misunderstandings or grievances. Nations used to go to war over their trade disputes. These days, they settle them peacefully at the WTO.

To the extent that American-European relations do need to be enhanced or repaired, the place to start might be with the following realizations. First, there is convergence between the U.S. and EU in regard to key issues, like the economic development of the poorer countries. The U.S. wants aid recipient nations to commit to the rule of law, economic reform, and the eradication of poverty, as well as equal rights for women. Similarly, the EU has declared its goal of making "aid and preferential trade arrangements with the [developing] states dependent on their democratization, including equality for women and improved management."

Second, as Nye points out, despite their differences, the United States and Europe are the parts of the world closest to each other in basic values, which are rooted in the Enlightenment. Nye also points out that nowhere on the planet do the United States and Europe threaten each other's vital or important interests.

Lastly, the United States and Europe need each other in a world where terrorists and their state sponsors seek to obtain or develop weapons of mass destruction. As *The Economist* has observed:

> [The United States and Europe] are, together, not only the main engine of the world's economy but the main custodian of its liberal values. They have strong interests in common, and each has additional interests in persuading the other to be at least partly involved in less obvious areas of concern: America needs European help in Asia, Europe needs American help almost everywhere. Why? Because neither power, not even the United States, is usually strong enough, on its own, to carry the day. Moreover, experience—remember Bosnia—shows that one without the other makes little headway, whereas the two together can be effective.

Ignatius has concluded, "solutions exist, or can be found, for all the problems that beset the allies, so long as they prepared to work to settle their differences."

That work should start with each side coming to grips with the other's anxieties. Americans must recognize the EU, for it is one of the truly remarkable accomplishments in human history. Because of the EU, the leading European nations have maintained peace and achieved economic prosperity
after two world wars that nearly destroyed their continent and civilization during the first half of the 20th century. The process and beneficial results have transformed the European thinking. As Robert Kagan explains in *Of Paradise and Power*:

> Europeans today are not ambitious for power, and certainly not for military power. Europeans over the past half century have developed a genuinely different perspective on the role of power in international relations, a perspective that springs directly from their unique historical experience since the end of World War II. They have rejected the power politics that brought them such misery over the past century and more. This is a perspective on power that Americans do not and cannot share, inasmuch as the formative historical experiences on their side of the Atlantic have not been the same.

He goes on, “within the confines of Europe, the age-old laws of international relations have been repealed. Europeans have pursued their new order, freed from laws and even the mentality of power politics. Europeans have stepped out of the Hobbesian world of anarchy into the Kantian world of perpetual peace.” In other words, what Americans might regard as Europe’s unwillingness to share the burdens of maintaining order and democracy in a troubled world is in fact what Europeans see as their mission to spread peace and the means by which they realized it. American bellicosity and unilateralism threaten this sense of mission. The United States, by contrast, remains “stuck in history,” as Kagan sees it, with American strategic thought dominated by what he calls the “lesson of Munich,” the inescapable conclusion that villainy and aggression must be preempted forcefully.

The Europeans should respond with greater sensitivity to the heroic irony of America’s predicament in the world, and with more appreciation. After all, as Kagan writes, “the United States has played the critical role in bringing Europe into [its] Kantian paradise, and still plays a key role in making that paradise possible.” The irony for the U.S. is that it cannot, as Kagan puts it, “enter the paradise itself.” Instead, he asserts, the United States, “mans the walls but cannot walk through the gate.” He concludes, “the United States, with all its vast power, remains stuck in history, left to deal with the Saddams and the ayatollahs, the Kim Jong I I s and the Jiang Zemin s, leaving most of the benefits to others.”

My conclusion is that relations between the United States and European Union would be enhanced if each side accepted what the other has become, and the role each has played in the other’s destiny.
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I. INTRODUCTION

I would like to begin by discussing several of the most crucial trade disputes confronting the United States and the European Union. I will then look at several factors that continue to link the United States and the EU from a trade perspective. Finally, I will address the focus of this panel: are these trade disputes symptomatic of a broader, overall divergence of U.S. and European interests and perspectives?

II. SOURCES OF FRICTION—SELECTED WTO DISPUTES

The United States and the European Union are currently facing an array of complex, high profile trade disputes. This is not surprising, because these entities make up the world’s single largest and most important bilateral trade relationship. The flow of goods, services and investment between the two totals

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more than US $1 billion every day. EU imports and exports of goods account for about 20% and 25%, respectively, of U.S. trade. The EU comprises about 40% of all U.S. trade in services, and the two entities account for about 50% of each other’s foreign direct investment.1

It comes as no surprise, then, that this relationship has given rise to trade disputes. These disputes, like the trade from which they arise, are large and complex. Several of these disputes have reached—or are soon to reach—a critical point.

A. Foreign Sales Corporations

One of the largest and most intractable disputes of the last few years has been the United States’ tax treatment of Foreign Sales Corporations (FSC). In this dispute, the EC had challenged a provision of the U.S. Internal Revenue Code under which these FSCs were provided tax exemptions for foreign trade income. The EC challenged the exemptions as prohibited export subsidies. A WTO Panel and Appellate Body agreed, in 1999 and 2000, respectively.2

In response, the United States repealed the FSC and passed the Extraterritorial Income Exclusion Act (ETI) in late 2000. The EC challenged this legislation as well, and again, both a WTO panel and the Appellate Body found that the ETI Act violated the United States’ international obligations. The EU had already requested authorization from the Dispute Settlement Body to suspend trade concessions in the amount of $4 billion per year.

Since then, the United States has struggled to implement legislation that would conform U.S. law to the WTO ruling. Competing proposals from the chairs of the relevant House and Senate committees are moving forward as we speak.

House Ways and Means Committee Chairman Thomas has offered legislation that would repeal FSC and ETI and replace those programs with two corporate tax cuts: one, a 3 percent tax rate cut to all U.S. corporations over six years, and two, a tax rate reduction of small and medium-sized businesses.

The EU, understandably, is pressing for enactment of corrective legislation. In particular, the EU has called for repeal of FSC/ETI by the end of this year. Earlier this month, the European Commission began the procedure of developing legislation allowing sanctions that would automatically take effect if repeal does not occur by yearend.


Commissioner Lamy has also commented directly on the pending FSC legislation, making two particular objections. First, the EU argues that the three-year transition period included in the legislation is far too long, since the United States has already had three years to make the necessary changes. Second, the EU objects to a “grandfather” provision that would maintain existing FSC benefits previously established under long-term contracts.

Recently, Commissioner Lamy wrote several key members of House Ways and Means, and included the following language, which I think is enlightening:

“It would send a very strong signal of transatlantic co-operation to successfully conclude this complex, sensitive and long-running dispute without resorting to trade sanctions—sanctions which none of us want.”

B. Steel Safeguards Measures

A second hot topic that rivals FSC in terms of size, complexity and political intrigue is the steel safeguards proceeding. This was the largest and most politically charged safeguards action ever taken, and this action has been condemned not only by the EU but also by most of our other trading partners as well. As we speak, the Bush Administration is deciding whether to keep the safeguard measures in place, modify them, or eliminate them altogether.

President Bush, who carried several critical steel-producing states in the 2000 election, initiated the 201 investigation, along with a call for global negotiations on steel subsidies and overcapacity. The goal was to “solve the steel problem once and for all.”

After one of the largest investigations in its history, the International Trade Commission made affirmative or divided findings on 16 out of 33 steel products, including most of the largest product categories. In March 2002, the President imposed tariffs on 14 of these products, including 30% tariffs on the largest product groups. The President excluded our free-trade partners, including the NAFTA nations, and 100 developing countries.

The brunt of the tariffs, in large measure, fell on the European Union and Japan. The EU wasted no time in reacting. In June, it approved a retaliation list totaling 2.4 billion euros against various U.S. industries, and began threatening

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4. The author represents Nucor Corp. and the U.S. manufacturers of steel bars and other long steel products.
to retaliate immediately unless the United States made substantial changes to the tariffs. The EU also commenced appeals at the WTO. During this time, steel prices both in the United States and abroad rose very quickly—by about $100 per ton.

The United States then began a lengthy process of excluding additional steel products from the remedy. Since March 2002, more than 1000 specific products have now been excluded. While the exclusion process was lengthy and painful for everyone involved, it did have an effect on the EU—it softened the impact of the tariffs enough that the EU agreed to forestall its immediate retaliation. This didn’t matter to the U.S. steel industry at all, which simply complained that their remedy had been weakened. (Steel prices did reverse course and start falling, probably due to a combination of causes.) But the fact that a “trade war” was averted did matter a great deal to both the United States and the EU, and to many other industries that might have been swept up in the retaliation.

A WTO panel has already struck down the U.S. steel remedies as contrary to the Agreement on Safeguards and the GATT. The determination is more than 900 pages in length. The panel found multiple flaws with the U.S. measures, for each of the different products involved.

The United States appealed to the WTO Appellate Body. The general consensus is that the United States will again lose. The decision will be completed on or before November 10, and adopted by the Dispute Settlement Body 30 days after that. And the European Union has adopted a regulation that would impose retaliation 5 days after the Appellate Body process is completed.

Even this is hotly disputed. The EU argues that Article 8 of the Safeguards Agreement gives it this right to “rebalance” its WTO concessions immediately. The United States argues that normal dispute settlement procedures should apply, which would give it a reasonable period of time—up to 15 months—to change its laws or modify its earlier decision. All of this will come to a head in the coming weeks.

Finally, the President has discretion to modify, reduce, or eliminate the tariff program. In September, the President received a “midterm review” report on the 201 measures from the International Trade Commission, which analyzed both how the domestic steel industry has used this period of relief, and how steel consumers—and the U.S. economy—have been affected. The Administration is reviewing this midterm report but it has not yet given any indication as to how it might rule.

C. Beef Hormone Dispute

The EU has also suffered its share of “losses” at the World Trade Organization, not to mention difficulty in the implementation of those rulings. One of
the best-known examples of this is the EU beef hormone dispute with the United States and Canada.

The dispute began when the EU banned the use of six growth-producing hormones often fed to cattle in the United States and Canada. In 1998, the WTO Appellate Body found that the EU’s ban was not based on a risk assessment, as required by the WTO Agreement on Sanitary and Phytosanitary Measures (“SPS”). In particular, the scientific material used by the EU to justify the ban was too general in nature, because it did not specifically evaluate the risks arising from hormone residues in these meat products. After the WTO ruling, the United States and Canada imposed sanctions of about $125 million.

On October 15, the EU announced that it had complied with the WTO’s ruling, by reviewing available scientific evidence and approving a new EU directive on the subject. The EU called this new data conclusive scientific evidence proving the risks and dangers of the hormones, and immediately asked the United States and Canada to lift their sanctions.

The United States has not formally responded, but informally, at least one U.S. official said he was “baffled” by the EU’s request. In the United States’ view, the WTO struck down the EU’s ban because it had never conducted a thorough assessment of risk to humans and animals from the hormones. And, as far as the United States is concerned, there has not been any new risk assessment from the EU. Senator Grassley, chairman of the Committee on Finance, also said, "I don't see anything new here.”

D. Biotech Products (Genetically Modified Organisms)

A similar dispute, one involving “biotech products” (also known as “genetically modified organisms,” or GMOs) has been brewing for more than five years, but is just now moving forward at the WTO.

Since 1998, the EU has applied a de facto moratorium on the approval of products of agricultural biotechnology—that is, modified corn, soybeans, tomatoes, etc. The EU has suspended consideration of applications for approval of such products, or the granting of such approvals. According to the United States, this has had the effect of restricting EU imports of US agricultural and food products, in violation of the GATT Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT).

The United States argues that it wants a scientific, rules-based process for how these genetically modified foods are assessed. The EU, on the other hand, maintains that it has recently set up regulations to do so. This summer, for example, the European Parliament approved new legislation setting labeling and tracing requirements for food or feed made with GMOs. These new laws could be approved imminently.

The US and EU avoided taking this genetically modified food fight to the WTO for years. However, the United States finally decided that the dispute should be pursued, and has requested the formation of a panel. Some claim that this is a form of U.S. retaliation, in response to the many recent US losses at the WTO, on the Steel, FSC, and other issues. Others see it as the U.S. Government simply caving in to the demands of big agricultural firms in the United States, which want an opportunity to sell these foods and feed in the EU.

E. Other Disputes

Lest there be any doubt, the list of difficult trade issues between the United States and the European Union goes on and on, including: geographic indications, the WTO “Singapore” issues (trade facilitation, investment, competition policy, and transparency in government procurement); the Byrd Amendment (which pays collected U.S. antidumping duties back to the domestic industry); the 1916 Antidumping Act (a U.S. antidumping statute with antitrust-style remedies of damages rather than antidumping duties); and the OECD Steel subsidy negotiations.

These cases and disputes have proven difficult to resolve, for a variety of reasons:

- the stakes are very high (billions of dollars involved);
- there are factors other than mere trade issues involved (political, cultural);
- the United States and the EU have very different regulatory and political systems, which complicates the ability to change our laws after a WTO decision; and
- WTO implementation is not a straightforward process. The bigger the case, the more it becomes a protracted negotiation, rather than an implementation.

III. PROSPECTS FOR RESOLUTION

With all of these storm clouds looming on the horizon—and some even directly overhead—are there reasons for optimism? Yes, absolutely.

First, the art of compromise remains. The United States and the EU understand the importance of this trade relationship, and they will preserve it if
at all possible. Consider the ongoing FSC dispute, where $4 billion in retaliatory tariffs hang in the balance—what Ambassador Zoellick has likened to a “nuclear bomb” in the world trade system. Again, the rhetoric has been harsh. But both sides appreciate the gravity of the problem. And, according to an article earlier this week in the Wall St. Journal, the EU is now considering how it could impose these sanctions gradually, rather than all at once. This approach, according to the Journal, “indicates how much the EU wants to avoid a full-scale trade crisis with Washington.”

The historical evidence is mixed. Several major trade disputes have been resolved successfully: wheat gluten, bananas, and others. But the process often takes a great deal of time. Others, such as FSC, the Byrd Amendment, and the 1916 Act, are still unresolved, years after the original WTO ruling. My colleague, Hunter Clark, has written extensively about the bananas dispute, and he calls that outcome “a small but good and significant exception to the overall decline in American-European relations.” I would characterize the case somewhat differently—not as the exception but as the rule, at least in trade relations. The US and the EU seem to have been able to resolve their trade differences in the past—even on big cases, but not without long periods of posturing and rhetoric.

A second reason for optimism is a related one: the leadership and the relationship of Ambassadors Zoellick and Lamy. I do not personally know either of these gentlemen. But, it is widely known that these two ambassadors have been friends, and marathon runners, for a number of years, dating back to the diplomatic efforts that led to the reunification of Germany. At that time, Lamy was chief of staff to Jacques Delors, president of the European Commission. Zoellick was counselor to Jim Baker, the U.S. secretary of state.

And so, perhaps it is not surprising that just before a critical G-7 conference, at a point when the WTO negotiations needed a jumpstart back in the summer of 2001, Ambassadors Lamy and Zoellick wrote a joint editorial in the Washington Post, where they emphasized, “We have a shared responsibility for the international economic system... As the two biggest elephants in the global economy, the EU and the United States need to get our act together on trade.” And, just months later, the Doha Development Round of trade negotiations was launched.

Ambassadors Zoellick and Lamy have found a way to work together on trade, even during a period where our broader diplomatic relations have suffered

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and been questioned. So it is not surprising that with several of the trade disputes described above now reaching their boiling point, Ambassador Lamy will be visiting Washington in less than two weeks. On his agenda, publicly, is the FSC dispute. And, I am willing to bet, on his agenda—whether or not publicly, is the steel 201 dispute.

The United States and the EU have worked very closely on several key WTO issues. They worked together in 2001 to launch the Doha Round. Now, the biggest question is whether they will meaningfully address the biggest single obstacle to the negotiations—the question of agricultural subsidies. The two parties made a common proposal just before the Cancun ministerial, although it was rejected by developing countries and in part overshadowed by other issues at Cancun. And before that, the US and EU made another similarly bold proposition: the removal of all tariffs on all industrial goods by the year 2015. Notably, we saw a fairly significant split of interests, not between the United States and the EU, but instead a North-South split, with the United States and the EU on one side, and the so-called G-21 developing countries on the other. If the United States and the EU want to show leadership, they will need to work together to do more than they have done to date, on agriculture and on other important issues.

IV. CONCLUSIONS

A. Has there been a fundamental change in U.S.-EU trade relations?

Despite the many obstacles, which are formidable, the United States and European Union still have a strong working relationship on trade issues, thanks in large part to the their common interests, the efforts of Ambassadors Zoellick and Lamy and their respective agencies. There are some who see the broader U.S.-EU diplomatic relationship as moving apart, and in some areas, that may be true. But in the area of trade, I think there is little evidence of a weakening relationship. At least, not yet.

We could well be engaged in an all-out trade war on any of the trade issues described above, but we are not. If anything, I think the United States and the European Union will look to collaborate even more on trade negotiations at the WTO, particularly given the emergence of the G-21 countries at Cancun.

However, the United States is pursuing other trade alliances as well, including a long list of bilateral free trade agreements, which seem to be moving very quickly recently, and the Free Trade Area of the Americas, where the outcome is somewhat more uncertain. The European Union is doing the same thing. It is too early to say whether these other efforts will overshadow the multilateral WTO talks. Another potential concern is whether the United States will use free trade agreements to drive its political objectives (for example, by concluding FTAs only with its allies on Iraq).
B. Is U.S. trade policy increasingly driven by unilateralism?

A law professor at George Mason University, for example, recently wrote that the United States’ filing of the GMO case “evidences a growing U.S. tendency to rely upon power politics and unilateral intimidation at the expense of diplomatic and multilateral efforts.”12 I disagree.

This may be true, unfortunately, of U.S. foreign policy, but it is not true of U.S. trade policy. The GMO case, at least to me, is an example of the U.S. Government trying to open an overseas market that is currently closed. The question is whether the reason why the market is closed is a valid, scientific one, or not. This is a reasonable question, given the WTO Agreements, and a legitimate subject for a Panel to consider.

The most unilateral trade action taken by the U.S. Government recently has been the Steel 201 safeguards. But the WTO does grant Members the right to take such action in the appropriate circumstances, as limited by the Safeguards Agreement. Neither the Steel 201 nor the GMO cases demonstrate any real trend toward unilateralism in trade policy. The greater danger is that U.S. frustration with the WTO dispute settlement process might weaken U.S. support for the WTO as a whole. But we have not yet reached that point.

The U.S. safeguard measures were imposed only after a period of serious injury to the domestic industry, after a unanimous finding of serious injury at the ITC, and after an extensive review process by the Administration. (In fact, the EU enacted its own such measures, shortly after the U.S. remedy was announced.) So I think it is easy, but incorrect, to simply say that the Steel 201 was protectionist and wrong, without any further analysis.

Certainly, on Iraq and on other international issues, there is a strong argument that the Bush Administration has pursued unilateralism over diplomacy and consensus. And there are deep cultural and political values that underlie today’s trade disputes, which in some ways continue to drive us apart. But the United States has not abandoned the goals of free trade and a multilateral trading system, or its main partner in achieving those goals, the EU.

V. POSTSCRIPT (DECEMBER 2003)

Since this speech in October, one of these critical disputes has been resolved. On December 4, 2003, President Bush signed a proclamation terminating the U.S. steel safeguard measures, ending the tariff relief 15 months early. The President took action only six days before the scheduled implementation of retaliatory tariffs by the EU, Japan, and other nations. This action

was welcomed by the United States’ trading partners and in particular by the European Union, which removed its own safeguard measures the next day.

The steel safeguard saga arguably confirms this paper’s general thesis: the United States and the European Union will find a way to resolve their trade disputes, but often only at the last possible minute, after other legal and political options are exhausted, and after unfortunate but expected posturing and rhetoric. (In the steel case, however, the U.S. Government’s endgame rhetoric was uncharacteristically muted.) While many other seemingly intractable trade challenges await, one should not underestimate the ability of the United States and the EU to resolve them—without resort to “trade wars” or a downward spiral toward unilateralism.
ADDRESS TO THE AMERICAN INTERNATIONAL LAW ASSOCIATION

Tal Becker*

It is a pleasure and an honor for me to participate in this panel discussion. In my day job, I serve as the legal adviser to Israel’s mission to the United Nations, and most of my comments today emerge less from academic research into the field of universal jurisdiction, and more from practical experience in issues related to international criminal justice both at the UN and outside it.

I should make clear though, that my comments are made in a personal capacity and do not necessarily represent the views of the Government of Israel.

When Dave invited me to participate in the panel, he noted that Israel was in the unique position of having relied on something somewhat analogous to universal jurisdiction in the Eichmann case, and having objected to the resort to universal jurisdiction in the recent case involving Prime Minister Sharon in Belgium.

Of course, these cases were very different, both factually and legally. [The Eichmann case was not, strictly speaking, a case of universal jurisdiction. Jurisdiction there was founded essentially on the passive personality principle, though novel issues were raised because the crimes prosecuted related to events against Jews in Europe during the Holocaust and before the establishment of the State of Israel. Still, the link between the prosecution and the State of Israel was clear, (though it would have made for an interesting legal and diplomatic interchange had Germany also sought the prosecution of Eichmann).

By contrast, the case in Belgium against Prime Minister Sharon and other Israeli officials was based on legislation which, as it then stood, granted Belgium jurisdiction to try persons for certain crimes, irrespective of when, where or against whom such crimes were committed. Thanks to a later amendment introduced by the Belgian Senate, there was at one point no requirement that the alleged offenders even be present in Belgium. In fact, one would be hard pressed to find any link between Belgium and the alleged offenses for which Prime Minister Sharon and other Israeli officials were to be charged.

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In that sense, the case involved a clear, if overly and unduly broad, reliance on universal jurisdiction. But I will get to that later.]

But in the mind of an Israeli lawyer, the Eichmann case and the Sharon case serve as bookends to a discussion on universal jurisdiction and frame at least my thinking about the appropriateness and utility of universal jurisdiction, as a mechanism for enhancing justice and the rule of law.

It is said that a diplomat is someone who thinks twice before saying nothing. Unfortunately, that principle is rarely followed, least of all at the UN. But I will try, at least, to be brief and limit myself to some general observations.

First, universal jurisdiction is concerned above all else with fighting impunity for certain recognized serious crimes. When dealing with the legal intricacies of universal criminal jurisdiction, we must always bear in mind that its moral and legal justification is founded on the notion that certain crimes are so heinous that they affect the interests of all members of the international community and give rise to a right, and some say an obligation, to any state to prosecute the alleged offender, absent any traditional jurisdictional link to the offense.

But when comparing the interests of states with such traditional links with those of the international community as a whole, I don’t think it accurate to suggest that these interests are equivalent. In fact, I would argue that there is really a hierarchy of interests involved in any potential exercise of universal jurisdiction. The interests of states wishing to assert universal jurisdiction are lower in that hierarchy to the interests of the state or states with clear jurisdictional links to the case on the basis of traditional criteria. To some extent this is because it is only in the state with traditional jurisdictional links to the offense that broader, but no less important, interests of justice and reconciliation can be served by the prosecution of the alleged offender.

In my mind, therefore, universal jurisdiction should not, and was not intended to, operate on a widespread basis as a system of justice. By its very nature, it is designed to play, at the most, a subsidiary, ad hoc role when offenders of certain serious crimes risk escaping with impunity. In fact in a post-ICC age, we could rethink the role to be played, if any, by remote foreign courts in presuming to judge crimes in relation to which they have no clear interest. At the very least we need to try to understand the desired relationship between these two international criminal justice mechanisms—the ICC and universal jurisdiction—and always bear in mind that from a policy perspective our efforts and resources should primarily be devoted to enhancing the effective operation of the judicial system of the state or states with traditional grounds for jurisdiction.

Along these lines, I think the case could be made at the very least that a notion akin to ICC complementarity applies with respect to the exercise of universal jurisdiction. The first limitation on universal jurisdiction should
arguably be that a state seeking to assert it may only do so if the state with a traditional jurisdictional link is unable or unwilling to investigate the case in good faith. I think a few scholars have recognized this approach and it may be the appropriate conclusion to draw from State practice generally and, after a somewhat tortuous process, from the final version of the Belgium law.

Second, one of the interesting yet less noted aspects of universal jurisdiction is that it shifts the priorities and focus from the ones we are used to seeing in a national criminal prosecution pursued on traditional grounds. As Professor George Fletcher of Columbia University has pointed out, national courts are primarily preoccupied with the rights of the accused. The accused has the most to lose from the trial and national constitutions and criminal codes of procedure impose great limitations on the criminal process so as to protect the accused. In fact, we are so concerned with the rights of the accused that we would rather a guilty defendant go free, than an innocent defendant be wrongly convicted.

Next in the list of priorities in regular criminal trials are the interests of the community itself, as represented by the prosecutor bringing the case. A prosecution conducted in the state with a clear jurisdictional link to the case, reflects the political, social and economic values of that society. The investigation and prosecution itself often plays a role in the healing and reconciliation process of a community after a crime, especially a serious crime, is committed.

Finally, there are the rights of the victims that in most national systems receive, unfortunately, the least attention. The US constitution, for example, contains numerous provisions on the rights of the accused, but not a word on the rights of victims. Victims are often less interested in a fair trial or in the long-term reconciliation process within their community. They are concerned, first and foremost, with seeing the accused convicted, with ensuring that there is no impunity.

Universal jurisdiction flips the order of priorities around. To a greater degree than the ICC, universal jurisdiction is primarily concerned with the rights of the victim and with ensuring that the accused is convicted. Its focus is the fight against impunity.

It is argued that the state exercising universal jurisdiction does so partly due to deterrence considerations. I think the jury is still out on how much of a deterrence role is really played by universal jurisdiction.

In my view, the central motivation for universal jurisdiction remains that it is simply unconscionable for the perpetrator of so grave a crime to go unpunished. As the International Law Association put it in its report of 2000, “the key rationale of universal jurisdiction, therefore, is not deterrence but justice.”

The prominence given to victims’ rights and to battling impunity in this way has important consequences, which are both procedural and substantive.
Scant attention has been paid, for example, to the practical and evidentiary problems posed by pursuing a prosecution in a foreign and unconnected court, which can amount in some cases, as one Belgian prosecutor has noted, to conducting “virtual prosecutions.”

I will not enter the debate about *in absentia* prosecutions or the issue of Head of State or diplomatic immunity, which will be discussed by the other panelists and was examined by the ICJ in the Congo v. Belgium case. [*But the fact that some scholars and judges are willing to entertain the idea that universal jurisdiction allows for prosecutions in absentia and does not respect traditional immunities is testimony to the precedence given by some to combating impunity. In the view of these advocates, preventing impunity is more important than guaranteeing the rights of the accused to be present at trial or protecting the immunity granted to state officials for the orderly and smooth conduct of international relations.*]

My comments are concerned more with other consequences of this emphasis on impunity to which I now turn, in my third point.

At the end of September, following a British initiative, the Security Council conducted an open debate on the subject of the UN role in promoting justice and the rule of law. In the context of that debate, several states as well as the Secretary-General made some comments that in my assessment suggest a growing recognition that an overdue emphasis on fighting impunity can actually have negative effects. [*These effects relate both to long-term processes of national reconciliation and to wider efforts aimed at establishing effective, fair and lasting judicial systems that would obviate the need to resort to universal jurisdiction.*] In his comments to the Council, the Secretary-General noted:

> At times the goals of justice and reconciliation compete with each other... the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times, and in all places on punishing those who are guilty of extreme violations of human rights it may be difficult, or even impossible, to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice a delicate peace may not survive.

I don’t want to overstate the significance of this comment, and it should be noted that the Secretary-General did temper it with other remarks. However, in my mind, this represents a fairly remarkable shift in policy that, when considered together with State practice highlights that universal jurisdiction is on the retreat. It is, I think, the culmination of an evolving trend that has drawn lessons, in particular, from the experience over the past decade of the Yugoslavia and Rwanda tribunals.
If we draw a line from the Yugoslavia and Rwanda tribunals, which were international tribunals pure and simple, through to the introduction of the principle of complementarity in the ICC and finally towards the emphasis on national or mixed tribunals in Sierra Leone, Cambodia and now in discussions regarding transitional justice in Iraq and Liberia we can see a fairly clear trend. The Yugoslavia and Rwanda tribunals have made important contributions to international justice, but they have also suffered from some fairly serious shortcomings. It is somewhat of an embarrassment among some UN circles that hundreds of millions of dollars have been spent on such a relatively small number of indictments.

For all their efforts, I have serious doubts as to the long-term contribution of these tribunals in three areas which should interest all those concerned with international criminal justice: reconciliation within Yugoslavian and Rwandan society, establishment of effective judicial systems that are crucial to preventing these societies from sliding back into conflict, and finally, providing an effective deterrence to future violators.

[In retrospect, the emphasis on complementarity in the ICC can be seen as an outcome of these considerations. While during negotiations on the ICC complementarity was viewed by many NGOs as a regrettable necessity in order to persuade States to support the project, it has now taken on cardinal significance. As the ICC prosecutor Moreno Ocampo has noted, the success of the Court will not be judged by the number of prosecutions brought before it, but by the number of international prosecutions avoided because of the effective and proper functioning of domestic legal systems. The potential significance of the ICC lies primarily in the role that it may play, as part of a broader network of mechanisms, as a catalyst in encouraging national jurisdictions to enhance the rule of law in their societies.]

At the end of the day, the international community is recognizing that there can be no substitute for serious efforts to strengthen the rule of law within national societies. Focus on transitional justice and rule of law issues, both during and after a conflict, remain the most important guarantee of lasting peace, democratization and stability in a society and it is here that our resources and energies should be primarily devoted. It is the rule of law, not ending impunity writ large, that helps societies to emerge from conflict and establish orderly system that encourage economic investment, prosperity and the protection of rights. If one takes the long view, such a focus is also really the best way to fight impunity itself.

Universal jurisdiction plays, at best, a fairly marginal role in these efforts and sometimes a counterproductive one. It often makes little or no contribution to internal processes of reconciliation. In fact, sometimes the interests of peace, justice and stability are better served by respecting national reconciliation processes and amnesties at the expense of the pursuit of a “perfect justice.” It
would be counterproductive, for example, to pursue the prosecution of individuals who have appeared before the Truth and Reconciliation Commission in South Africa on the basis of universal jurisdiction.

This does not mean that blanket or unjustifiable amnesties should be respected. But it is one thing for the international community to withhold its blessing from a political process involving these kind of amnesties. It is quite another to allow remote judicial mechanisms to interfere and potentially unravel delicate political processes of which they are unfamiliar and ill-suited to repair. [As always, a balance is required. In seeking to strike that balance we must bear in mind that while the international community can encourage the parties to a conflict to make the “right” choices, few if any conflicts can be solved unless the parties themselves live up to their responsibilities.]

Universal jurisdiction also makes only a limited contribution to the establishment of fair and effective domestic judicial mechanisms. And sometimes it can even allow parties to pursue or exacerbate their conflict by advancing political agenda in foreign courts instead of settling it around the negotiating table.

The resort to universal jurisdiction can, in addition, and has in practice, been perceived as arrogant interference by States who are hardly in a position of moral authority to judge the conduct of others. It is important to appreciate that any exercise of universal jurisdiction does not only involve passing judgment on the alleged perpetrator, it involves passing judgment on the judicial system of the State that is deemed to have failed to prosecute the offender.

One sometimes gets the feeling that the discussion of universal jurisdiction serves as an easy way out: A way for states to clear their conscience for failing to prevent or reduce serious human rights violations. A way for developed states to avoid the difficult tasks of assisting and guiding others towards enhancing their domestic judicial systems, by purporting to step into their shoes so as to remove the most egregious cases from the headlines. We should also not pretend that the pursuit of universal jurisdiction in countries such as Belgium and Germany for instance is purely altruistic and unconnected with national interest and perhaps more significantly the national legacy.

I am not suggesting that universal jurisdiction and enhancing the domestic rule of law are always or necessarily mutually exclusive. Sometimes universal jurisdiction can play an important and useful role in promoting justice and encouraging interested states to pursue prosecutions. And perhaps I am placing undue emphasis on the limits of universal jurisdiction, to counter-balance the support it has received in academic circles. But I would echo the views of some those who have suggested that the academic focus on universal jurisdiction at the expense of a serious examination of the ways to advance the rule of law within societies may not always be helpful.
Fourth, it is probably appropriate to make some comments about the need for significant safeguards against political abuse, if and when universal jurisdiction is relied upon. Naturally, I am drawn towards using the Sharon case in Belgium as an example, though there are others. The political nature of this prosecution was evident in several ways. As Professor Malvina Halberstam has observed, the prosecution was not instituted in 1993 when the Belgian law was enacted, but only once Sharon had become Prime Minister. It was not brought against those Lebanese who actually perpetrated the massacre at the Sabra and Shatilla refugee camps in 1982, but against those alleged to have failed in preventing something that they ought to have known was taking place. This is doubly significant because there is hardly a precedent in the field of international humanitarian law for examining the legal responsibility of individuals for their omissions in relation to the conduct of others who are not operating as *de jure* or *de facto* State agents. Certainly, Lebanon did not examine the possible responsibility of its own forces in failing to prevent, let alone perpetrating, attacks on civilians during the civil war, and instead preferred to grant a blanket amnesty.

The fact that an investigation had already taken place in Israel by a commission, headed by the President of the Supreme Court that held 60 sessions, heard 58 witnesses, considered a mountain of documentary evidence, and led among other things to the forced resignation of Sharon as Defense Minister, was not taken into account. And while Belgium did not institute the prosecution, it was Belgian legislation that made room for it, and it was the Belgian parliament that intervened in order to overturn the decision of a lower court so as to allow for the case to proceed *in absentia*.

Whatever one's view of the events in question, the whole episode in Belgium illustrates the dangers not just to international relations but also to the interests of peace and justice in an overly liberal reliance on universal jurisdiction. The limitations introduced to Belgium's law after complaints were brought against US officials and after elections were held in Belgium are both well advised and indicative, I think, of a growing realization of the dangers and shortcomings of universal jurisdiction, especially in a post-ICC age.

Significant consideration still need to be given to the safeguards that should be introduced in order to prevent the abuse of universal jurisdiction and avoid the harmful use of foreign courts as political or public relations weapons in conflicts that need to be resolved by political dialogue. The adoption of a notion of complementarity into the exercise of universal jurisdiction, as I suggested earlier, may be one of a number of mechanisms that should be expressly endorsed. Other threshold requirements could be introduced, aside from the more familiar ones that have been considered, for example, in the work of the International Law Association and the Princeton Project on this subject.
Before concluding, I would like just to try to contribute to the discussion by raising two questions on issues on which I am somewhat conflicted. First, how should our thinking about universal criminal jurisdiction affect the way we approach universal civil jurisdiction of the kind advanced, for example, by some interpretations of the Alien Torts Claims Act? Second, for those who support the broad use of universal jurisdiction, how do we draw the appropriate balance between cases where it is better for a disinterested state to pursue a prosecution and cases where we would prefer the state or states with a vested interest in the outcome to prosecute? I would be grateful if anyone on the panel or in the audience would like to share his or her views on these questions.
PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS—A NEW APPROACH

Elizabeth F. Defeis*

Trafficking in persons, the illegal and highly profitable recruitment, transport, or sale of human beings into all forms of forced labor and servitude is a tragic and complex human rights abuse. The U.S. State Department estimates that anywhere from 700,000 to four million persons are trafficked annually worldwide, and that approximately 50,000 women and children are trafficked annually for sexual exploitation into the United States.¹ Women and female children are particularly vulnerable to this slavery-like practice, due largely to the persistent inequalities they face in status and opportunity worldwide and the widespread business of prostitution.²

International agreements that address trafficking in women or trafficking in children date back to the 1904 International Agreement for the Suppression of White Slave Traffic.³ The goal of the Agreement was to halt the sale of women into prostitution in Europe at a time of adverse economic conditions. Several subsequent treaties were adopted under the auspices of the League of Nations and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁴ consolidated all previous treaties on the subject. It characterized prostitution as “incompatible with the dignity and worth of the human person,” and obligated governments to punish any person who “exploits the prostitution of another person, even with the consent of that person.”⁵ The 1949 Convention also criminalized the action of any person who “(1) keeps or manages or knowingly finances or takes part in financing of a brothel (or) (2) knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.”⁶ However the

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2. Id.
5. Id. at art. 1.
6. Id. at art. 2.
enforcement provisions of the Convention are extremely weak and the Convention has had very limited value.

The 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) prohibits the “exploitation of prostitution of women.”7 It also prohibits “all forms of traffic in women and obligates governments to “take all appropriate measures, including legislation to suppress all forms of traffic in women and exploitation of prostitution of women.”8 Whether the 1979 Convention intended to recognize a more comprehensive definition of trafficking, which includes all types of slavery practices, is not entirely clear, although a strict interpretation of the language used may support this conclusion.

However, like the previous treaties, the enforcement provisions are weak and are limited to reporting procedures by states parties although recently an optional Protocol that would allow for direct individual petition has been adopted.

More recently, efforts have been made to address trafficking of children and child prostitution. For example, the 1989 Convention on the Rights of the Child, which has been ratified by virtually every state but not the United States, requires State Parties to take all appropriate measures to prevent “the abduction of, sale of, or traffic in children for any purpose or in any form, “to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.”9 However, once again enforcement is limited to self-reporting by states. Most recently, the 1999 Convention to Eliminate the Worst Forms of Child Labor adopted under the auspices of the International Labor Organization prohibits “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.”10

In the last 20 years, the rise in the volume of human trafficking has risen dramatically. The causes include the end of cold war with the concomitant opening of borders and increased movement of people, emergence of organized crime and the rise of the sex tourist industry. The number of illegal sex workers in the European Union ranges from 200,000 to half a million, with some two-thirds coming from Eastern Europe. Trafficking from this region, once minimal, now rivals traditional trafficking source regions, such as Asia, Africa and the Caribbean.11

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8. Id. at pmbl.
Many national legal systems particularly those of the sending countries, that is, those states from which the victims come, are ill equipped to deal with the current massive increase in human trafficking. Adequate legislation, limited law enforcement capabilities, and corruption of local law enforcement personnel, have all combined to hamper cooperation on an international level. At the Seventh Session of the Commission on Crime presentation and Criminal Justice in 1998, Argentina proposed the drafting of a new Convention against trafficking in minors, citing growing evidence of the involvement of organized criminal groups in this activity. This initiative was expanded to incorporate trafficking in all persons. It was decided by member States that the most appropriate way to deal with the issue was to elaborate a Protocol to the UN Convention against Transnational Organized Crime.

Negotiations on the Protocol were extensive and the Protocol was open to all states in Palermo, Italy in December 2000. The fundamental concept adopted by the Member States in negotiating the Protocol was to maintain a carefully crafted balance between law enforcement and the protection of victims.

The Protocol sets forth three purposes:

- To prevent and combat trafficking in persons, paying particular attention to women and children;
- To protect and assist victims of trafficking, with full respect for their human rights; and
- To promote cooperation among States in order to meet these objectives.

The Protocol is not a stand-alone instrument. Rather, it must be applied in conjunction with the parent Convention, and each state is required to become a party to the Convention in order to become party to the Protocol. Protocol offenses are deemed to be Convention offenses for the purposes of extradition and other forms of cooperation. The application of the Protocol is governed by the same rules as the application of the parent Convention. Both instruments apply in any case involving the investigation or prosecution of an offence that is suspected of being “transnational in nature” and involving an “organized criminal group”, as defined in the Convention.

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14. Id. at pmbl.
Although victims and witnesses are also dealt with in the parent Convention, the protection of, and assistance to, a victim is specified as a core purpose of the Protocol. It considers victim assistance, both as an end in itself and as a means to support the investigation and prosecution of trafficking crimes.

Although there was strong support for a new international agreement to address trafficking, several issues required extensive negotiations and even today are unresolved.

Probably, the most contentious issue concerned the definition of trafficking. Some states, including initially the United States took the position that only trafficking that involved forced prostitution should be addressed by the Protocol and hence that a victim's consent would take the act outside of the ambit of the Protocol. Others, including many NGO's such as the Coalition Against Trafficking in Women and Equality took the position that all prostitution should be addressed since the distinction between forced and free prostitution was meaningless.

On the other hand, it was agreed that requiring countries to make the consent of victims completely irrelevant could exclude valid defenses and raise constitutional or other legal issues. The compromise was to specify that, while the accused Traffickers may initially raise consent as a defense, consent to initial recruitment is not the same as consent to the entire course of trafficking. Any alleged consent to exploitation must be deemed irrelevant if any of the means of trafficking listed in the definition have occurred. For example, means of trafficking include the threat or use of force, coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person such as a parent.

What is noteworthy is that for the first time, the International Community has agreed on a definition of trafficking. Essentially, trafficking consists of actions in which offenders gain control of victims by coercive or deceptive means or by exploiting relationships, like those between parents and children, in which one party has relatively little power of influence and is therefore vulnerable to trafficking.

The Protocol defines trafficking as follows: Trafficking in persons shall mean “the recruitment, transportation, transfer, harboring or receipt of persons, particularly women and children, by means of force, coercion, or欺骗, or by taking advantage of the vulnerability of the victim as a result of the abuse of power or of a position of vulnerability, or by the giving or the receiving of a benefit, whether of a material or of a sexual nature, in return for giving consent, either directly or by a third person acting on behalf of the trafficker.”

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15. Protocol, supra note 13, at arts. 4-6.
by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or similar to slavery, servitude or the removal of organs.'\textsuperscript{19}

The Protocol requires States to criminalize trafficking, by enacting laws to reach the prohibited activity. The law enforcement provisions of the Protocol are mandatory and require law enforcement agencies to cooperate in such matters as the identification of offenders and trafficked persons, sharing of information and the training of investigators and victim support personnel.

However, in addition to criminalizing trafficking, the Protocol requires States to take steps to protect and assist victims of trafficking. It recognizes that victims of trafficking are often in great danger and in need of assistance and support, particularly if repatriated to their countries of origin. Under the Protocol, trafficking victims would be entitled to some degree of confidentiality in legal proceedings involving traffickers and assistance in legal proceedings. Under both the parent Convention and the Protocol, countries must also endeavor to provide for the basic safety and security of victims, and the Protocol requires that victims be afforded, "...the possibility of obtaining compensation for damage suffered."\textsuperscript{20}

The Protocol encourages social assistance to victims in areas such as counseling, housing, education and health care needs, although these are not obligatory. The obligations of States regarding victims fall upon whichever State the victim is in at a given time.

The legal status of trafficked persons and whether they would eventually be returned to their countries of origin was also the subject of extensive negotiations. Generally, the developed countries to which persons are often trafficked took the position that there should not be a legal right to remain since this would provide an incentive both for trafficking and illegal migration. Countries whose nationals were more likely to be trafficked sought as much protection and legal status for trafficked persons as possible.

The negotiations are still ongoing, but the text presently requires states "to consider" laws which would allow trafficked persons to remain, temporarily or permanently in "appropriate cases." States also agree to "facilitate and accept" the return of victims who are their nationals or who had legal residency rights when they were trafficked into the destination country. The Protocol incorporates a series of safeguards to protect victims. Repatriation should be voluntary.

\textsuperscript{19} Protocol, supra note 13, at art. 3, par. (a).
\textsuperscript{20} Id. at art. 6.

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if possible, and must take into consideration the safety of the victim and the status of any ongoing legal proceedings. Thus, reducing the likelihood that victim witnesses will be repatriated before they can testify enhances the viability of prosecutions.

However, human rights groups have criticized the Protocol. Even though the Protocol contains a strong law enforcement provision and a first-ever international definition of “trafficking in persons”, it was viewed as a lost opportunity to protect the rights of victims of trafficking. Shortly after the UN Crime Commission finished negotiations on the Protocol, the Human Rights Caucus, composed of twelve NGO’s, announced that, the new Protocol was inadequate as it did not in fact require governments to provide any services to victims of trafficking and it provided no basis for insisting that governments treat victims of trafficking different from undocumented migrants. They challenged the effectiveness of the Protocol on the grounds that does not require governments to provide emergency shelter, medical or psychological services or legal counseling or to cease arresting, imprisoning and summarily deporting victims. Further they argue that victims are not protected. For example, victims are not notified when traffickers are released from prison. The Protocol fails to protect the identity of victims or permit victims to remain in the country, even temporarily if it is unsafe for them to return home.21

According to a Human Rights Caucus press release, “[t]his serious gap in the Protocol is partly due to government reluctance to make any commitments to provide services and protection to undocumented persons even if they are victims of a horrific crime.”22 They note, “Governments were unwilling to distinguish between trafficking victims and undocumented migrants. This means local NGO’s will encounter tremendous obstacles in advocating the inclusion of mandatory protection in their domestic trafficking laws.”23

The Protocol will enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification. Although the Protocol is a step towards the eradication of human trafficking, several problems remain that have yet to be addressed by any major international body. For example, there is a lack of systematic research and reliable data on the trafficking of human beings that would allow comparative analyses. The Global Program against Trafficking in Human Beings (GPAT) designed by the United Nations Office on Drugs and Crime has been developed to facilitate the gathering of data and the

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22. Id.
23. Id.
coordination of national efforts to curb trafficking. Further, the program is
designed to raise awareness of human trafficking at a grassroots level.24

There is a need to strengthen the criminal justice response to trafficking
through legislative reform, awareness raising and training, as well as through
national and international cooperation. Although many nations have adopted
legislation that address human trafficking, these laws often do not have the
beaurocratic support system to implement the laws.

Most importantly, the support and protection of victims who give evidence
is a key to successful prosecution. This support, although addressed in the
Protocol, is clearly inadequate.

Finally, the legal status of trafficked persons must be addressed. Often,
because of the stigma attached to serving as a prostitute, or because of the fear
of AIDS, many victims of trafficking cannot return or do not wish to return to
their native countries despite the fact that they were taken against their will.
Because the states parties could not agree, the Protocol only requires states “to
consider adopting legislative or other appropriate measures that permit victims
of trafficking to remain in its territory temporarily or permanently in appropriate
cases.”25 Clearly, requiring such legislation would provide added protection to
victims of trafficking.

While trafficking in persons has finally gained the attention of the world
community, adequate resources and political will are necessary if this scourge
is to be eradicated. While the Protocol is an important first step, its provisions
must be strengthened to address the needs of the victim as well as law
enforcement.

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UN's HUMAN RIGHTS NORMS FOR TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES: AN IMPERFECT STEP IN THE RIGHT DIRECTION?

Surya Deva*

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I. INTRODUCTION

The United Nations (UN), in its life of forty-eight years, has faced several challenges as promoter of human rights in international arena. One such challenge has been to ensure that even non-state actors such as transnational corporations (TNCs) respect human rights, at least within their respective spheres of activity. The UN, in a way, was alive to this when it constituted a Commission on Transnational Corporations in the mid-70s. Though the vision of the Commission to draft an agreeable code for TNCs failed to materialize due to various reasons, the UN continued to pursue the issue of social responsibility of TNCs in different forms and forums. The approval of the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms/Norms) by the Sub-Commission on the Promotion and Protection of Human Rights in August 2003 represents a new vigor on the part of the UN in regulating corporate human rights abuses. This development, together with the launch of Global Compact, 7


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1. The challenges related not only to ascertaining the "content" of human rights, but also to their effective "enforcement."

2. The United Nations preferred the usage of the terms TNCs to multinational corporations (MNCs) or supranational entities. See generally CYNTHIA D. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 10-12 (Martinus Nijhoff 1983).


clearly reflects the necessity as well as urgency on part of the UN to revive its relevance in a new world order in which states no longer enjoy the monopoly as violators of human rights.\textsuperscript{9}

The UN Norms, however, have not received the attention of academia they deserved; the release/approval of the Norms is not followed by the searching academic critiques.\textsuperscript{10} Though the Norms undoubtedly represent an improvement in terms of both formulation and implementation of human rights standards over earlier such attempts at the international level, they still fall short of what is required for evolving an effective international regulatory regime of corporate human rights responsibility. In this article, I intend to analyze the provisions as well as omissions of the UN Norms. The central objective of the analysis is to highlight the operational shortcomings, and also explore the possible approaches that could be taken to remedy them before the Norms come up for consideration and further action before the UN Commission on Human Rights in March 2004. By way of caveat, it should be noted that I do not make any claim of offering final and/or detailed solutions to such shortcomings, the primary idea being to put an academic debate into motion.


\textsuperscript{9} By way of caveat, it should be noted that I do not make any claim of offering final and/or detailed solutions to such shortcomings, the primary idea being to put an academic debate into motion.

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\textsuperscript{10} Infra note 15.
\end{itemize}
I begin in Part II by briefly explaining how the Norms make a departure from the past, and could be characterized, in view of such departure, as an improvement over their predecessor as well as other current regulatory regimes of corporate human rights responsibility. Part III first reviews the human rights obligations of TNCs as laid down in the Norms, and then highlights the two operational difficulties that they might face: the one of which is the result of (over)-reference to international human rights instruments whereas the other relate to putting universal standards of human rights into practice. Regarding the first issue, I will argue it is desirable that the human rights obligations of TNCs are enumerated, as far as possible and in an inclusive manner, in a schedule to the Norms. As far as the second difficulty is concerned, despite a claim for universality of human rights and the common standards flowing from such universality, it is necessary for the UN Norms to acknowledge a distinction between, what I term, “aspirational” and “operational” standards of human rights. The former signifies general objectives whereas the latter translates those objectives into concrete measurable units. The Norms could possibly lay down only the aspirational standards, the exact contours of which are to be determined by making further rules at municipal levels.

The provisions of the Norms related to implementation of TNCs’ human rights obligations are dealt with in Part IV. Though the Norms make a promising start by employing multiple monitoring techniques both at national and international levels, they neither invoke multiple sanctions to enforce obligations against TNCs nor go far enough in establishing a vigorous enforcement mechanism. Moreover, it is equally vital that the Norms also devote some attention to the procedural issues associated with implementation of human rights standards. It is fundamental to the success of the UN Norms that, at least, the rules regarding the application of the doctrine of *forum non conveniens* and the liability of a parent corporation for human rights violations by its subsidiaries are reexamined and agreed upon. Part V sums up the analysis, including the arguments, and also throws some light on the future treatment of the Norms.

II. NATURE OF UN NORMS: DEPARTURE FROM THE 'PAST'?  

The starting point for an analysis of the provisions and omissions of the UN Norms should be, in my view, the relevance of their place in an international mechanism of TNCs’ accountability for human rights violations. After all, what was the need for these new (TNCs would also claim ‘additional’)  

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11. *See e.g., Talking Points on the Draft “Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” available at http://209.238.219.111/USCIB-text-Talking-Points.htm* (last visited Feb. 3, 2003); USCIB is also critical of the Norms on the ground that, among others, they (i) blur the line between voluntary and legal actions; (ii) are “predicated on the belief*
norms when various international initiatives already exist?\textsuperscript{12} The answer to this question must be found with reference to the provisions of the Norms as compared with the provisions of their predecessor\textsuperscript{13} and other current regulatory regimes of corporate responsibility.\textsuperscript{14}

The relevance of the UN Norms lies in the fact that they represent a shift in the paradigms "that have to date dominated the discourse of corporate social responsibility"\textsuperscript{15} and have been responsible for ineffective regulation of corporate conduct impinging upon human rights.\textsuperscript{16} I argue that the Norms present the most promising human rights norms for TNCs to date because of at least six factors. First, instead of being limited to labor and/or environmental rights,\textsuperscript{17} the UN Norms attempt to draw a comprehensive list of human rights that can best be advanced by circumventing national political and legal frameworks"; (iii) extend far beyond issues of "basic" human rights; (iv) impose impractical obligations. Compare Sir Geoffrey Chandler, \textit{Commentary on the United States Council for International Business 'Talking Points' on the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights}, available at http://209.238.219.111/Chandler-commentary-on-USCIB-Talking-Points.htm (last visited Dec. 23, 2003) (considering USCIB’s response to be "misleading and factually inaccurate").


17. Though the Tripartite Declaration makes a reference that the multinational enterprises “should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly,” the thrust of its provisions is undoubtedly on labor and employment rights. Tripartite Declaration, \textit{supra} note12, \textsection 8. The same could be said about the OECD Guidelines despite the fact that after the 2000 review a recommendation on human rights finds a place. OECD Guidelines, \textit{supra} note 12, \textsection II.2.
obligations. Besides a general obligation “to respect, ensure respect for, prevent abuse of, and promote human rights recognized in international as well as national law,” the specific obligations relate to the right to equal opportunity and non-discriminatory treatment; the right to security of person; the right of workers; the respect for national sovereignty and human rights; and the obligations with regard to consumer and environmental protection. The general obligation to respect “international human rights” becomes a potent provision in view of another provision in paragraph 23, which provides that a reference to “international human rights” in the UN Norms includes all civil, cultural, economic, political and social rights.

Second, the Preamble to the Norms makes a clear, specific and unequivocal reference to the UN Charter, the Universal Declaration of Human Rights (UDHR) and other international treaties to deduce obligations for TNCs. This provides a stronger and more widely accepted basis of human rights responsibility generally, and a *jus cogens* basis regarding some human rights. In view of the UN Norms’ reliance on the said international covenants, one commentator has concluded that the Norms “thus represent a restatement of existing international human rights law” which “already does or should apply to companies’ conduct.” Though an academic argument could be made that the UDHR or other international covenants apply to non-state actors including TNCs, one should not, however, lose sight of the fact that those international covenants were never drafted to *directly* apply to TNCs and therefore, nowhere provided for any enforcement mechanism in case TNCs fail to observe the obligations.

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19. The reference to various international conventions, for the purpose of reliance, is quite elaborate and covers a wide range of civil, political, social, economic and cultural rights. *Id.*, at the pmbl.
23. However, an argument can be made that the courts have “indirectly” tried to make private actors accountable, i.e., failure of state to prevent human rights violations by private persons, including corporations, within its territory amounts to violation of a state’s mandate under the international conventions. See e.g., Guerra v. Italy, 26 E.H.R.R. 357 (1998). See also David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, in COMMERCIAL LAW AND HUMAN RIGHTS 25, 40-41 (Stephen Bottomley & David Kinley eds., 2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 470 (2001).
24. The International Council on Human Rights Policy report concludes that only the ILO and
Further, the very fact that there is a move towards framing human rights norms "specifically" directed to TNCs also makes it clear there exist certain gaps in the prevailing state-focal international regulatory regime. The UN Norms, therefore, do more than merely state the existing; they not only formulate obligations directed clearly and directly to TNCs but also lay down the provisions for their implementation.

Third, in terms of the nature of obligations also, the Norms clearly make an encouraging advancement vis-a-vis the prior or existing corresponding instruments. As TNCs could violate human rights in several ways (including by failing to act), it is insufficient to draft obligations in conventional "negative" terms, i.e., that TNCs should/shall not violate human rights. The UN Norms try to overcome this problem by imposing "positive" obligations on TNCs. TNCs shall not only refrain from directly or indirectly contributing to, and benefiting from, human rights violations but also "use their influence in order to promote and ensure respect for human rights."  

Fourth, the Norms substitute the conventional approach of "should" with "shall" in terms of the compliance of the obligation. Although it may be suggested that the change of terminology may not make much difference in terms of the end result and that strictly speaking the Norms are still not binding, it is still a positive and definite shift in approach, and should make a difference when coupled with provisions for implementation of the norms. This shift is

OECD enforcement mechanism were designed with companies in mind. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 117 (2002).

25. Steven Ratner argues that "a system in which state is the sole target of international legal obligations may not be sufficient to protect human rights." Ratner, supra note 23, at 461.


27. This is clear from the use of terms obligation to "promote" and "protect" human rights. U.N. Norms, supra note 6, ¶ 1. Also, the obligation is constructed in terms of not only respecting but also contributing to the realization of human rights. U.N. Norms, supra note 6, ¶ 12. For an argument why TNCs should be under positive obligations, see Surya Deva, Human Rights Standards and Multinational Corporations: Dilemma Between "Home" and "Rome," 7 MEDITERRANEAN J. HUM. RTS. 69, 87-89 (2003).


29. A shift in approach is visible from the use of the term "shall" in paragraphs 2 through 17 and 19 as well as by the fact that the provisions for implementation are given due importance and place in the U.N. Norms. U.N. Norms, supra note 6. See also Hillemanns, supra note 15, at 1068.

30. It is important to note that paragraph 14 of the final draft of the UN Code of Conduct on
also a tacit acceptance of the fact that the prevailing “dialogue-cooperation” based approach of voluntary compliance\(^3\) with human rights norms is not proving to be adequate.\(^3\)

Fifth, the UN Norms propose specific provisions for implementation of human rights norms.\(^3\) In fact, this is a corollary to the Norms opting for an obligatory approach to the compliance of the obligations. Besides asking states to “establish and reinforce the necessary legal and administrative framework for ensuring that the Norms ... are implemented by transnational corporations”,\(^3\)\(^4\) the Norms propose independent and transparent periodic monitoring as well as verification by national and international (including the UN) mechanisms.\(^3\) This again is a departure from the existing *indirect* mode of implementation in which the responsibility of enforcement lies solely and exclusively with states. A note must be taken of another significant provision of the UN Norms which provides for prompt, adequate and effective reparation to persons and communities adversely affected by failure to comply with responsibilities.\(^3\)

Sixth, the scope of the Norms is not limited just to TNCs, but also covers “other business enterprises,”\(^3\) that is, any business entity, regardless of its legal form and/or area of operation, including a partnership, contractor, subcontractor, supplier, licensee or distributor (hereinafter contractors-suppliers *et al*).\(^3\) The Norms shall apply to such “other business enterprises” if they have any relation with a TNC, the impact of its activities is not entirely local, or the activities involve violations of the right to security outlined in paragraphs 3 and 4.\(^3\) Such a wide amplitude of the UN Norms should be seen as a response to the problem associated in pinning the precise responsibility of a TNC. As in many situations the *apparent* violator is not a TNC but its subsidiaries, contractors or suppliers, should the concerned TNC be allowed to bypass the

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Transnational Corporations has chosen “shall” in place of “should.” It reads: “Transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate.” (Emphasis added). *See* cases cited *supra* note 13.

31. *See, e.g.*, Compact Progress Report, *supra* note 8, at 4. “It [the Global Compact] is a cooperative framework based on internationally established rights and principles.” It must also be noted that engaging in “policy dialogues” with the business sector is one of the four main areas of activity of the Compact. *Id. See also* OECD Guidelines, *supra* note 12, ¶ 1.1.


34. *Id.* ¶ 17.

35. *Id.* ¶ 16.

36. *Id.* ¶ 18. Compensation not as charity but for violation of a right due to omission of duty is crucial. *See* Union Carbide Corp. v. Union of India, *infra* note 130.


38. *Id.* ¶ 21.

39. *Id.*
liability on technical grounds, e.g., the separation of personality or lack of control? The Norms, thus, try to overcome this problem by directly and squarely placing an obligation, that the contractors-suppliers et al of a TNC respect human rights, on the concerned TNC.41 It must be noted that the obligation of TNCs also extends to ensuring that their contractors-suppliers et al actually implement the Norms in their respective operations.42 The Norms, therefore, send a clear message to TNCs: either ensure that the entities with whom you do business dealings respect human rights or do not deal with them, for failure to act may attract liability.43

The above analysis makes it manifest that the UN Norms represent a progress (and that too in the right direction) over the prevailing regulatory regimes. At the same time, one should not become unduly optimistic from this progress. Despite the above vital improvements, as compared with previous instruments, the Norms still suffer from serious theoretical and operational shortcomings, both in terms of formulation and implementation of human rights obligations. These shortcomings, together with the positives, are dealt with below in the next two parts.

III. FORMULATION OF HUMAN RIGHTS NORMS

In this section I first intend to briefly analyze the general as well as specific human rights obligations of TNCs formulated under the UN Norms, and then examine some of the operational difficulties which they might face. I also explore the possible theoretical recourse that could help in overcoming those difficulties. But before proceeding further, two clarifications. First, I have invoked, wherever considered appropriate, the Commentary on UN Norms to understand and state human rights obligations of TNCs because the Norms

40. Though the definition of TNC in paragraph twenty is wide enough to cover even the subsidiaries of a TNC, "subsidiaries" as such are not specifically mentioned along with suppliers-contractors in paragraph 21. It seems, however, that the subsidiaries of a TNC could still be covered, being a "business enterprise" having a "relation with a transnational corporation". This interpretation could also be supported from the language used in paragraph 15. U.N. Norms, supra note 6.

41. Paragraph one provides: "... [W]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises shall have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, ..." (emphasis added.) U.N. Norms, supra note 6. See also Hillemanns, supra note 15, at 1072-73.

42. This is clear from a provision regarding implementation, which lays down: "... [e]ach transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms." (emphasis added.) U.N. Norms, supra note 6, ¶ 15.

43. See Commentary on U.N. Norms, supra note 28, at 18.
itself consider the Commentary to be “a useful interpretation and elaboration of the standards contained” therein.\footnote{44} Second, as mentioned before, though the Norms are directed towards TNCs and other business enterprises, for the sake of convenience I have used TNCs to indicate both.

A. Human Rights Obligations

1. General Obligations

The UN Norms begin by laying down general obligations in paragraph 1. The obligations are two-fold: primary\footnote{45} responsibility of states and “within their respective spheres of activity and influence” the obligation of TNCs to “promote, secure the fulfillment of, respect, ensure respect of and protect human rights.”\footnote{46} The general obligations assume more significance because of two reasons. First, all the Norms that follow are to be interpreted in the light of these general obligations.\footnote{47} This interpretational guideline becomes very potent in view of a broader spectrum of duties conceived herein,\footnote{48} and should go a long way in a (required) liberal construction of the human rights obligations. Second, the appended commentary clarifies that the obligations apply to corporations and other business enterprises irrespective of the fact where they operate\footnote{49} -whether in home or at ‘Rome’, that is, the host country.\footnote{50} This again tries to address, at least at theoretical level, an issue which should have been the starting point of any theory of corporate responsibility.

A difficulty may, however, arise in construing what is the “respective spheres of activity and influence” of TNCs, especially when the Norms do not prescribe any guidelines. For example, would it include the entire supply chain, and all the subsidiaries as well as affiliate sister concerns of a TNC? Moreover, whether the spheres of activity of a TNC engaged in, say, construc-

\footnote{44} U.N. Norms, supra note 6, at pmbl., ¶ 9.\footnote{45} Qualifying states’ responsibility by ‘primary’ may, though inadvertently, suggest that the responsibility of TNCs is secondary. Such an implication is avoidable because in view of TNCs emerging status, role and place, their responsibility to respect/promote human rights should also be primary in nature. “Because MNCs have gained powers traditionally vested only in states, they should arguably be held to the same standards that international law presently imposes upon states.” Mahmood Monshipouri et al., supra note 9, at 966.\footnote{46} UN Norms, supra note 6, ¶ 1.\footnote{47} Commentary on UN Norms, supra note 28.\footnote{48} See Deva, supra note 27; Commentary on U.N. Norms, supra note 28.\footnote{49} Commentary on U.N. Norms, supra note 28.\footnote{50} Which standards of human rights corporations operating in many countries should follow has been a critical issue of corporate responsibility debate. See Clare Duffield, Multinational Corporations and Workers’ Rights, in HUMAN RIGHTS AND CORPORATE RESPONSIBILITY, A DIALOGUE 193 (Stuart Rees & Shelley Wright eds. 2000); JOHN R. BOATRIGHT, ETHICS AND THE CONDUCT OF BUSINESS 379 (3d ed., 2000). See also Deva, supra note 27.
tion work would extend to promoting right to education or privacy generally, i.e., outside its activity boundary? As TNCs and human rights activists are likely to plead for opposing interpretations, this aspect requires clarification.

2. Right to Equal Opportunity and Non-Discriminatory Treatment

The UN Norms mandates TNCs to “ensure equality of opportunity and treatment” in order to eliminate discrimination based on race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability or age.\footnote{Commentary on U.N. Norms, supra note 28.} Besides, there is also a diluted\footnote{Diluted because the obligation is drafted in terms of ‘should’ and moreover, laid down under the commentary as distinguished from the main text of the relevant paragraph.} obligation to eliminate discrimination on the ground of health status (including HIV/AIDS), marital status, capacity to bear children, pregnancy and sexual orientation.\footnote{Commentary on U.N. Norms, supra note 28, at 5.} The measures that accord special protection to children, or are “designed to overcome past discrimination against certain groups”\footnote{A recent survey of almost 8,000 high-level executives from firms in 103 countries revealed that “fewer than 6 percent of businesses surveyed have an HIV/AIDS-specific written policy that has received formal approval.” David E. Bloom, et al., Business and HIV/AIDS: Who Me?, WORLD ECONOMIC FORUM, (2003), available at http://www.weforum.org/pdf/Initiatives/GHL_BusinessAIDSWhoMe_WAD.pdf (last visited Dec. 18, 2003). See generally INT’L LAB. OFF., Time for Equality at Work (2003), available at http://www.ilo.org/public/english/standards/decl/publ/reports/report4.htm (last visited Dec. 18, 2003); Jayanth K Krishnan, The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India, 25 HUM. RTS. Q. 791-819 (2003).} TNCs are expected to pay special attention “to the consequences of business activities that may affect the rights of women”, especially regarding conditions of work.\footnote{For example, in the context of India, where arts. 15(4) and 16(4)/(4-A)/(4-B) of the Constitution provide for special affirmative action provisions for certain under privileged classes of citizens, an argument}

Though the list of discriminating factors is appreciably extensive, it is difficult to understand why the obligation is made soft regarding some equally important variables. For example, despite HIV/AIDS and pregnancy being very potential reasons for discrimination practiced by corporations all over the world,\footnote{For example, in the context of India, where arts. 15(4) and 16(4)/(4-A)/(4-B) of the Constitution provide for special affirmative action provisions for certain under privileged classes of citizens, an argument} the Norms prescribe no mandatory obligation to desist from such practices. In one respect however, the Norms deserve credit: an express provision for taking affirmative action measures to rectify past discrimination. Such a provision becomes crucial at a time when a fear is expressed that the assumption of public services by corporations, in view of states resorting to privatization and disinvestments, will not be accompanied by adoption of erstwhile states’ policies of affirmative actions.\footnote{For example, in the context of India, where arts. 15(4) and 16(4)/(4-A)/(4-B) of the Constitution provide for special affirmative action provisions for certain under privileged classes of citizens, an argument} But it should be noted that
the UN Norms do not make it clear whether this is merely an enabling provision, or an obligation requiring taking of positive steps. In the context of corporations, a provision for affirmative action would prove more effective only if it is of the latter category.

3. Right to Security of Person

Paragraph 3 of the UN Norms deals with crimes against the human beings in violation of international human rights and humanitarian law. TNCs, for example, shall neither engage nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, and extrajudicial, summary or arbitrary executions. In addition, the appended commentary provides that besides not producing or selling weapons declared illegal under international law, TNCs which produce and/or supply military, security, or police products/services shall also “take stringent measures to prevent those products and services from being used to commit human rights or humanitarian law violations.” These provisions are a reflection of the lessons learnt from the trial of several corporations for their direct or tacit involvement in the commission of above-mentioned heinous crimes, since the Second World War to the present day.

The Norms also contain another provision directed at remedying the fallouts of security arrangements made by TNCs on human rights. “Business security arrangements shall be used only for preventive or defensive services,” and the force applied by security personnel shall be proportional and only when “strictly necessary.” It must also be kept in mind that security personnel do not violate important rights of workers/employees such as the rights to freedom of association and peaceful assembly and to engage in collective bargaining. Moreover, TNCs shall establish policies to prohibit the hiring of private

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59. U.N. Norms, supra note 6, ¶ 3.

60. Commentary on U.N. Norms, supra note 28, at 5.


62. U.N. Norms, supra note 6, ¶ 3.


64. Id.
militias/paramilitary groups, or working with units of state security forces known for human rights violations. Again, we can see clearly the influence of the human rights violating activities of Enron and Unocal on the drafting of these provisions.

4. Rights of Workers

The UN Norms make elaborate provisions regarding workers’ rights. TNCs are supposed to provide a safe and healthy working environment, and are mandated not to use forced or compulsory labor as forbidden by the relevant international instruments, national legislations, and international human rights/humanitarian law. A special provision obligates TNCs to respect the right of children to be protected from economic exploitation. TNCs shall not only create and implement a plan to eliminate child labor but also not employ any person under the age of 18 in any type of work that is hazardous, interferes with child’s education, or is likely to jeopardize the health, safety or moral of young persons.

Besides the above rights, two more provisions deserve special mention. First, TNCs shall provide workers with remuneration “that ensures an adequate

65. Id.
66. The report of Human Rights Watch on Enron documents detail how Enron/Dabhol Power Corporation violated civil-political right with the help on Indian police. HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE RESPONSIBILITY IN HUMAN RIGHTS VIOLATIONS (1999), available at http://www.hrw.org/reports/1999/enron/ (last visited Mar. 10, 2003). It should further be noted that one of the charges levered against Unocal before the U.S. courts is that it aided/abetted the Burmese military force to carry out forced dislocation, forced labor, rape, etc. See John Cheverie, United States Court Finds Unocal May be Liable for Aiding and Abetting Human Rights Abuses in Burma, in 10 HUMAN RIGHTS BRIF 6 (2002).
67. U.N. Norms, supra note 6, ¶ 7. The relevant commentary further provides that TNCs “shall make available information about the health and safety standards relevant to their local activities.” Commentary on U.N. Norms, supra note 28, at 9. Such a provision is very important because most of times corporations do not disclose information about the possible negative effects of their activities on the health/safety of employees, consumers and general public. For example, in Bhopal catastrophe the failure of UCC/UCIL to provide prompt and adequate information about the negative effects of MIC and other gases proved fatal as far as victims are concerned.
68. U.N. Norms, supra note 6, ¶ 5. It is also provided that employers shall have resort to prison labor only as a consequence of a conviction in a court of law, provided that the work/service is carried out under the supervision and control of a public authority. Commentary on U.N. Norms, supra note 28, at 7.
69. U.N. Norms, supra note 6, ¶ 6. “Economic exploitation” is defined in an expansive manner to include employment “in a manner that is harmful to their health or development” or in any occupation “before a child completes compulsory schooling and, except for light work, before the child reaches 15 years of age.” Commentary on U.N. Norms, supra note 28, at 6.
71. Id. at 7. TNC may, however, employ persons aged 13 to 15 years in light work in national laws or regulations permit. Id. Such a provision though might be misused by TNCs in view of the fact that they often enjoy more bargaining power than many developing countries.
standard of living for them and their families.” The remuneration should be freely agreed upon or fixed by national laws/regulation, whichever is higher, and keep in mind the principle of equal remuneration for work of equal value. Second, the TNCs shall ensure freedom of association and effective recognition of the right to collective bargaining of their employees/workers, especially in those countries that do not fully implement international standards concerning those rights. It should be noted that a sincere commitment on the part of corporations to respect the rights to freedom of association and collective bargaining could go a long way in protecting rest of the workers’ rights.

It is clear from a brief review of workers’ rights that the Norms seek to achieve lofty goals and make extensive provisions to attain those goals. Critics, however, argue that the intended results might not be achieved as ambiguity in the provisions affords enough room for corporations not to follow the provisions in spirit. For example, with the reference to the provision for fair and reasonable remuneration it is argued that the Norms “leave it open to anyone to interpret what are an adequate standard of living and a just wage” and “continue to base their wage criteria on the notion of national conditions.”

Though the first point regarding ambiguity deserve consideration, a suggestion for having equal global wages, both in North and South, is more difficult to defend as well as pursue. Even if workers in North and South work for same number of hours and under similar circumstances, it will be both unrealistic and unreasonable to argue that they should be given same wages, for the wages awarded to workers at any two given places would command different purchasing power to satisfy basic needs. It is still necessary though to agree on common variables with reference to which fair and reasonable wages could be determined at national level. This is further explained below with reference to a distinction which should be drawn between aspirational and operational standards of human rights.

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72. U.N. Norms, supra note 6, ¶ 8.
74. Id. at 10-11.
75. U.N. Norms, supra note 6, ¶ 9. TNCs are also supposed to respect the right to workers to strike.
5. Respect for National Sovereignty and Human Rights

Under the umbrella of “respect for national sovereignty and human rights”, the Norms stipulate obligations on a wide range of issues—from adherence to rule of law to abstaining from corruption; from promoting right to development to respect for national laws/regulation; from promoting social, economic and cultural rights to positive contribution for human rights realization generally. The most striking feature of these provisions is their treatment of TNCs, together with other state organs, as vehicle of developing a society wedded to rule of law, transparency, accountability and sustainable development and in which people’s civil, political, economic, social and cultural rights are realized. Despite the fact that TNCs’ obligations are subject to the limitations of “their resources and capabilities,” it represents a departure from the traditional role of TNCs in society in at least three respects. First, the human rights obligations of TNCs instead of being limited to mere civil and political rights now also encompass second and third generation human rights, that is, both individual and collective social, economic and cultural rights. Second, the scope of obligations is clearly broadened; TNCs shall be subject to both negative and positive obligations. Third, TNCs are expected to respect/promote human rights not only of those who are affected by their activities directly (workers/consumers) but also of those affected indirectly, invisibly and/or in the longer run (society as such).

It will be worthwhile to note some of the obligations which demonstrate the above shift. TNCs are, for example, expected to enhance the transparency of their activities in regard to payments made to government/public officials. They are also obligated to respect the rights of indigenous people, including “to own, occupy, develop, control, protect and use their lands, other natural resources, and other cultural and intellectual property.” Moreover, TNCs shall contribute to the realization, in particular, of the rights to development, adequate food and drinking water, the highest attainable standard of physical/mental health, adequate housing, privacy, education, freedom of thought, conscience and religion, and freedom of opinion and expression.

The above provisions undoubtedly reflect a paradigmatic shift in terms of the appropriate role and place of corporations in society generally and regarding human rights in particular. But the Norms merely paint this picture with a

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79. U.N. Norms, supra note 6, ¶ 10-12.
81. Id. at 13.
82. Id. at 12.
83. U.N. Norms, supra note 6, ¶ 12.
84. See e.g., Erin Elizabeth Macek, Scratching the Corporate Back: Why Corporations have no Incentive to Define Human Rights, 11 MINN. J. GLOBAL TRADE 101 (2002).
broad brush; it is not clear how TNCs are expected to put these expectations into practice. Various issues would require clarification or concretization before TNCs actually deliver the desired goods. For example, whether only those TNCs whose activities come in direct contact or conflict with certain human rights are under a positive obligation, or all operating TNCs are under a general obligation to promote all the human rights? It seems that the Norms tend to adopt, in my view rightly, the second option, but in that case it will be necessary that corporate law, which governs the establishment and working of corporations, both at national and international level is amended to provide for taking into account the impact of corporate decisions/activities on human rights in society. The Norms are, however, silent on this issue. Unless it is precisely clear what we want TNCs to do, any further talks about the efficacy of the proposed regime will be premature as well as unsound.

6. Obligations with Regard to Consumer Protection

As the activities of corporations also come in conflict with consumers' various (human) rights, the Norms make specific provision to address this issue. TNCs shall not only act in accordance with fair business, marketing and advertising practices, including relating to competition and anti-trust matters, but also take all necessary steps to ensure safety/quality of the goods and services provided. An important aspect is that TNCs are also expected to observe the precautionary principle, and also disclose, in cases where a product is potentially harmful, all appropriate information on the contents and possible hazardous effects of the products through proper labeling, informative and accurate advertising and other appropriate methods. These provisions


86. U.N. Norms, supra note 6, ¶ 13. See also Commentary on U.N. Norms, supra note 28, at 15.

87. U.N. Norms, supra note 6, ¶ 13. See also Commentary on U.N. Norms, supra note 28, at 15.

"Precautionary principle" means that lack of full scientific certainty should not be used as a justification for not taking or delaying a step which could have enhanced the safety/quality of the goods or services, especially when doing so may result in irreversible harm.

will become immensely relevant in the time to come, for example, in the context of genetically modified products, or breast implants technology.

7. Obligations with Regard to Environmental Protection

The UN Norms also respond to the growing concern about corporations’ indifference to sustainable development while taking business decisions as well as formulating short/long term policies. Accordingly, TNCs shall carry out their activities in accordance with laws, practices and policies of the country of operation as well as international agreements, principles and standards regarding environmental perseverance in order to contribute to “the wider goal of sustainable development.”\(^8^9\) TNCs are required to assess periodically the impact of their activities on environment and human health,\(^9^0\) especially of certain groups such as children, older person, women and indigenous people.\(^9^1\) Further, best management practices and technologies must be adopted to reduce the risk of accidents and damage to the environment.\(^9^2\)

As TNCs operate in countries placed at different levels of development and consequently having varying levels of environmental standards, it becomes problematic and often full of business dilemmas as to which standards out of three—home, host or international—should they follow. Though the Norms mandate TNCs to observe both international and host standards, in many situations the host standards are as good as non-existent or are not enforced.\(^9^3\) As far as the international standards are concerned, they are generally so vague and general that it is quite easy to comply with their words without adhering to their spirit.\(^9^4\) In such a scenario, it is worth exploring whether TNCs should not follow the higher of home or host standards, irrespective of the fact where they operate.\(^9^5\)

\(^8^9\) U.N. Norms, supra note 6, ¶ 14.

\(^9^0\) Commentary on U.N. Norms, supra note 28, at 16.

\(^9^1\) Id. TNCs are also required to make the impact reports accessible, in a timely manner, to the affected groups, concerned national/international institutions and to the general public. Id.

\(^9^2\) Commentary on U.N. Norms, supra note 28, at 17.


\(^9^5\) See generally Deva, supra note 27.
B. Operational Difficulties: A Response

Despite making a commendable effort to formulate human rights obligations for TNCs, the UN Norms, in my view, might face several operational shortcomings. Two of such possible difficulties are dealt with below.

1. (Over)-reference to International Human Rights Law/Instruments?

The Norms make frequent reference to numerous international treaties, which are negotiated and signed by states and are directed primarily towards states. This approach is problematic due to several reasons. At the outset, the approach is circular. Instead of laying down ascertainable and guidable human rights standards, it leads the consumers of the Norms—from TNCs to NGOs, states, and victims—to several national and international instruments. In other words, the questions such as what are the obligations of TNCs in a given case and whether they violated those obligations cannot be determined with reference to the UN Norms. Though at places the appended commentary try to give concrete shape to some of the obligations, on the whole that is highly inadequate. A reference to state oriented international instruments to deduce TNCs’ human rights obligations might present another difficulty when it comes to TNCs’ positive obligations. Whether the positive human rights obligations of TNCs, especially regarding socio-economic and cultural rights, are expected to be equivalent to that of states, which were conceived as original and primary targets of such international instruments? If TNCs’ positive obligations are not as extensive as that of states, which seems to be a more probable as well as acceptable stand, then it will be logical to stipulate their obligations separately.

I argue, therefore, that though there is no need to redefine human rights especially for corporations and it is perfectly legitimate to rely upon international instruments ‘negotiated-signed-applicable’ to states to construct human

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96. See e.g., Commentary to U.N. Norms, supra note 28, at 7-9.


98. For example, a pharmaceutical company should have positive obligations only regarding those human rights which are directly related to its core business (e.g., right to health), or qua all human rights generally (e.g., right to adequate housing or food/drinking water).

99. For obvious reasons, TNCs cannot be equated to states as far as the nature and extent of human rights obligations are concerned. Donaldson argues that “corporation is an economic animal” and therefore, “it would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human individuals.” THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 84 (1989). See also Deva, supra note 27, at 95-96.
rights obligations for TNCs, it may still be necessary to deduce specific obligations of TNCs with reference to the referred international instruments. This is also required because TNCs could not possibly violate certain human rights enumerated in state-focal international treaties. Therefore, in my view, subject to the limitation regarding putting universality in operation discussed below, it is desirable that the human rights obligations of TNCs are enumerated, as far as possible and in an inclusive manner, in a schedule to the Norms. Doing so will not only bring certainty in terms of what is to be followed and consequent higher rate of compliance, but will also be an economically efficient way of regulation.

2. Human Rights Standards: Putting Universality in Operation?

The Norms acknowledge, among others, the universality of human rights, which in the context of TNCs also mean that they should observe the same standards of human rights whether operating in "home" or at "Rome". Though this article is not the appropriate place to join an already intensive and extensive debate over universality (or lack of it) of human rights generally, I intend to explore this additional TNCs-related dimension of universality.

100. Joseph Raz argues that "there is no closed list of duties which correspond to the right .... A change of circumstances may lead to the creation of new duties based on old right." (emphasis added). JOSEPH RAZ, THE MORALITY OF FREEDOM 171 (1986).


102. U.N. Norms, supra note 6, ¶ 3. Besides universality, "indivisibility, interdependence and interrelatedness of human rights" are also acknowledged. Id.

which arise because of the fact that TNCs, unlike states, operate in more than one country. Agreeing that TNCs shall pay fair and reasonable remuneration, whether fair and reasonable would quantify into ‘same’ wages, say, at a factory in India and in the US? Again agreeing that TNCs shall contribute to the realization of, say, the right to drinking water (or access to highest attainable standard of health, for that matter), what type of and level of contamination will make the water not suitable for ‘drinking’ (or in case of right to health, by which yardstick highest attainable standard will be judged)? Such examples, which could be easily multiplied with reference to various provisions in the Norms, demonstrate that there are operational difficulties associated with universal human rights. How such difficulties could be overcome, to the satisfaction of the affected parties having conflicting interests?

Even if we assume *arguendo* that human rights are universal, it seems that in case of many human rights universality is only in terms of *aspiration* and not regarding the *content of aspiration*; in fact, a push for pressing universality also regarding the content of rights might result in negation rather than promotion of human rights. For example, there is a universal right to food but it is doubtful whether there is a universal right to a particular type of food. Similarly, the right to safe and healthy working environment or the right to fair and reasonable subsistence wages is universal only in abstract terms and in each case the quantification of what is safe and healthy or fair and reasonable is bound to vary from place to place. Thus, in order to operationalize the abstract universality and/or to ascertain the content of human rights, certain adjustments to local social, political, economic and cultural conditions are to be made.\(^{104}\)

A distinction, therefore, needs to be drawn between aspirational and operational standards of human rights. A note of caution, however, is required in *localizing the universality* in such a manner. As the objective of this exercise is to promote human rights, it should be ensured that only those local differences are given weight which help in fulfilling the intended objective; the differences which do not respect human dignity should be treated as irrelevant.\(^{105}\)

In view of the above distinction proposed between aspirational and operational standards of human rights, the Norms could only possibly lay down aspirational standards of human rights. Such aspirational standards would require to be translated into concrete measurable operational standards at municipal level. Unfortunately, the Norms do not recognize this distinction and consequently try to achieve an impossible balance between generality and

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104. For example, Shelley Wright argues how local cultural differences might be used to promote human rights, and a failure to recognize such differences might in fact result in subverting human rights. *Shelley Wright, International Human Rights, Decolonisation and Globalisation: Becoming Human 88-93, 111, 213-14 (2001).*

105. *See Deva, supra* note 27, at 77-78.
specificity. In the absence of UN Norms not adopting the distinction between aspirational and operational standards, they might prove ineffective not only in guiding the conduct of TNCs but also working as touchstone with reference to which violation of human rights could be measured. Recognition of such a distinction, on the other hand, is likely to increase the efficacy of the UN Norms.

IV. IMPLEMENTATION OF HUMAN RIGHTS NORMS

Lack of implementation strategy and effective sanctions have been the most critical lacunae of the existing international regimes of corporate responsibility for human rights violations. Being conscious of this aspect, the UN Norms, after some initial debate during drafting stage, make a departure from the past approach of merely voluntary implementation. Paragraphs 15 to 19 deal with “general provisions of implementation.” Out of these, only the first three paragraphs (15-17) relate to implementation procedures stricto sensu; while paragraph 18 elaborates the obligation to provide for reparation to the victims adversely affected by non-compliance with the Norms, paragraph 19 lays down the rule that the Norms shall not be “construed as diminishing, restricting, or adversely affecting the human rights obligations” of states and/or TNCs under national or international laws. I begin below with an analysis of the provisions related to multiple implementation techniques as well as reparation and then move on to examine some of the lacunae which may seriously hamper the efficacy of the prescribed implementation mechanism.


108. In case of a choice between the Norms and “more protective interests”, paragraph nineteen confers priority on the latter. Commentary (a) to paragraph nineteen also makes it clear by providing that “[i]f more protective standards are recognized or emerge in international or state law or in industry or business practices, those more protective standards shall be pursued.” Commentary on U.N. Norms, supra note 28, at 20.
A. Techniques and Modes of Implementation

The UN Norms try to combine multiple implementation techniques for ensuring that TNCs comply with their human rights obligations. On a closer scrutiny of the relevant provisions, one can also notice that these techniques seek to implement two different types of obligations: direct and indirect. Paragraphs 15 and 16 are aimed at implementing direct obligations of TNCs and I will, therefore, call it the “direct mode.” The mode is direct because it treats TNCs under a direct obligation to respect/promote human rights and seeks to enforce such obligation by invoking internal as well as external techniques. Paragraph 17, on the other hand, is directed at implementing indirect obligations, i.e., the obligation of states to ensure that all entities, including TNCs, within their jurisdiction respect human rights rather than implementing TNCs’ obligations to respect human rights.109 This can, therefore, be termed as “indirect mode” to distinguish it from the first one.110 I believe that the distinction between the two modes is vital. To draw an analogy, it is the distinction between saying that minor children shall not drive and that parents shall ensure that their minor children do not drive. The distinction, in other words, is that in the former case the proposed mechanism, whether national or international, will be enforcing obligations imposed directly on TNCs whereas in the latter what the mechanism will be enforcing is only an intermediary/indirect obligation, i.e., states’ obligation to ensure that TNCs within their territory respect human rights.111

1. Direct Mode

The direct mode adopts a two-fold strategy of implementation. First, TNCs “shall adopt, disseminate and implement internal rules of operation in compliance with the Norms.”112 As here the emphasis is on TNCs adopting and

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111. Such an obligation on states is discernable, among others, from paragraph I of the Norms: “States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.” (emphasis added). See generally U.N. Norms, supra note 6. See also Chirwa, supra note 109. See cases cited supra note 23.

112. See U.N. Norms, supra note 6, ¶ 15. TNCs are also obliged to “periodically report on and take other measures fully to implement the Norms.” Id. It is, however, not very clear to whom such reporting is to be made.
applying the Norms themselves, I will call this the strategy of "internalization." The strategy of internalization is directed towards developing a corporate culture of respect to human rights. TNCs should give appropriate training to their managers and workers as an initial step for building such a culture. More importantly, such human rights culture is not to be confined to the narrow legal structure of TNCs but has to extend to their contractors-suppliers *et al*, as TNCs are obligated to apply and incorporate the Norms in the relevant contracts/business arrangements. TNCs shall either ensure that their business partners comply with human rights obligations or cease to work with them. Though TNCs might contend that this is an impractical expectation, the Norms rightly place the obligation directly and squarely on TNCs because only TNCs are in a position/power to achieve this result.

Second, TNCs "shall be subject to periodic monitoring and verifying by United Nations, other international and national mechanisms already in existence or yet to be created." It can be termed "external" strategy in view of the focus being on external agencies keeping an eye on the conduct of TNCs. Though the Norms have not elaborated upon the details of proposed monitoring/verification, the appended commentary suggests that the UN human rights treaty bodies should monitor implementation of these Norms, among others, through the "creation of additional reporting requirements for states." A role is also envisaged for other UN special agencies, including the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. But it is surprising that there is no specific mention of the Global Compact despite the fact that it is a UN initiative especially directed towards corporate social responsibility. Moreover, the reliance on state reporting to ensure that TNCs comply with the Norms is too optimistic to be realistic, more so when states act in connivance with TNCs on many occasions.

118. *Id.*
120. Andrew Clapham and Scott Jerbi point out three types of corporate complicity: direct, indirect,
It can be said that though the Norms rightly take cognizance of the necessity of putting in place an external international regulatory regime to make TNCs accountable for human rights violations, they fall short of moving in the right direction. For example, it requires thorough investigation whether a new international body is created for this purpose or the existing institutions, including the WTO, are molded to enforce human rights obligations against TNCs. What is, however, appreciable that the commentary to paragraph 16 not only encourages trade unions and NGOs to invoke the Norms for their actions/dealings with TNCs, but also hope that the Norms could be used as benchmarks of ethical investing. Such a provision is important because the success of any mechanism aimed at enforcing human rights obligations on TNCs requires, in addition to traditional enforcement tools, evolution and employment of new enforcement strategies.

2. Indirect Mode

Under the indirect mode, the Norms expects that “states should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms” are implemented by the TNCs. It is interesting to note that this is the only provision that is drafted in terms of ‘should’, a deviation which is difficult to explain especially when the obligation of states to respect and promote human rights also includes the responsibility to ensure/secure respect from other natural or legal persons operating within its territory. The and silent. Clapham & Jerbi, supra note 26, at 342-49. See also Ramasastry, supra note 9, at 100-04 (examining in detail the nature and level of corporate complicity with states that should give rise to civil and criminal liability); Ratner, supra note 23, at 500-06.

121. See e.g., the proposals cited by William Meyer and Boyka Stefanova. Meyer & Stefanova, supra note 106, at 520-21. See also Monshipouri et al., supra note 9, at 983-86.


123. Commentary on U.N. Norms, supra note 28, at 19. It could be said that by introducing the notion of “ethical investment” the Norms are catching up with a global trend towards promoting ethical or socially responsible investment. For example, the Australian Securities and Investment Commission is currently in the process of finalizing guidelines regarding product disclosure statements (PDS). See AUG1.. SEC. & INV. COMM’N, DISCLOSURE ABOUT LABOUR STANDARDS AND ENVIRONMENTAL, SOCIAL AND ETHICAL CONSIDERATIONS IN PRODUCT DISCLOSURE STATEMENTS—DRAFT ASIC S 1013 DA GUIDELINES FOR PRODUCT ISSUERS (2003), available at http://www.asic.gov.au (last visited Sept. 15, 2003); see generally AUSTRALIAN GOVERNMENT’S DEPARTMENT OF THE ENVIRONMENT AND HERITAGE, CORPORATE SUSTAINABILITY—AN INVESTOR PERSPECTIVE: THE MAYS REPORT (2003).

124. U.N. Norms, supra note 6, ¶ 17.

125. Id. ¶ 1. See also Chirwa, supra note109.
appended commentary elaborates further the above expectation of the UN Norms: the governments should not only make these Norms widely known but also use them as a model for initiating legislations or taking administrative processes, including national human rights commissions.\footnote{Commentary on U.N. Norms, supra note 28, at 20.} Whether this provision makes any difference or not, will depend to a large extent on how the courts, both municipal and international, make use of this directory mandate.\footnote{See sources cited supra note 23.}

In case TNCs fail to comply with the Norms, they shall provide reparation to individuals, entities and communities adversely affected by such failure.\footnote{U.N. Norms, supra note 6, ¶ 18.} The reparation, which may take the form of restitution, compensation and rehabilitation for any damage done or property taken, must be prompt, effective and adequate.\footnote{Id.} This provision is significant because of at least three reasons. First, it implies that victims of corporate human rights abuses shall have \textit{a right} to claim compensation. Thus, TNCs should no longer be able to present payment of monetary compensation as a sign of mercy shown to the victims.\footnote{For example, in the Bhopal case the settlement order of the Supreme Court read: "The aforesaid payments [of $470 million] shall be made to the Union of India as claimant and for the benefit of all victims of the Bhopal gas disaster \ldots and not as fines, penalties, or punitive damage." Union Carbide Corp. v. Union of India A.I.R., 1990 S.C. 273, 275 (India) (emphasis added).} Second, as the compensation could be claimed even by communities, presumably for violation of collective rights, this will take care of those situations when it is difficult to attribute harm to identifiable individuals. Third, the provision expressly acknowledges that reparation, in order to serve any real purpose, should be prompt, effective and adequate.

Despite the above positives, one difficult issue survives regarding the adequacy of compensation. Courts, both at municipal and international levels, face an obvious difficulty in quantifying damages for human rights violations, especially when victims and TNCs belong to countries placed in vastly different stages of economic development. It seems that the guidance offered by the Norms—that courts, while determining damages, shall apply the Norms in pursuance to national/international law—does not reach to the root of the problem. The quantification of damages invariably raises the question about the value of life, say, of a worker in an Indian factory qua a worker employed in a similar factory in the US or Europe. To put it differently, whether the loss of life should have same monetary value everywhere or not? Another ambiguity remains regarding the objectives sought to be achieved by the provision for reparation; it is not clear whether deterrence is one of the underlying themes. If deterrence is one of objectives behind reparation, which

\footnote{U.N. Norms, supra note 6, ¶ 18.}
in my view should be, then there should be a specific provision for awarding punitive damages. If so, what should be the test for determining punitive damages—whether the proportionality of the harm caused or the economic capacity of the concerned TNC should play any role in this regard?\textsuperscript{132}

B. What is still Lacking?

Effective and efficient implementation of the Norms holds the key to the extent of their success in achieving the intended objective. Though the Norms make a sincere attempt in formulating the provisions for implementation, in my view they fall short of what is required. In my view, the UN Norms suffer from at least following three glaring omissions which might seriously hamper the prospect of their viable enforcement.

1. Multiple Sanctions

As explained above, the Norms stipulate implementation provisions. But which coercive measures could follow if certain TNCs fail to implement the mandate of the Norms? It seems that the response of the Norms to such a situation is two-fold. First, the expectation is that states will establish the necessary legal framework to ensure that TNCs comply with their human rights standards under the Norms and also otherwise.\textsuperscript{133} It is logical to assume that provisions related to sanctions could be part of such legal framework. It can, however, be said that administering sanctions solely or even predominantly through states might not fulfill the desired results. Past experiences show that on many occasions, if not always, states either act in complicity with TNCs\textsuperscript{134}

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\textsuperscript{132} The Indian Supreme Court has laid down a principle of punitive damages that is worth considering. Oleum Gas Leak Case (M.C. Mehta v. Union of India) A.I.R. 1987 S.C. 1086. Justice Bhagwati observed that “the measure of compensation in the kind of cases referred to in the preceding paragraphs [i.e., liability of an enterprise dealing with hazardous or inherently dangerous activity] must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. \textit{Id.} The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.” \textit{Id.} at 1099-1100.
\textsuperscript{133} U.N. Norms, supra note 6, \S 17.
\textsuperscript{134} For an example, see the activities of Enron in India and Unocal in Myanmar.
\end{flushleft}
or tacitly align with them.\textsuperscript{135} This is besides the fact that any municipal system will always find it difficult to impose sanctions on a transnational entity.\textsuperscript{136}

Second, TNCs which fail to implement the Norms are obligated to pay reparation to those adversely affected.\textsuperscript{137} Reparation is undoubtedly an important, and from the perspective of victims also useful, remedy, but it is doubtful whether reparation alone could coerce TNCs to respect the Norms. Ideally, the UN Norms should employ three types of sanctions against TNCs: civil, criminal and social. Reparation under the Norms seems to be used only as a civil remedy as it is unclear whether it is also intended to be utilized as a criminal sanction. It is important that the Norms not only resort to criminal sanctions against TNCs (and their human hands) but also effectively invoke social sanctions—by which I mean outcast of the concerned corporation from the market through blacklisting/ban on commercial dealings, and also pressure emanating from consumers, investors, media and NGOs\textsuperscript{138}—to enforce the human rights obligations against TNCs.\textsuperscript{139} Further, it is equally vital that these multiple sanctions flow, wherever possible, from international as well as non-state sources, including market forces.

2. Enforcement Mechanism

A strong enforcement mechanism is sine qua non for effective implementation of the Norms. Being alive to this, the Norms conceive of multiple monitoring and verification mechanisms, both at national and international

\textsuperscript{135} For an example see the response of the US government which is clear from the following two facts. First, the U.S. Department of State, in a letter submitted to the District Court of Columbia, has taken the stand that the adjudication of human rights violation case against ExxonMobil Corporation by the U.S. courts might have “serious adverse impact on significant interests of the United States.” Secondly, on May 8, 2003, the US Justice Department, in an amicus curie brief submitted in Unocal case before the Court of Appeal for the Ninth Circuit, has questioned the very basis of judicial invocation of the ATCA against the US based MNCs for redressing human rights violations abroad. Brief of Amicus Curiae United States of America, John Does I, et al. v. Unocal Corp., et al., 2002 WL 31063976 (Nos. 00-55603, 00-56628, available at http://www.hrw.org/press/2003/05/doj050803.pdf (last visited Dec. 12, 2003). See generally Elliot J Schrage, \textit{Judging Corporate Accountability in the Global Economy}, 42 COLUM. J. TRANSNAT’L L. 153 (2003).

\textsuperscript{136} For example, the UCC and its officials are successfully avoiding the pending criminal proceedings in India. See also Deva, supra note 16, at 48-49 (explaining various substantive and procedural difficulties associated with state-based regulation of TNCs).

\textsuperscript{137} \textit{U.N. Norms}, supra note 6, \S 18.

\textsuperscript{138} See Su-Ping Lu, \textit{Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law} 38 COLUM. J. TRANSNAT’L L. 603, 607, 613, 624 (2000); Macek, supra note 84, at 110-15; Monshipouri et al., supra note 9, at 986-87.

\textsuperscript{139} Though the Commentary to paragraphs 15 and 16 indicates that the U.N. Norms conceive a role for civil society organs and stakeholders, generally that role still needs to be clearly demarcated and institutionalized.
levels. But it seems that the idea is still undeveloped; no definite and/or viable framework for such a mechanism is ascertainable from the Norms, and the appended commentary invite the Sub-Commission on Human Rights and other UN bodies “to develop additional techniques for implementing and monitoring these Norms.” If the Norms are adopted in its present form, that is, without any concrete mechanism to supervise the implementation, it will undoubtedly make a mockery of the Norms, framed admittedly in “non-voluntary” terms and supported for the first time with implementation provisions. Therefore, an enforcement mechanism should be put in place before the Norms being adopted. It is equally critical that the mechanism is both effective and efficient, that is, it could not only preempt human rights violations but also offer speedily an adequate remedy to the victims in cases of violation. For example, the suggestion of monitoring implementation by existing human rights treaty bodies through additional state reporting requirement is likely to prove neither effective nor efficient.

3. Response to (Mis)use of Procedural Issues

At least two procedural issues—*forum non conveniens* and the liability of a parent corporation for human rights violations by its subsidiaries—have

140. *U.N. Norms, supra* note 6, ¶ 16.


145. A cocktail of two principles of corporate law—separate personality and limited liability—achieve this effect, as demonstrated by many cases. In fact, the U.N. Center on Transnational Corporations recognized this as early as in 1988. A further complication arises from the concept of limited liability in corporate law, ...
often been (mis)used by TNCs to avoid or delay their responsibility for human rights violations.\textsuperscript{146} The judicial response to these two issues has also, by and large, helped the cause of TNCs rather than the victims.\textsuperscript{147} But the UN Norms do not address these important procedural issues, in the absence of which any implementation mechanism, even if equipped with multiple sanctions, can hardly deliver justice to the victims.

The Norms should, therefore, respond to the above procedural challenges by offering principled\textsuperscript{148} guidelines to be followed by courts. For example, on the issue of the liability of a parent corporation for human rights violations by its subsidiaries, the Norms could adopt the enterprise theory rather than the entity theory as the basis of liability.\textsuperscript{149} This will ensure that the courts instead of deciding the issue afresh in each and every case, which is not only time consuming but also leads to inconsistent decisions, may determine the question of liability swiftly and in accordance with a predictable principle rather than wagering between various principles.\textsuperscript{150} This will also send a signal to those parent corporations which conduct more hazardous business through financially weaker subsidiaries\textsuperscript{151} and then keep distance by design with them in order to

\begin{itemize}
  \item parent entity by either the home or host country in respect of the actions of the affiliate.
\end{itemize}

\textsuperscript{146.} Besides these two issues, conflict of jurisdiction and choice of law are other problematic areas.


\textsuperscript{148.} Borrowing from Ronald Dworkin, I use “principle” in the sense of “a standard that is to be observed … because it is a requirement of justice or fairness or some other dimension of morality.” \textit{RONALD DWORLIN, TAKING RIGHTS SERIOUSLY} 22 (Harv. U. Press 1978).


\textsuperscript{150.} Courts in different cases have invoked, or have been urged to invoke, the doctrine of agency, attribution, alter ago, or piercing of corporate veil to mitigate the rigor of the principle of separate personality.

\textsuperscript{151.} \textit{See Nina A. Mendelson, A Control-Based Approach to Shareholder Liability for Corporate Torts} \textit{102 COLUM. L. REV. 1203}, 1205, 1246, n.179-82 (2002). \textit{See also A. Ringleb & S. Wiggins, Liability
exploit a principle of corporate law which is probably out of tune with the present day reality of TNCs. ¹⁵²

Similarly, the existing predominant judicial approach to the doctrine of *forum non conveniens* also require adjustment, at least when cases are tried by municipal courts, so as to prevent its abuse for evading liability for human rights violations. The Norms should take a lead in this regard. Blumberg suggests that presence of international human rights should be considered among the public interest factors to be taken into consideration by courts while hearing the plea of *forum non conveniens*. ¹⁵³ It can further be argued that since realization of human rights is no longer a matter internal to national boundaries, in cases involving human rights violations the doctrine of *forum non conveniens* should be invoked only when courts are of the view that a particular forum is clearly and grossly inconvenient to the defendant. ¹⁵⁴

V. CONCLUSION

Many actors—from states¹⁵⁵ to international institutions,¹⁵⁶ academia, media and civil society organs¹⁵⁷—are engaged in a search for evolving an effective as well as efficient regulatory framework of TNCs' accountability for human rights violations. The UN initiatives hold a prominent, if not central, place in such a quest; the Norms being the most recent, and also to date most promising, effort on the part of the UN. The Norms seems to have benefited from the exposure of the infirmities of its predecessor as well as other current

¹⁵⁴ See generally Peter Prince, *supra* note 147 (arguing that the Australian approach of "clearly inappropriate forum" is better than the approach of "most suitable forum" adopted by the courts in the United States and United Kingdom).
¹⁵⁶ One can easily identify the initiatives on the part of the OECD, ILO, UN and the EU. See supra notes 5, 6, 7, 12, and 13.
regulatory regimes of corporate human rights responsibility, as they apparently seek to remedy some of those infirmities. However, certain lacunae still survive which, in my view, might hamper the efficacy of the Norms and neutralize the edge that they claim over their counterparts.

I have argued in this article that though the Norms revive the hope for establishing a legally binding international regime of corporate responsibility for human rights violations, they represent an imperfect step, albeit in the right direction. It is critical for the efficacy of the Norms that imperfections related to both formulation and implementation of TNCs’ human rights obligations are further deliberated upon thoroughly before any move towards the adoption of the Norms. In sum, it is argued that the Norms should not only deduce human rights obligations of TNCs from state-focal international treaties and maintain a distinction between aspirational and operational standards of human rights, but also establish a robust enforcement mechanism which invokes multiple sanctions. Besides, the Norms should also take the lead in responding to hindrances posed by the procedural issues related to forum non conveniens and the liability of a parent corporation for human rights violations by its subsidiaries.

Though at this stage it is difficult to predict with certainty whether the UN Commission on Human Rights will adopt the Norms in March 2004, or whether they will become legally binding *stricto sensu* in the near future, in my view it might be more appropriate that some of the issues raised herein are deliberated upon further before a formal adoption of the Norms. As far as the binding nature of the Norms is concerned, it will be ideal if they take the shape of a legally binding instrument; but this is not to suggest that the non-binding Norms could not contribute, in some way, to rectify the current state of TNCs’ impunity for human rights violations. What is more important, however, that a healthy debate amongst all the affected parties on an issue of vital significance ensues, and if that happens, the present article would achieve its modest objective of highlighting the positives and exposing some of the inadequacies of the Norms.
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"The situs of intangible property is about as intangible a concept as is known to the law."1

I. INTRODUCTION

Recent economic downturns in Argentina, Uruguay, and Venezuela, to name a few Latin American states among others in various parts of the world, have once again raised serious concerns regarding the ability of international lenders or creditors to recover on the sovereign and private debt instruments

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that they hold. With respect to sovereign debt, while the International Monetary Fund, the Paris Club, and the London Club have provided institutional mechanisms by which to conduct organized sovereign debt restructurings, it nonetheless remains for lenders or creditors dissatisfied with the reorganization process to look to the courts to enforce their contractual rights. Significantly, the predictability of debt restructuring regimes have been eroded by the emergence of bondholders and secondary market debt purchasers as principal creditors in place of traditional commercial bank lenders engaged in longstanding relationships with debtor states. Apart from the problems endemic in transnational litigation, this new fixture of non-syndicate or “rogue” creditors in international sovereign lending has engendered a whole set of legal and public policy questions, the heart of which falls beyond the scope of this paper, but which, nonetheless, have already left an indelible imprint on legal commentary and United States decisional law concerning international public or sovereign debt.

In the instance of private debt, which is the realm of creditor-debtor law this paper will focus on, the gamut of international lender or creditor concerns similarly runs wide. However, in the international private debt market the institutional mechanisms for re-negotiation available to sovereign lenders are ordinarily not available to private creditor-obligees. As a result, these creditor-obligees are limited principally to seeking judicial remedies for default or non-


payment either, in their own national courts, or the national courts of the
debtor-obligor. Further complicating these creditor-debtor disputes is the
underlying cause for debtor default or non-payment. Increasingly, it has been
noted that the inability of debtors to perform their payment obligations is due,
at least in some part, to foreign government regulations to which the debtor is
subject. As will be discussed below, these regulations may be imposed in
several forms, the prevailing of which are: foreign exchange controls,
mandatory currency conversions, debt repayment moratoria, depositary
expropriations, and unilateral debt restructurings.

The economic distress that a number of Latin American, as well as other
debtor nations must confront, indeed, is likely to increase the resort to creditor-
debtor litigation, particularly in the United States. While it is true that
international private debt disputes may be litigated in either the home forum of
the creditor-obligee or the debtor-obligor, at least where United States debtors
or creditors are parties to the contracts in question, United States courts have
commonly served as the de facto decision-making forum. More importantly,
however, the prospect of international debt litigation in the United States
arising from these recent economic downturns is likely to revive some difficult
and legally complex issues that remained, arguably, unresolved throughout the
last period of debt crisis litigation in the 1980's.

One issue likely to evoke an extensive and contentious corpus of legal
literature and decisions concerns American notions on international comity and
application of the Act of State Doctrine. The Act of State Doctrine has indeed
been the focus of much scholarly debate over the last fifty years. While the
majority of commentators have been inclined to support the Doctrine, still a

6. Other significant issues that arise from the transnational nature of international debt litigation
involve, inter alia, the doctrine of forum non-conveniens, foreign sovereign immunity, jurisdiction to
prescribe, and jurisdiction to adjudicate. See generally ALAN C. SWAN & JOHN F. MURPHY, CASES AND
MATeRIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 242-97 (2d ed.
1999) (providing a basic framework for understanding the impact of these areas of transnational litigation
on international business transactions); ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND
ARBITRATION 257-72, 608-97 (2d ed. 2002) (providing cases and discussion on the development of forum

7. For an enlightening sampling of the theoretical and historical background of the Act of State
Doctrine and its relation with other principles of comity consult, see Ifeanyi Achebe, The Act of State
247 (1989); Daniel C.K. Chow, Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction
to Prescribe, 62 WASH. L. REV. 397 (1987); Margaret A. Niles, Note, Judicial Balancing of Foreign Policy
Considerations: Comity and Errors Under the Act of State Doctrine, 35 STAN. L. REV. 327 (1983); Irene
Elizabeth Howie, Note, The Nonviable Act of State Doctrine: A Change in the Perception of the Foreign
Act of State, 38 U. PITT. L. REV. 725 (1977); Louis Henkin, Act of State Today: Recollections in Tranquility,
6 COLUM. J. TRANSNAT'L L. 175 (1967).
number of others have called for its abandonment by the courts. In the courts, however, the Doctrine has generally enjoyed substantial normative stability dating back to its earliest articulation in the landmark United States Supreme Court decision *Underhill v. Hernandez*. The Court in *Underhill* considered an action in tort for wrongful detention of a United States citizen against a military government in Venezuela, later recognized as the legitimate governing authority by the United States. The Court held that the sovereign acts of a foreign government done within its territory were unreviewable by United States courts.

More than a century later, the Supreme Court invariably has continued to look to *Underhill* as the classic statement of the Doctrine. In fact, most if not all decisions concerning acts of state have maintained a tradition of quoting verbatim the words of Chief Justice Fuller in *Underhill*:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In subsequent decisions the Supreme Court has adjoined to their classic statement in *Underhill* more precise restatements of the Doctrine and its theoretical predicate. In what has been termed the "second classic statement

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9. 168 U.S. 250, 252 (1897) (providing a curt distinction between “sovereign risk” and “country risk”).

10. Id.

11. Id.


14. See Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918) (“The principle that the conduct of one independent government cannot be successfully questioned in the courts of another [must] rest... upon the highest considerations of international comity and expediency ...”); Ricaud v. Am. Metal Co., 246 U.S. 304 (1918) (“the details of such [confiscatory] action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision”).
of the act of state doctrine," the Court in Banco Nacional de Cuba v. Sabbatino announced:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The Act of State Doctrine, thus, is squarely implicated by some of the potential debt litigation that may ensue given the proclivity of debtor nations to intervene the private banking sector to curb the devaluative effects of financial crises on domestic currency. While this measure appears extreme, even mitigated options such as exchange controls raise the same Act of State problems for international creditors. Nonetheless, the dire economic conditions many debtor nations must confront leave a dearth of alternatives for government policymakers other than adoption of such stringent measures, which effectively, and quite intentionally, disrupt the performance of payment obligations flowing from local debtors to foreign creditors. As such it is of significant value that the Doctrine be examined and its application better understood in anticipation of what may, although hopefully not, turn out to be a reemergence of mass international debt litigation in the United States.

This paper will attempt to address some of the salient issues in the territoriality inquiry that the courts since Sabbatino have been concerned with. Additionally, this paper will make an earnest attempt to examine key problems in international debt (i.e., intangible property rights) cases. The following section of this paper will deal directly, and at some length with notions of territoriality as developed by the courts and commentators subsequent to Sabbatino. Further, that section will treat the historical and modern functions of the territorial limitations in the Act of State Doctrine. Section three will deal in greater length with the major approaches to situs of debt rules relevant in the Doctrine. That section will treat the underlying rationale for these rules, and argue for an enhanced rule of reason in guiding judicial situation of international debts. Section four will recapture some of these salient points and provide some concluding remarks.

17. Id. at 428.
II. THE TERRITORIALITY INQUIRY

One important element the Court refined in *Sabbatino* was the proposition that application of the Act of State Doctrine was not dependent upon the inclusion of the acting state in the litigation.\(^\text{18}\) In *Sabbatino* the plaintiff, an instrumentality of the Cuban government, brought an action in conversion against a court appointed receiver in New York City to recover payment for a shipment of sugar that had been previously confiscated by the government within Cuban territory.\(^\text{19}\) The Court, nonetheless, maintained that the Act of State Doctrine could very well be raised even in the context of non-state party disputes.\(^\text{20}\)

Another important element, perhaps the more crucial one to territoriality, in the *Sabbatino* decision was the rehashing of judicial self-restraint principles, particularly over foreign political matters. The newer modification of the Act of State Doctrine in *Sabbatino* indeed appeared to reflect a judicial preoccupation with the increased exercise of expropriatory and confiscatory takings by sovereign states of foreign-owned property. Within a short time period preceding *Sabbatino*, and shortly thereafter, numerous nation-states underwent significant social and political changes, the most notable of which was embodied in the Cuban revolution and the movements for de-colonization in Africa and Asia. Understandably then, the Court in *Sabbatino*, following the dictates of *Underhill*, deemed it necessary to clarify that even takings in contravention of international customary law would be barred from examination by American courts irrespective of whether it was American-owned or locally-owned property that was taken abroad.\(^\text{21}\)

The Court, however, made its holding in *Sabbatino* clear that the Doctrine would not apply where the acting sovereign had taken property not located within its territory.\(^\text{22}\) While this proposition had been an implied part of the holding in *Underhill*, *Sabbatino* strived to transform the territoriality inquiry

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18. *Id.* at 417-18, 428; *Underhill*, 168 U.S. at 252 (While it is clear the *Sabbatino* opinion established that the Act of State Doctrine was generally applicable independent of the acting state’s participation in litigation, the rudiments of this proposition were first borne out in the *Oetjen* and *Ricaud* cases).

19. *Sabbatino*, 376 U.S. at 402-09. The previous owner of the Cuban sugar attempted to intervene as party to the litigation but was unsuccessful.

20. *Id.* Unlike foreign sovereign immunity, which necessarily involves foreign governments or their instrumentalities in litigation, the Act of State Doctrine operates more akin to an issue preclusion or a strict choice of law rule. See, e.g., Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985) (citing to *Sabbatino* for the proposition that the Act of State Doctrine does not require government defendants, or even that the subject matter of the dispute, to be specifically based on a sovereign act).

21. *Sabbatino*, 376 U.S. at 422; see also Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 716 (Marshall, J., dissenting) (asserting the point supported by the plurality and concurrence opinions).

into one of the only sharp points of distinction in the Doctrine. The Court, thus raised a judicial wall of separation from reviewing acts undertaken by foreign governments within their territory, while dismantling any opportunity to have the Doctrine apply to cases where property rights in the United States were affected by foreign government regulations. A handful of commentators have questioned the development of this doctrinal threshold element as one not entirely rooted in traditional notions of international comity and respect for sovereign authority.\(^23\) Notwithstanding criticism, the *Sabbatino* restatement with its central concern for territoriality has become the guiding rule of law.

Until *Sabbatino*, although arguably thereafter as well, the Court had been certain to indicate that the rule of decision contained in the Act of State Doctrine was predicated upon notions of international comity.\(^24\) Nonetheless, beginning with the *Sabbatino* decision the Court began to elaborate a distinct foundation for the Doctrine.\(^25\) Rather than resting on international comity, the Court in *Sabbatino* and subsequent decisions has made it clear that the Act of State Doctrine has “constitutional underpinnings” and rests upon separation of powers concerns that generally preclude the judiciary from meddling in the foreign affairs powers of the Executive Branch.\(^26\) Under this “judicial institutional” explanation of the Doctrine, *Sabbatino* and its progeny have essentially developed the rationale that where a foreign sovereign undertakes governmental action that affects (expropriates, confiscates, modifies, etc.) property not within its territory then the Act of State Doctrine will not apply since the Executive Branch could not possibly be “embarrassed” from judicial action before the other nations of the world, particularly the acting state. This rationale, of course, presupposes that extraterritorial regulation of property rights by foreign governments fails to raise political questions and that these should not be accorded a high degree of comity and respect.

The new rationale for the Act of State Doctrine advanced in *Sabbatino*, while argued to be logically flawed in some areas,\(^27\) however, probably does

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23. See, e.g., Bazyler, supra note 8; Henkin, supra note 7.
24. See *Oetjen*, 246 U.S. at 303; *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); but cf. *Sabbatino*, 376 U.S. at 421 (noting that the doctrine is not compelled by the inherent nature of sovereign authority or by some principle of international law; historic notions of sovereign authority do not dictate the doctrine’s existence).
appropriately limit the Doctrine’s application to territorial state actions. It is indisputable, at least as a matter of law, that when the “parties and the res are outside the foreign government’s territorial boundaries, the foreign government does not possess the ability to alter the legal status of the parties relative to the res.”28 The Court’s rationale in Sabbatino indeed reflects reasonable notions of territorial sovereignty and comity among independent states. It is not an unsound proposition that “judicial re-examination of a foreign sovereign’s act will vex relations with foreign governments or hinder the executive in the conduct of foreign policy only when courts act to frustrate the foreign sovereign’s reasonable expectations of dominion.”29 It follows, then, that a reasonable expectation of dominion would be fatally attenuated where a sovereign state acts to regulate property not located within its territory.30 As a matter of positivist logic, so much is generally conceded. The difficulty, however, comes with the judiciary’s determination of when and where territorial state action has transpired. The questions to resolve, thus, seem readily framed: what property exactly is the territorial action being asserted over and when is its location ascertainable? Whereas, these queries have been adequately treated in disputes arising from state actions that “take” tangible property, the judiciary has struggled terribly to arrive at an equally expeditious treatment where intangibles are concerned.31 Consider the following intangible property dispute scenarios:32

Case 1—A United States bank makes a loan to a foreign borrower (sovereign or private), and brings an action in the United States to


30. See Callejo v. Bancomer, 764 F.2d 1101, 1123 (5th Cir. 1985) (holding that the theory underlying the territorial limitation to the act of state doctrine is that a foreign state is less concerned about effect of its acts on property outside of its territory than within); Maltina Corp., 462 F.2d at 1021. See also 22 U.S.C. § 2370(e)(2) (also termed the “second Hickenlooper amendment” presently bar application of the Act of State Doctrine with respect to property located within the United States where the act of expropriation contravenes international law).

31. See F. & H.R. Farman-Farmaian Consulting Eng’rs v. Harza Eng’g Co., 882 F.2d 281, 286 (7th Cir. 1989) (Judge Parsons commenting that “a debt (like a word, a number, an idea) has no space-time location; it is not a physical object, and efforts to treat it as such, like efforts in conflicts of law jurisprudence, now largely abandoned . . . to find the site of a contract, seem bound to fail”).

32. The characterizations of these model cases are derived from Tahyar, supra note 29, at 614-16. See also Zamora, supra note 25, at 1056-58.
enforce the loan following the imposition of exchange controls that, effectively, prevent the borrower from servicing the debt with the contractually stipulated currency (United States dollars).  

Case 2—A United States bank depositor deposits dollars in a foreign bank (government-owned or private), and the implementation of exchange controls by the foreign government prevents the depositor from withdrawing dollars; the dollar deposit subsequently is converted to local currency at the government-declared rate, hence becoming greatly devalued. The depositor brings an action against the foreign bank in the United States.

Case 3—A foreign depositor deposits funds in a United States bank; the government of the foreign depositor brings an action against the bank in the United States to collect the deposit following an expropriatory or other regulatory act undertaken by the foreign depositor’s government asserting ownership over the account.

Case 4—A depositor (either from the United States or foreign) deposits funds in a foreign branch office of a United States bank, and brings an action against the bank’s home office in the United States to recover the deposit following the depositor government’s seizure of the branch’s accounts or its prohibition of withdrawals pursuant to exchange controls.

Case 5—A foreign government expropriates property owned by one of its subjects, and then sells the property for export to the United States. The former owner of the expropriated property relocates to the United States and brings an attachment action against the United States buyer to recover proceeds or account receivables derived from the sale of the expropriated property.

Case 6—A United States seller exports goods to a foreign buyer, and the foreign buyer’s government imposes exchange controls thus preventing the foreign buyer from making payment in the contractually stipulated currency. The United States seller brings an action in the United States to collect payment.

Clearly, these scenarios raise issues the nature of which vary substantially, legally and practically, from the more basic tangible property cases which plainly involve the “taking” of movable property or realty located within the territory of the acting state. Still, however, courts continue to fit intangible property into some conception of place and time. To better understand this core convergence a historical perspective on the rules of territoriality might be appropriate.

A. History and Development

The foundation of United States law and policy regarding the conduct of foreign governments acting to regulate rights within and outside their territory
can be traced back to the notions of sovereignty developed within the Westphalian regime of international politics. Under this regime, the state's authority to regulate affairs within the state was an inherent and unquestionable exercise of sovereign power free from review or re-examination by other states. "Thus, an act valid where done [could not] be called into question anywhere" outside the jurisdiction sanctioning its validity. While this basic tenet of vested rights theory developed in the 17th century continues to recede from modern American jurisprudence, its underlying rationale has occasionally maintained a significant degree of adherence among American courts with respect to issues in conflicts of law, and prescriptive and personal jurisdiction. The courts, thus, have selectively opted against vested rights theory in adjudicating some issues implicating more than one body of sovereign law, while favoring the theory in other cases.

The dichotomy engendered by the selective application of vested rights theory has been explained as an implicit acknowledgement by the American courts that giving effect to, or perhaps more accurately, exercising restraint from deciding disputes based on foreign regulations requires a certain degree

33. See Torbjorn L. Knutsen, A History of International Relations Theory 84-86 (2d ed. 1997) (articulating the proposition that the power to exercise sole control over rights and duties within a territory was a prerequisite to achieving sovereignty); see also Seyom Brown, The Causes and Prevention of War 104-05 (2d ed. 1994) (noting that "Westphalian norms give pride of place to national sovereignty and the noninterference by countries in another's domestic affairs").

34. See Chow, supra note 7, at 405-06.

35. 3 J. Beale, A Selection of Cases on the Conflicts of Laws 517 (1902); see Chow, supra note 7, at 405-06 & n.47 (providing a brief account of the influence of legal positivism and vested rights theory on notions of territoriality in the Act of State Doctrine).


37. See Chow, supra note 7, at 406-09. See also McDonald v. Mabee, 243 U.S. 90, 91 (1917) (noting that the foundation of jurisdiction is power); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (noting that "[a]ll legislation is prima facie territorial"). While the narrow holding in American Banana has been overruled in subsequent years, the general thrust of the Court's opinion in that case remains an influential guide through prescriptive jurisdiction cases.

38. See Am. Banana, 213 U.S. at 357; Oetjen v. Cent. Leather Co., 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another [must] rest . . . upon the highest considerations of international comity and expediency . . ."); Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918) ("the details of such [confiscatory] action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision"); These cases represent only a select instance where the courts strongly favored a vested rights approach. Cf. Hilton v. Guyot, 159 U.S. 113, 164 (1895) (holding that the principle of comity is essentially a voluntary recognition of foreign acts); Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (holding that "[c]omity is a recognition that one nation extends to within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice convenience, and expediency") (emphasis added).
of relaxation of the forum’s own sovereignty.\textsuperscript{39} As such, the fundamental predicate of vested rights theory (sovereign power) appears irreconcilably at odds with the natural consequences of requiring that vested rights be recognized everywhere. The resulting effect of vested rights theory, thus, has served to maximize the acting states territorial sovereignty while minimizing that of the forum state.\textsuperscript{40} The reasoning is that where a foreign state acts to regulate property rights squarely within its territory then it has sole territorial sovereignty to do so. Under vested rights theory this means that the act of state must be given strict effect anywhere outside the acting state’s territory. This strict effect mandate, of course, would also mean that the forum state would have to relax its territorial sovereignty in order to give such effect to the regulation of the acting state.\textsuperscript{41}

While there certainly appears to be an undercurrent of vested rights rationale in the territorial limitation to the Act of State Doctrine, the Doctrine does not entirely depend on that theory.\textsuperscript{42} Rather, the Doctrine more soundly rests on the principles that attempt to detach the judiciary from balancing the territorial sovereignty of two states, that is, the acting state and the forum state.\textsuperscript{43} These principles are collected under the self-restraint penumbra of non-justiciable political questions.\textsuperscript{44} In essence, the Doctrine’s territorial inquiry has been designed to serve more as a determinant alerting the courts as to when to avert the consequences of vested rights (minimization of forum sovereignty) on non-justiciable grounds, or when to proceed safely to determine the extent of international comity without the mandate of strict effect.\textsuperscript{45} The Doctrine,

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\item \textsuperscript{39} See Chow, supra note 7, at 410-11.
\item \textsuperscript{40} Id.; but cf. Am. Banana, 213 U.S. at 357 (Justice Holmes suggesting that the mere election of a party subject to foreign sovereign law to litigate in the United States only requires the forum to consider and apply foreign law without, at the same, relaxing notions of the forum’s sovereignty).
\item \textsuperscript{41} See E. SCoLES & P. HAY, CONFLICT OF LAWS 13-15 (1982).
\item \textsuperscript{42} See Chow, supra note 7, at 408-09 (stating the proposition that Sabbatino fundamentally recast the rationale for the Act of State Doctrine from one of external (strict effect to territorial sovereignty of acting state) to internal deference (non-justiciability for reasons of separation of powers and abstention from deciding issues of sovereignty minimization and foreign policy); Cf. Charles Mac. Mathias, Jr., Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform, 12 LAW & POL’Y INT’L BUS. 369, 392 (1980).
\item \textsuperscript{43} See Chow, supra note 7, at 415-16.
\item \textsuperscript{44} See Baker v. Carr, 369 U.S. 186, 217 (1962) (providing the seminal statement on doctrinal tests involved in determining non-justiciable political questions as the impossibility of deciding without an initial policy determination of a kind for non-judicial discretion, or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decisions already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question);
\item \textsuperscript{45} Swan, Act of State at Bay: A Plea on Behalf of the Elusive Doctrine, 1976 DUKE L.J. 807, 848-55 & n.145.
\end{itemize}
hence, allows a shift of decisional power on the former determination from the judiciary to, presumably, the Executive branch. This shift is predicated on the not unsound assumption that the Executive is better suited to seek appropriate means of remedial redress on behalf of private actors from other sovereign states in the international plane.

B. Modern Function

The historical effect of the territorial inquiry was to raise the question for the judiciary of whether to apply the Act of State Doctrine, thereby eluding a direct confrontation with the issue of forum sovereignty minimization, or to employ notions of international comity to discretionarily enforce the acting state’s policies affecting property within the forum. This bifurcation, nonetheless, accorded the party raising the Doctrine as a defense in litigation an exception to the territorial limitation. While the rules of comity, of course, depend on jurisprudential balancing of interests and public policy considerations, the territoriality inquiry could be obviated if enforcing the acting state’s policy did not offend the forum’s notions of justice and fairness.46 This interest and policy-balancing component to the territoriality inquiry was firmly established in earlier jurisprudence dating back to the first half of last century.47

The modern effect of the inquiry, however, has proven that the judiciary proposes a much sharper bifurcation of results under the Act of State Doctrine. Since the Court’s pronouncements in Oetjen, Ricaud, and Sabbatino, the consequence of falling outside the purview of the Doctrine’s territorial limitation has meant, with a large measure of certainty, that the acting state’s policies will not be enforced or be given effect in the forum state.48 Hence, the territoriality inquiry has, indeed, become one of burden shifting and risk allocation in transnational property rights litigation.49 The practical effect of

46. See Chow, supra note 7, at 410-11; Elliot E. Cheatham, American Theories of Conflict of Laws: Their Role and Utility, 58 HARV. L. REV. 361, 367-68, 373 (1945).

47. See Hilton v. Guyot, 159 U.S. 113, 164 (1895) (holding that the principle of comity is the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws”); See, e.g., United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).


49. See Jose Ibietatorremendia, Exchange Control Risk in Eurodollar Deposits: A Law and
this burden and risk allocation function has meant the “[D]octrine does not apply at all when the foreign sovereign attempts to take property located in the United States.”\(^5\) The reason for this sharp-edged rule seems explicable only by the judiciary’s reluctance, indeed refusal, to abstain from deciding against issues of property takings by a foreign sovereign.\(^5\)

Due to its modern function, the territoriality inquiry will rarely, if ever, yield a result other than judicial abstention from examining another sovereign’s regulation of property rights within its territory, or judicial denunciation of property takings outside the acting states territory. Applying this, seemingly strict, territorial “win or lose” rule has traditionally led to some reasonable outcomes in disputes regarding tangible property.\(^5\) However, as earlier stated, the more difficult question remains: how to determine who wins and who loses in disputes over property the physical nature of which is indefinable, to be sure, intangible. Put simply, the question is: where is the intangible property. As reasonable as may be the outcome in tangible property cases under the territoriality inquiry, the judiciary’s treatment of disputes over issues of debt and other choses in action leave much to be desired in the way of reason and consistency.\(^5\)

III. THE SITUUS OF DEBT RULES

Transnational intangible property disputes involving sovereign acts affecting debt obligations have generally relied on three distinct theories for the determination of the situs of debt, in other words, the place where the intangible property is located.\(^5\) The first, and most traditionally rooted, traces the positivist theories on the in personam jurisdictional power of sovereigns to subject persons within the sovereign’s territory to its regulations. This theory has produced the “jurisdiction over debtor” rule. The second theory focuses on a similar positivist concern. However, rather than looking solely to jurisdiction,

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Economics Perspective, 141 U. PA. L. REV. 591, 593. See also Underhill v. Hernandez, 168 U.S. 250 (1897) (providing a curt distinction between “sovereign risk” and “country risk”).

50. Chow, supra note 7, at 444.

51. See Tahyar, supra note 29, at 595-96.


54. See generally Courtade, Annotation, Situs of Debt or Property for Purposes of Act of State Doctrine, 77 A.L.R. FED. 293 (1986).
this second theory, more importantly, looks at the sovereign’s power to complete the alteration in property rights within its territory. This theory has produced the “fait accompli” or “complete fruition” rule. While these two theories have been stringently criticized for producing mechanical rules without demonstrating due respect for the underlying rationale of the Act of State Doctrine, most courts have not entirely, or even partly, abandoned them. Yet, a handful of courts and commentators have developed a third rule that seeks to avoid rigid, litmus-like situs tests in favor of a rule of reason and circumstance. This latter attempt has produced the “incident of the debt” rule, the analysis of which “considers whether judicial inquiry will frustrate the foreign sovereign’s reasonable expectations of dominion over the debt.”

A. Pointing to Jurisdiction Over Debtor

In the seminal case of Harris v. Balk, the United States Supreme Court held that “the obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.” The Court in Harris went on to state the debtor “is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted.” Essentially, then, under this reasoning a debt is located within the territory, even if foreign, to whose jurisdiction the debtor is subject.

While the Court in Harris employed the term “foreign” to characterize a debt incurred in North Carolina but litigated in Maryland, the holding has been applied beyond interstate debt disputes to those involving cross-border transactions. In Menendez v. Saks & Co., the Second Circuit applied the Harris situs test to a factual scenario upon which the above model Case five is based. In Menendez, the dispute arose from the Cuban government’s confiscatory taking of a Cuban-owned cigar exporting business. The original Cuban owners instituted an action against a cigar importer in the United States alleging that pre-confiscation debts owed to them by the importer were not located in Cuba, hence not subject to the Act of State Doctrine. The circuit court agreed, holding that since the cigar importers were subject to the court’s

56. See Chow, supra note 7, at 439.
57. 198 U.S. 215, 222 (1905).
58. Id.
59. Id. at 223.
61. Menendez, 485 F.2d at 1365-66.
62. Id.
in personam jurisdiction, the debts owed to foreign creditors were located in the United States, thus the Doctrine was inapplicable.  

In a few intangibles cases preceding Menendez, the Second Circuit had already evinced an inclination toward considering the “jurisdiction over debtor” rule. In Republic of Iraq, the court held that a bank deposit account carried in New York was a debt owed by a debtor over whom the court had in personam jurisdiction. As a result, the Act of State Doctrine was inapplicable and the newly formed Iraqi government, claiming to have confiscated all of the depositor’s (King Faisal) assets, was unable to also affect the bank’s debt to the accountholder’s estate.

In light of these Second Circuit cases, the “jurisdiction over debtor” rule, indeed, became a mainstay in the territoriality inquiry. However, within only a few years following Menendez the rule’s inherent problems would gradually become apparent. For one, the courts had not articulated an alternative rationale to the obvious problem of shared jurisdiction, where both the acting state and the forum state exercised in personam jurisdiction. Secondly, the courts seemed content in continuing to apply this rule ignoring the even greater problem of foreign sovereign intangible takings based on the simple assertion of jurisdiction over a debtor, particularly United States banks operating foreign branches or multinational entities. Theoretically, a strict and mechanical application of the “jurisdiction over debtor” rule would render a creditor powerless to enforce a debt whose obligor (domestic or foreign) was even tenuously subject to the jurisdiction of another sovereign having attempted to “take” that intangible.

B. Pointing to “Fait Accompli” or “Complete Fruition”

Shortly following the decision in Menendez, the Second Circuit again had opportunity to treat the “jurisdiction over debtor” rule of Harris in United Bank Ltd. v. Cosmic International, Inc. The facts in Cosmic present a scenario fundamentally similar to Menendez, where a pre-confiscation owner and the

63.  Id.
65. See Republic of Iraq, 353 F.2d at 51.
67. See Richard Herring & Friedrich K. Degressubler, Allocation of Risk in Cross-border Deposit Transactions, 89 Nw. U. L. Rev. 942, 989-90 (arguing that a “government should not be allowed to interfere with a deposit made in another country if its only justification is that it can put its hands on property owned by the depositary bank”).
68. 542 F.2d 868 (2d Cir. 1976).
newly formed government of Bangladesh claimed pre-confiscation accounts receivables owed by a United States creditor. Whereas in *Menendez* and *Republic of Iraq*, the court avoided addressing the issue of shared jurisdiction over the debtor,\(^6^9\) in *Cosmic*, the Second Circuit dealt squarely with the problem.\(^7^0\) The court there recognized, at least impliedly, that *in personam* jurisdiction alone could not afford the sole basis upon which to determine the situs of intangible property under the Act of State Doctrine.\(^7^1\) More importantly, the court's reasoning in declining to follow the *Harris* and *Menendez* analysis touched upon the basic problems with the "jurisdiction over debtor" rule mentioned above.

First, the court declined to determine whether the acting state had any jurisdiction over the debtor.\(^7^2\) To this extent, the court stated: "jurisdictional determinations would inevitably require American courts to engage in complex interpretations of foreign statutory and case law pertaining to jurisdiction, resolving situs questions on such a basis would deprive the act of state doctrine of certainty and predictability."\(^7^3\) Short of entirely rejecting the "jurisdiction over debtor" rule, the court nonetheless denied having previously adopted the strict jurisdictional approach and determined that following such a rule would give the Act of State Doctrine "needless scope."\(^7^4\) As a result, the court implicitly recognized that it was required to apply a rule that would obviate the need for a potentially complex shared jurisdiction analysis.

Second, in looking for an alternative to jurisdictional analysis, the court elected to employ and base its decision on the "fait accompli" rule, which had been previously adopted by the Fifth Circuit in a factual pattern virtually indistinguishable from *Menendez* and *Cosmic*, *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*\(^7^5\) While the *Menendez* opinion provided a

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69. See *Menendez v. Saks & Co.*, 485 F.2d 1355, 1365 (2d Cir. 1973) (providing that the result might differ were the importer-debtor "present in Cuba or subject to the jurisdiction of Cuban courts" at the time of the confiscation); *Republic of Iraq*, 353 F.2d at 51 (recognizing that its conclusion might differ if the foreign sovereign could also assert jurisdiction over the debtor).
70. *Cosmic Int'l*, 542 F.2d at 874.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. 392 F.2d 706, 714-15 (5th Cir. 1968). *Tabacalera* was, perhaps, the first true intangibles case arising from the long series of Cuban confiscations revisited in United States courts. In establishing the "complete fruition" test the court in *Tabacalera* held:

When a foreign government performs an act which is an accomplished fact, that is when it has the parties and the res before it and acts in such a manner as to change the relationship of the parties touching the res, it would be an affront to such foreign government for courts of the United States to hold that such an act was a nullity. Furthermore, it is plain that the [previous] decisions [have taken] into consideration
rudimentary statement of the "fait accompli" rule,⁷⁶ the more developed rule and rationale in Tabacalera was applied in Cosmic. This alternative rule appeared to address the secondary "jurisdiction over debtor" flaw of ignoring intangibles "takings" exercised by foreign sovereigns solely and tenuously asserting in personam jurisdiction over the debtor, thus leaving a creditor powerless before an Act of State defense. The court in Cosmic, thus, determined that the situs of a debt was within the acting state’s territory if the state had the power to enforce or collect the debt, leaving the forum court no means by which to rectify the alteration in property rights.⁷⁷

The "fait accompli" debt situs rule established in Tabacalera has been hailed as a "common sense" one because it is predicated on the foreign sovereign’s ability to extinguish the debt obligation through its collection power over funds carried locally and/or payments to be made by the debtor.⁷⁸ Quiter obviously, jurisdiction over the debtor is a prerequisite to the power to collect the debt. Thus, in this sense the "fait accompli" rule is a more comprehensive situs determinant. However, this rule too has intrinsic flaws.⁷⁹ For one, the rule assumes that forum courts will always be powerless to rectify a foreign sovereign’s alteration of intangible property rights. Secondly, the rule, in some ways, replicates the jurisdictional simplicity of the "jurisdiction over debtor" rule in requiring that the debtor and the creditor be subject to the acting state’s in personam jurisdiction. These flaws have generated mounting criticism against continuing application of this similarly mechanical situs rule.⁸⁰ The former assumption has increasingly proven untrue, particularly, in international private debt cases where the debtor’s obligation, although leviable by the acting sovereign, is also enforceable and collectable in the forum state through attachment and execution of debtor’s assets outside the acting state. The ability of the forum to enforce and collect the debt, thus should serve to negate the genuine motivation for the territoriality inquiry: respect for the acting

⁷⁷ See Cosmic Int'l, 542 F.2d at 874.
⁷⁸ See Allied Bank Int'l v. Banco Crédito Agrícola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985); Herring & Degreesubler, supra note 67, at 990-91 (arguing that in the case of depositary accounts held by banks the situs of the obligation is where the bank "books" the liability, in other words, where the bank carries, maintains, and makes accounting entries regarding the debt); Chow, supra note 7, at 441.
⁷⁹ See Chow, supra note 7, at 441-42; Tahyar, supra note 29, at 597-98; Ibietatorremendia, supra note 49, at 604-05.
⁸⁰ See generally Zamora, supra note 25, at 1079-80 (citing to Callejo v. Bancomer, S.A., 764 F.2d 1101, 1123 (5th Cir. 1985) for the proposition that the "complete fruition" test, based on power to enforce or collect a debt is not an adequate test of determining situs of debts for act of state purposes because the analysis ignore the quantity and quality of contacts the debt has to the forum state).
sovereign’s reasonable expectation of dominion over property sought to be regulated.\footnote{81}{See Zamora, supra note 25, at 1079-80; see also Callejo, 764 F.2d at 1123 (holding the fact that a “debt can be enforced by the creditor in one forum should not be the basis of depriving him of his ability to enforce the debt in a different forum”).} As is argued, where the debtor has assets in the forum against which the creditor may execute, the acting state attempting to alter the obligation of the debtor cannot expect to have the forum enforce the alteration. The result is the acting state will not have a reasonable expectation of dominion over the debt.

\section*{C. On Incidents Of Debt And Reasonable Expectation Of Dominion}

Despite the commonsense approach of the “fait accompli” for determining debt situs, the rule’s shortcomings have encouraged the development of an alternative rule of reason that looks to the “incidents of the debt.” Perhaps the first decision to enunciate this alternative rule was \textit{Libra Bank Ltd. v. Banco Nacional de Costa Rica}.\footnote{82}{570 F. Supp. 870 (S.D.N.Y. 1983).} In \textit{Libra}, the court dealt with one of the first debt crisis cases of the 1980’s.\footnote{83}{The factual scenario of \textit{Libra Bank} provided the basis upon which the above model Case 1 is composed. In the ensuing years following \textit{Libra Bank}, the majority of exchange control cases implicating the Act of State Doctrine came under the basic pattern of model Case 1; see, e.g., Allied Bank Int’l v. Banco Credito Agrícola de Cartago, 757 F.2d 516 (2d Cir. 1985); Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660 (1990). During the same time, however, other banking cases raising the Act of State increasingly fit the mold of model Cases 2, 4, and 5. See, e.g., Trinh v. Citibank, N.A., 850 F.2d 1164 (6th Cir. 1988); Riedel v. Bancam, S.A., 792 F.2d 587 (6th Cir. 1986); Callejo v. Bancomer, 764 F.2d 1101 (5th Cir. 1985); Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985); Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114 (S.D.N.Y. 1985); Perez v. Chase Manhattan Bank, N.A., 463 N.E.2d 5 (N.Y. 1984); Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645 (2d Cir. 1984); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854 (2d Cir. 1981).} There a Costa Rican bank was prevented from servicing its debt to foreign creditor banks due to strict exchange control measures imposed by the Costa Rican government, and thus was sued in the United States by its creditor.\footnote{84}{See \textit{Libra Bank}, 570 F. Supp. at 874.} The Costa Rican bank raised the Act of State defense to excuse its non-performance, however, the court held the Doctrine inapplicable having found the situs of the foreign bank’s debt to be in New York, rather than Costa Rica.\footnote{85}{Id. at 881-82.} The rationale for its holding expressly indicated the court’s pursuit of a more flexible, multifaceted rule: “although a debtor may in theory be sued at the creditor’s choice in either of two jurisdictions, the legal incidents of the debt may nevertheless place it, for the purposes of the act of state doctrine, in this nation rather than in a foreign nation” (emphasis added).\footnote{86}{Id.}
Some of the factors or "legal incidents" the Libra court emphasized included the terms of the loan agreement respecting forum selection, choice of law, and place of payment. Additionally, and perhaps, more importantly, the court stressed the significance of the debtor bank's assets in the United States and the attendant ability of the courts to enforce collection of the debt. The court stated: "[s]ince Banco Nacional was found here and had considerable assets here, 'the Act of State itself remain[ed] incomplete in the absence of acquiescence by the forum state,' and in such a case as this, 'the obvious inability of a foreign state to complete an expropriation of property beyond its borders reduces the foreign state's expectations of dominion over that property.'" Clearly, Libra sought to meld the "fait accompli" rule with another, more flexible fact-specific approach. In so doing, it set situs analysis on a course substantially in tune with the territorial underpinnings of the Act of State Doctrine.

Only a few years later the Second and Fifth Circuits, again, made significant strides in the adoption and further development of the "incidents of the debt" rule. In Callejo v. Bancomer, S.A., the Fifth Circuit expressly adopted the "incidents of debt" rule. There the court dealt with a factual scenario upon which model Case two is based: the Mexican government imposed exchange control restrictions that directly prevented the debtor Mexican bank from performing its certificate of deposit obligations to a United States creditor. The creditor sued in the United States and the Mexican bank raised the Act of State defense. The Fifth Circuit accepted the defense holding that the situs of the certificate of deposit right was within the territory of Mexico and thus subject to Mexican regulations. The rationale employed by the court clearly evinced an attempt to ascertain whether Mexico had a reasonable expectation of dominion over the debt. The court, in this respect, focused on where the deposit was carried, the contractual choice of law and forum, and collectability. Since the parties had agreed to have the deposit carried and payable in Mexico, and the creditor could only collect from the debtor in Mexico, the court determined that the debt was properly sitused in

87. Id. at 884 (quoting Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972)).
88. Id. (holding that where a foreign government contracts to repay a debt in the United States, consents to jurisdiction, waives sovereign immunity, and continues to maintain substantial assets in the United States, "it can hardly be said that this court's judgment shall frustrate the foreign state's reasonable expectations of dominion over the legal rights involved therein so as to vex our amicable relations with that foreign nation."); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (declining to lay down or reaffirm inflexible and all-encompassing rules).
89. 764 F.2d 1101 (5th Cir. 1985); see also Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985) (indistinguishable factual pattern and legal outcome).
90. 764 F.2d at 1124.
91. Id. at 1123-24.
Mexico. The court, additionally, raised another seemingly significant factor for situating the debt in Mexico stating: “[g]iven Mexico’s interest in these certificates of deposit, which were issued by a Mexican bank and payable in Mexico, disregarding Mexico’s exchange regulations would be a serious affront.”

It appears from this statement that the court also considered the sovereign’s interest in the underlying private credit transaction.

1. The Factors

In recent time, the courts have increasingly stressed the importance of the contractual terms of payment and choice of law and forum in determining debt situs.\(^9\) In *Garcia v. Chase Manhattan Bank, N.A.*,\(^9\) the Second Circuit expressly indicated that the intangible property right there, a certificate of deposit allegedly confiscated by the Cuban government, was situated outside Cuba due to a contractual stipulation in the debt instrument ensuring the safety of the deposit against government acts. While this stipulation certainly would have governed the legal rights as among the debtor and creditor, for the purpose of locating the debt the court’s reasoning was arguably flawed. First, the deposit in *Garcia* was issued, carried, and maintained in Cuba, not in the United States.\(^9\) Secondly, the creditor was not contractually deprived from collecting the deposit in Cuba.\(^9\) Thus, the debt situs for the purpose of Cuba’s confiscatory act was reasonably expected to be within the territory of Cuba. Notwithstanding this considerable flaw, the courts, over the years, have continued using contractual provisions as a weightier factor than the others.

Reflecting the traditional debt situs analyses, *in personam* jurisdiction over the debtor and enforcement/collection power are, quite obviously, another set of factors in the “incidents of debt” rule. Whereas as every court following an “incidents of debt” analysis has considered these essential factors, the courts following more traditional approaches to locating a debt have too, necessarily, looked to the proper exercise of personal jurisdiction and, both, the ability to enforce and collect debts to determine situs.\(^9\) The one point concerning this set

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92. Id. at 1125.
94. 735 F.2d 645 (2d Cir. 1984).
95. Id. at 647-50.
96. Id. at 647-50, 652 (Kearse, J. dissenting) (stating that in the “present case, when Garcia and her husband (collectively “Garcia”) made their deposits and acquired their certificates, they agreed with Chase that the debts could be collected on presentation of the certificates anywhere that Chase has a branch... Cuba was not excluded”) (emphasis added).
97. See supra text accompanying notes 56 through 80; see, e.g. F. & H.R. Farman-Farmaian Consulting Eng’rs v. Harza Eng’g Co., 882 F.2d 281, 286 (7th Cir. 1989); Trinh v. Citibank, N.A., 850 F.2d 1164.
of factors that, to an extent, remains unsettled concerns shared collectability. Similar to the problem confronted by the courts in applying the “jurisdiction over debtor” rule where the forum and the acting state could validly exercise jurisdiction, the incidence with which each state can now also exercise enforcement and collection powers presents an area requiring clarification by the courts. Essentially, where both, the acting and the forum state share enforcement and collection powers over the intangible (derived from the same power exercisable over the debtor), all else being equal, the court must consider yet another factor to determine whether the foreign sovereign has retains a reasonable expectation of dominion over that intangible.

In Callejo, the Fifth Circuit, indeed, provided an additional factor on which to potentially find the foreign sovereign’s continued reasonable expectation of dominion over a debt. This factor, as mentioned above, would allow the courts to consider the foreign sovereign’s interests in the underlying private credit transaction. In this respect, some of the interests the courts have directly or indirectly recognized have been connected to the denomination of the debt obligation in the foreign sovereign’s currency.

2. Ordinary or Special Debt Situs Rules

The same year the Fifth Circuit decided Callejo, the Second Circuit had chance to treat anew another debt crisis matter in the companion case for Libra. In Allied Bank Int’l v. Banco Crédito Agrícola de Cartago, the court, once more, considered the case of a Costa Rican bank’s non-performance arising from the same exchange control restrictions dealt with in Libra. The court in Allied held, like Libra, that the debt situs was in the United States and not in Costa Rica. Thus, the intangible property right held by the creditor was not and could not be affected by the Costa Rican regulations, and was, as a result,


98. See supra text accompanying notes 78 through 80.
99. See Frumkin, supra note 52, at 491-93 (arguing that an additional factor to consider in shared collectability is whether the forum court can fully or substantially satisfy the debt obligation owed to the creditor by execution of the debtor assets within the forum). This argument is a persuasive one, particularly, as the lack of obtaining adequate collection relief in the forum may reasonably indicate to the acting state that it has dominion over the regulated intangible.
100. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 (5th Cir. 1985); Braka v. Bancomer, S.A., 762 F.2d 222 (2d Cir. 1985). See also Frumkin, supra note 52, at 491-92.
101. Callejo, 764 F.2d at 1124; Tahyar, supra note 29, at 613.
102. 757 F.2d 516 (2d Cir. 1985).
enforceable in the United States. The court’s rationale, more than simply apply the traditional mechanical rules, intimated that flexibility was an important concern under the Doctrine’s territoriality inquiry.

The result in Allied yielded yet another development in debt situs analysis. Rather, than conform to the generally accepted “fait accompli” rules, the Allied court made a distinction between “act of state situs analysis” and “ordinary situs of debt analysis.” Judging from the court’s opinion the reasonable inference is that the court was no longer satisfied with the “fait accompli” rules and instead was searching for a rule of reason, which it termed “ordinary situs of debt analysis.” On closer inspection, however, this “ordinary” analysis considers similar, if not identical, factors as those in Libra: jurisdiction, place of payment, and collectability. Interestingly, rather than characterizing the analysis as one looking to the “incidents of debt”, the court utilized the more confusing term “ordinary situs analysis” as if to suggest the use of conflict of laws rules to determine debt situs.

In contrast to the Allied court’s leaning toward an “ordinary” conflict of laws analysis, it has been suggested that the appropriate debt situs analysis under the territoriality inquiry requires a unilateral focus on the expectations of the foreign sovereign and not a balancing approach weighing the interests of the forum against those of the foreign sovereign. This unilateral focus is, arguably, implied in the Libra analysis as the court there elected not to directly consider the potential interests of the forum in determining debt situs. The Libra opinion consciously considered the factors outlined above (jurisdiction, place of payment, collectability, etc.) as they related to the acting state’s reasonable expectation of dominion.

D. Devising a Continuum of Reasonableness

In determining an acting state’s expectation of dominion over intangibles the foregoing situs factors may combine to more accurately reflect the

103. Id. at 521.
104. Id. at 521-22.
105. Id.
106. Id. at 522.
107. Tahyar, supra note 29, at 611 n.106 (noting the similarity between the debt analysis and conflict of laws rule).
reasonableness of that expectation.\textsuperscript{109} The ability to enforce and collect is essential elements in determining reasonableness. So too is the power to assert \textit{in personam} jurisdiction over the debtor. Consideration of contractual stipulations (place of payment, choice of law and forum, country risk insurance, etc.) between the underlying private parties is an important element, but is likely not one of fundamental value for a state’s reasonable expectation of dominion.

1. Strongest Expectation of Dominion

An acting state’s regulations, when viewed through the unilateral situs analysis, are seized with the strongest possible expectation of dominion where the state has jurisdiction over the debtor, power to enforce and collect, and is, either, by default or design of the underlying private parties the place of payment. The exemplary cases on this point are \textit{Callejo} and \textit{Braka}. These cases provide the factual scenario upon which model Case two is based.

2. Strong Expectation of Dominion

Following the strongest case for the acting sovereign is the fact pattern where the state, again, has the sole power to enforce and collect the intangible and jurisdiction over the debtor. Unlike the case above, reasonableness here may require that the acting state have exclusive power to levy against the debtor’s assets within its sovereign territory. There have been a number of decisions indicating that this would likely be the accepted result on this point: \textit{Bandes v. Harlow & Jones},\textsuperscript{110} \textit{Republic of Iraq v. First National City Bank},\textsuperscript{111} \textit{Tchacosh Co. v. Roskwell Int’l Corp.},\textsuperscript{112} and \textit{F. & H.R. Farman-Farmaian Consulting Eng’rs v. Harza Eng’g Co.}\textsuperscript{113} These cases provide the factual scenarios upon which model Cases three and five.

3. Substantial Expectation of Dominion

On the fringes of reasonableness, a state may still retain sufficient dominion over a debt so as to come expect judicial abstention from the forum

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\item \footnotesize See Miller, supra note 25, at 675-79.
\item \footnotesize 852 F.2d 661, 667 (2d Cir. 1988).
\item \footnotesize 353 F.2d 47 (2d Cir. 1965).
\item \footnotesize 766 F.2d 1333 (9th Cir. 1985). The facts in \textit{Tchacosh} clearly also evokes the strongest expectation of dominion for the acting sovereign. The Ninth Circuit held there that the acting state was the place where the service contract between the parties was to be performed and where payment was impliedly to be made.
\item \footnotesize 882 F.2d 281, 286 (7th Cir. 1989). Similar to \textit{Tchacosh}, the Seventh Circuit in \textit{Farmaian}, also determined that shared enforcement and collection power did not lower the acting state’s expectation of dominion where the contractual and implied obligations were performable within the acting state.
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state where jurisdiction over the debtor can be asserted, but the power to enforce and collect is shared with the forum state, and no other contractual factor serves to further connect the acting sovereign with the intangible. In this case, the acting sovereign may validly be held to retain dominion if it has a legitimate interest in the underlying private credit transaction between the parties. Under the additional “tie-breaking” factor in *Callejo* and *Braka*, this interest is implicated by the acting sovereign’s inherent right to regulate its national currency and payment obligations denominated in such currency.114

IV. CONCLUSION

The financial obligations of developing and debtor nations, as well as the obligations of private debtors within these debtor nations is, once more, becoming a mounting concern for private international creditors. The fact that these nations have in the past resorted, and may again look to drastic policy measures to contain economic downturns should alert international and domestic creditors to the attendant legal implications of such purely sovereign maneuvers. The Act of State Doctrine is just one of the several jurisprudential concerns in international credit disputes; however, to a greater degree than the other concerns, it evokes profound considerations of sovereignty and international comity. Moreover, the Doctrine’s territoriality inquiry, particularly with respect to disputes over intangibles, has for many years mired the judiciary in a morass of, on one-hand rigid standards, and on the other, unconvincing rationale on the situs of indefinable cross-border property rights. If any one notion on debt situs persists, it should fundamentally necessitate legal and analytical flexibility, and must consider the reasonable expectation of a sovereign to regulate property rights within its territory.

114. See *supra* text accompanying notes 97 through 100.