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Table of Contents

Bilateral Investment Treaties: Arbitrating Investor-State Disputes

Are WTO Violations Also Contrary to the Fair and Equitable Treatment Obligations in Investor Protection Agreements? .................. Charles Owen Verrill, Jr. 287

International Issues in National Courts: Recent Developments in Private Litigation

The Lugano Case in the European Court of Justice: Evolving European Union Competence in Private International Law ................ Ronald A. Brand 297

Open Season: Recognition and Enforcement Of Foreign Judgments in Canada After Beals v. Saldanha ...................................................... H. Scott Fairley 305

Globalization of the Rule of Law: Training, Education, and Mentoring

A Brief History of Lawyers Without Borders: Crossing Borders to Make a Difference .......... Howard Putnam Lowry 319

Export and Import of the Rule of Law in the Global Era ................................................................. Elizabeth Barad 323

The Use of Non-Domestic Courts for Obtaining Domestic Relief

The Use of Non-Domestic Courts for Obtaining Domestic Relief: Jurisdictional Conflicts Between NAFTA Tribunals and U.S. Courts? .................. Pieter H.F. Bekker 331

Human Rights Law and Middle Eastern Politics

Can Legalism Be Exported? U.S. Rule of Law Work in Arab Societies and Authoritarian Politics ............................................ David E. Mednicoff 343

Can Law Halt the Violence? Palestinian Suicide Bombings and Israeli "Targeted Assassinations" Under International Humanitarian Law .................... Donna E. Arzt 357
The Role of Domestic Courts in an International Legal Order

Outsourcing and Its Impact on Trade and Trade Law

Jus Ad Bellum: The Next Iraq

The Vienna Convention on Consular Relations After Avena

Employment Law Issues in the Global Economy

International Law and Literature
The Challenging Landscape of Self-Determination

Revisiting the Challenging Landscape of Self-Determination Within the Context of Nation’s Right to Sovereignty

Sabyasachi Ghoshray 443

Current Issues in Extraterritoriality

The Extraterritorial Application of Antitrust Laws

Caterina Ventura 461

Current Issues in Extraterritoriality: How Long is the Long Arm Jurisdiction of International Human Rights Bodies?

Christina M. Cerna 465

2004: The European Union’s Year of Expansion

A Bill of Rights for the European Union

Elizabeth F. Defeis 471

United States Membership in UNCLOS: What Consequences for the Marine Environment?

U.S. Membership in UNCLOS: What Effects for the Marine Environment?

Howard S. Schiffman 477

Iraq: Ad Bellum Obligations & Occupation

The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq

Ralph Wilde 485
ARE WTO VIOLATIONS ALSO CONTRARY TO THE FAIR AND EQUITABLE TREATMENT OBLIGATIONS IN INVESTOR PROTECTION AGREEMENTS?

Charles Owen Verrill, Jr.*

Bilateral investment treaties typically require the host state to ensure "fair and equitable" treatment to the investors of the other state. While decisions concerning fair and equitable treatment are often fact specific, three pending NAFTA Chapter 11 arbitrations raise a novel legal variant of the following issue: Is the breach of a WTO obligation that results in harm to a foreign investor a denial of fair and equitable treatment?'

In Methanex v. United States, the investor argues that certain WTO agreements require that "governmental measures cannot restrict trade any more than necessary to achieve a legitimate state objective." Methanex goes on to argue that this "least restrictive" principle as embodied in the WTO Agreements is widely followed among civilized nations, and thus constitutes a part of 'customary' 'international law' Finally, Methanex argues that the failure of California to apply the "least restrictive" principle in banning a gasoline additive was a denial of fair and equitable treatment in violation of NAFTA Article 1105.

A slightly different argument is advanced in Canfor Corporation v. United States, where the claimant contends that U.S. officials acted arbitrarily in failing to follow WTO rulings concerning the calculation of dumping and countervailing duties and that such action was a denial of fair and equitable treatment. In Kenex v. United States, the investor claims that the respondent failed to

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3. Claimant Rejoinder ¶ 57, Methanex.


follow the WTO rule of proportionality and consequently denied the investor fair and equitable treatment.6

Since Methanex, Canfor, and Kenex are arbitrations pursuant to NAFTA Chapter 11, the tribunals will have to take into account the NAFTA Free Trade Commission (“FTC”) “interpretation” that Article 1105 “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”7 The interpretation also states that a “determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).” Subsequently the NAFTA Chapter 11 tribunal in Mondev v. United States observed that this interpretation “makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA parties.”8

It is not necessary to wade into the debate whether the FTC Action was a permissible “interpretation” of NAFTA or an unauthorized amendment, to conclude that it is likely that the Methanex, Canfor and Kenex tribunals will follow the FTC rule.9 Even so, unless the tribunals somehow manage to dodge the issue, the decisions in Methanex, Canfor and Kenex could reach beyond the conclusions in the Mondev award and conclude that WTO obligations, or at least those that are “norm-creating,” have achieved the status of “customary international law” and, therefore, indicate what protections derived from WTO rules the “fair and equitable” treatment standard in Article 1105(1), as interpreted by the FTC, requires governments to afford investors protected by BITs.

It must be observed that giving investors the right or opportunity to challenge WTO violations would be a radical departure from the normal rules of WTO dispute resolution. Under those rules, only states can assert WTO “rights.” Individuals have no standing to request dispute resolution no matter

9. Tribunals have generally followed the FTC guidance. Thus, in UPS v. Canada, the tribunal accepted “that the obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard.” Award on Jurisdiction, United Parcel Serv. of Am., Inc. v. Canada (2002), www.dfaitmaeci.gc.ca/tna-nac/documents/jurisdiction%20Award.22NOV02.pdf. Similarly, in Loewen v. United States, the tribunal held that the “effect of the Commission’s interpretation is that ‘fair and equitable treatment’ and ‘full protection and security’ are not free-standing obligations.” Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, ¶ 128, 42 I.L.M. 811 (2003), available at www.state.gov/documents/organization/22094.pdf. “They constitute obligations only to the extent that they are recognized by customary international law.” Id.
how harmful the WTO violation is to their personal interests. Methanex, Canfor, and Kenex, therefore, could open to investors’ rights to compensation that is not available to traders.

Since this is a novel and likely to be controversial issue, I propose to venture into this subject by presenting for discussion the following hypothetical involving the imaginary Republic of Tremex. In anticipation of the ending of textile quotas as required by WTO obligations, a Tremex company invests a substantial amount in distribution facilities in the United States. However, before the WTO compliance deadline, the United States responds to pressure from domestic interests and announces that the quotas will stay in place indefinitely. The Tremex government can challenge this action at the WTO and would probably win in Dispute Resolution Body proceedings that could take three or more years.

However, even if the Tremex government does win and achieves eventual withdrawal of the quotas, there is no compensation under the WTO agreements for the losses incurred by the Tremex investor during the period when the quotas were in effect. The WTO system focuses on trade damage to the economy of members and the balance of concessions negotiated, not on injury to individuals or corporations. There is no provision for damages to private parties even though they are the purported beneficiaries of WTO obligations.

Suppose though that there is a BIT between the United States and Tremex with investor protection provisions identical to NAFTA Chapter 11. In these circumstances, would the investor have a basis to request arbitration before ICSID or under UNCITRAL rules (or whatever venue is available) claiming that the failure to eliminate the quota was a denial of fair and equitable treatment as required by customary international law even under the restrictive NAFTA standard?

In support of such a claim, the petitioner would point out that the WTO Agreement clearly states that the multilateral trade agreements “are integral parts of this Agreement, binding on all members.” Further, the petitioner would cite Article XVI.4, which provides that “[E]ach member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” These obligations are mandatory even though it could be argued that WTO commitments are not “binding” because a WTO member can ignore an obligation even if the

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10. For example, GATT Article XI confers “trading rights” in the sense that exporters from a WTO country have the “right” to market access in other member countries except as constrained by WTO consistent measures. General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194,224. However, exporters that are denied market access have no right to enforce these rights at the WTO. Id. 224-25.

11. That is, fair and equitable treatment as interpreted by the FTC.

12. WTO Agreement art. II., para. 2 (emphasis added).
consequence is retaliation following dispute resolution proceedings.\textsuperscript{13} This argument, however, is NOT consistent with the clear directive of the WTO Agreement, as it must be construed under the Vienna Convention. Nor is it consistent with the conclusion of Professor John Jackson that there is an international law obligation to implement WTO dispute resolution determinations.\textsuperscript{14}

The petitioner could thus argue that the principle that emerges from the WTO Agreements is this: WTO members not only have an obligation to follow the substantive WTO obligations, but also to implement those rules and regulations in domestic legislation. While the substantive rules and regulations would not themselves necessarily be deemed customary international law, the obligation to implement them would be. This is essentially the claim advanced in \textit{Canfor v. United States}, where the complainant argues that the failure to follow WTO Dispute Resolution Body decisions in the administration of the antidumping and countervailing duty laws by the Department of Commerce was a denial of fair and equitable treatment. Under the FTC interpretation, this argument would only be valid if the obligation to implement WTO rules, as interpreted by dispute resolution panels, is derived from customary international law.

It is not, of course, sufficient to simply claim that a principle is customary international law. There are well-established but not always clear or easily applied criteria for the identification of customary international law that have evolved and need to be evaluated. What follows is a preliminary and hopefully not too superficial effort to analyze whether WTO obligations can be deemed principles of customary international law, which, if violated, would constitute a denial of fair and equitable treatment under the restrictive NAFTA definition.

In \textit{Methanex}, the claimant argued that many "international tribunals and scholars have recognized that treaty provisions, if widely adopted, can become a source of customary international law." It continued that since the "least-restrictive measure principle" has been adopted by more than 100 countries in the WTO agreement, "it has become a part of customary international law."\textsuperscript{15} Thus, the claimant in \textit{Methanex} contends that multilateral treaties or trade agreements can create new customary international law (as contrasted to codification of existing customary international law).\textsuperscript{16}

\textsuperscript{13} In defending the 1994 Uruguay Round agreements, the United States Trade Representative claimed there would be no loss of sovereignty if the Agreements were implemented precisely on this ground. \textit{See USTR Statement on the URRAA.}


\textsuperscript{15} Claimant Rejoinder ¶ 57, \textit{Methanex v. United States} (2004) (Arguing that the "least restrictive" principle is found in several of the multilateral WTO Agreements, including GATT 1994, Article XX.).

\textsuperscript{16} This is a key distinction since there are authorities that argue that only treaties that codify existing customary international law are evidence thereof. \textit{See e.g.}, Richard Baxter, \textit{Multilateral Treaties as Evidence of Customary International Law}, 41 B.Y.I.L 275 (1965-66).
The *Methanex Rejoinder* accurately argues that multilateral treaty obligations can "create" customary international law under current theory.\(^\text{17}\) Section 102(3) of the Restatement of the Foreign Relations Law of the United States provides that: "(3) International Agreements create law for the states party thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." The Comments to Section 102 elaborate on his articulation of the contemporary role of treaties in the creation of customary international law as follows:

International agreements constitute practice of states and as such can contribute to the growth of customary law. Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states. A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law.\(^\text{18}\)

The WTO Agreements fit precisely into this framework:

1) They are designed for adherence generally;
2) Are widely accepted; and
3) Have not rejected by a significant number of important states.

The International Court of Justice ("ICJ") has also held that treaty obligations can become customary international law. In *Methanex*, both the claimant and the United States rely on the ICJ decision in *North Sea Continental Shelf*, ICJ (1969). According to the Court, a treaty can create customary international law when it concerns a norm-creating provision which has constituted the foundation, or has generated a rule which, while only commercial or contractual in its origin, has since passed into the general corpus of international law and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the convention.\(^\text{19}\)

\(^{17}\) *Id.* Baxter disagrees, but his views now seem to be in the minority.


\(^{19}\) Claimant Rejoinder ¶ 71, *Methanex*.
The ICJ went on to observe that this process is "one of the recognized methods by which new rules of customary international law may be formed," and which from "time to time occur."\textsuperscript{20}

While not a model of clarity, the \textit{North Sea Continental Shelf} decision seem to require the following before a treaty can be said to create new customary law:

i) There must be a norm-creating provision that has passed into the general corpus of international law;

ii) The provision must be accepted by the opinio juris; and

iii) As such, is deemed binding on states that are not parties to the convention/treaty.

In \textit{Methanex}, the claimant cited \textit{North Sea Continental Shelf} and other authorities as support for its claim that WTO principles are customary international law; that the least restrictive principle was long accepted by GATT; and that it was explicitly adopted by more than 100 states.\textsuperscript{21} The Legal Adviser disagreed, and argued that the "least restrictive principle," as well as the treaty provisions relied on by the claimant "are not the type of norm-creating provisions" the ICJ had in mind in \textit{North Sea Continental Shelf}.\textsuperscript{22} The Legal Adviser goes on to argue that there are no international tribunal decisions or other authorities that find the principle to be part of customary international law. In addition, it was argued that trade agreements are not suitable to be considered customary international law because they involve a balance of concessions and assumption of obligations as opposed to norm-creating provisions.

The Legal Adviser's arguments never explain why the WTO agreements are not "fundamentally norm-creating provisions."\textsuperscript{23} Its arguments suggest there is a standard test for identifying norm-creating provisions that the WTO agreements do not meet. But, this test is not articulated, which is not surprising since there is a paucity of authority on this point. Indeed, a report by the International Law Association concludes that this "phrase does not seem to have any antecedents in international law, and the Court was somewhat Delphic about what it had in mind."\textsuperscript{24} The report continued that "it can be inferred that what it [the ICJ] meant was that the rule [at issue] did not have the degree of

\textsuperscript{20} Id.

\textsuperscript{21} Claimant Rejoinder §57, \textit{Methanex}.

\textsuperscript{22} \textit{OFFICE OF THE LEGAL ADVISOR, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW} 594-98, (Sally J. Cummins & David P. Stewart eds., 2001).

\textsuperscript{23} Id.

\textsuperscript{24} \textit{INTERNATIONAL LAW ASSOC., COMM. ON FORMATION OF CUSTOMARY INTERNATIONAL LAW, FINAL REPORT: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW} 52 (2000).
generality and compulsoriness that it thought necessary."\textsuperscript{25} That, is, there were so many reservations to the treaty being considered that it could not be of a "fundamentally norm creating character."\textsuperscript{26} Brownlie seems to agree with the ILA interpretation, but states that "with respect, it may be doubted if the existence of reservations of itself destroys the probative value of treaty provisions."\textsuperscript{27}

Approached from this vantage, one could argue that the requirement of the WTO Agreement that "each member shall ensure the conformity of its laws with its WTO obligations"\textsuperscript{28} is a "norm-creating" provision. While this obligation was "commercial or contractual" in origin, it is now arguably in the "general corpus" of international law. To begin with, the WTO Agreement and the obligation to implement its provisions are not generally subject to reservation. True, there are special rules for developing countries and accession agreements often delay full implementation by new members. However, these exceptions are hardly of the same magnitude or character as the reservations referred to in the ICJ North Sea Continental Shelf opinion. Moreover, the WTO Agreements are "intended for adherence by states generally" as required by the Restatement, which enhances their "norm-creating" status.\textsuperscript{29}

The \textit{opinio juris} argument is more problematic. Relying on this point, the Legal Adviser's Rejoinder in \textit{Methanex} contends that there was no evidence that any state not a member of the WTO had adopted the least restrictive principle. The Legal Adviser further argues that the only relevant state practice is that of non-participants "for only the practice of such States can clearly evidence a belief that the principle at issue is binding as a rule of customary, rather than conventional, international law."\textsuperscript{30} This analysis of the practice of non-party states is necessary, according to the Legal Adviser, to demonstrate "a general recognition that a rule of law or legal obligation is involved."\textsuperscript{31}

The Legal Adviser's argument arguably overstates the role of the practice of states not a party to the treaty/convention. For example, the Restatement provides that wide acceptance of a treaty obligation is important, as is the fact that the treaty/convention "is not rejected by a significant number of important

\textsuperscript{25} Id.
\textsuperscript{26} See ILA Report at 52.
\textsuperscript{27} IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 13 (4th ed. 1990).
\textsuperscript{28} WTO Agreement art. XVI, para. 10.
\textsuperscript{29} Another commentator has argued that the \textit{North Sea Continental Shelf} test for the creation of new customary law is based on intent. "If the treaty manifests an intent to have a particular provision create customary law, that manifested intent is controlling." Anthony D'Amato, \textit{Manifest Intent and the Generation by Treaty of Customary Rules of International Law}, 64 AM. J. INT'L LAW 892, 896 (1970).
\textsuperscript{30} Claimant Rejoinder, \textit{Methanex} cites North Sea Continental Shelf (Judgment), 1969 I.C.J. 3, 43, ¶ 74 (Feb. 20).
\textsuperscript{31} Id.
states. In the case of the WTO, there are 148 member states, which is evidence that the WTO Agreement is "widely-accepted," as required by the Restatement. This wide acceptance is further evidenced by the fact that 25 additional states (including Saudi Arabia and Russia) are in the accession process. These non-member states therefore would also appear to accept the binding effect of WTO obligations. Indeed, no major state has rejected the WTO agreements and only a few (including North Korea) have not applied for accession or observer status. (Iraq and Libya are among the few states that are observers but not accession applicants.)

This almost universal acceptance of the WTO obligations would appear to satisfy the North Sea Continental Shelf requirement of "a very widespread and representative participation in the convention . . . provided it includes States whose interests were specifically affected." Indeed, with the accession of China and the approaching access of Russia, it would appear reasonable to argue that the WTO membership is "functionally universal."

Finally, the WTO Agreement has now been in effect for ten years. During this period, accessions have occurred almost monthly as the pool of member states has rapidly been enlarged. No country has withdrawn its accession. While the Legal Adviser argued in Methanex that the (then) six years since the WTO Agreement was adopted was not a "considerable" period of time, it is now plausible to argue that the WTO has passed the test of time. Indeed, in North Sea Continental Shelf, the ICJ stated that "even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specifically affected." Moreover, Brownlie states that: "Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency."

Even if certain customary law principles can be said to have evolved from the WTO Agreements, a question remains about their applicability to NAFTA Article 1105 claims. Shortly after the FTC interpretation was adopted, Canada took the position in Mondev that the meaning of fair and equitable treatment was to be derived from the decision "of the Mexican Claims Commission in the

32. Claimant Rejoinder ¶ 102, Methanex.
34. See North Sea Continental Shelf, 1969 I.C.J. at 43, ¶ 73.
35. Id. ¶ 73.
36. Id. ¶ 73-74.
37. BROWNLIE, supra note 23, at 5.
The tribunal rejected this contention, noting that the "United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential." Summing up, the tribunal concluded that the term customary international law in the FTC interpretation "refers to customary international law as it stood no earlier than the time at which NAFTA came into force."

The Mondev analysis leaves open the question whether customary international law that has been created after 1994 can be referred to in addressing claims that NAFTA country actions amount to a denial of fair and equitable treatment. NAFTA and the WTO came into effect the same year (1994). Hence, the practice of the large number of states that have joined the WTO since 1994 could be cited as evidence that they did not deem themselves bound by WTO "norm-creating" provisions as of 1994. In addition, the U.S. could argue that even if it accepted the "evolutionary" character of customary international law prior to 1994, subsequent evolution of that law would not be binding or relevant to Article 1105(1) claims.

While the U.S. (and the other NAFTA governments) may claim it would be unreasonable to conclude that the NAFTA parties entered into commitments in 1994 that could be modified by the evolution of the meaning of fair and equitable treatment, it seems unlikely that tribunals would not be sympathetic to this argument. Both the Restatement and the North Sea Continental Shelf decision recognize that customary international law is evolutionary and the NAFTA governments can hardly claim they were unaware of this when the FTC interpretation expressly referencing customary international law was adopted.

38. Mondev Int'l, Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, ¶ 114 (2002).
39. Id. ¶ 119.
40. Id. ¶ 125.
On October 19, 2004, the European Court of Justice held its first *en banc* hearing since the 2004 enlargement to twenty-five Member States. The case was *Opinion 1/03*, involving a request by the Council of the European Union on whether the Community has exclusive or shared competence to conclude the Lugano Convention. While the case on its face deals only with a single convention, it has far broader implications and is likely to influence the development of private international law and private law on a Community level for years to come. In this brief article, I hope to trace the origins of the issues faced in the *Lugano* case and comment on some of its implications for the future.

The original Treaty of Rome creating the European Economic Community recognized that in order to have effective free movement of goods, services, capital, and persons, it was also necessary to have free movement of judgments and arbitral awards. After all, the ultimate test of the existence of a right is the ability to reduce that right, as against others, to a form that is both recognized and enforced by the legal system. Unlike the U.S. Constitution, which addresses this issue in its Full Faith and Credit Clause, the original Rome Treaty provided in its Article 220 that the Member States of the Community should “enter into [further] negotiations with each other with a view to securing for the benefit of their nationals ... [including among others] the simplification of formalities governing the reciprocal, recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”

The six original Member States carried out this dictate by negotiating the Brussels Convention, a treaty that was both narrower and broader than the objectives of Article 220. Due to the existence of the New York Convention...
covering arbitration, the Brussels Convention was limited to court judgments and did not have to cover arbitration. It also was limited to "civil and commercial" matters, thus avoiding a broader scope that would have been consistent with Article 220. On the other hand, as to judgments, the Convention is not limited to recognition and enforcement. The original Member States realized the importance of jurisdiction to questions of judgment recognition. They negotiated a "double convention" that included rules of direct jurisdiction for the originating court, as well as rules of recognition and enforcement for the court addressed in the second instance, for purposes of gaining the effect of the judgment. The Brussels Convention thus did much more than provide the equivalent of a Full Faith and Credit clause for Europe; it harmonized jurisdictional rules and provided specific protection for defendants domiciled in other Member States from otherwise "exorbitant" jurisdictional bases. In this respect, it added the equivalent of the U.S. Due Process Clause as it has been applied to jurisdictional issues.

As each new Member State joined the European Community, it acceded to the Brussels Convention as a part of its package of obligations. As the Community was broadened, it was also deepened, and in the area of private international law the Treaty of Amsterdam added language to the European Community Treaty that moved competence from the Member States to the Community Institutions. As part of the establishment of "an area of freedom, security and justice," Article 61 of the Treaty now provides that "the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65." Article 65 in turn, describes the scope of such authority as follows:

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5. Single (sometimes referred to as "simple") conventions on the recognition of judgments deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment. The recognizing court considers the jurisdiction of the court issuing a judgment in deciding whether to recognize the judgment of the originating court. Double conventions, like the Brussels and Lugano Conventions, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought — thus addressing the matter from the outset and preempting the need for substantial indirect consideration of the issuing court's jurisdiction by the court asked to recognize the resulting judgment.

6. See Brussels Convention, supra note 4, art. 3.

7. For a discussion of the application of the Fifth and Fourteenth Amendment Due Process Clauses to issues of personal jurisdiction in U.S. courts, see Ronald A. Brand, Due Process, Jurisdiction and a Hague Judgments Convention, 60 U. PITT. L. REV. 661 (1999).

8. See Brussels Convention, supra note 4.

9. TEC, supra note 3, art. 61.
Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

a) Improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

b) Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

c) Eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.10

The Community institutions have not hesitated to exercise this authority. The Council has adopted regulations dealing with:

a) Insolvency proceedings;11

b) Jurisdiction and the recognition and enforcement of judgments in family law matters;12

c) Service of process;13

d) Taking of evidence;14 and

e) Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.15

Proposals for further instruments continue to be considered.16 Each of these instruments adds to the set of rules now applicable to internal Community

10. TEC, supra note 3, art. 65.


16. For further information on the agenda under Article 65, see http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm (visited Oct. 8, 2004).
legal matters. They combine with several treaties to provide the current private international law framework within the European Union. Those treaties include the Rome Convention on the law applicable to contractual obligations, and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

While these instruments clearly have brought about change regarding the source of law applicable to private law and private international law issues in the courts of the Member States of the European Union, they are on their face limited for the most part to litigation that is internal to the Union. While the rules of the Brussels Regulation would apply to a case brought by a U.S. national against a French domiciliary in a French court, they would not apply in courts outside the European Union. Those rules reflect exercise of competence for matters relating, as required by Article 65, to "the proper functioning of the internal market." This leaves open the question of authority for the adoption of such rules for purposes of external relations.

The question of external competence in the area of judicial cooperation has surfaced in several ways. One is at the Hague Conference on Private International Law, where since 1992 the Hague Member States have considered the possibility of a multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Hague negotiations have evolved from full participation by European Union Member States to full coordination of a Community position represented in the Hague Special Commissions by the European Commission and Council on behalf of the Community. This has not occurred, however, without some tension in regard to the appropriateness of this representation. There has been no clear statement as to whether the competence for such matters now rests with the European Union Member States; with the Community institutions; or in a mixed form with Member States and Community institutions each having competence for some, but not all issues.


19. TEC, supra note 3, art. 65.

Another setting in which the issue of Community competence for external relations in matters of judicial cooperation has surfaced, is found in the effort to adopt amendments to the Lugano Convention that are consistent with the changes made when the Brussels Convention was replaced with the Brussels I Regulation. In this setting, however, there has been a further step in the process with the Council having asked the European Court of Justice for an opinion under Article 300(6) of the European Community Treaty, on whether the Community “has exclusive or shared competence to conclude the new Lugano Convention.”

Citing the 1971 ERTA decision of the European Court of Justice, the Council’s Legal Service rendered an opinion on February 5, 1999, that:

once the Community has exercised its internal competences adopting positions by which common rules are fixed [pursuant to Article 65], the Community competence becomes exclusive, in the sense that the Member States lose the right to contract, individually and even collectively, obligations with third countries which affect the said rules.

The ERTA doctrine was further developed by the Court in its Open Skies judgment of 2002, when it stated:

21. TEC, supra note 3, art. 300(6)

The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.


23. Alegria Borrás, The Effect of the Adoption of Brussels I and Rome I on the External Competences of the EC and the Member States 2 (copy on file with the author). The Legal Service was paraphrasing the ERTA judgment at ¶ 17 and 18, which stated:

17 In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18 As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

81. It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

82. According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (AETR judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

83. Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).

84. The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).

Commentators have argued that these decisions do not indicate clear exclusive Community competence in areas of private international law and judicial cooperation because a doctrine lay down in “purely economic areas such as external trade,” may not apply evenly to private international law.25

From this side of the Atlantic, the ERTA line of cases is particularly interesting. The idea that powers emanating from constitutional documents—in this case the treaties creating the European Community—that grant specific authority for internal matters, without granting specific authority for external matters, can be exercised internally and thus result in the capture of external authority is an intriguing one. This clearly is seen as both fundamental and

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necessary to the evolution of the law of the European Community. At the same
time, this concept demonstrates the tension between the Member States and the
Community institutions as the deepening of the Community moves forward. In
the *Lugano* case, it also demonstrates the capture by international trade lawyers
within the Community institutions of authority in the realm of private interna-
tional law; something the private international law experts seem never to have
been consulted upon when the Treaty of Amsterdam was concluded and
competence was moved to the Community institutions.

The outcome of the *Lugano* case will have significance beyond just deter-
mining who should sign the amended Lugano Convention. It is likely to
suggest, as well, the answer to who represents the Community and its Member
States in negotiations at the Hague Conference on Private International Law and
other multilateral bodies.\(^{26}\) Whether the European Court of Justice finds any
important distinction between prior cases in the international economic law
realm and these matters in the field of private international law will say a lot
about the evolution of the European Community from a simple common market
to the more complex type of law-making framework that makes it look more-
and-more like a federal system.

\(^{26}\) The allocation of competence may have implications as well for negotia-
tions in the United Nations Commission on International Trade Law (UNCITRAL)
and the Institute for Unification of
International Private Law (UNIDROIT).
OPEN SEASON: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA AFTER BEALS v. SALDANHA

H. Scott Fairley*

I. INTRODUCTION .......................................................... 305
II. A REVISED STATUS QUO ............................................. 306
III. CONFIRMING THE STATUS QUO: FACT AND LAW FROM BEALS .. 308
   A. Compelling Facts .................................................. 308
   B. The Lower Court Rulings ......................................... 309
IV. THE LAST WORD AND A FEW DISSenting VOICES ............... 310
V. CONCLUSION AND PROSPECTUS ..................................... 316

I. INTRODUCTION

At the end of last year, the Supreme Court of Canada handed down its decision in Beals v. Saldanha.1 This case had appeared some years before in the courts of Ontario where a Florida plaintiff had sought the recognition and enforcement of a Florida federal district court decision awarding damages against Ontario resident defendants concerning a small land purchase that had gone bad. It was unexceptional, save perhaps for the impressive quantum of damages enterprising Florida plaintiffs managed to secure in default proceedings before the Florida court. Nevertheless, it became the chosen vehicle of Canada’s highest court to complete the evolution of a judge-made transformation of Canadian conflict of laws principles specific to the recognition and enforcement of foreign judgments that it had embarked upon thirteen years earlier with its seminal ruling in Morguard Investments Ltd. v. DeSavoye.2 For an American legal audience, the decision is significant. It confirms the correctness of lower court rulings which had applied the Morguard precedent—itself a case confined to inter-provincial recognition and enforcement within the Canadian federation—to foreign judgments. Most of these cases, not


surprisingly, emanated from various U.S. jurisdictions, with initially unanticipated and sometimes harsh consequences for Canadian defendants.\(^3\)

From a Canadian legal standpoint, particularly from an incoming perspective on international litigation, *Beals* and the previous pattern of Canadian court decisions that it has vindicated, suggests a level playing field that may have been irretrievably lost, absent legislative redress domestically or, if possible, by treaty at the international level.\(^4\) That too, should be of interest from an American law reform perspective that has perennially viewed the U.S. legal system as considerably more hospitable to the enforcement efforts of foreign plaintiffs than American plaintiffs tend to receive from other legal systems.\(^5\) But my basic message today is that Americans have nothing to complain about north of the border. For hunters of compensation in Canada for damages done to them outside of Canada, we might even go so far as to say that the Supreme Court has declared an “open season” on Canadian assets.

II. A REVISED STATUS QUO

Not long ago, Canadian courts rigorously adhered to the English—somewhat imperial—common law approach to recognition and enforcement issues which allowed that, unless the Canadian defendant had voluntarily attorned to the jurisdiction of the foreign court, or was otherwise deemed to be found within that jurisdiction in certain circumstances,\(^6\) the foreign proceeding could be safely ignored. The foreign plaintiff would be required to sue on its judgment, against which a full defence on the merits could then be waged at home. This

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6. Emanuel v. Symon, 1. K. B. 302, 309 (Eng. C.A. 1908) (per curiam): In actions *in personam* there are five cases in which the Courts of this country will enforce a foreign judgment:

   (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began;

   (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

rule applied coequally to the enforcement of rulings from one province to another within the Canadian federation.

*Morguard* abandoned the traditional English formula in relation to the interprovincial context, importing the American constitutional concept of "full faith and credit" as between coordinate jurisdictions within national boundaries, and posited a new formula. The enforcing court would recognize and enforce the judgment of the originating court, precluding any further defense on the merits, provided that first, the adjudicating court had properly exercised jurisdiction under its own rules and second that the enforcing court could satisfy itself that there was "a real and substantial connection" between the adjudicating jurisdiction and determinative features of the *lis* or the Defendant as a party. However, the *Morguard* Court, in prophetic unanimous reasons in *obiter* authored by Justice LaForest, suggested that the same approach might apply to foreign judgments of comparably civilized jurisdictions, premised on the notion of international comity. Citing *Spencer v. The Queen*, the *Morguard* court quoted, "[T]he 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..."9

The rationale for resurrecting this nineteenth century notion straight from the pen of Justice Gray in *Hilton v. Guyot*10 was, however, grounded in the late twentieth century realities of a trade dependent country. Justice LaForest elaborated:

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under the circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.11

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7. U.S. Const. art. IV, § 1.
This invitation to a dramatically liberalized approach was taken up enthusiastically by lower courts across Canada.\textsuperscript{12} These endorsements entailed harsh consequences for Canadian defendants. Many were caught by the retrospective application of the new rule to pre-\textit{Morguard} decisions made not to defend foreign lawsuits;\textsuperscript{13} others by exposure to damages awards—notably from U.S. civil juries—far in excess of anything a Canadian court would have awarded had the defendant been sued in a Canadian jurisdiction at first instance.\textsuperscript{14} Nevertheless, the Supreme Court chose not to revisit such concerns until it granted leave to appeal in Beals.

\section*{III. Confirming the Status Quo: Fact and Law from Beals}

\textbf{A. Compelling Facts}

An ultimately very unlucky Canadian couple, the Saldanhas, together with another Canadian couple, the Thivys, had purchased in 1981 a vacant lot in Florida for $4000. Three years later, they were approached by a real estate agent to sell the lot to two American couples, which they agreed to do for the sum of $8000. There was a mistake in the property description in the original offer, which Mrs. Thivy corrected, and the transaction was completed. However, some months later, the American purchasers, the Beals and the Foodys, discovered they were building a model home for a development project they had in mind on the wrong lot, adjacent to the one they had actually purchased.

Predictably, in the spring of 1985, a variety of individuals were sued in Florida State Court, including the Saldanhas, who filed a defense on their own behalf; the suit was withdrawn, having been commenced in the wrong county. A second suit was commenced in the fall of 1986, this time in the Circuit Court of Sarasota County. The Canadian defendants were served in Ontario and Mrs. Thivy filed an unsigned duplicate of the Saldanhas' previous defense on their behalf. Thereafter, amended claims were served and filed in the Florida court, but no further defenses were forthcoming from the Canadians who, alas, had not retained Florida counsel. In the end, only the Canadians were left at the end of a default judgment on liability in the summer of 1990. A further jury award on damages followed in late 1991 for $210,000 in compensatory damages, an

\begin{itemize}
\item[12.] \textit{Enforcement of Foreign Judgments-Can. Cts.}, supra note 3; Blom, supra note 8.
\end{itemize}
additional $50,000 in punitive damages, and post judgment interest of twelve percent per annum, notice of which the Saldanha received for Christmas 1991.\(^{15}\)

At this point, the Saldanhas did consult a lawyer in Ontario. Unfortunately, that lawyer was not aware of the *Morguard* precedent of the previous year or its possible application to foreign as well as interprovincial enforcement actions. He advised the Saldanhas to do nothing in Florida, as they had not secured legal representation in Florida, and, as and if necessary, they could offer a full defense in Ontario.\(^{16}\) This was bad advice.

\textbf{B. The Lower Court Rulings}

Enforcement proceedings began in Ontario in 1993. At first instance, the Ontario trial court refused to enforce the Florida judgment, notwithstanding *Morguard*; however, not without some difficulty.\(^{17}\) Justice Jennings expressed considerable discomfort with the practical consequences of Florida justice for the Saldanhas, and equal discomfort with the limits of the law he felt obligated to apply. In the result, Justice Jennings reached to find an element of fraud based on the absence of certain facts before the Florida jury, and also refused to enforce on grounds of public policy. Although none of the traditionally narrow grounds precluding application of penal, revenue or other foreign public law fit the situation, Justice Jennings posited an extension of doctrine to encompass a “judicial sniff test” allowing for non-enforcement in what he viewed as the particularly egregious circumstances that confronted him in this case.\(^{18}\)

The Ontario Court of Appeal reversed in favor of enforcement based on *Morguard* principles.\(^{19}\) Justice Doherty, joined by Justice Catzman on a three-judge panel, rejected the defense of fraud, restricting it to extrinsic circumstances, not those which the Saldanhas could have discovered with reasonable diligence and countered had they defended themselves in Florida. The Court viewed Justice Jennings’ imaginative extension of public policy in like terms. No matter how egregious the totality of the circumstances, Justice Doherty concluded: “The fact of the matter is the respondents chose not to go to court in Florida and demonstrate just how ‘strange and wonderful’ the allegations in the complaint were,”\(^{20}\) and that decision was fatal to any defense on the merits in Ontario.

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16. Id. at 431.
18. Id. at 144.
20. Id. at 662.
In lone dissent, Justice Weiler appealed to substantive elements of natural justice in the context of undisclosed jeopardy arising from features of the Florida legal system not readily apparent to foreign defendants. For her, the procedural requirement of notice was based on "the underlying fundamental principle of justice that defendants have a right to know the case against them and to make an informed decision as to whether or not to present a defence," an opportunity never squarely presented to the Saldanhas. To this perception was added, in the context of a potential fraud on the Florida court, the apparently less than frank disclosure of material facts by counsel for the Beals to the Florida judge and jury.

Of course, all of the foregoing procedural pitfalls and consequential substantive liabilities would have become apparent had the Saldanhas engaged competent Florida counsel. What separated the majority and dissenting voices on the Ontario Court of Appeal, mirrored again in the Supreme Court, was their profoundly different views on the necessity of taking that critical step.

IV. THE LAST WORD AND A FEW DISSENTING VOICES

A majority of the Supreme Court of Canada (6-3) affirmed the Ontario Court of Appeal in favor of enforcement. Justice Major opined:

International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in Morguard ... can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test should apply to the law with respect to the enforcement and recognition of foreign judgments.

The question remains, of course, whether the common law result merits a statutory response. Hard cases often make bad law and perhaps they should not invite statutory revision of otherwise positive and necessary organic legal developments. Justice Major appears not unreasonable in noting:

Here, the appellants entered into a property transaction in Florida when they bought and sold land. Having taken this positive step to bring themselves with the jurisdiction of Florida law, the appellants could reasonably have been expected ... to defend the claim pursuant to the Florida rules. Nonetheless, they were still entitled, within ten

21. Id. at 675–76 (Weiler J., dissenting).
22. Id. at 670.
24. Id. at 436.
days, to appeal the Florida default judgment, which they did not. In addition, the appellants did not avail themselves of the additional one-year period to have the Florida judgment for damages set aside. While their failure to move to set aside or appeal the Florida judgment was due to their reliance upon negligent legal advice, that negligence cannot be a bar to the enforcement of the respondents' judgment.25

Leaving aside the retrospective application of Morguard to the circumstances confronted by at least the Saldanhas,26 Justice Major does have a point. The substantial connections test, once accepted, appears unassailable because if a foreign court did not properly take jurisdiction, its judgment will not be enforced. Here, it was correctly conceded by the litigants that the Florida court had a real and substantial connection to the action and parties.27 On this general proposition, the Court was essentially unanimous.28 The more troublesome question, however, is whether, in the wake of adopting the new test, existing defenses to enforcement elaborated under the previous Anglo-Canadian common law approach of formal attornment, also require revision. Justice Jennings thought as much at first instance in resorting to his "judicial sniff test" and Justice Major was not unmindful of such considerations, in which respect it is appropriate to quote the Justice at length:

The defenses of fraud, public policy and lack of natural justice were developed before Morguard, supra, and still pertain. This Court has to consider whether those defenses, when applied internationally are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.

These defenses were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defenses are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive.

Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, the facts of this

25. Id. at 440.
26. The Court found that the co-defendant Dominic Thivy had secured representation in Florida and had specifically submitted to the jurisdiction of the Florida Court. Id. at 438.
27. Id. at 441.
28. Beals, [2003] 3 S.C.R. at 456 (Binnie, J., Iacobucci, J., concurring); Id. at 473 (LeBel, J., concurring).
case do not justify speculating on that possibility. Should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences. (emphasis added)\textsuperscript{29}

Justice Major goes on to apply the traditional defenses without enlargement, essentially concurring with the Ontario Court of Appeal.\textsuperscript{30} It is with these applications, however, that the two dissenting opinions on the Supreme Court take issue with the majority.

Justice Binnie, joined by Justice Iacobucci, readily agrees that the substantial connections test “provides an appropriate conceptual basis for the enforcement in Canada of final judgments obtained in foreign jurisdictions….”\textsuperscript{31} At the same time, however, the Binnie/Iacobucci dissent emphasizes the original domestic context and “constitutional flavour” of \textit{Morguard} stressing: “We should not backtrack on the importance of that distinction.”\textsuperscript{32}

The difference between a known system of justice within national borders and the undisclosed mysteries of foreign legal systems provide the touchstone for Justice Binnie’s dissent from the majority, but in the end, he does so within the traditional defence of a failure of natural justice as a ground for non-enforcement, purportedly without enlargement.\textsuperscript{33}

My colleague Major J. holds, in effect, that the appellants are largely the victims of what he considers to be some ostrich-like inactivity and some poor legal advice from their Ontario solicitor. There is some truth to this, but such a bizarre outcome nevertheless invites close scrutiny of how the Florida proceedings transformed a minor real estate transaction into a major financial bonanza for the respondents.

While the notification procedures under the Florida rules may be considered in Florida to be quite adequate for Florida residents with easy access to advice and counsel from Florida lawyers (and there is no doubt that Florida Procedures in general conform to a reasonable standard of fairness), nevertheless the question here is whether the appellants \textit{in this proceeding} were sufficiently informed of the case against them, both with respect to liability and the potential financial consequences, to allow them to determine in a reasonable way whether or not to participate in the Florida action, or to let it go by default.\textsuperscript{34}

\begin{itemize}
  \item 30. \textit{Id.} at 440-453.
  \item 31. \textit{Id.} at 456 (Binnie J., concurring).
  \item 32. \textit{Id.}
  \item 33. \textit{Id.}
  \item 34. \textit{Id.} at 458–59 (emphasis in original).
\end{itemize}
I do not propose to detail all the steps in Justice Binnie’s argument. It emphasizes the idiosyncrasies of Florida procedural rules—at least from a Canadian perspective—requiring defendants to refile in response to each and every amended claim, rendering their previous defense non-existent.\(^{35}\) Additionally there was other information the appellants did not know. In particular, the gradual removal of other domestic defendants, notably the Florida real estate agent and title insurer with whom the respondents settled for comparatively modest sums while retaining title to the property conveyed,\(^{36}\) all of which remained invisible to the Saldanhas. On these cumulative findings, Justice Binnie concludes:

I do not accept the suggestion that the appellants are the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about all of these developments. The Appellants decided not to defend the case set out against them in the Complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

I do not suggest that any one of the foregoing omissions of notice would necessarily have been fatal to enforcement of the respondents’ default judgment in Ontario. Cumulatively, at all events, these continuing omissions seem to me to demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice.\(^{37}\)

In a separate dissenting opinion, Justice LeBel, expresses much stronger concerns. In reasons considerably more expansive than those provided by either the majority or the Binnie/Jacobucci dissent, Justice LeBel asserts that the possible circumstances arising within foreign legal proceedings as illuminated in *Beals* call for a reformulation of the traditional nominate defences to enforcement.

Justice LeBel does not explicitly endorse an expansion of the public policy defence to include Justice Jennings’ “judicial sniff test,” and notes international efforts at the Hague Conference on Private International Law to develop a treaty instrument that would confer discretion on a court to limit the quantum of a foreign judgment if the court was satisfied that the amount of the award was “grossly excessive.”\(^{38}\) However, he would “continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum,


\(^{36}\) *Id.* at 465–69.

\(^{37}\) *Id.* at 470–71.

rather than the way the law was applied, or the size of the award per se." One example Justice LeBel cites in this regard as a candidate for non-enforcement should resonate with an American legal audience is as such: a Canadian court presented with a judgment from a jurisdiction whose law provides, for example, that punitive damages can be awarded on the basis of simple negligence or strict liability ought to have a discretion to deny or limit the enforceability of the judgment on grounds of public policy. It is important to note here, again principally for the benefit of an American legal audience familiar with statutory prescriptions for punitive damages in civil cases, that Canadian courts do currently enforce without serious question foreign judgments embracing extensive punitive damages awards where even the threshold of simple negligence is barely met. Indeed, the majority of the Supreme Court did just that in Beals. It bears emphasis, however, that the LeBel dissent sees the future differently.

With regard to the defence of fraud, Justice LeBel generally adheres to the majority approach of requiring fresh evidence of fraud not reasonably discoverable at first instance to properly invoke the defence. Justice LeBel would not, however, rule out the possibility that a broader test should apply to default judgments in cases where the defendant’s decision not to participate was a demonstrably reasonable one. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts.

Nevertheless, Justice LeBel finds that neither of the two preceding defences would support a reversal in favour of the Saldanhas. Rather, his principal concern, in common with the Binnie/Iacobucci dissent, is one of natural justice applied to the facts of the particular case before him. Justice LeBel embraces the notion expressed by the English Court of Appeal in Adams v. Cape Industries and by Justice Weiler, dissenting in the Ontario Court of

40. Id.
41. Id. at 511.
Appeal on *Beals*, that the natural justice defence comprises both substantive as well as procedural elements "such as the proposition that damages should be based on objective proof and judicial assessment."  

Applying substantive and procedural considerations to the case before him, Justice LeBel concludes that the Saldanhas were deprived of natural justice: first in relation to lack of proper notice on the basis of which to make an informed decision to continue defending in the Florida proceeding, and further, in terms of substantive unfairness in the quantum of general damages without apparent objective proof of the harm suffered, together with the awarding of punitive damages without proof of conduct deserving of punishment. Under this reasoning, in marked contrast to the six-justice majority of the Supreme Court, the natural justice defence was available, notwithstanding the Saldanhas' failure to defend.

What Justice LeBel appears to be allowing for here within the context the natural justice defence is a subsidiary defence of reasonable expectation as to both process and consequences, even though such expectations are uninformed and clearly unjustified when placed in the context of the foreign legal proceeding. Justice LeBel observes:

> The evidence at trial was that Florida's legal system provides all the appropriate protections for judgment debtors in the appellants' position and probably would have afforded them a remedy in these circumstances. But at the relevant time the appellants did not know this; they only knew that Florida's legal system had produced a judgment against them for an astronomical amount, a verdict that was difficult to reconcile with the simple facts they had set out in their defence. Their apprehensiveness about going back to that very legal system to seek relief was, in the circumstances, understandable.

Justice LeBel could have stopped there, but decided to go further. Even if his expanded view of natural justice did not avail, he would decline to enforce on a residual ground of general unconscionability:

> The circumstances of this case are such that the enforcement of this Judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own

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46. *Id.* at 523.
47. *Id.* at 527.
jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. In an adversarial legal system, it was, of course, open to them to do so, but the Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim, the fact that the parties did not compete on a level playing field and the lack of transparency in the Florida proceedings.48

The residual category of concerns resorted to by Justice LeBel is, on the one hand, a refuge for judicial discretion. In extreme cases, it may have a place where none of the bright-line rules quite fit. On the other hand, an unconscionable test in the hands of lower court judges potentially lacking the world view that informed Justice LaForest in Morguard, could be equally viewed as something of a trojan horse undermining the substantial connections test which, simplicity, the Supreme Court of Canada has unanimously affirmed.

V. CONCLUSION AND PROSPECTUS

At this time, Canada taken as a whole, and specifically in individual provinces, is one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions. It has become so through perhaps, due to an overly generous adoption to twentieth and twenty-first century circumstances of the nineteenth century common law doctrine. Unfortunately, at least for Canadian defendants, international comity is neither universally shared doctrine, nor even championed any longer by the jurisdictions in which it was originally developed.49 While Canada is also distinguished by a large and important civil law jurisdiction in the province of Quebec where the applicability of common law doctrine derived from Morguard and Beals may be debated, the pragmatic approach of Quebec courts to the recognition and enforcement of foreign judgments complements that of the Canadian approach overall.50

48. Id.
The result is a situation of opportunity for foreign plaintiffs and one of some risk and discomfort to Canadian defendants exposed at home to foreign standards of justice with which they are unfamiliar. The Supreme Court dissents in *Beals* sound a muted alarm in that regard, but the majority has confirmed a reality that will be difficult to substantially alter in future cases. Once the substantial connections test is met, and barring extensive procedural sloppiness by an originating court, the only latitude that remains for denying recognition and enforcement by a Canadian court lies within the currently narrow parameters of the established impeachment defences. The Supreme Court of Canada has left open the possibility of expansion within those categories, but apart from Justice LeBel in vigorous dissent, there seems little current judicial appetite for residual protectionism in aid of hapless or unlucky Canadian defendants.51 Similarly, there is no suggestion that recognition or enforcement should be predicated on conditions of reciprocity within the originating jurisdiction. However, all of these concerns are voiced in the legislative precincts of law reform and by governmental private international law visionaries and putative legal engineers at the Hague.52 It remains to be seen whether any of those efforts will come to fruition. But, from a Canadian perspective, critics of judicial methodology and legal consequences in *Beals* and the work of Canadian lower courts that *Beals* has implicitly endorsed, may have little alternative but to embrace and advocate some form of legislated law reform agenda. The Canadian courts are unlikely to re-engage in such a task any time soon. Indeed, as previously noted, Justice Major signaled with some clarity that legislative reform was an available alternative to the road taken since *Morguard*, but not one the Court was inclined to vary of its own accord.53

In the meantime, what does all this mean for American litigants bringing the results of American justice to Canada? A truly generous and hospitable environment! Given constitutionally imposed standards of “minimum contacts” required to support the assumption of *in personam* jurisdiction by American state and federal courts over foreign defendants, fulfillment of the substantial connections test as applied by Canadian enforcing courts would appear to be a virtually foregone conclusion.54 Finally, notwithstanding some disquiet in

51. Since *Beals* was decided, two of the judges supporting the majority opinion of justice Major (Gonthier, J. and Arbour, J.) have retired or resigned, together with one of the dissenting justices (Iacobucci). See at http://www.scc.csc.gc.ca (last visited June 12, 2005).


54. See Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945) (interpreting the “Due Process” clause of the Fourteenth Amendment of the U.S. Constitution to require out-of-state or foreign defendants to have certain “minimum contacts” with the jurisdiction before jurisdiction to adjudicate is established); Muscutt
Canada for the profligacy of American civil trial juries, Canadian courts are basically sending the message that different standards of justice between jurisdictions on the quantum of damages are not unenforceable ones. In short, the season is open, and the hunting is good. Welcome to Canada.

A BRIEF HISTORY OF LAWYERS WITHOUT BORDERS: CROSSING BORDERS TO MAKE A DIFFERENCE

Houston Putnam Lowry*

I. INTRODUCTION ......................................... 321
II. PROJECT ............................................... 320
III. FINGERPRINTS ....................................... 320
IV. NEUTRAL INDEPENDENT COURT TRIAL OBSERVER PROJECT . 320
V. INS DETAINEE PROJECT .................................... 320
VI. PROVIDING BOOKS ..................................... 321
VII. CENTRALIZED BULLETIN BOARD FOR JOBS AND INTERNSHIPS . 321
VIII. NGO ACCREDITATION .................................. 321
IX. CONCLUSION ........................................ 322

I. INTRODUCTION

Non-governmental organizations (NGOs) come in all shapes and sizes. However, they usually have something in common: they are geographically located near concentrations of power. In the United States, this usually means Washington D.C. or New York City.

Lawyers Without Borders, Inc. (commonly called LWOB) was incorporated in Connecticut on March 1, 2000 and its primary offices are in Hartford, Connecticut. While Hartford is the capitol of Connecticut, people outside of Connecticut tend to overlook it. From the beginning, LWOB was supported by the Connecticut Bar Association’s Section of International Law & Practice and strongly supported by Byrne & Storm, P.C. Christina Storm was the founding executive director of LWOB.

LWOB strove to match resources with needs, regardless of where the resource and the need were located. A number of pools of talent were recognized early on; younger lawyers and more senior lawyers with experience that could be applied in different circumstances. Recognizing Connecticut was a bit out of the way for many wanting to help, LWOB focused its organizing efforts

through the internet. LWOB is very much a virtual organization because of the way it communicates, galvanizes and harnesses legal resources.

II. PROJECT

Over the years LWOB has undertaken a number of projects. Some of the projects have been large and some have been small. Each project has reflected LWOB’s desire to connect resources with needs. While it is not possible to discuss all of LWOB’s projects, a representative list can be shown.

III. FINGERPRINTS

One of the first virtual projects came from Yugoslavia. As criminal trials under the new regime commenced, the local bar did not know how to examine fingerprint experts. Fingerprint evidence was not commonly used under the old regime. Fingerprint evidence was being used under the new regime as part of the criminal prosecution.

A local Yugoslavian lawyer requested assistance from LWOB. LWOB located a Canadian criminal attorney with substantial experience in cross examining fingerprint experts who was willing to assist the Yugoslavian lawyer. While the Canadian lawyer did not leave his office, he was able to effectively assist another lawyer in Yugoslavia through the use of the internet.

IV. NEUTRAL INDEPENDENT COURT TRIAL OBSERVER PROJECT

In some countries and some proceedings, a court proceeding is not open to the public. LWOB has sent observers to watch closed trials in Tehran and Pakistan. LWOB contacts the governments involved before sending the observers. The ground rules are agreed upon in advance and differ from many NGOs.

LWOB observers will not report their finding and observations in public. They will report their findings, observations and recommendations to the government in question. The emphasis is cooperation rather than confrontation. The objective is to fix the problem rather than to create publicity. Under these circumstances, LWOB has been able to observe trials no other NGO has been able to observe.

V. INS DETAINEE PROJECT

Since September 11, 2001, there has been a dramatic rise in the number of immigration detainees within the United States. Simply put, the federal government does not have enough space to house all of the detainees. This means some detainees are being held in state facilities under contract to the federal government.
There are comprehensive regulations on holding such detainees (because they are not incarcerated criminals). While the federal government may be well versed in these rules, the states are not. In response to inquiries from various people, LWOB teamed up with the American Bar Association to conduct inspections in Connecticut and Massachusetts. LWOB's report resulted in some changes in how detainees were being held.

VI. PROVIDING BOOKS

When the United States invaded Iraq, it committed itself to reopening universities and teaching. A number of courses were taught on United States Constitutional Law, but there was a critical shortage of books and teaching materials.

LWOB provided a number of copies of the United States Constitution and the federalist papers for several law schools in Northern Iraq. When it was pointed out that a number of students felt more comfortable reading this material in Arabic rather than English, LWOB located reliable Arabic translations of the United States Constitution and the federalist papers in Brooklyn Public Library. Copies were made (with the appropriate copyright permissions) and sent to Iraq.

VII. CENTRALIZED BULLETIN BOARD FOR JOBS AND INTERNSHIPS

One of the difficulties has been locating opportunities for those with an interest in pro bono (and paying!) work. LWOB launched (with the assistance of JobTarget.com) a jobs board in February 2004 that allowed the anonymous posting of resumes (people looking for opportunities) as well as the traditional posting of job listings. The job board is free to job seekers and free for a period of time for employers wishing to test the system. The first major employer to enlist the system for his human resource needs was the International Criminal Court. This jobs board was a "first" of its type for rule of law, transitional justice, and legally oriented capacity building jobs.

VIII. NGO ACCREDITATION

LWOB has been an accredited NGO with the United Nations Department of Public Information for some time. It was recently accredited to the United Nations Economic and Social Council (one of the five principal organs of the United Nations). This provides a greater opportunity for LWOB to contribute to the work of the United Nations.
IX. CONCLUSION

LWOB is a relatively new NGO. Its emphasis is on connecting people to make a difference. Unlike the traditional NGO, this means LWOB offers exceptional opportunities to its volunteers. We hope you will become one of those volunteers.
I. INTRODUCTION

When an officer of the Kigali Bar Association in Rwanda said their members would like an e-commerce training, I was amazed. Rwandan phone lines don’t work and the infrastructure was destroyed after the genocide. “Why?” I asked. “We want to be prepared,” said the Association’s officer who survived the 1994 genocide that left only a few judges alive and only sixteen lawyers in the entire country.

Developing countries are eager to prepare for the global era and developed countries seek new markets and avenues of trade. Emerging nations also need to establish the rule of law because it is a prerequisite to receiving aid from the World Bank, the IMF and mandated by certain agreements such as the African Growth and Opportunity Act (AGOA). New democracies need developed countries to export training and education regarding their long-established laws. Equally important is the need for developed nations to import knowledge of emergent countries’ laws in order to trade with them and understand their training requirements.

Let me first share with you my experience in exporting United States laws and legal ethics in seminars abroad and, secondly, discuss the effectiveness of teaching overseas. Lastly, let me focus on lessons learned from such experiences, i.e. the need for continuing programs, the contacts developed and the knowledge gained from other countries’ laws and cultures.

* Former Chair of the Rwanda Legal Task Force and member of the Committee on African Affairs of the Association of the Bar of the City of New York. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2004, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2004.
II. EXPERIENCE

Experiences, teaching and mentoring abroad can be the most rewarding part of one's professional career. Exporting United States laws and importing knowledge of foreign laws adds to the increasing globalization of the rule of law.

My first experience overseas was in Tibet when I was investigating for the Tibet Information Network. I was asked to discuss the United States Constitution at adult education classes in the Tibetan section of the capital, Lhasa, which is overrun by Chinese military and Chinese settlers. Although the students were not lawyers, they were men and women at the forefront of the Tibetan quest for freedom from the Chinese. It was enlightening to discover how much they wanted to adapt their way of life to American constitutional liberties. "Change comes with education," commented one of the less shy participants.

I was thereafter invited to teach a seminar on international intellectual property for practicing lawyers at the International Law Institute in Kampala, Uganda. Most of the lawyers had a general practice and wanted to learn not only the international norms of intellectual property law but also practical tips for handling their cases. A Ugandan judge, who joined us for a session asked about United States copyright decisions because he had a publishing matter before him and was interested in cases of a more active copyright jurisdiction.

The workshops we held with hypothetical cases created interesting discussions, provocative questions, and a congenial fun-filled atmosphere. Since the class members always lunched together, this gave us an opportunity for informal talk and learning experiences for both me and the Ugandan lawyers.

Since Rwanda borders Uganda, I went to Rwanda to address the Kigali Bar Association, the only active bar association in the country. Their lawyers were interested in three topics—intellectual property, arbitration and e-commerce. Although my Ethiopian Airlines flight was four hours late, the President and the Treasurer of the Association waited for and greeted me at the airport. The participants at the seminars included not only members of the Rwandan Bar but the Attorney General, the Justice Minister and Parliamentarians. Such attendees who were responsible for revising pre-genocide statutes (even those that still referred to the former colonial power's King of Belgium), wanted to study United States laws to use as a basis for their revisions.

Although Rwanda has an exemplary Copyright Statute, developed with the help of the World Intellectual Property Organization, enforcement of the laws was minimal. Rwandan lawyers were interested in pursuing their client's claims more actively. We discussed their trademark cases as well as United States and

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East African decisions. Electronic commerce law was an entirely new topic for the Rwandan legal community. The participants appeared to be interested in our relevant statutes as well as the legal problems raised by doing business electronically. The arbitration section of the seminar was aided by a presentation from the head of the Rwandan Arbitration Court. We discussed differences between the United States and Rwandan methods of arbitration.

Because United States elections were forthcoming when I was in Kigali in 2000 and the first elections after the genocide were scheduled in 2003, lawyers asked me about fair and free elections in the United States and the laws governing them and in 2003 they asked about, as well as the United States Supreme Court case relevant to the 2000 election.

The students at the Rwandan Law School in Butare, the second largest Rwandan city, were mostly interested in international intellectual property laws since there were no courses offered on that subject. Their professors also sat in on the training.

My experience in Rwanda prompted me to initiate and find funding for two ethics trainings for the Rwandan justice system, as requested by members of the Rwandan legal community. Juridical ethics is an important topic for countries accused of lack of judicial transparency. As World Bank president, James D. Wolfensohn, said "it is a question of ethics" as to "how a country is run." Many of the horrors of the genocide went unpunished because of the lack of impartial judges and prosecutors.

The United States Agency for Development generously supported the ethics projects enabling the Association of the Bar of the City of New York (ABCNY) to hold two ethics seminars were held in Kigali and Butare in 2002. Two members of the ABCNY joined me on the first week-long program along with Michael Johnson, a former Chief of Prosecution at the International Criminal Tribunal for Yugoslavia and Acting Deputy Prosecutor for the Rwanda Tribunal. Judge David Ebel of the Tenth Circuit Court of Appeals, who taught ethics at Duke University and helped formulate a Canadian judicial ethics code, was a wonderful addition to the group and of great assistance to the Rwandan judiciary. Joining us with the presentations were the Rwandan Minister of Justice, the President of the Supreme Court, the Attorney General, the head of the Military Court and a Supreme Court judge who oversees the functioning of the country's courts and personnel. Judges from all over the country attended the seminar.

We spent two days at the Law School at the National University in Butare, where we were greeted with an elaborate reception and a chance to chat with the students and faculty. Among the audience for the training were graduating

seniors who were to be appointed as judges at informal tribunals ("Gacaca"—Ga-cha-cha, meaning grass because these communal courts are held on the grass). These prospective judges will try over 500,000 alleged genocide perpetrators that conventional courts are not able to handle. There were difficult practical problems such as the senior student, soon to become an unsalaried judge, who said, "Either I can pay my fare to come here tomorrow or use the money to feed my family." (The government cannot afford salaries for Gacaca judges).

The follow-up ethics seminar was joined by Professor Mary Daly, who teaches ethics at Fordham Law School and Tom Strunk, a lawyer who teaches ethics at the West Point Military Academy.

My subsequent trip to Rwanda in 2003 was to prepare an international training on gender and the law for the Ministry of Gender funded by the World Bank. I not only met many hard-working female lawyers in parliament, the government and NGOs, but I also studied Rwandan laws to determine the requirements for change. The input of female leaders was essential to my formulating a program for the training. (Although Rwandan women constitute 48.8% of the Parliament, more than any other country in the world, some of their laws lack the gender sensitivity that Rwandan women seek). Several statutes have been revised, but there are still no laws on domestic violence, sexual harassment or equal opportunity, and there is no statutory infrastructure for the commendable Constitutional mandate for a Gender Monitoring Office and a National Council of Women.

Several women at the ABCNY, including Sara Rakita, a Human Rights Watch lawyer in Rwanda for two years, have been working on a training manual for the international program, which is planned for 2005. In the works and depending on funding, are ethics training sessions for Kenya and one for Nigeria, both of which countries are accused of corruption in their judiciary.

My interest in the Rwandan genocide and the pursuit of justice for the perpetrators led me to attend trials at the International Criminal Tribunal for Rwanda in Tanzania where I met the President, judges and prosecutors of the Court. Through guile and inadvertence of the guards, I interviewed the only woman on trial for rape and genocide, who is allowed no visitors. Such adventures are an added feature of training experiences abroad.

Teaching overseas is not only an enriching experience, but enables lawyers to lecture on foreign and international law in the United States. For instance, my preparation for the intellectual property seminars in East Africa allows me to contribute to the forum: “Doing Business in Africa,” that the ABCNY’s Committee on African Affairs will be holding in the spring. Likewise, the knowledge of international, European and African gender-expertise gained in researching international gender laws for the Rwandan training enables me to participate in pertinent programs in this country.
III. Effectiveness

Without a result trainings are purposeless. The most productive programs that I have been involved with were the Rwandan ethics trainings. During the weekend of the first session officers of the Rwandan Bar established a Permanent Commission on Ethics to review and answer questions regarding ethical practices. The training participants also recommended an overall ad hoc Committee to enforce ethical rules for prosecutors and military court judges. Internal Ethics Committees for judges and prosecutors were also suggested as well as a codification of ethics rules for each group to be publicly disseminated. (Ethics rules were previously spread out over many statutes so there was no easy reference to them and they were not available to the public). The participants also recommended further ethics training sessions, permanent contacts with the ABCNY for assistance, better working conditions for judges (who are not well-respected and poorly paid), a longer than one-year term for military judges; and more emphasis on respect for ethics codes and strict adherence to their rules.

At the second session, the Kigali Bar had codified its ethics code. With the help of Judge Ebel, judicial ethics rules were drafted and incorporated into one document. Judge Ebel later participated in two Law Reform seminars that produced drafts of both judicial and prosecutorial statutes improving and restructuring these segments of the justice system. Both of these drafts are now law as well as a statute establishing a Superior Council of the Judiciary that approves the appointment of judges and that can sanction them for infractions of the judicial code.

The effectiveness of the Tibetan training was proven by one of the student’s immigration to the United States, where she is fighting for Tibetan rights similar to those in the United States Constitution. One of the students at the Ugandan training now practices intellectual property law there after completing a masters at the South African Law School at the University of Wittswatersrand.

The Rwandan seminars were effective for the presenters to learn about local laws from overseas lawyers and to identify their needs rather than imposing United States concepts. Preparing for the trainings enabled us to import knowledge of international and African laws to advise United States clients dealing abroad.

IV. Lessons Learned

Knowledge gained from global trainings was threefold, i.e. continuing training requirements, contacts developed abroad, and countries’ customs and laws.
A. Continued Training Requirements

Continuing commitment to a project is necessary to effectuate the goals of global trainings. The fact that there was a follow-up Rwandan ethics seminar and a continuing interchange with the Kigali Bar enabled the training objectives to be met. This is not to minimize the purposefulness of short-term programs that can also produce results through ongoing contacts and cultivation of other countries’ customs and laws. One-time trainings can also help with current legal problems and be inspirational for further study and professional practice in a specialized area. However ongoing projects can assist in not only drafting, but finalizing legislation and professional codes.

B. Contacts Developed

Developing and continuing contacts is not just about acquiring clients, although that can be the outcome of overseas professional relationships (particularly with the increasing privatization plans in emerging democracies). Ongoing contacts are important in guiding seminar participants in their careers and advising them on specialties in the law. Mentoring in this global era not only helps overseas lawyers develop skills and ongoing associations keep us abreast of legal changes in foreign countries. For instance, a Rwandan judge recently told me that there was a complete overhaul of their judiciary. All the judges were sacked and must now reapply for a seat on the bench and adhere to a strict, recently-legislated Judicial Code.

For me, an offshoot of keeping connected with female Rwandan lawyers was the ability to suggest and advise them on incorporating a Woman’s Law Association and to complete an article, “Rwandan Women Reborn” that will be published later this year.

C. Knowledge Of Countries Customs and Laws

Without a background in local customs, we are less helpful to participants in training seminars. We may seem out of place and too foreign to understand attendees’ needs. It is even helpful to appreciate local dress codes. I learned that, even if it’s hot in Africa, women lawyers wear black suits both to deflect Kampala dust and the droppings of the flamingo storks constantly circling the city. Even female lawyers who are parliamentarians wear traditional dress in Rwanda. The Rwandan Supreme Court judge, who participated in the ethics trainings, stressed the importance of proper dress to elicit esteem for the profession and show respect for the court.

Learning local laws is important in suggesting and drafting revisions of statutes. For instance the Rwandan rape law is very limited and denies prosecution for deeds commonly committed during the genocide—penetrating
women’s vaginas with gun barrels, bottles and sharpened sticks. Female Rwandan lawyers realize this law must be changed as well as the adultery statute that penalizes women with imprisonment, but only fines men. Revisions of these laws, adapted to international standards, have been sent to the Ministry of Gender.

It is also important not to offend lawyers whose laws and customs are different than ours. For instance, abortion is outlawed in Rwanda except in medical emergencies and homosexuality is viewed with disfavor. Additionally, unlike our system, Rwandan lawyers are not permitted to participate in any business.

The best way to learn about local customs and laws is to make a preparatory trip. But, absent that, one can always speak to someone from a country’s diaspora; the Mission to the UN of that country can give you the name of a person to contact.

V. CONCLUSION

My experience in teaching and formulating trainings for overseas participants has been the most interesting and rewarding part of my professional career. It has led to more involvement and further service to overseas lawyers and United States clients.

The effectiveness of trainings benefits legal communities abroad and enables them to familiarize themselves with international and United States laws and adapt them to their own justice system. Among the lessons learned from these trainings are not only the need for continuing programs, but also the professional and personal pleasure of maintaining contacts with overseas lawyers. Additionally, knowledge of foreign laws helps in advising clients and developing our own clientele and expertise.
THE USE OF NON-DOMESTIC COURTS FOR OBTAINING DOMESTIC RELIEF: JURISDICTIONAL CONFLICTS BETWEEN NAFTA TRIBUNALS AND U.S. COURTS?

Pieter H.F. Bekker

I. DEFINITION OF JURISDICTIONAL CONFLICT ............................................ 331
II. NAFTA CASE LAW .................................................................................. 332
   A. The Mondev Case .............................................................................. 333
   B. The Loewen Case ............................................................................ 333
   C. Inconsistent Rulings? ...................................................................... 334
III. THE POSITION UNDER GENERAL INTERNATIONAL LAW ....................... 335
   A. Attribution ...................................................................................... 335
   B. Exhaustion of Local Remedies ...................................................... 335
   C. Diversity of Nationality .................................................................. 336
IV. EVALUATION OF NAFTA CASE LAW .................................................. 337
V. DISTINGUISHING THE FORK-IN-THE-ROAD PROBLEM .......................... 340
VI. CONCLUSION ....................................................................................... 341

I. DEFINITION OF JURISDICTIONAL CONFLICT

This contribution will examine whether or not there exist jurisdictional conflicts between international tribunals operating under the North American Free Trade Agreement (NAFTA) and the courts of the United States of America, one of the three NAFTA member states. It will be useful first to identify the perceived jurisdictional conflict before investigating whether or not there exists such a conflict at present. We are dealing here with a situation where a non-U.S. claimant in an international proceeding under NAFTA's Chapter 11 complains of a violation of international law founded upon a U.S. judicial act, i.e., one or more decisions of a court, or courts, of the United States. The judicial act essentially constitutes the NAFTA member state's "measure" complained of. This situation must be distinguished from the one in which the

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action challenged is that of another branch of government, as in the case of ADF Group Inc. v. U.S.A.¹

Is there a problem here? In other words, is there a trend of domestic cases brought as NAFTA cases that should be of concern? As with so many legal problems, there is more to it than initially meets the eye.

As the Tribunal in the Mondev Case, discussed below, explicitly recognized,² NAFTA tribunals are faced here with a tension between the following two considerations: International tribunals are not courts of appeal; and NAFTAs Chapter 11 is intended to provide a real measure of protection for foreign investors.

The critical questions that must be asked in this context are threefold. First, is the NAFTA claim in substance an original, or un-remedied, appeal from a municipal decision, or was there true judicial finality? Second, is the NAFTA claimant in essence a foreign party or, rather, a U.S. party? Third, does the NAFTA claim present a colorable case under international law, i.e., is there prima facie evidence of a breach of international law constituted by a municipal judicial act?

In investigating whether or not the NAFTA case law points to a problem, it is necessary to distinguish the following two scenarios: Is the judicial act challenged that of a lower municipal court (as in the Loewen Case); or is the judicial act challenged that of the NAFTA member state's highest judicial authority (as in the Mondev Case)?

Assuming that the requirement of diversity of nationality under NAFTA Article 1139 is met, the NAFTA claim might be in substance an improper appeal from a municipal court decision in case of a failure to exhaust local remedies (usually implicated by a failure to file a writ of certiorari in the U.S. Supreme Court), or in the absence of a colorable international law claim.

II. NAFTA CASE LAW

Given that the Mondev and Loewen Cases have been referred to as possibly presenting a jurisdictional conflict between NAFTA tribunals and U.S. courts, we will concentrate on these two cases below. A summary of the facts in each of these cases will assist in clarifying their meaning in the present context.

¹. ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1 (2003), http://www.worldbank.org/icsid/cases/ADF-award.pdf.

A. The Mondev Case

The Mondev Case was brought by a Canadian investor against the U.S. under the “Additional Facility” Rules of the International Centre for Settlement of Investment Disputes (ICSID), Canada not being a party to the ICSID Convention. The case arose from a failed Boston real estate investment by the Canadian investor through its U.S. subsidiary, a Massachusetts limited partnership. The U.S. subsidiary obtained a jury verdict against the City of Boston and the Boston Redevelopment Authority (BRA) in the Massachusetts Superior Court. The court ruled, however, that the BRA was immune from liability for interference with contractual relations based on a Massachusetts statute. Both the City of Boston and the U.S. subsidiary appealed the lower court’s ruling. Massachusetts’ Supreme Judicial Court affirmed the lower court’s ruling with regard to the BRA and also overturned the jury verdict against the City. The U.S. subsidiary’s petition for a writ of certiorari filed in the U.S. Supreme Court in respect of the contract claim against the City of Boston was denied without giving any reasons, as was its petition for rehearing before Massachusetts’ highest court. These decisions effectively put an end to the U.S. subsidiary’s claims under Massachusetts law.

The Canadian investor then brought a proceeding under NAFTA’s Chapter 11 alleging U.S. violations of Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation), and claiming some fifty million in damages caused to its interests in the U.S. The essence of the Canadian investor’s complaint was that the U.S. courts had frustrated its compensation in respect of a failed investment. In its Award of October 11, 2002, the NAFTA Tribunal allowed as the basis of Mondev’s claim under NAFTA only the conduct of the U.S. courts in dismissing the U.S. subsidiary’s claims (Art. 1105(1)). In the circumstances, the case turned on the presence or absence of a denial of justice by the U.S. courts. Finding no evidence of such a denial of justice under contemporary international law in the circumstances, the NAFTA Tribunal dismissed Mondev’s claims in their entirety.

B. The Loewen Case

The Loewen Case also was an ICSID Additional Facility case brought by a Canadian investor against the U.S. Loewen’s case rested on the judgment and judicial orders of a Mississippi trial court and the Mississippi Supreme Court, which judicial acts were alleged to be the relevant government measures under

3. The author’s law firm represented the Canadian claimant in the NAFTA case.
4. Id. at 110.
NAFTA Chapter 11 and were alleged to have violated NAFTA Articles 1102, 1105, and 1110. The dispute arose from litigation involving a local funeral home and funeral insurance business in Mississippi State Court against Loewen. This litigation resulted in a $500 million jury award against Loewen, by far the largest verdict ever awarded in Mississippi. The value of the underlying contract in dispute was a mere $980,000. Loewen did not pursue an appeal in light of Mississippi State court decisions refusing to relax excessive bond requirements (125% of the jury award) as a condition to an appeal. Loewen also did not file a petition for a writ of certiorari in the U.S. Supreme Court. Loewen finally agreed to settle the Mississippi case for $175 million. Subsequently, it initiated a proceeding under NAFTA's Chapter 11.

In June 2003, the NAFTA Tribunal dismissed Loewen's claim based on its failure to show that it had no reasonably available and adequate remedy under U.S. municipal law in respect of the matters of which it complained.

C. Inconsistent Rulings?

In the light of the facts of these cases, it may be asked: Did the Mondev and Loewen Tribunals provide openings that should concern or disturb us? The Mondev Tribunal did express "some sympathy for Mondev's situation" and found it "implicit in the jury's verdict that there was a campaign by Boston ... to avoid contractual commitments freely entered into." Yet it dismissed Mondev's NAFTA claims. To soften the pain, the Tribunal did not make any order for costs or expenses.

Even though the Loewen Tribunal concluded that there had been a miscarriage of justice by the courts of the U.S. State of Mississippi vis-à-vis the Canadian investor, including the trial court's failure to take control of the trial, it still decided not to "use the [NAFTA] weapons at hand to put it right." It did so even after asking itself the following rhetorical question: "What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?"

In order fully to understand the rulings of the NAFTA Tribunals in the Mondev and Loewen Cases, which appear to be sound from an international law perspective, it will be necessary to examine the international law concepts underlying them, in particular those of attribution and exhaustion of local remedies, before a proper evaluation may be made.

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III. THE POSITION UNDER GENERAL INTERNATIONAL LAW

A. Attribution

It is well-settled under general international law that the unlawful actions of the U.S. courts, which constitute organs of the U.S. for purposes of international law, entail the U.S.' responsibility under international law. The International Court of Justice has stated that "the conduct of an organ of a state—even an organ independent of the executive power—must be regarded as an act of the state."9 It also has pointed out in a recent case against the U.S. that "the international responsibility of a state is engaged by the action of the competent organs and authorities acting in that state, whatever they may be."9 NAFTA Article 105 confirms this fundamental rule of attribution, which also is reflected in Article 4 of the International Law Commission’s Articles on State Responsibility, for purposes of NAFTA proceedings.

As the NAFTA Tribunal in ADF Group Inc. v. U.S.A. confirmed "the established rule of customary international law that acts of all its governmental organs and entities and territorial units are attributable to the [s]tate and that that [s]tate as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units."10 Consequently, it is wholly unexceptionable for an international tribunal to examine whether the decisions of the judicial organs of a state gave rise to a violation of that state’s obligations under international law, and hence triggered its responsibility under international law.

B. Exhaustion of Local Remedies

When can an investor take action against a foreign state on the international plane? Under general international law, before pursuing an international claim, the claimant is bound to exhaust any local remedy that is adequate and effective so long as the remedy is not obviously futile i.e., so long as it is not clear in advance that the municipal courts of the state concerned will not provide redress for the injured investor. This rule was confirmed in the Ambatielos and Interhandel cases.11

10. ADF Group Inc., ICSID Case No. ARB(AF)/00/1 ¶ 166.
As we will see, the local remedies rule translates into a rule of judicial finality in NAFTA cases that are based on a judicial act alleged to violate international law.

C. Diversity of Nationality

As stated above, we are dealing here with the situation where a non-U.S. claimant in an international (NAFTA) proceeding complains of a violation of international law constituted by a U.S. judicial act. As is common in investor-state proceedings, NAFTA requires diversity of nationality as between a claimant and the respondent government. Therefore, in each NAFTA proceeding the question must be asked: Is the NAFTA claimant truly a non-U.S. party? In other words, who owns the claim? Mondev involved injury done directly to a U.S. limited partnership fully owned by a Canadian company. Mondev brought the NAFTA claim on its own behalf and not on behalf of its U.S. subsidiary. In the view of the Mondev Tribunal: “It is true that these interests [relating to Mondev’s investment in the Boston project] were held by [Mondev’s U.S. subsidiary] LPA, but LPA itself was ‘owned or controlled directly or indirectly’ by Mondev, and these interests were an ‘investment or an investor of a Party’ as defined in Article 1139” of the NAFTA.12 The U.S. had urged the Tribunal to pierce the corporate veil. The Tribunal found, however, that faced with the NAFTA scheme, “there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders.”13

In the Loewen case, Loewen had assigned its NAFTA claims to a Canadian corporation owned and controlled by a U.S. corporation as part of a reorganization under Chapter 11 of the U.S. Bankruptcy Code. The Loewen Tribunal warned: “If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a unit of the U.S. government.”14 In its view: “[i]n international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim, which date is known as the dies ad quem.”15 The problem is that NAFTA expressly requires nationality only on the date of the submission of the claim, the treaty being silent on the question of whether nationality must continue to the time of resolution of the claim. The Loewen Tribunal adopted the rule of customary

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13. Id.
15. Id.
international law requiring continuous national identity, which it found to emerge from U.S. non-espousal treaties.

The claim of one of the claimants, the Loewen Group, Inc., was dismissed due to a lack of diversity of nationality following U.S. Chapter 11 bankruptcy reorganization as a U.S. corporation. This ruling will dissuade claimants from changing their nationality at tactical points.\(^\text{16}\)

IV. EVALUATION OF NAFTA CASE LAW

Back to the critical issue at hand, i.e., the exhaustion of local remedies and its treatment under the NAFTA case law. The Loewen Tribunal held that it “cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment.”\(^\text{17}\) It rightly pointed out that a “NAFTA claim cannot be converted into an appeal against the decisions of municipal courts”\(^\text{18}\) and that “the [s]tate is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort.”\(^\text{19}\) Most importantly, the Tribunal stated that:

the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 [of NAFTA] is established.\(^\text{20}\)

As the Tribunal pointed out, however, the problem is that NAFTA “says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.”\(^\text{21}\) At the same time, “[n]or is there any basis for implying any dispensation of that requirement.”\(^\text{22}\) The Tribunal concluded that “Article 1121 involves no waiver of the duty to pursue local remedies in its application to a

\(^{16}\) For an instructive ICSID case containing an elaborate discussion of the diversity of nationality requirement and corporate nationality under international law, see Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 (2004), http://www.worldbank.org/icsid/cases/awards.htm#award30.

\(^{17}\) Loewen Group, Inc., 42 I.L.M. at 819.

\(^{18}\) Id. at 833.

\(^{19}\) Id. at 834.

\(^{20}\) Id. at 833 (emphasis added).

\(^{21}\) Id. at 837.

\(^{22}\) Loewen Group, Inc., 42 I.L.M. at 837.
breach of international law constituted by a judicial act."23 It came up with its own version of the international law rule requiring exhaustion of remedies: "It is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated."24

Given that Loewen had entered into a settlement agreement instead of appealing the merits of its case, the Tribunal concluded:

[This] is not a case in which it can be said that it was the only course, which Loewen could reasonably be expected to take. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option.

In other words, it failed to file a petition for a writ of certiorari in the U.S. Supreme Court.25

Interestingly, the Tribunal attached the following postscript to its decision:

[W]e find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real.26

By contrast to the Canadian investor in Loewen, the investor in Mondev did file an appeal and a petition for a writ of certiori in the U.S. Supreme Court, and thus had exhausted all local remedies in that there was a final judicial act of the municipal courts. The U.S. initially claimed that there was a lack of a final judicial act, but it withdrew this objection later in the proceeding. As the Tribunal pointed out:

It will be a matter for the investor to decide whether to commence arbitration immediately, with the concomitant requirement under Article 1121 of a waiver of any further recourse to any local remedies in the host state, or whether initially to claim damages with respect to the measure before the local courts.27

23. Id. at 838.
24. Id.
25. Id. at 845 (emphasis added).
26. Id. at 851.
27. Mondev Int'l Ltd., 42 I.L.M. at 103.
In the circumstances, the Mondev Case turned on the question whether or not there had been a denial of justice (the standard of treatment of aliens applicable to decisions of the host state's courts or tribunals) under NAFTA Article 1105(1). As the Tribunal stated:

It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a state. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.\(^{28}\)

The Tribunal cited another NAFTA case, Azinian v. United Mexican States, which had held that a denial of justice may exist if:

a) The relevant courts refuse to entertain a suit;
b) There was undue delay in the relevant courts;
c) The relevant courts administered justice in a seriously inadequate way; or
d) There was a clear and malicious misapplication of the law.\(^{29}\)

The standard formulated by the Mondev Tribunal was the following:

In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.\(^{30}\)

The Loewen Tribunal cited this standard with approval.\(^{31}\) These considerations by the Mondev and Loewen Tribunals are all perfectly sound from the perspective of international law and should put to rest any concerns that NAFTA tribunals might sit as courts of appeal over municipal decisions of NAFTA member states.

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28. *Id.* at 109.
31. *See Loewen Group, Inc,* 42 I.L.M. at 838. According to the Loewen Tribunal, "a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level." *Id.* at 836. "...the pursuit of local remedies plays a part in creating the ground of complaint that there has been a breach of international law." *Id.* at 838.
V. DISTINGUISHING THE FORK-IN-THE-ROAD PROBLEM

The situation examined here must be distinguished from that where an investor attempts to have a "second bite at the apple" after having pursued domestic proceedings, otherwise known as the "Fork-in-the-Road Problem." This problem may be described as follows: If an investor has initiated domestic litigation (or contractual arbitration) in respect of a particular dispute, does he still have available the alternative of treaty arbitration in respect of that dispute? By comparison, Article 26(3) of the Energy Charter Treaty (ECT) stipulates that, for Contracting Parties who are signatories of the ECTs Annex ID (an opt-out annex), consent to treaty arbitration is not given where the investor has previously submitted the dispute to the courts of the Contracting Party or to a previously agreed dispute settlement procedure. In other words, the ECT prevents a party from pleading treaty breaches in two separate arbitrations. It does not, however, bar a party from pleading contract breach at one time, and treaty breach at another. The NAFTA claims discussed above all concerned alleged breaches of NAFTA and customary international law.

It is true that NAFTA Article 1121 requires that the would-be claimant to a NAFTA arbitration waive its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing [NAFTA] party that is alleged to be a breach" of Section A of NAFTA's Chapter 11 and must desist from pursuing claims for damages in relation to such measures. But that provision has nothing to do with the local remedies rule. On the other hand, the rule of judicial finality is tied to the local remedies rule. As the Loewen Tribunal explained, "[a]rticle 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act." In that scenario, "the pursuit of local remedies plays a part in creating the ground of complaint that there has been a breach of international law." On the other hand, the Tribunal pointed out, "Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act." It all depends on the essential basis of the cause of action that is pleaded. As the ICSID Tribunal in Vivendi v. Argentine Republic held, "[I]n a case where the essential basis of a claim brought before an international


33. Loewen Group, Inc., 42 I.L.M. at 838.

34. Id.

35. Id.
tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."\(^3\)

Thus, a distinction must be made between, on the one hand, an international claim for breach of treaty (such as NAFTA) and, on the other hand, a breach of domestic legal obligations. As the ICSID Tribunal in SGS v. Pakistan pointed out: "the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders."\(^3\) This distinction is also reflected in Article 3 of the ILCs Articles on State Responsibility. NAFTA cases are restricted to the international legal order.

VI. CONCLUSION

Based on the above review of the decisions in the Mondev and Loewen Cases, the conclusion is inescapable that there is no need for panic. These cases do not present a jurisdictional conflict with U.S. courts. It should be kept in mind that there is no \textit{de novo} review in NAFTA proceedings. As the NAFTA Tribunal in ADF Group, Inc. v. U.S.A. stated:

The Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131(1) to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter eleven and applicable rules of international law.\(^3\)

Recent state reluctance to accept that judicial acts may give rise to international claims under the NAFTA Chapter eleven scheme is redolent of arguments raised by Latin American states resorting to the Calvo Doctrine. As the Loewen and Mondev decisions and those of ICSID tribunals demonstrate, non-domestic tribunals have not allowed, and should not allow, themselves to be used for obtaining domestic relief not previously sought in the domestic courts. The claims underlying these decisions were claims under international law for violations of NAFTA. As long as NAFTA tribunals continue to adhere to a strict interpretation of the local remedies/judicial finality and diversity of nationality requirements along the lines of international law, there should be no jurisdictional conflicts.

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38. \textit{ADF Group Inc.}, ICSID Case No. ARB(AF)/00/1 ¶ 190.
Investors will need to file a petition for *certiorari* in the U.S. Supreme Court lest they find themselves struck out under NAFTA Chapter eleven based on the non-fulfillment of the rule of judicial finality. Most importantly, however, if the domestic courts (arguably) got it wrong under international law and if the rule of judicial finality is satisfied, NAFTA remedies should be available and such suits will not be frivolous or abusive.
I. INTRODUCTION

I am pleased to be part of this panel devoted to the Middle East and of this year’s rich program at International Law Weekend.

I have decided not to speak directly about Arab human rights today, despite the title of my panel. I believe you will agree with this decision, given that most of what I have to say about the recent context of human rights in Arab countries is pessimistic. The post September 11, 2001 context has allowed political systems in the Middle East to use deterring terrorism as an excuse to clamp down on human rights to a worrying extent. I shall talk a little about human rights in Arab countries, but mostly as an example of a broader argument I would like to present to you about law and politics in the Middle East.

I would like to discuss instead a general issue that has been of interest to me since fieldwork I did as a Fulbright Scholar in Morocco in the early 1990s. At that time, I was visiting the uncle of a Moroccan professor friend of mine in a quintessentially rural village in a really remote region of the country. This is the sort of place that took hours to get to by bus from the nearest large town, and had the electricity and running water cut off for hours every day. There I was having tea with a man in an unheated living room with no electricity and far away in space and time from think tanks in Cairo or Washington. Then we started to talk about politics. My host astonished me by stating bluntly that “the real problem in our local and national politics is instilling popular respect for the rule of law.” As the lights occasionally flickered on and our tea was refreshed,
we proceeded to speak for an hour or so about the rule of law and politics in Morocco.

I decided that I wished to follow up on this conversation. More specifically, my sense that even in isolated parts of Arab countries people appreciated the idea of the rule of law in sophisticated ways led me to conduct research on how this is used more generally in contemporary political discourse by diverse politically-active Arabs. Since my initial interest in this general area, even before the Bush Administration’s self-created challenge of trying to shape a viable political and legal order in Iraq, the importance of the rule of law in Arab societies has gained enormous ground as a focus in Washington. Out of a sense that neither Arab democratic political institutions nor integration into the global economy can occur without the rule of law, well-meaning American policymakers and legal practitioners have built a new industry to teach Middle Easterners their collected wisdom as to how law works. As Tom Carothers at the Carnegie Endowment for International Peace has observed, however, American rule of law specialists often operate with a striking lack of clear knowledge about what and how they are doing.¹

This problem is especially evident with respect to contemporary Arab societies. Arab states of the Middle East and North Africa generally share two features: non-democratic governments; and legal systems that are a patchwork of Islamic, Ottoman, European, and contemporary sources. It certainly does not make sense to presume that thinkers and practitioners trained in an Anglo-American common law tradition can build respect for the rule of law by transporting and transplanting their technocratic techniques to such different legal soil. Indeed, the very idea that people in Arab societies would be receptive to being taught by Americans how to reform their legal systems in the current climate of popular mistrust of the United States reflects some combination of elitism, hubris, and ignorance.

Thus, there is little reason to believe that American lawyers can bring the rule of law directly to Arabs. Nonetheless, there are grounds to appreciate the importance of shoring up law’s potential to check the political centralization and corruption of contemporary Arab political systems. This talk embraces the assumption that enhancements in the rule of law may be useful to Arab citizens, who generally have concerns about the accountability and performance of their governments. However, I also argue that it is crucial to map out the terrain and contours of law in the current political context of these societies, rather than simply taking on faith that they are conducive to improvement by American legal practice. Indeed, selective enhancement of the rule of law in Arab

societies may actually have the effect of shoring up political authoritarianism, as one might opine has happened in recent years in Egypt.

While important specific areas of tension exist between how the rule of law is conceptualized in the United States and Arab societies, the rule of law is generally appreciated as useful and in need of amelioration within the Middle East. The impediment for American rule of law advisors does not, therefore, lie in a lack of Arab desire for more predictable, responsive, and fair laws. Instead, the problem is a widespread two-fold Arab concern about the United States as the messenger for the rule of law in the Middle East. First is a common sense that U.S. policymakers do not know or care to know basic aspects of law, politics, and society in Arab countries. Second is an even stronger perception that the United States does not, in fact, practice what it preaches in fealty to the rule of law through its government’s policies, particularly those in the Middle East.

As a result, well-intentioned American efforts to export ideas about the rule of law to Arabs are unlikely to succeed unless and until the U.S. is seen as less hypocritical in its own embrace of the rule of law at home and abroad. Even should this happen, I argue below, the rule of law as an export industry seems inherently problematic because it cannot be decoupled from the broader challenge of bolstering political accountability and limits on governments in Arab countries.

With this basic point in mind, after discussing in brief what is meant by the rule of law, I turn to ways in which the understanding and the politics of the rule of law are, as a general matter, similar and different in American and Arab societies.

II. THE RULE OF LAW IN ARAB AND AMERICAN CONTEXTS

Before discussing the rule of law in the Middle East, it is important to be clearer about the meaning of the concept itself. The brevity of this talk and the complex ways in which the concept is used defy a complete answer to this definitional issue. Nonetheless, the rule of law generally refers to the pre-eminence of legal norms over personal political authority, or, as often formulated, a government of laws, not men.

Although the concept is used in diverse and imprecise ways, it typically is grounded in an assumption of some separation between a society’s politics and law. Specifically, the rule of law is meant to protect people from anarchy,


unpredictability, and arbitrariness. In broad terms, the rule of law suggests a promise that legal supremacy, stability, and accountability will prevail over leaders’ caprices.

However, the extent to which politics can or even should be entirely separated from law is unclear; it varies within and across societies. At the same time, the rule of law does not mean or guarantee that ordinary citizens enjoy the same access to legal resources as leaders. Despite the ideal of laws trumping leaders, the reality is that the drafters, executors, or interpreters of law can flout this ideal unless meaningful accountability and transparency exist in a political system.

Indeed, one vein of recent social scientific scholarship on the rule of law insists that it is, to some extent, an unrealizable ideal that is inseparable from specific politics. Perhaps because of the real questions of whether and how law can truly curb abuses by the leaders of powerful countries, ideas about implementing the rule of law often focus on the relatively limited dimension of improving procedural regularity in courts or lawyers’ guilds. More fruitful approaches might look instead at detailed assessments of how political and legal systems do and do not approximate rule of law ideals in such areas as legal restraints on government, legal system neutrality, and human rights.

In the late 1990s, members of the U.S. foreign policy community concerned with the democratization of non-Western political systems increasingly asserted that globalization of economic free markets and representative political institutions could only take root in societies with shared respect for the rule of law. However, there is little empirical research as to how such shared respect is established or how the rule of law is conceptualized and contested in specific non-Western contexts. The research that does exist tends to be focused narrowly on judicial opinions and the function of courts, rather than whether or how popular the understanding of or respect for law may matter to legal and political systems more generally.

The rule of law industry has grown, despite this dearth of research as to how the rule of law is established and legitimized in a society. In Arab societies where Washington is prone to underestimate the importance and variations of popular political attitudes, limiting treatment of the rule of law to the performance of elite judicial institutions would seem to compound a major error of U.S. foreign policy. Some specification of the nature and contested political meanings of the rule of law that moves beyond judges and courtrooms is therefore important. My discussion today is limited to the putative connection between legalism and democratic development. I believe that the contemporary Arab context suggests that the rule of law cannot and should not be readily decoupled from its general political situation. Thus, aiming to improve the rule

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of law without confronting a broader authoritarian backdrop can do little to foster democratization or better law, for that matter.

This is not to imply either that the rule of law is absent from Arab societies or that these societies are inherently or unalterably undemocratic. On the contrary, a major point below is that the rule of law, as an ideal, is similar in Arab and American societies. However, this ideal should be understood with reference to the reality of its past and present use by external and internal autocrats to serve political centralization. For this reason, I argue below that the best hope for American-based rule of law work in Arab contexts is in areas that have the potential to decrease the gap between ideal and reality in the subordination of government elites to laws.

A. Points in Common

As is true in the United States, the rule of law has been an influential doctrine in Arab political history. Indeed, the Islamic and Ottoman socio-legal traditions that contribute to contemporary Arab law predate the Anglo-American common law by many centuries. Moreover, the Middle Eastern origin should not be forgotten of two of the most ancient legal codes of all: the Code of Hammurabi and the Judeo-Christian Bible. Thus, no serious discussion about the potential for American rule of law specialists to bolster the rule of law in Arab states can proceed without acknowledgment that the concept has firm roots in Middle Eastern soil.

I focus on points in common between Islamic and American law. This is sensible in light of the fact that Islam dominated the development and practice of law from the seventh century until the present. Moreover, the dominant contemporary trope of political discourse and opposition in Arab countries at present remains Islamic, so the idea that Islamic law may have some significant resemblance to law in the United States has implications for contemporary rule of law work. Nonetheless, a comprehensive discussion of how the legal landscape in Arab societies might be recognizable to American law specialists would require consideration of more dimensions of Arab law than can be discussed in this modest presentation.

Among the sociopolitical effects of Islam from its seventh-century inception is three of obvious relevance to the rule of law. The first is the general understanding of Muslims that Islamic political theory specifically stressed political accountability by insisting that rulers’ legitimacy was grounded in their status as defenders of the Islamic faith and its principles, whether this status is based on descent from the prophet Muhammed’s bloodline or some other distinction. In particular, rulers were to be judged by qualified Islamic scholars and Muslims more generally on their record of executing and enforcing Islamic law.
To be sure, leaders historically used their military power more frequently to subjugate than to empower Muslim jurists in the exercise of their mandate to determine when Islamic law was being upheld. Nonetheless, the connection of political legitimacy and legalism cannot be ignored as a core concept in Islamic history. In short, if the very purpose of an Islamic political order is to execute law, the rule of law is, in theory, integral to Muslim society.

A second point is the manner in which concerns about justice have been centrally and popularly embedded in Islam. Justice as a concept and a discourse is ubiquitous in the Qur'an. Moreover, Islam's emphasis on justice includes significant emphases on social equity and individual rights. Thus, discussions of many of the general and specific issues that frame legal discourse are engrained in the religious identity of the large majority of people in Arab societies.

The importance of justice within Islam also contributed to the fact that Islamic jurisprudence never fully developed a concept of natural law. This has meant that there is no clear theory to ground legitimate, a completely secular legal order, as natural law helped do over time in the West.

A third, if more contentious point, is that Islamic political theory can be read as presupposing two central tenets that have clear relevance to contemporary discussions of the rule of law: despite the ideal that political authority exists for the benefit of Islam, authority in practice will tend towards absolutism, rather than subordinating itself to communal legitimacy or justice; and resources autonomous from the state (civil society) are therefore needed to check leaders' actions. In essence, a significant tendency of classical Islamic legal theory is a distrust of government and an emphasis on finding legal ways to constrain authority that would sound quite familiar to many Americans.

One major scholar of the Middle East argues that Islamic law shares a fourth and crucial feature of Anglo-American law—a common law system. Anthropologist Lawrence Rosen makes a good case for considering as fundamentally similar American and Islamic laws' reliance on local courts and local cultural information as characteristics that distinguish both from the legal centralization of a civil law system.\(^5\) Thus, American and Arab lawyers may share a similar understanding of the importance of locally-grounded legal process, among other things.

Nonetheless, experts such as Rosen emphasize that similarities between legal systems exist alongside significant differences. For instance, American and Islamic common law vary in crucial ways, such as American law's doctrine of litigating a particular legal issue once to establish a future precedent, as opposed to Islamic law's predilection towards assuming that no two sets of

litigants are alike even when issues are similar. Thus, an appreciation that legal systems in the United States and the Middle East may share important features should not carry with it an assumption that differences can or should be minimized. I turn now to some of the most basic and important of these differences.

B. Points in Contention

The rule of law exists as a political touchstone in Arab societies, just as it does in the United States. Yet particular differences in the sociopolitical environment of the Middle East and North America shape local understandings and implementation of the rule of law in significant ways. Prime among these is an important, if sometimes over-stated, source of many contemporary Arabs’ concerns about Western countries’ politics, the multifaceted impact of Ottoman and European colonial domination.

The impact of foreign great power rule on the rule of law in the Middle East and North Africa was threefold. First, it led to a patchwork of legal orders in a given society, rather than the relatively long-standing growth of a unitary national legal system such as occurred in the United States. Second, it set up an authoritarian norm that law would in fact be subordinated to imperial political power. Third, and related to this, it fostered a tendency for constitutions to exist without a significant history of judicial interpretation. In some states, such as Morocco, this led to frequent redrafts of the constitution to reflect changes in the power or preoccupations of political authority, in contrast with the American norm of a single basic constitutional document that can only be modified with difficulty.

The legal system of every contemporary Arab nation is a unique mixture of Islamic, Ottoman, European, and post-independent laws. To be sure, a number of territories escaped direct foreign domination, most notably in the Persian Gulf. The mixture of sources of law in most Arab societies does not in itself preclude legal clarity or the development of legal checks on authority. However, along with the lapses in territorial and ethnic logic that European colonial powers frequently employed in setting borders for many of the contemporary nations of the Middle East, the lack of legal systemic unity in Arab states has two logical consequences for recent American-fostered efforts to enhance the rule of law: the jurisprudential reference points of lawyers in the United States are not likely to be of direct use to Arab societies; and post-colonial Arab leaders have had many incentives to centralize their authority and no real legal impediments.

This second source of general Arab sociopolitical divergence is even more obviously related to the primary legacy of colonialism in the Middle East – an emphasis on control backed by force that was not meant primarily to serve the best interests of indigenous citizens. The political example that socialized Arab nationalist elites was the resort by colonial regimes to fictitious and fallacious political forms like mandates and protectorates to conceal their exercise of raw military power. Legal norms and institutions existed under colonialism in which the contradictions between stated and true purposes were readily apparent.

At the same time, these norms and institutions were somewhat successful at centralizing political and economic administration. While Arab nationalists rebelled against colonial rule, they also learned that the lofty promises of colonial political ideas were generally subservient, or even in direct contrast to the reality of police control. Small wonder that facing severe economic and other challenges, these nationalists built on, instead of dismantling, the legacies of authoritarian rule that they inherited.

To be sure, the ideal of the rule of law will often be at odds with the centralizing tendencies of governments. My argument is that Arab states in the Middle East, in general, had an especially wide gap between ideal and reality because of the combination of the relative lack of autonomous pre-colonial, unified, legal order in these states, and the repressive tendencies of colonial governments. More subtly, I am suggesting that the level of discontinuity between the rational, legalistic values preached by European administrators and their practice of resource extraction and police rule tainted the very ideal of the rule of law in a way that is unlikely to resonate with the socialization of many American lawyers.

In short, many Arabs view the rule of law in a manner similar to American legal scholars on the left, as an ideology of political control, not as a check on political abuse. Of course, this does not mean that post-independent Arab regimes lacked a legal system or avoided legal centralization and growth. Indeed, most Arab states have basic laws or constitutions. Thus, a third major distinction between Arab and American political experiences with the rule of law is not that Arab constitutions do not matter, but that they have been subject to less institutionalization and independent judicial interpretation than has the U.S. Constitution.

This difference is neither surprising nor unknown to American rule of law experts. In fact, given Arab political centralization, the very existence of constitutions is at least as interesting a political phenomenon as the dearth of independent judicial interpretative traditions for these documents. For my

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7. For a very good treatment of the importance of Arab constitutions, see NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT (2002).
purposes here, however, it is worth underscoring the challenge that the juxtaposition of constitutions and political regimes with few genuine legal checks poses for building broad social support or even judicial competence for the rule of law.

A fourth difference of approach to the rule of law between U.S. and Arab societies does not connect directly to the Middle East’s history of outside great power influence, but it is the relationship of law and religion. Within the United States, religious pluralism has led to the ideal that law should facilitate the separation of church and state. However, with the notable exceptions of Lebanon, Syria, and Egypt, Arab societies have predominantly Muslim populations, and have built political orders that often establish Islam as a state religion. Thus, laws and legal institutions in many Arab states, even those with secularized leaders, privilege Islam and its traditions.

Of course, most scholars of American Constitutional law would assert that the separation of church and state in the United States is far from perfect or unproblematic, and has often favored Christianity and its ideas. Nonetheless, the assumption that Islam should inform the political and social order has caused, and is likely to continue to cause, misunderstandings and difficulties for would-be American political reformers in the region.

The extent to which Islam in general, and the shari’a in particular, should inform the rule of law and what forms this should take is a complicated, current area of great debate and discussion among Arab and non-Arab Muslim scholars. Adding to the complexity of this issue is the theoretical contradiction between the Islamic ideal of siyyasa al-shari’a, or the rule of God’s law, and siyadat al-qanun, or the rule of man-made law. The latter term, the general way in which the Western idea of the rule of law is translated into Arabic, conveys with it a patina of illegitimacy to many Muslims.

However, there is no obvious reason that the ideal political effects of the rule of law, constraining governmental abuse and providing procedural fairness, are impossible to achieve in a society with an established religion, so long as religious dissenters and minorities receive legal protection. Yet understanding, navigating, and being sensitive to the ways that religion and politics are intertwined in most Arab societies is a daunting task for American rule of law experts and one that their own socialization and training in the First Amendment of the U.S. Constitution is unlikely to facilitate.

It is important to reiterate that the above four major differences between Arab and American experiences with the rule of law do not eliminate the possibility that Arab governments can have more robust legal checks or that many Arabs are predisposed towards the rule of law. My argument is instead that the experiential differences discussed above pose intellectual barriers for American law specialists who seek to strengthen the rule of law in the Middle East. Moreover, these differences raise some Arabs’ suspicions that American
lawyers are functioning in the manner of previous agents of Western foreign powers, whose attractive political words concealed their complicity in imperial coercion.

In short, would-be American rule of law experts face a variety of specific and general challenges in trying to bring legal reform to Arab societies:

1) The diverse sources and systems of law;
2) The authoritarian legacy of colonialism;
3) The lack of authority and tradition of judicial review; and
4) The connection between the mosque and state.

These are all features of the Middle Eastern legal landscape that hobble easy access for lawyers whose primary grounding is in American common law and politics. Furthermore, a general wariness towards Western incursion, alongside a particular negative reaction to American foreign policy since 9/11, creates a particularly unreceptive current environment for rule of law reformers with even the best of techniques and intentions. What then, is to be done?

III. REFORMING THE RULE OF LAW REFORMERS?

One simple response to the formidable challenges to U.S.-based rule of law work in Arab countries is to give up on it. Indeed, there is something to be said for this. American foreign policy hubris and naïveté in general often have exacerbated the ability of the U.S. to influence political change in the region. Humility and introspection in the face of a genuine crisis in American-Arab foreign relations may prove to be the best strategy in the long run to foster legal reform. After all, Arabs themselves are best-suited to understand and work in the diverse and different sociopolitical environments discussed above. Given the pessimism in Washington for Arab political transformation as a result of the challenge of Iraq, the winding down of U.S. rule of law work in the Middle East may in fact be the most likely scenario.

However, I do not believe that abandoning the possibility of a useful role for Americans in Arab legal reform is the only conclusion that follows from my analysis. Facilitating changes in Arab societies that increase the legal system's prospects for moderating governmental excess continues to be one possible way of improving Arabs' lives. The key to rule of law work in the Middle East is the realization that it cannot get very far if it is decoupled from broader strategies, which address the repressive tendencies of authoritarian regimes in the region, along with the popular perceptions of many Arabs that the U.S. government is complicit in this repression.

Arab governments consistently rank among the worst cases in the world in their refusal to uphold their citizens' political freedoms, human rights, and civil
liberties. Explanations abound for the resilience of Arab authoritarianism. Yet, a core part of this issue is Washington’s understandable, if short-sighted, general preference for governments in the Middle East that it might characterize as stable, whether or not such stability comes at the point of a gun. The second-largest recipient of American foreign aid in almost every year since the late 1970’s, Egypt, has used its funds to buy weapons and police to enforce the government of the very unpopular and anti-democratic military leader Hosni Mubarak. Long-term studies of U.S. foreign policy in the Middle East are clear that Washington’s predilection for maintaining extant regimes usually outweighs its commitment to popular accountability and democratization.

The aftermath of the 9/11 attacks has intensified this trend. The unpopular governments of Egypt, Tunisia, and Saudi Arabia, among others, have deliberately emphasized the message to American policymakers that their repressive politics are necessary to combat Islamic extremism. Whether or not Washington insiders are persuaded by this message, the need to line up Arab support to help with the war and reconstruction in Iraq has made it an especially unlikely time for the United States to press its allies in the region. For all the Bush Administration’s rhetoric about democracy and change in the Middle East, regional human rights and democratic reform outside of Afghanistan and Iraq have received little sustained attention.

In other words, democratic activists in Arab societies are right to express frustration with the U.S. government’s actions, for they correctly perceive a discontinuity between American democratic ideals and American governments’ general practice of supporting repressive rulers. Ironically, one of the ways that authoritarian governments in the Middle East, including those closely linked to Washington, have tried to deflect their citizens’ dissatisfaction has been to fan the flames of anti-Israel feeling, which, in turn, fuels Arab anger towards the Jewish state’s major ally. It may not seem reasonable to Americans that many Arabs harbor such hostility for Washington’s stalwart support of Israel. Nonetheless, this issue is undoubtedly one of the things that poison potential dialogue between Arabs and Americans.

Short of an unlikely major foreign policy overhaul, what can American policy-makers and rule of law specialists do to help Arab legal systems function more credibly? The obvious first step is for rule of law reform efforts to take into account the greater cultural and political similarities with respect to the rule of law between Arabs and Westerners, while also making efforts to understand and tailor programs geared towards the specific differences discussed above. This is undoubtedly an easy suggestion for well-intended rule of law activists

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to embrace, and one which people engaged in rule of law work undoubtedly strive to achieve. Nonetheless, it will require much more research and on-the-ground knowledge to realize.

A second, more challenging step that would-be rule of law reformers should take, is to appreciate the importance of viewing rule of law work as inextricably connected to the broader context of authoritarian politics in most Arab states. Specifically, specialists must craft their programs and arguments to project a clear understanding that entrenched authoritarian institutions, often supported by the United States rather than anti-democratic cultural norms, are the major impediment to expanding the role that legal norms and institutions can play in expanding political freedom and participation. Indeed, some appreciation that even societies like the United States that view themselves as shining examples of the rule of law can show tarnish in some of their practices. Doing these things, in turn, can contribute to the credibility problem of American advisors preaching legalism at the same time that the American government is perceived to stand for supporting repressive regimes and projecting force in a neo-imperialistic manner.

Rule of law activists need not despair of the impossibility of achieving these two general policy prescriptions. There are specific strategies that they can follow that have yielded positive results both in terms of increasing the pressures of law on centralized politics in Arab states and boosting the credibility of American reformers. Let me mention four such strategies:

1) Link up with Arab activists and initiatives;
2) Localize the scope of reform to particular issues or sectors that increase legal pressures for political accountability;
3) Look for openings that move reform work beyond a narrow elite of judges and politicians;
4) Let issues like education, Internet access and freedom of the press get onto the reform agenda that may be prerequisites, rather than obvious components of respect for the rule of law.

This is, of course, where human rights reform in Arab societies is very instructive. As I have argued at length elsewhere, a variety of politicized groups in several Arab countries in the 1980s and early 1990s found human rights activism particularly useful, because it manifested the potential to chip away at state authoritarianism. More specifically, international human rights activism in two countries I know well, Morocco, and Tunisia, was able to make use of all four of the above strategies and link up particularly well with local

initiatives to the extent that it seemed to connect with pressuring governments to liberalize politically. In Morocco, the ongoing synergy between rights activism and gradual political opening has meant a continuation and diversification of human rights politics, such as the recent effort that bridged international and indigenous feminists to reform the country's mudawana, or family code in early 2004.

The release of prominent Egyptian sociologist, Saad Eddin Ibrahim, from an Egyptian prison in 2003 for his criticism of Hosni Mubarak's government is also notable for its involvement of a coalition of Arab and Western lawyers, intellectuals, and other activists. This coalition managed to get the Bush Administration to put high-level pressure on the Egyptian government, which in turn, publicized the extent to which Mubarak's trial and sentencing flouted the ideals of the rule of law. Even though Ibrahim's release appears to be a more modest accomplishment than might the training of an entire cadre of judges in Anglo-American jurisprudence, it serves the growth of the rule of law precisely because it highlights the general manner in which a well-developed Arab legal system can nonetheless be subordinated to authoritarian politics.

The above suggested strategic orientations all build on four major points that follow from my comments:

1) The rule of law as an ideal is relevant to and understandable within Arab societies;
2) The legacy and endurance of authoritarianism in Arab countries engenders understandable cynicism about governments' and outsiders' use of the term;
3) Rule of law work cannot therefore be decoupled from addressing the resilience of political elites who see law as serving, rather than constraining them;
4) The particular differences between the Arab and American contexts for the rule of law and the particular distrust which many Arabs have for the U.S. government require circumspection, caution, and coalition with Arab activists if rule of law work is to have even a modest hope of success.

My sketch here of the broad problems and prospects for rule of law work in contemporary Arab societies and the conclusions that follow, should not be read as an attack on American specialists who believe in the importance of strengthening the promise of equality, rights, and political accountability for the betterment of Arabs in general. I am instead proceeding from a posture which is likely to be shared by the most experienced and proficient of these activists—that a scaling-down of expectations and a scaling-up of patience represent the
best prospect for any hope of improvement in the sustained subjugation of law by Arab leaders.

Echoing Alexis deTocqueville's well-known sense that lawyers are less inclined than many others to political rashness, I would like to think that American practitioners of rule of law projects in Arab societies would push for this policy area to be characterized by diligence, deliberation, and diplomacy, rather than a legal missionary posture that has little to do with current regional realities. In any case, as much as we lawyers might like to think otherwise, the social scientist side of my academic background suggests to me that working to dismantle authoritarian governments in Arab countries is more likely to foster the rule of law than the other way around.
I. INTRODUCTION

My objective in this paper is not to use international law as another weapon in the conflict, as further fuel to fan the flames, as it's so often used in this conflict, but instead to use it as a message to both Palestinians and Israelis: Stop. Enough. A plague on both your houses. The point is to get the parties back to negotiating a peace agreement by using international law to demonstrate that each side's brutality through armed action only engenders a reciprocal armed brutality by the other in a classic cycle of violence.

This approach is prompted by three developments:

1) First, the utter insanity of the current impasse, the mutually destructive behavior in which close to 4000 people have been
killed in the four years since the second Intifada began—over 2800 Palestinians and over 900 Israelis - with no end in sight. Indeed, in the last two weeks [not counting the Taba bombings, which may have been by Egyptian militants and not Hamas], another 100 have died, including perhaps 30 children, primarily Palestinian. The two sides are incapable of breaking the cycle themselves, in part because they won’t let the other side have the last shot, literally;

2) Second, the International Court of Justice’s July 2004 advisory opinion about the Separation Wall, particularly, the hysterical Israeli rejection of it. Because Israel did not concede jurisdiction and the opinion, in their view, ignored the murder of Israeli citizens in repeated terrorist attacks, it has been perceived there as just another piece of one-sided, politicized anti-Zionist propaganda from the UN. Therefore, in my estimation, the best way to attain Israeli compliance with international law is to demonstrate the culpability of both parties to the conflict and to seek the accountability of both sides for violating international law;

3) Finally, the third development is the recent UN “Focus 2004” Summit drawing attention to treaties on the protection of civilians, who are the primary victims in armed conflicts all over the world today. The distinction between combatants, who take a direct part in armed hostilities, and non-combatants is one of “the oldest, most fundamental maxims of established customary rules of humanitarian law.”

I’m now going to lay out how both suicide bombings and targeted assassinations are war crimes and possibly also crimes against humanity. But my point is not so much to press for prosecution of those individually responsible. I’m more concerned about state responsibility on Israel’s part and the question of whether there’s some kind of quasi-state responsibility on the part of the Palestinian Authority for failure to exercise effective control over terrorists operating from Palestinian-controlled territory.

Given that it’s always easy in the Israeli-Palestinian conflict to accuse the other side of fabricating facts and given that very few independent monitors of the “facts on the ground” are deemed to be unbiased, I’m going to use a paradigmatic series of attacks instead of actual incidents to illustrate this

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2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J., 43 I.L.M. 1009 (July 9, 2004).
analysis. Imagine (and it isn’t difficult to do, as it has happened so often) that a 16-year old Palestinian suicide bomber walks into a shopping mall north of Tel Aviv and kills 17 Israeli shoppers. Approximately two weeks later, Israeli army helicopters fire a missile at a structure within a refugee camp in the West Bank where the dispatcher of the suicide bomber is working. He is killed along with his wife and children, as well as 23 neighbors in surrounding homes. Shortly after that, a nephew of the bomb dispatcher decides to become a suicide bomber in memory of his uncle.

Trying to determine “who started it” in order to assign relative fault is not a particularly effective mediation technique in the middle of a cycle of violence because the determination is unlikely to be accepted by both sides—which will then result in further retaliatory attacks.

II. THRESHOLD QUESTION: IS IT INTERNATIONAL ARMED CONFLICT?

First, a threshold question: Does international humanitarian law apply to the waves of violence between Israel and the Palestinians? If the Intifada is “armed conflict,” it is undisputed to be international rather than internal armed conflict. Not only the ICJ but also the Supreme Court of Israel on numerous occasions have applied provisions of the 4th Geneva Convention to the Israeli occupation of the West Bank and Gaza.

But does the cycle of Intifada violence—terrorist attacks (whether in the name of national liberation or for purely nihilistic reasons) and targeted killings (whether defended as retaliatory for past attacks or deterrent of future ones) - constitute armed conflict within the meaning of international humanitarian law? The ICTY in the Tadic case defined armed conflict as including “protracted armed violence between governmental authorities and organized armed groups. [Therefore,] [i]nternational humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until ... a peaceful settlement is achieved.”4 The Geneva Conventions apply even when one side is not a Contracting Party. Moreover, the fighting can be sporadic and still be considered armed conflict.

Of course, International Criminal Law holds the perpetrators and their commanders and instigators individually responsible. But as I said, I’m more interested in focusing on the corporate responsibility, so-to-speak. I’ll discuss shortly the issue of whether there is a command structure within the Palestinian Authority sufficient to hold it accountable for implementing humanitarian law in the territory it controls, which would include locations that Hamas operates from. As for Israel’s defense that what it is doing constitutes counter-terrorism

and not war, then it would be required to prove guilt before a court of law instead of assassinating the targets in their cars, homes or mosques.

III. SUICIDE BOMBINGS AS WAR CRIMES

Using the Rome Statute's article 8 delineation of international crimes as a codification of customary law, war crimes include willful killing or causing great suffering to non-combatants (which is a grave breach of the 4th Geneva Convention), directing an attack against civilians not taking part in hostilities, and causing excessive incidental death, injury or damage to civilians. All three types of war crimes require knowledge or intent to subject civilians to attack. Hamas has frequently claimed that Israeli settlers are not civilians and sometimes claims that Israelis living within the Green Line are not either. But under Geneva Protocol I, a civilian is someone who is not a member of an organized armed force and is not taking part in hostilities, which means someone in the very act of posing an imminent threat to life. While it may be disputable whether that would cover an attack on Israeli soldiers standing at a bus stop while on weekend leave, it surely covers bombs which kill or maim shoppers in a shopping mall.

IV. TARGETED ASSASSINATIONS AS WAR CRIMES

A. Application of the Same Criteria

The same war crimes as just described would apply to Israeli actions. More particularly, in regard to the direct targets of assassinations, whom Israel considers to be combatants, Common Art 3 (a baseline of jus cogens applying to any armed conflict) prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable to civilized peoples." Regarding civilians who are killed in the wake of a targeted assassination, it is a war crime to employ a method of combat which cannot be directed at a specific military objective, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians" and "which would be excessive in relation to the concrete and direct military advantage anticipated." Thus, "military necessity" arguments which are made by Israel are subject to a rule of proportionality.

7. Id, art., 51 para. (5)(b).
B. Is There a Counter-obligation Not to Locate Military Targets amid Civilians?

While it's usually a matter of heated factual dispute as to whether Palestinian militants deliberately place themselves and their associated military equipment in the middle of civilian areas, so as to make the surrounding civilians vulnerable to indiscriminate Israeli weaponry, I will note that the 4th Geneva Convention provides that “the presence of a protected person may not be used to render certain points or areas immune from military operations.” Using civilians as “human shields” is prohibited. But it should also be pointed out that killing militants when they are not taking part in hostilities or posing an imminent threat to lives—for instance, when driving a car or exiting a mosque—is also prohibited. Taking part in hostilities only causes a temporary loss of protection.

V. Are Either Suicide Bombings or Targeted Assassinations Also Crimes Against Humanity?

I will leave this issue to those of you who are more predisposed to a shouting match over facts on the ground and will simply lay out the criteria for what constitutes a crime against humanity: Particularly serious—in fact, odious—attempts to attack human dignity; systematic or widespread attacks (not isolated events); a civilian population that is specifically targeted and knowledge that the offenses are part of a systematic or widespread attack against a civilian population.

A crime against humanity—in contrast to a war crime—need not be committed during armed conflict. So even if the Intifada is determined not to be an “armed conflict,” this part of International Humanitarian Law still applies. According to leading authority Antonio Cassese, crimes are considered systematic or widespread when there is “the manifestation of a policy or plan drawn up by or inspired by State authorities or by the leading officials of a de facto state-like organization, or of an organized political group.”

VI. Parity? Do the Palestinians Have Int’l Responsibility?

To begin to wrap-up, I return to my initial motivation for engaging in this analysis: that demonstrating the culpability of both sides (without attempting to quantify or assign relative fault) might allow each of them to move beyond the impulse to retaliate yet again and instead, to agree to cooperate to halt the cycle of brutality for which they both bear responsibility. There’s an irony in

8. Multilateral Protection, supra note 6, art. 28.
this: in the political realm, the asymmetry between Israel and the Palestinians goes the other way: Israel is more powerful because it is a state. But in the legal realm, there is an asymmetry if the Palestinians are not held to account under the same rules of armed conflict that apply to Israel.

Three related questions must be asked. Legally, does a national liberation movement such as the Palestinian Authority, seeking to become a state, have the duty to implement the rules of international humanitarian law within the territory it has jurisdiction over? Factually, is there effective control by the PA over Hamas and other sponsors of suicide bombings? Politically, should Israel share some responsibility for undermining the authority of the PA to such an extent that it cannot control the terrorists who operate from its territory?

VII. IMPLICATIONS

A. For International Law

Briefly, there are two important implications for international law generally. First, especially since September 11, there is a growing awareness of the need to hold non-state actors directly responsible under international humanitarian law and human rights law. Provisions of the ILCs Draft Articles on State Responsibility which deal with non-official actors under the control of a state or with successful insurrectional movements which later become a state do not address the question of the current responsibility of a non-state which wants to be a state.

Second is the lack of an objective adjudicator for conflicts like this one while it is ongoing. It is unfortunately a truism that not only is international law on the protection of civilians rarely enforced; it’s also true that it is even more rarely enforced in the Middle East. There is no regional human rights court and while the prosecutor of the International Criminal Court could, on his own initiative, undertake an investigation of criminal violations during the second Intifada, he is unlikely to take on such a politicized case so early on in the institution’s history. And the ICC would not be adjudicating state responsibility.

B. For the Arab-Israeli Conflict

There are many implications for the Arab-Israeli conflict. But a significant one that this analysis discloses is that statehood for the Palestinians is the obvious answer to halting the violence because statehood will give them the means as well as the incentive, both legally and politically, to stop terrorists

before they attack Israel and thereby jeopardize the Palestinian state itself. What is required for statehood is of course another topic for another day and so I’ll end there.
THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER: A TRIBUTE TO RICHARD FALK

Janet Walker*

I. INTRODUCTION ........................................... 365
II. STATE IMMUNITY: THE BOUZARI CASE .................... 366
III. THE REVENUE RULE: THE IVEY CASE ...................... 367
IV. FOREIGN JUDGMENTS: THE BEALS CASE .................. 369
V. CONCLUSION ............................................. 370

I. INTRODUCTION

Forty years ago, when I was a child, the world was a different place. Television was a new invention: I remember watching antennae come out of a man's head on a show called My Favorite Martian and wondering how they did that—was he really from Mars?. People were sending away for plans to build bomb shelters in their backyards; and a young scholar named Richard Falk wondered about the role that courts of law might play in a world order that we increasingly hoped would become an international legal order.

In his now famous book, The Role ofDomestic Courts in the International Legal Order,1 Professor Falk undertook a critical examination of the act of state doctrine, particularly as it was considered in the Sabbatino case.2 He wrestled with the two challenges that were faced by national courts when they adjudicated cases affected by controversies in foreign policy. First, how could courts promote the rule of law while still showing respect for diverse approaches to international law and to the fundamental norms that comprise it? And second, how could courts maintain their independence from the Executive in matters relating to international law without producing decisions that would undermine the proper functioning of the Executive in matters of foreign policy?

Much has changed since that time. The information era is upon us; and men, and women, who are not from Mars, go about with telephones strapped to

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their ears speaking to one another via satellite from around the globe. Each day, people brave threats of terrorist attacks that make us look on the days of backyard bomb shelters with a fondness bordering on nostalgia. And the international legal order that was barely a glimmer in Professor Falk's eye has grown to become more and more of a reality.

But national courts continue to face challenges arising from the special role that they serve in the international legal order. And so today, as part of the tribute to Professor Falk's pioneering book, I would like to give you a snapshot of some recent moments in the history of these challenges. Because I expect that many of you are familiar with recent developments in the United States in this area. I want to share with you three recent developments from Canada that capture a sense of the current state of the law, and that give us an idea of how far we have come and what might lie ahead.

These three developments have come in decisions by Canadian courts in three areas in which the courts have wrestled with the questions that Professor Falk described in his book. These areas are: state immunity, the revenue rule, and the enforcement of foreign judgments. While each of these decisions produced results that were a disappointment to the Canadian parties that were involved, the approach taken by the courts to their role in the international legal order shows a degree of sophistication in relation to the challenges described by Professor Falk. That would, I think, have amazed the first readers of his book just about as much as would a cellular telephone.

II. STATE IMMUNITY: THE BOUZARI CASE

The first area I want to touch upon is that of state immunity. This summer the Court of Appeal for Ontario released its decision in the Bouzari case. In that decision, the Court described the plight of a man who was abducted, imprisoned, and tortured by agents of the Islamic Republic of Iran, and who escaped from Iran eventually coming to live in Canada as a landed immigrant. He sued the State of Iran in a Canadian court for the damages he suffered. He argued that by engaging in torture, and thereby breaching international law, the State of Iran had forfeited its right to enjoy the privilege of state immunity. He also argued that as a country that had committed itself to taking steps to bring an end to torture, Canada had an obligation to provide a forum for civil remedies for victims of torture.

The Court did not agree. It granted immunity to Iran. In this regard, the result was no different from Mr. Bouzari's perspective than it might have been forty years ago. But the process by which the court arrived at this result was remarkably different. As might have been expected, there was no intervention

by the Executive to dictate the result, (although that seems less obvious in the United States since the *Altmann* decision\(^4\) of the Supreme Court). But what might not have been expected was that the Court did not feel constrained to be bound by the dictates of the Legislature. To be sure, Canada has a State Immunity Act\(^5\) and the Court did not disregard it. However, remarkably, the Court approached the issues by engaging in a review of Canada's obligations under customary international law, and by considering whether granting immunity as required by the Act would be consistent with those obligations.

Iran did not defend the proceeding, and so it was left to the Attorney General of Canada as intervener to provide the court with an expert to testify on the effect of allegations of torture on the application of the Act. Mr. Bouzari's expert said that Iran had lost its entitlement to claim immunity and that Canada had an obligation to provide access to the courts and to a civil remedy. The Attorney General's expert said that even though torture may be contrary to international law, Canada's treaty obligation to provide access to civil remedies was limited to torture occurring in Canada. Beyond that, no other country deprived foreign states of their immunity under these circumstances. Accordingly, the present state of international law was consistent with granting of immunity as required by the Act. The Court accepted this view and granted immunity.

Now, some were disappointed with the result. Some felt that it was a missed opportunity for Canadian courts to strike a blow for accountability in cases of state-sponsored breaches of international law. But regardless of the result in this particular situation, the courts demonstrated their independence from the other branches of government in their approach to this difficult question. Canadian courts were prepared to determine for themselves the role that they might best play in the international legal order. The courts recognized the roles that might be played by other branches of government and by other institutions and found mechanisms for responding to the underlying complaint.

**III. THE REVENUE RULE: THE IVEY CASE**

The second area I want to mention is the revenue rule and the way in which it has resulted in earlier courts denying relief to claimants and judgment creditors in cases that would otherwise be admissible as ordinary civil claims. I should clarify that in Canada we do not have "revenue rule" *per se*, although our case law has developed just as it has in the United States, from decisions of the English courts, such as in *Holman v. Johnson*.\(^6\) Rather, we have an

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exception to the application of foreign laws and to the enforcement of foreign judgments for claims or judgments that are based on foreign public laws. We tend to describe this in terms of an exception for foreign penal laws (that is, fines), foreign revenue laws (that is, taxes), and "other foreign public laws" (a term which is intended to describe other laws that give effect to purely governmental interests).7

While this exception still exists in theory and is described from time to time by the courts, it is less and less applied. Indeed, the way in which it is not applied by Canadian courts is indicative of their interpretation of the role of courts in the international legal order. A striking example of this is the decision in the Ivey case, or more properly, United States of America v. Ivey.8 In that case, the United States wanted to enforce a judgment in Ontario based on a CERCLA order (Comprehensive Environmental Response and Compensation Liability Act). The problem addressed was that under the foreign public law exception, a claim made by a foreign government, or one that would result in an award that would accrue to a foreign government, would not be entertained by Canadian courts.

As it happened, the Ontario courts did enforce the judgment. In doing so, they appeared to be motivated, in part, by one point that was a matter of simple common sense: this was not a situation in which enforcing the judgment would be tantamount to giving effect to the sovereign will of a foreign power. Rather, it was just a situation in which the courts would be holding a defendant accountable for harm caused by him in another country while doing business there. The striking part about the result, though, was that the court was prepared to go beyond the superficial indications that this judgment was subject to the foreign public law exception. It was prepared to look at the substance of the claim and the relief granted. Perhaps even more striking was that the court recommended a flexible interpretation of the foreign public law exception so that the application would not prevent the court from providing suitable support for governmental schemes designed to further public interests that are of obvious trans-boundary significance, such as protection of the environment. The courts clearly took an approach to comity that called upon them not to refrain from engaging in matters that might bear on foreign policy, but rather to take positive steps to cooperate with foreign courts and lend support to them—where this seems warranted.

Some might say that in doing so, the courts would undermine the capacity of the Executive to make arrangements with other countries that are the most

favorable for Canadians. And some might say that such a restriction on access to Canadian courts by foreign governments should be lifted only for the governments of foreign states whose courts provide similar access to the Canadian government. But I think that in the Ivey case, the courts demonstrated strength in their independence from the other branches of government and their preparedness to respond to what they regarded as the requirements of their role in the international legal order.

IV. FOREIGN JUDGMENTS: THE BEALS CASE

The third area that I want to talk about is that of the enforcement of foreign judgments and the decision of the Supreme Court of Canada in the Beals case.

It may seem odd to include an ordinary private law judgment enforcement case among cases that relate more directly to foreign policy and to the interests of foreign sovereign powers, but I think that there is good reason for including this case here. In the Beals case, the Supreme Court of Canada confirmed that Canadian courts should apply jurisdictional standards to foreign judgments that are similar to those applied under the Uniform Foreign Money Judgments Recognition Act of 1962. Just to be clear, Canadian courts had been doing that since the Supreme Court of Canada approved the use of the standard for judgments from other provinces in 1990.

The result in the Beals case was rather harsh because it involved a claim based on the purchase of a vacant lot from two Ontario couples in Florida for $8,000. This claim had mysteriously mushroomed into an award that, at the time of enforcement, had grown to over one million dollars. Various features of the procedure raised what seemed to many to be serious questions of fairness, and there is reason to be concerned that the result could encourage abuse.

But I want to highlight a point on which I think this decision represents an advance on the previous state of the law. Under what we call the old rules for the enforcement of judgments, or what is sometimes called, “the English rules,” the choice of forum in cross-border disputes is policed by the parties. Or, to be more accurate, the defendant has a veto over the plaintiff’s choice of forum, even if that choice is a sensible one. This is because a judgment is enforceable internationally only when a defendant has submitted to the jurisdiction of the
court issuing the judgment or when the defendant was served there.\textsuperscript{15} Under the new rules, a judgment given by a court in a forum with a real and substantial connection to the claim will be entitled to enforcement.

I think this is a step forward. It reflects a view of the network of courts of civil jurisdiction around the world that conceives of it as less like the lawless highways of old, populated by highwayman and other perils, and more like the business sectors of major modern cities. It encourages defendants to respond to claims in the courts chosen by plaintiffs and to direct any challenges to plaintiffs' choices of court to those courts. To be sure, this deference to foreign courts exposes defendants with assets in Canada to risks that they were once in a position to control for themselves—by ignoring foreign proceedings. But the need for rules to protect litigants from specific concerns about fairness is not a reason to turn our backs on the need to develop a more generous approach to the recognition and enforcement of foreign judgments generally. For the many participants in this conference who have toiled over the years to develop a workable multilateral judgments convention, I am sure that I am only preaching to the converted. My point, though, is to underscore the extent to which some courts are willing to embrace this new respect for the role of domestic courts in fostering the security of transactions across borders that is so important to the international legal order.

V. CONCLUSION

And so, with these three examples, I hope that I have given you a sense of the distance that the courts have come in meeting the complex challenges they face in fulfilling their important role in the international legal order. As far as they have come, you can see in the mixed results of each case how far they have yet to go, particularly as the international legal order itself continues to develop. In this regard, I wonder if there might be some young member of the audience here today who, some forty years from now, might give a talk to the American Branch of the International Law Association on the further progress that has been made in this area. I do not think that we can fully imagine the role that domestic courts will play in the international legal order in the year 2044. But I think that we can safely assume that the man that we might see on the street with the antennae coming out of his head would not, in fact, be a Martian.

\textsuperscript{15} Emanuel v. Symon, 1908 P. 302 (Eng. C.A.).
MONUMENTAL FLAWS AND DYSFUNCTIONS:
SOME SUGGESTIONS FOR MENDING THE
BROKEN TRADE ADJUSTMENT ASSISTANCE
CERTIFICATION PROCESS

Brad A. Brooks-Rubin*

Good afternoon. Please accept my apologies if I suddenly tear out of here, or look nervously at my watch throughout the panel. My wife is due to give birth at literally any minute, and I had to promise I would handle no less than twenty middle of the night feedings in order to be here today. Talk about a job I would not mind outsourcing.

Anyway, I would like to begin with a quote from a recent Court of International Trade (or, CIT) opinion:

This case stands as a monument to the flaws and dysfunctions in the Labor Department’s administration of the nation’s trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. Only time will tell whether the Labor Department, and Congress, are listening.1

So wrote Judge Jane Ridgway, venting her frustration after four long years of trying to resolve the case of Former Employees of Chevron Products Co., v. Sec’y of Labor. Unfortunately, it does not appear that her words have been fully heard yet. And although other CIT judges have begun to join Judge Ridgway in reversing their former hesitance to do the Department of Labor’s labor job for it, and affirmatively certify workers as eligible for trade adjustment assistance (TAA), it is clear that these words need to be heard, and soon.

Amidst all of the current politicking about how to deal with outsourcing, job creation and free trade agreements, one major issue has been largely overlooked, or at least is not being paid enough due. In sum, despite the jobs numbers the presidential candidates like to toss about, we have people losing

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2. The division of the Labor Department formally responsible for the TAA program is the Employment and Training Administration.
jobs to outsourcing and other trade-related factors all of the time, and there is
a program, TAA, in place, flawed in overall structure though it may be, to
address at least some of the needs of some of these people. In fact, TAA has
been with us, in various forms, since 1962, providing retraining benefits,
extended unemployment payments, etc. President Bush touted TAA specifically
in Wednesday night's debate, referencing the increased funding for TAA during
his tenure. Nevertheless, despite the President's confidence in TAA, according
to one estimate of the manufacturing job loss situation in 2003, less than forty
percent of potentially eligible workers even applied for TAA—and only thirteen
percent of the potentially eligible workers received benefits.3

It is my belief that the failures in the Labor Department's administration
of the legal side of TAA investigation and certification are among the primary
factors in the trend we see of fewer and fewer workers applying for benefits, as
well as the program's overall mixed record. Because of the knowledge that the
certification process is flawed, and may well result in a denial of benefits or
years of protracted appeals, many workers simply choose not to apply to take
advantage of the benefits they may well be entitled to. A report on TAA issued
just last month by the GAO showed that many of the program's newest and
most progressive benefits have gone largely untapped, as workers are either
unaware or uninterested in even starting the process.4 When combining the
TAA failures with the shortcomings in the rest of the array of benefits available
to workers whose jobs have been outsourced—a recent report by the TAA
Coalition concluded that the U.S. spent the least among Germany, Japan, France
and the U.K. to assist unemployed workers5—many of our workers are unable
to adapt to the changing economy, with our nation the worse for it.

Let's start with the problem. According to a special report issued by the
Bureau of National Affairs this past May, a study of three years of CIT deci-
sions found that the Court upheld only twelve and a half percent of Labor's
denials of certifications of TAA eligibility.6 Now, in the TAA context, the
Court will uphold investigations supported by "substantial evidence," defined
as sufficient evidence to show that the investigation based on more than a mere

3. Michael R. Triplett, Trade Court's Critique of Labor Department Places Spotlight on Handling
   of TAA Claims, 21 INT'L TRADE REP. 795, 797-98 (2004).
4. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE COMMITTEE ON
   FINANCE, U.S. SENATE: TRADE ADJUSTMENT ASSISTANCE - REFORMS HAVE ACCELERATED TRAINING
5. Howard Rosen, Trade-Related Labour Market Adjustment Policies and Programs with Special Reference to Textile and Apparel Workers (2003),
6. Triplett, supra note 3 at 795.
scintilla of evidence that leads to an arbitrary and capricious finding.\(^7\) For there to be a mere five Labor determinations satisfying this standard, out of a possible forty-one published opinions in three years, should be all we need to know to establish that things are serious. After all, only a few of Labor's denials make it to this stage—based on these percentages, it is possible thousands of potentially eligible workers have been left without the benefits they need, and deserve.

What is it that needs to be shown for benefits to be conferred when workers petition the Labor Department’s benefits? In order to be certified, a group of at least three workers must meet the following statutory standards\(^8\).

1) That a significant number or proportion of the workers in such workers’ firm, or an appropriate subdivision, have become, or are threatened to become, totally or partially separated;
2) That sales or production, or both, of such firm or subdivision have decreased absolutely; and
3) That one of the following is present: (a) increase of imports of articles like or directly competitive with articles produced by such workers’ firm or subdivision contributed importantly to such total or partial separation, (b) shift in production to a country that is party to a free trade agreement or other tariff preference program; (c) the firm is a downstream or upstream supplier to another firm.

On the whole, this seems like it should be doable. Fact-intensive, to be sure, but relatively straightforward standards. But when so few of the cases that get before the CIT pass judicial muster, we must look at what the issues have been, and what can be done. To my mind, the current issues with the investigation and certification process break down in three ways:

1) The understanding of what constitutes “production”;
2) What factors are evaluated in determining the impact of trade on the job losses; and finally
3) The process Labor uses to address the first two issues.

The first question is what a worker must do in order to be certified. In light of both the estimated loss of 300,000-500,000 service industry jobs, and the failure of a Senate bill this past Spring that would have enabled service industry workers to receive TAA, the issue of what work is covered by TAA has become

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more critical than ever. An example of the difficulties involved is the 2003 CIT case of *Former Employees of Marathon Ashland Pipeline*,\(^9\) where Labor was faced with the issue of whether gaugers at an oil production facility were production workers. In sum, gaugers perform quality control to determine whether oil can be introduced into the stream of commerce. In reviewing and then denying the gaugers' petition, Labor relied exclusively on basic information from the company, ignored the workers' claims and determined, with, as the Court found, no other investigation, that the gaugers were not involved in production, but in post-production activity.

The Court reversed this determination and certified the workers for TAA. After reviewing at length, mostly because Labor had not reviewed it all, the issue of what production means in the context of oil production, the Court found that all activity leading up to the introduction of oil into the stream of commerce, such as gauging, should be considered production. The Court used a variety of secondary publications, some authored by Labor itself, in creating a judicial definition of production.

And after all of the CIT's heavy lifting, the Federal Circuit reversed, saying, in essence, the CIT had overstepped its bounds.\(^10\) Which left everything back at the Labor drawing board. But was the CIT right to say what it had, that production equals anything done up to the point of entry of the good into the stream of commerce? Was the Federal Circuit right to stop the CIT from doing Labor's job for it? I'm not sure—but what I am sure about is that this is the type of question the courts should not—must not—be dealing with at all. In my opinion, the fix required is to establish standards for what "production" is. GAO statistics show that approximately thirty-five percent of workers applying for TAA in the past several years have been from the textile industry.\(^11\) We therefore should have definitions of what the production process means in the textile context: does it include every worker involved from thread to yarn to cutting and sewing and finishing? More importantly, does it include workers, like oil gaugers, involved in inspection, shipping, etc. How to account for the changing nature of American work, where the traditional notion of employment—i.e. companies make only certain products, and workers perform only certain defined tasks—bears little resemblance to how American companies and workers must operate to stay afloat?

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After all, if production equals creation of a good for sale and introduction of it into the stream of commerce, it is certainly reasonable to argue that anyone involved, in any way, in the process of bringing a good to market should be eligible for TAA. As Howard Rosen of the TAA Coalition has argued, shouldn’t all workers who lose their jobs in this context be eligible for TAA?\textsuperscript{12} Even the Accounting and Customer Service departments make possible the sale of a good—so why should they be denied TAA because they are not “production” workers? Although the argument has always been that individuals in a department like Accounting can find other jobs in their field, with the growth in outsourcing of white-collar/service functions, this is no longer an assumption based on reality. But if the answer to these questions is no, and we do prefer a more limited TAA coverage scope, shouldn’t workers at least know what the scope is?

The second issue is how, when evaluating TAA petitions, we determine whether the job losses are, or should be, of the type eligible for TAA. That is, do we look only to imports or shifts in production related to the specific item or firm, or do we look industry-wide at overall trends that affect workers? This is perhaps the most critical question of all—most commentators agree that a company’s decision to outsource or shift production abroad can generally not be narrowed down to a single factor. For example, domestic plants may become out-dated, education and training levels may not be at desired levels, etc., in addition to the more common explanation of salaries and wages. Yet Labor generally attempts to investigate by simply asking the narrow question presented by the statute: are imports increasing or have jobs left to one of a certain list of countries?

In \textit{Former Employees of Rohm & Haas},\textsuperscript{13} Labor attempted to deny certification based on just such an analysis. In \textit{Rohm & Haas}, workers whose plant was scheduled to have its production shifted to two other company locations applied for TAA. Labor’s investigation consisted solely of inquiring whether imports of the company’s own products from its foreign locations had increased. Labor then found that, in addition to other factors, because imports were not increasing, the workers were not eligible for TAA.

The Court rejected this analysis and remanded for further investigation. Specifically, the Court demanded that Labor investigate the possibility that imports of competitive third party products had increased, thus impacting the decision of \textit{Rohm & Haas} to close the workers’ facility. The Court also mentioned that Labor needed to make determinations related to the other potential


\textsuperscript{13} \textit{Former Employees of Rohm & Haas Co.}, 246 F.Supp.2d at 1344.
factors involved in the decision to transfer the jobs, such as technological obsolescence, in order to satisfy the statutory requirements.

Should it be that, even if there are non-import factors, non-labor related factors, or shift in world demand for a product to focus on non-U.S. markets, that those workers are covered as well? Shouldn't the issue of whether jobs are lost due to "international trade" be redefined to include all aspects of international trade? This is admittedly a dangerous road to go down, and the 2002 revisions to TAA addressed some, like upstream/downstream suppliers.  \textsuperscript{14} But there is room for much more. Resolution of this issue could challenge the current balance between TAA and other benefit programs available to dislocated workers, benefits not tied to international trade. Looking elsewhere than imports for reasons to grant TAA could also impact international trade obligations, not to mention take the program to potentially untenable funding levels. Nevertheless, a truly functioning program should at least address and respond to all of these issues, so that the Court need not take the issue up again and again, and workers will know the scope of what is available to them.

Finally, there are the details of how investigations are conducted. Reading through CIT opinions gives you a sense almost that Labor is doing its job for the first time each time it handles an investigation. Recognizing that the individuals at Labor are, in general, good people attempting to do a good job, but are chronically under-funded and short-staffed, one would nevertheless hope that a system of conducting investigations would have evolved that could pass the Court's muster.

But, as I mentioned, this is not the case at present. The recent opinion of \textit{Former Employees of Sun Apparel} \textsuperscript{15} is just the latest in a line of cases demonstrating that there is a need for standardization in the process, as well as guidelines for what must occur during an investigation, in order for it to pass the CIT's review. In \textit{Sun Apparel}, a series of petitions were presented to Labor by employees of a garment production factory in Texas. The workers lost their jobs in waves, and a number of petitions were filed over time, with an admittedly complicated series of petitions, dismissals, and requests for reconsideration. Unfortunately, even with several series of workers applying, from a number of departments, Labor's investigation consisted of a few emails to the firm's Human Resources director. Not anyone in the manufacturing, sales, logistics, or other similar departments, but the Human Resources director, someone who is likely not aware of the precise details of the jobs actually performed by each individual. Even when her answers appeared inconsistent, or at least incomplete, Labor failed to follow up. Labor also failed to pay any attention


\textsuperscript{15} Former Employees of Sun Apparel of Texas v. United States Sec'y of Labor, No. 04-106, slip op. at 11 (Ct. Int'l Trade, Aug. 20, 2003).
Rubin

whatever to the information provided by the workers. By the end of the opinion, Chief Judge Restani, although she did not comment on the questionable choice by Labor of which company official to contact, was actually composing basic questions for Labor to use in its investigation, such as "what actual work was performed?" It is hard to imagine both that questions like this would not be asked by Labor, and that a CIT judge is so aware of the issue that she would feel the need to actually draft specific questions for Labor, rather than rely on previous practice, where the Court suggested general areas of a case that it had concerns about. What can be done? The first is to issue guidance on the petition process. In many situations, workers completing the initial petition may not understand the full implications of the questions, or have access to the accurate information, yet feel obliged to complete the document. GAO data shows that approximately eighty percent of workers completing TAA petitions have not gone past high school in their education, and twenty percent are not proficient in English. Without the assistance of a guide to completing the petitions, or formal assistance from a trained Labor official or an attorney, the process often begins with unusable, or in some cases inaccurate or detrimental, information and just deteriorates from there. With a streamlined petition process that provides detailed instructions for workers so that the information they provide is worthy of detailed review, we would certainly be better off.

Another part of this is to standardize who within a company completes the Labor questionnaire. My suggestion would be to direct all questionnaires to in-house counsel, or if there are none, to the company's outside legal counsel. By directing the questionnaires in this way, with instructions to the attorney to consult with all relevant company departments and requiring them to provide a list of whom they spoke with, Labor can rely on the standards of professional ethics in demanding that information be provided in a complete and accurate form. It is also reasonable to assume that, in most cases, attorneys will research the relevant standards and issues in order to provide Labor with usable answers.

Of course, it's always nice to give a presentation where you present a problem, suggest solutions and then leave it to someone else to figure it out. I am trying to respond differently. At present, an ad hoc committee of the Customs and International Trade Bar Association, of which I am a part, is currently developing a plan to identify what we can do to help change the situation. Similarly, advocacy groups like the TAA Coalition are bringing a wide array of sectors together to advocate for, and bring more sweeping changes to,

16. Id. at 21.

the TAA program, as well as working hard to insure that all workers who lose their jobs are aware of the possible benefits out there for them. We can only hope that the efforts of these organizations will be understood for what they are by the Labor Department—offers of assistance to improve the program vis-à-vis workers and the CIT. The sooner these issues are remedied, the more effectively our nation and its workforce will be able to adapt to outsourcing and the ever-changing global economy, relying less on political rhetoric and more on real action, in the way our competitors have.
A NEXT RWANDA? A NEXT IRAQ? MILITARY INTERVENTION IN THE 21ST CENTURY

Patrick J. Flood*

I. INTRODUCTION ................................................. 379

II. RECOMMENDATIONS ............................................. 379
   A. Mass Killing ............................................. 380
   B. Intervention Against States and Terrorist Organizations .... 380
   C. Intervention Against Illegal Nuclear and Other
      WMD Programs ............................................. 380

III. FUNDAMENTAL REALITIES ....................................... 381

IV. MASS KILLING .................................................. 381

V. POWER AND INTERNATIONAL INSTITUTIONS ..................... 384

VI. TERRORISTS AND PRE-EMPTIVE INTERVENTION ................ 388

VII. STATES AND WMDS ........................................... 390

I. INTRODUCTION

This essay addresses the conditions under which reactive and pre-emptive military intervention are ethical, and whether adjustments can and should be made in international law and institutions to establish the parameters of their legality and to ensure that they are authorized by legitimate authority. Both types of intervention can be multilateral or unilateral, and each needs to be addressed in relation to the three major issues on the contemporary agenda: mass killing within the borders of a state, international terrorism, and the illegal spread of weapons of mass destruction (WMDs). The essay also re-examines the balance of authority and action among states, regional organizations, and the United Nations (U.N.) in matters of military intervention and suggests how to clarify their respective roles and responsibilities.

II. RECOMMENDATIONS

This essay recommends that the Secretary Council and General Assembly endorse the following principles and rules and take appropriate action to give them effect.

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A. Mass Killing

That reactive multilateral military intervention authorized by a regional organization, the Security Council, or, failing these, the General Assembly under the Uniting for Peace procedure, is justified to halt mass killing within a state when the state itself is the cause of the killing or is unwilling or unable to stop it.

That pre-emptive multilateral intervention authorized by one of the foregoing institutions is justified if there is abundant, well-corroborated, clear and convincing evidence that mass killing is imminent and the state is unwilling or unable to prevent it.

That reactive unilateral intervention by a state or coalition is justified to halt mass killing underway in another state, if it is evident that efforts to secure multilateral intervention or authorization are too slow or ineffective, provided that post-facto authorization is sought promptly from the proper institution.

B. Intervention Against States and Terrorist Organizations

That reactive intervention, whether multilateral or unilateral, is justified in cases such as Afghanistan in which a state has sheltered terrorists who have mounted a series of international attacks.

That pre-emptive action against terrorist organizations is justified on the authorization of the Security Council or a regional organization, failing the cooperation of the state where terrorists are located.

That unilateral pre-emption by a state or coalition is justified when there is abundant, well-corroborated, clear and convincing evidence that an attack by an international terrorist organization sponsored by a state, or by a state itself, against one’s own territory is imminent and no multilateral institution is willing and able to prevent it; as an extension of self-defense, pre-emptive action must be proportionate and aimed solely at frustrating the attack.

That unilateral pre-emptive intervention is justified when necessary, by means of clear and convincing evidence, to safeguard the lives of one’s nationals in another state and to evacuate them if appropriate.

C. Intervention Against Illegal Nuclear and Other WMD Programs

That pre-emptive military intervention authorized by the Security Council or the General Assembly (under the Uniting for Peace procedure) is justified to frustrate or otherwise neutralize the transfer to a terrorist organization of nuclear weapons, and in many cases will also be justified in the case of chemical and biological weapons.
That pre-emptive military intervention authorized by the Security Council is justified as a last resort to neutralize an illegal program by a state to acquire nuclear weapons.

III. FUNDAMENTAL REALITIES

Physical power simply exists in the world; it is there. One has to deal with it, not act or think as if it were not present. It is always present. And it is, at bottom, human power, enhanced by weapons and tools and technology made and used by humans. It is primarily military power, including control over communications and intelligence-gathering technology and systems. The other basic reality one encounters always and everywhere is that human beings want to live in a world that combines justice and order, at least enough both to safeguard their lives and limbs and to enable them to work, learn, raise families, worship and do other ordinary things on a reasonably predictable day-to-day basis.

Looking at the world from above, as if from a point in space, the scene is of over 190 individual authority communities-states-each possessing some quantity of power. The leaders of one state can, if they wish, use their power against another state, and groups of state leaders can pool their resources to do the same. Power, and its potential for use at any time, often appears to be the central reality in interstate relations.¹

But even looked at from above, it is clear that the human desire for order and justice is also part of the picture. This desire is as real as power. To live in a world of justice means living in a world of law, which expresses the practical meaning of justice in clear terms, and where those who hold power act in accordance with law. To bring law from paper to life, institutions link power with law. Today we need to add something to the existing architecture of institutions and law, and it can be accomplished without amending the Charter.²

IV. MASS KILLING

Massacres occur because a regime or group believes that the world will be a better place without certain people; they believe that the target group is the main obstacle to creating a superior society or that it must be wiped out as

¹. Physical power is of course not the same thing as influence. Some small states having little physical power are able to exercise considerable influence in world affairs, that is, to affect the course of events and the outcome of issues. Examples include Ireland, Costa Rica, Senegal and Ghana. It is important to keep this in mind even while studying ways to channel and control military power.

². It is not necessary to amend the Charter to accomplish such purposes. This has been emphasized by many observers. See, e.g., MINH-THU D. PHAM, THE UNITED NATIONS FOUND., THE UNITED NATIONS & THE NEW THREATS: RETHINKING SEC. 12–14 (2004), http://www.un-globalsecurity.org/pdf/reports/rome_conference_rep.pdf.
punishment for past crimes. Intervention to stop mass killing faced formidable opposition in the 1960s through the 1980s in such places as Uganda, East Pakistan, and Cambodia. Most states either kept silent or actually criticized the intervention, because a fundamental principle of world order was being breached: borders must not be crossed by military force except in self-defense or to carry out a U.N. Security Council resolution under Chapter VII. Most states saw their own survival jeopardized by acceptance of any intervention that could be used as a precedent against themselves. "Order by borders" was for them the main guarantee of their own sometimes recently-won independence, and even for long-established states, the fact that two world wars had broken out when borders were violated had embedded the view that the inviolability of frontiers was the best safeguard of peace.

This began to change, fitfully, in the 1990s, as the conscience of human-kind was newly shocked by the killing of Kurds in northern Iraq following the first Gulf War and the subsequent slaughters in Bosnia-Herzegovina and Rwanda. In Rwanda, the horrific result of the Security Council’s paralysis led to a strong movement in many countries to search for ways to apply enough flexibility to the principle of inviolability of state borders to save the lives of the human beings whose security was the ostensible reason for those very borders in the first place. People began to reason that the wall of sovereignty must be strong enough to prevent aggression, but not so rigid as to protect mass slaughter within it. Just as within a polity there is a need for public authority to safeguard lives, there is also a need for authority on a broader plane to do this when domestic authority fails or disappears or turns homicidal.

It is not difficult to argue that the purpose of self-determination, the right of a people to “freely determine their political status and freely pursue their economic, social and cultural development” (Article 1 (1) of both International Covenants on Human Rights), is to enable a people to provide for the security of their lives and to achieve, progressively, the multidimensional fullness of life through their own laws, policies and institutions. Going further, one could argue that self-determination has rational limits, specified first by its intrinsic purposes and second by the principle of subsidiarity. If a government itself becomes murderous or if it simply cannot provide a minimum of personal security, it fails to achieve the first purpose of self-determination. In this situation, larger entities of which this state is a part as a member of the international community, can and should come to the people’s rescue. Intervention should be limited to situations in which lives are actually being taken on a large scale or there is clear and convincing evidence that such killing is about to commence.

The issue has been cogently presented by the International Commission on Intervention and State Sovereignty in its report, "The Responsibility to Protect." Released in December 2001, this is a document that merits close attention by the United Nations. The Commission rightly affirms the existence of a responsibility to protect human life even in the face of the important norm of nonintervention, and that appropriate action to carry out this responsibility should be recognized as legal.

This paper stands in agreement with the first "just cause" criterion for military intervention proposed by the Commission, namely "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation." However, the second proposed criterion is problematic: "large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape." The latter amounts to authorizing the use of lethal force against acts for which police, in most countries, are not authorized to use lethal force. The phrase "carried out by killing" is already included in the first criterion, so it is the other elements we must evaluate: evictions and rape, both of which are terrible crimes but not, in the view of this writer, justifiable grounds for summarily killing the perpetrators, and vague "acts of terror."

Intervening forces arrive with weapons and the authority to use them to kill, if necessary, in order to stop the practices that led them to intervene. If rape and illegitimate eviction are made bases for military intervention, they would become in effect capital crimes under international law, punishable summarily by death at the hands of intervening forces. This seems excessive, unwise and unnecessary. The International Criminal Court can prosecute and try rapists and those responsible for expelling people, or national courts can try them under applicable extradite-or-prosecute provisions of international law.

Further over-stretching the limits of a rational responsibility to protect, the Commission asserts that "situations of state collapse" and "overwhelming natural or environmental catastrophes" are to be included in the two just-cause criteria as "conscience-shocking situations" justifying military intervention. This merely creates pretexts for intervention. It would lead to a fundamental weakening of the principles of international order, in a way that accepting intervention only to halt large-scale killing would not. In a later passage, the Commission perhaps recognizes that: "[i]t is a real question ... where lies the most
harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.\textsuperscript{8} Only human life is mentioned here. This is the right standard.

Moreover, the Commission endorses pre-emption, but unambiguously limits it to lifesaving situations:

Military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing of civilians or other noncombatants. Without this possibility of anticipatory action, the international community would be placed in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it.\textsuperscript{9}

As the Commission elsewhere makes clear that in its view intervention must be authorized by the United Nations or an established regional or sub-regional organization, it follows that its endorsement of anticipatory action does not encompass unilateral pre-emption.

The reference to "clear evidence" takes us to the question of imminence and with it, to the reliability of intelligence. Here the Commission steps back a bit and acknowledges that "[i]t is difficult to conceive of any institutional solution to the problem of evidence, of a kind that would put the satisfaction of the 'just cause' criterion absolutely beyond doubt or argument in every case."\textsuperscript{10} Despite the straw-man second clause, the recognition of a problem with evidence is a bright yellow light, a powerful argument for great caution in following the Commission's call to take "anticipatory action." If the standard of evidence were set at abundant, well-corroborated, clear, and convincing, this would at a minimum require information from multiple reliable sources, pointing unambiguously at the same conclusion. While there can never be 100 percent certainty or comprehensive knowledge about a developing situation, a responsibility to protect must be exercised by decision-makers within a framework of substantiated fact and professional analysis. There is no substitute for this.

V. POWER AND INTERNATIONAL INSTITUTIONS

To imagine what it would take to structure a world where power would be used only to serve justice requires following two distinct but interdependent lines of thought. The first would seek to articulate, in terms as close as possible

\textsuperscript{8} Id. at 55.

\textsuperscript{9} RESPONSIBILITY TO PROTECT, supra note 5, at 33.

\textsuperscript{10} Id. at 35.
to a universal consensus, what justice means within and among political societies, and for this we do not need to start from scratch. We already have principles and norms that enjoy universal or near-universal acceptance. We find them in the U.N. Charter, the Genocide Convention, the Universal Declaration of Human Rights, the two Covenants on Human Rights, and other landmark documents adopted by the international community either as treaties or as standards of conduct. Two relevant examples of the latter are the Declaration on the Elimination of Religious Discrimination and Intolerance and the Declaration on the Rights of Persons Belonging to Minorities.

The second path invites us to design structures within which power can be used in clearly bounded channels. Absent such channels, we are left with a situation in which those who actually have power can use it as they wish unless constrained by other power-holders, i.e., the world before 1945. To succeed, these structures must represent an aggregation of strength that can come only from the shared recognition by the powerful of a common interest in ensuring that the use of power must be managed within a particular set of rules and structures. The League of Nations demonstrated that commitments on paper are not sufficient for this purpose, and the U.N. was designed to remedy that defect. The U.N. can now make improvements in the design.

Some have argued that it is crucial to invest the U.N. with standing armed forces to enable the Security Council to deal swiftly and decisively with mass killing and other threats to peace and security. The current practice of building every U.N. force from scratch, from voluntary ad hoc contributions, would give way to a speed and regularity of application of appropriate force when and where needed. Some massacres and even wars could probably be deterred, others halted just after their outbreak.11 In time, the existence of an effective standing multilateral armed force might allow some states to reduce their own military establishments and rely for their security on the international force, a huge saving that would permit unprecedented progress toward development.

Establishment of such a force in the near term would require a political will that does not yet exist among the members of the Security Council, although it might be possible to agree on steps to implement or expand the pre-positioning of specialized logistical and communications staffs, facilities and supplies, to further strengthen U.N. headquarters monitoring and early-warning capabilities, and to broaden participation in standby forces. It might even be possible to infuse life into the Charter provisions for a Military Staff Committee. Even

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11. Had a standing United Nations force existed in 1994, the Rwanda tragedy could have been stopped in its first phase. Moreover, on the Iraq issue, it is arguable that a robust standing U.N. force would have added credibility to the Council's various pre-2003 resolutions, and might have induced Saddam Hussein to cooperate with the U.N. much earlier than he did, thereby forestalling the U.S.-United Kingdom decision to take matters into their own hands.
perennial recommendations that cannot be put into place immediately should be revisited from time to time, as political will evolves. But the most promising avenue of near-term progress might lie in a different direction.

Intergovernmental activity takes place at four main levels: directly between states, and through sub-regional, regional, and global institutions. These official channels are complemented by transnational nonofficial networks of labor unions, multinational corporations and banks, human rights organizations, political federations, and criminal and terrorist organizations. But states have almost all of the military power and remain the fundamental authority communities in the system. They and only they can commit themselves and their resources to specific purposes, including creation of binding laws and law enforcement structures. Today, their attention and energy are focused increasingly on the regional level.

The wave of nationalism, although still strong, is giving way to regionalism in most parts of the globe. Regional economic integration and federation are already well-advanced, but what is new is that states within a region are now increasingly willing to engage in military cooperation and coordination within their area. This is another example of subsidiarity in action. One finds within a region a greater commonality of culture and approach than in a global body. A view can develop that it is better for "us" to resolve our own problems together than for "us" to allow them to get worse or to invite the possible intervention of extra-regional powers.¹²

The Security Council could capitalize on the regionalist trend by granting regional security institutions more decision-making autonomy to deal with crises as they arise. The evolving Darfur and Congo crises are examples of the potential usefulness of a regionalist approach, a solution that Africans have turned to in other recent crises, notably in West Africa (Sierra Leone, Ivory Coast, Liberia). The actual force can be sub-regional, but should be authorized (even post-facto) by the African Union. In the Western Hemisphere, the Organization of African States (OAS) has authorized and managed successful interventions in several crises of the last two decades.

NATO intervention in Bosnia and Kosovo has demonstrated its ability to act effectively in humanitarian crises. In Afghanistan, NATO's post-conflict role demonstrates the utility of further developing its collective security potential under the U.N. umbrella. The European Union is well on the way to developing an analogous capability. The Security Council should work with both organizations to develop clear rules and procedures for future out-of-area involvement.

In general, the Security Council should encourage the expanding security role of regional institutions by adopting resolutions interpreting Chapters VII and VIII in such a way as to establish specific criteria under regional intergovernmental organizations, designated in advance by the Council, would be authorized to intervene without advance Council authorization in cases of mass killing of civilians and noncombatants.\footnote{This paper does not advocate giving regional organizations authority to deal with every kind of threat to peace and security. In the case of a state that is developing or otherwise acquiring nuclear weapons, responsibility must remain with the Security Council.}

The Security Council could draft and approve a set of principles and procedures for regional action that would include advance authorization for the pre-designated regional intergovernmental organizations to act at once in response to an outbreak of large-scale killing (or to clear and convincing evidence that such killing is about to begin) and seek subsequent Council approval for that action. The language of Articles 47 and 53 of the Charter seem to offer enough flexibility for this purpose, particularly when taken together with Articles 33, 34, and 39. This would codify what has largely developed as accepted practice in recent years, and it would arm the international community with instruments that could be activated quickly to save lives, as an alternative to unilateral or coalitional action. The advance authorization would commit the regional institutions to certain obligations to the Council in the areas of reporting, time limits, and ongoing coordination.

Would this be legal? Since the end of the Cold War, the Security Council has interpreted its responsibilities for international peace and security to include things never before thought to be encompassed within the meaning of those terms. On occasion the Security Council has, acting on its own authority under Chapter VII, taken temporary charge of state administration, including police, prisons, and judicial institutions, organized and conducted elections, assisted in the writing of constitutions and in general overseeing the reshaping of political life and law. It has, in short, acted in these situations as a kind of international legislature, in the process taking on new powers to meet urgent humanitarian requirements where there was no other solution at hand. In addition, recent Council resolutions on terrorism (1373) and WMDs (1540) impose on all states obligations to take specific actions to confront these problems, via legislation, law enforcement and prosecution. Although some critics have warned that a continuation of this legislative trend could erode state sovereignty, it is currently the case that decisions of the Council under Chapter VII stand as law.

Checks and balances are crucial to the success and justice of any system of governance. In the Security Council, the principal checks are the supermajority requirement for substantive decisions, the veto power of the five permanent members, and the fact that the non-permanent members turn over so
frequently that the General Assembly could possibly reverse a prior decision of the Council by electing enough new non-permanent members who oppose the decision, assuming no veto of the override by a permanent member. Given these checks, this paper endorses the view that the need to fill the gap in international responsibility to protect human life outweighs the risk of abuse of power in cases of mass killing.

The “Responsibility to Protect” Commission recommends that in cases where no regional agency has acted and the Security Council has failed to deal with a situation of mass killing, the General Assembly’s “Uniting for Peace” procedure should be invoked.

In granting a carefully delimited general advance authorization to regional agencies to intervene to halt or prevent mass killing, the Security Council would retain authority to overrule a regional decision to intervene and could even demand withdrawal of an intervening force or its replacement by another force.

VI. TERRORISTS AND PRE-EMPTIVE INTERVENTION

U.S. officials have argued, before and after the Iraq intervention, that the apocalyptic power of WMDs, combined with the growth of anti-Western terrorist organizations, justifies and even requires governments to act pre-emptively to defend the lives and fundamental rights of their people.

Except for a subway attack with poison gas in Japan, terrorists have not yet employed WMDs, but they have tried to obtain the weapons themselves and their key components from certain states and criminal networks. That a group might succeed in acquiring such a weapon was put forward as justification for unilateral pre-emption against a prospective supplier state. It was argued that Saddam Hussein might use WMDs to attack the U.S. (although there was no evidence that he had the required delivery capability), or his neighbors (since he had done so before), and that he would have incentive to hand over WMDs to terrorists. It was thought that he could, for instance, supply terrorists with enough nuclear material to wrap around a conventional explosive to make a “dirty bomb” and kill thousands via radiation. The absence of evidence at the time of any meaningful Iraqi links with Al-Qaeda was glossed over, apparently on the assumption that the two could not possibly pass up a chance to collaborate. The U.S. concluded that something must be done, that the Security Council was hamstrung, and that once the U.S. had taken charge of Iraq, the

14. Al-Qaeda used four airliners as flying bombs to kill thousands of people in the United States, and they carried out earlier attacks with conventional weapons on the World Trade Center, U.S. embassies and the U.S.S. Cole, and have continued to strike in different parts of the world since September 11, 2001. For instance, they have attacked in parts of Indonesia, Spain, and Saudi Arabia.

proof of Iraqi WMD programs and Al-Qaeda ties would come to light. The subsequent public record shows quite clearly that these conclusions were based on extremely faulty intelligence collection and analysis, but even had they been accurate there would remain the question of whether military intervention would be justified.

For purposes of analytical clarity it is useful to look at how one can confront terrorist organizations as distinct from states. Terrorist organizations are groups of volunteers, analogous to crime syndicates, not to states. A state is not a voluntary organization; all kinds of people, most of whom have nothing to do with terrorists, live within its borders under a common authority and go about their lives in all kinds of normal ways. The population may include terrorists (every terrorist group is located within some state) but it is vital to remember that they are not identifiable with the state or with the general population. In almost every state, the authorities look upon terrorist groups as problems to be solved.\footnote{The Taliban regime in Afghanistan was a notable exception.}

Conventional military operations (tanks, artillery, bombers, large infantry units) are generally less effective in disrupting terrorist organizations than other means. On its own territory, a country first needs to strengthen its domestic intelligence, investigative and law enforcement capabilities, including especially control of its borders. Second, it needs to cooperate with as many others as possible in the same ways, including information-sharing and joint operations. None of this involves unilateral pre-emptive intervention or raises legality issues, because states are free to deal with each other on such matters, as for instance in the ongoing U.S.-Pakistan and U.S.-Philippines campaigns.

Conventional military intervention to fight terrorists makes sense if a country is sheltering terrorists who have mounted previous international attacks, because one must first defeat the sheltering state’s armed forces in order to get at the terrorists (as in Taliban Afghanistan). The main question becomes whether intervention can be unilateral or must be multilateral. As the Afghan case was one of self-defense by the U.S. against the manifest danger of renewed attacks by Al-Qaeda operating under Taliban protection, unilateral intervention was justified; the Security Council agreed. Pre-emption arose only in the sense that there was a moral certainty of new attacks from the same source, and that these attacks must be pre-empted by disrupting the organization. If there had been no previous attack, but there was well-corroborated, clear and convincing evidence that a group was preparing an imminent attack, pre-emption would also be justified –preferably with multilateral authorization, but unilaterally if time constraints so required. Note that whether or not the terrorists possessed WMDs was irrelevant in the actual Afghan case and would be irrelevant in the hypothetical case just described.
Coalitions of the willing formed for pre-emptive purposes, as in the U.S./U.K. coalition that invaded Iraq, are equivalent to unilateral pre-emption and need to meet the same criteria for justification. While a coalition provides a framework for interchange of perspectives and rational deliberation between analysts and leaders of two or more states and is therefore more likely than a single state to base its actions on established facts and agreed analyses, coalitions are not officers of the law unless authorized to act as such. Unauthorized unilateral or coalitional pre-emption tends to undermine the network of laws that states have imposed on themselves to regulate their interactions, and to undermine respect for law itself. Coalitional intervention, whether reactive or pre-emptive, must be limited to rare cases of extreme emergency when no other solution is available, as outlined elsewhere in this essay.

It is also important to note that any force combating terrorism must make every effort to maintain respect for internationally-recognized basic human rights, above all those that are non-negotiable even in situations of national emergency (Article 4 of the International Covenant on Civil and Political Rights). In the 1970s and early 1980s, some governments confronting critical situations tried to control terrorists by sweeping aside respect for all human rights standards and killing and torturing suspects at will, claiming that terrorist violence justified any and all methods to defeat them. But when terror becomes state policy, a government loses legitimacy, and it can also lose focus, as some of the regimes just described soon failed to distinguish between terrorists and nonviolent political opponents.

VII. STATES AND WMDS

A state has many channels of ongoing contact and communication with another state, legal, political, diplomatic, economic, social, technological, official and private, bilateral and multilateral. They are all channels of influence through which states deal with each other, and they do not exist in the relationship between a state and a terrorist organization. These channels do not exclude the reality of power; rather, they presuppose, discipline and channel it. They do not exclude the possibility of military intervention.

Every rational government takes measures to defend its people, and those of its allies, from external attack. Governments discharge this task through a defense establishment, diplomatic and intelligence services, border controls and alliances. Professionals must tell policymakers frankly what they know for sure about a particular threat and what they don’t know, how certain they are as to what it means, and why they reach the conclusions they do. But it is policymakers who have to decide what to do about it, and when to wait for more information before deciding on a course of action, understanding that it is never
possible to know everything about a developing situation and that time for decision can be very short.\textsuperscript{17}

Regarding imminence, it is widely accepted that a state has a right, as a logical extension of self-defense, to use military force to defend itself against an imminent attack. Classically, this has meant that the pre-empting state had abundant, well-substantiated, clear and convincing information that a neighbor whose forces were massed along the border had gone into final preparation for immediate attack; tanks and infantry were in position to move, warships entering territorial waters were in battle formation, planes were in the air and headed in your direction.\textsuperscript{18} During the 2002 U.S. Congressional debate on whether to authorize the use of military force against Iraq, proposals were introduced to restrict the President's authority. The Administration and its supporters replied that in today's world, technology has made traditional notions of imminence obsolete, and that an attack with a WMD would most likely take place without warning.\textsuperscript{19}

Admittedly, there are difficulties with imminence as a criterion. On an individual level, there are situations in which it is unmistakable that an armed individual is about to attack another with lethal intent. Police officers and crime victims face these situations frequently, and there are times when it would be irrational not to shoot first to save one's own life or the life of another immediately threatened person. In state-to-state situations, one needs solid facts about intentions, capabilities and actions in progress. There is the danger that the doctrine of pre-emption in the face of imminent attack can be stretched to a point where it blends seamlessly into a strategic doctrine of preventive war: "strike first as soon as possible and gain the advantage of surprise and the momentum of offense, because sooner or later they will probably make war on us anyway." This thinking characterized both pre-war strategic planning and the last-minute crisis phase of the outbreak of the First World War.\textsuperscript{20}

\textsuperscript{17} In Iraq's case, time was not this limited, as onsite inspections were producing valuable information, onsite monitoring equipment was being repaired or installed, and conventional missiles were being destroyed when the decision was made to invade.


\textsuperscript{19} This rested on the claim that Iraq was working hand in glove with Al-Qaeda and similar groups, who would carry out the attack through their yet undetected agents in the U.S.

\textsuperscript{20} In the planning phase, both France and Germany had decided well before 1914 that war between them was sufficiently probable that, in light of modern developments in weaponry, transportation and communications, it would be crucial to strike with full force as rapidly as possible once hostilities began.
During the Cold War, for both NATO and the Soviet Union attack was always "imminent" in the sense that both sides were ready and able to mount an attack with just a few minutes notice; hostility and capability were givens, and the only questions were about short-term intent and the meaning of specific moves by the other side. World War III did not break out because both sides developed formal structures of round-the-clock communication, and a code of conduct that ensured that any given action by one side was explained to the other in a way that the intent and meaning were clear. During this period, when everyone lived with the knowledge that modern weaponry and means of delivery could destroy nations in an hour, a structure of communication and a code of conduct promoted transparency and helped to manage the problem.

Fear that a state might use a WMD against another country is still focused mainly on nuclear weapons and their means of delivery, despite the fact that chemical weapons have been used in recent decades as well as in World War I. Biological and chemical weapons are thought to be difficult to use in interstate war, in that they are so unstable that in certain conditions they are as likely to kill those who use them as their intended victims. Also, most states do not regard acquiring chemical or biological weapons as a prestigious accomplishment. On the other hand, some states suspected of clandestine nuclear weapons programs already have or are on the way to obtaining transcontinental delivery capabilities, and there is also rapidly growing recognition of the difficulty of preventing the smuggling of a "dirty bomb."

Nuclear weapons are produced by states. IAEA Director General Mohammed El-Baradei told that organization’s General Conference in September 2004 that the agency has reason to believe that some forty states have or are on the way to developing the means to produce weapons-grade nuclear material or actual weapons, and that this means that substantial improvement is needed in existing international controls on nuclear proliferation. He pointed out that slippage in the nonproliferation regime has undeniably occurred since the end of the Cold War, and that strengthening it is one of the most urgent tasks of the international community. As noted above, possession of missiles by a state that is found to be developing or has developed a nuclear weapon further complicates the problem.

In most and perhaps all countries the facilities that produce, use, and store nuclear material are under government control. It is good security procedures

They thereupon began to train, equip and position their forces to carry out this strategy. In the last-minute crisis, multiple mobilizations on the continent persuaded all major powers that attack was imminent; it was only misperception and fear caused the false perception to become real.

21. *Id.* (discussing several gaps in the existing system, assessing the strengths and weaknesses of recent efforts to close them, and recommending new multilateral legal initiatives and institutional controls, accompanied by a shift in aspects of U.S. nuclear weapons policy).
that will prevent the theft of this material, good police work that will investigate any theft, good intelligence, and international cooperation that will halt its transport across borders.

If a terrorist organization is found to have acquired a nuclear weapon or the components of a nuclear weapon, the Security Council, acting under Chapter VII, or the General Assembly acting under Uniting for Peace, should regard this fact as an imminent threat to international peace and security and take immediate action to neutralize the threat, including military action if necessary, with or without the cooperation of the state where the terrorists and the weapons are located. If neither the Council nor the Assembly is able to act in a timely or effective way, a state that has suffered previous attacks by the same terrorist organization would have the right in self-defense to seize or destroy the nuclear weapon(s) or components. Terrorists acquisition of biological or chemical warfare agents demands appropriate and immediate Security Council action under Chapter VII, with General Assembly action under Uniting for Peace as an alternative in case the Council is unable to act promptly or with effect. The Council must also take appropriate measures against any state that is found to have supplied a WMD to a terrorists group.

The quality of intelligence supporting the conclusion that terrorists have acquired nuclear weapons or other WMDs is a key determinant of whether pre-emptive action is warranted. Mere suspicion is not enough, as all have seen in the case of Iraq. As has been said elsewhere in this essay, the evidence must be abundant, well-corroborated, clear and convincing. This requires multiple reliable sources and as wide a circle of cross-checking and joint assessment among national services as is consistent with security requirements for intelligence sources and methods.
JUS AD BELLUM: THE NEXT IRAQ

Ian Johnstone

I. INTRODUCTION .................................................................. 395
II. KOSOVO: HUMANITARIAN NECESSITY AS AN EXCUSE ............... 396
III. THE EVOLVING LAW OF SELF-DEFENSE .................................. 396
IV. IMPROVING THE QUALITY OF SECURITY COUNCIL
    DECISION-MAKING .................................................................. 398
    A. Substantive Principles/Considerations ..................................... 399
    B. Procedural Innovations ......................................................... 400
V. CONCLUSION ........................................................................ 401

I. INTRODUCTION

Our chairman said that the task of this panel is to discuss preemptive military intervention to combat either: the threatened use of force, for example, by terrorists armed with weapons of mass destruction; or outrageous human rights violations, like genocide. While these two categories of threat look quite different, I think it is instructive to discuss them together in the context of preemption, and I am glad we are doing so.

In my presentation, I plan to do the following three things: outline where the law relating to humanitarian intervention stands post-Kosovo; outline where the law relating to preemptive self-defense stands post-September 11th (9/11); and offer a few modest proposals on how to improve the quality of the United Nations Security Council (Security Council) decision-making on these issues. My central argument is that the law is less restrictive than meets the eye, but there are substantial weaknesses in the existing legal and institutional regimes. Those weaknesses can be addressed through a number of substantive and procedural steps, which would constitute a politically viable evolution, but not a revolution in the existing legal order. My proposals focus on the Security Council, not because I believe it has any inherent claim to legitimacy, but because I do not think I can properly defend a more radical transformation of the international legal order in only ten minutes. However, I will conclude with one somewhat radical suggestion, which we may be able to take up in the discussion period.

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II. KOSOVO: HUMANITARIAN NECESSITY AS AN EXCUSE

I do not intend to review the law relating to humanitarian intervention at length, but rather focus on the international reaction to the Northern Alliance Treaty Organization’s (NATO) intervention in Kosovo in 1999. In my view, that is the most illuminating way of understanding where the law currently stands.

The weight of scholarly and official opinion is that the intervention was illegal. None of the three principal legal justifications: authority based on existing Security Council resolutions; a customary right of humanitarian intervention; or self-defense, was persuasive. However, my reading of the international reaction to the intervention is that NATO’s violation of the law was in effect excused.

The best way of characterizing what happened from a legal point of view is that an interpretive community of governments and actors represented on the Security Council, along with other interested governments, such as lawyers, Non-Governmental Organizations (NGOs), and blue ribbon panelists, deemed the intervention illegal, but turned a blind eye to the violation of the law given the extreme circumstances.

Without going into details, I would argue that this reading is supported by the many statements of government representatives who were disinclined to accept the legality of the intervention, but reluctant to condemn it. This includes many Non-Aligned Movement (NAM) and Islamic countries, and even some NATO countries who stressed the exceptional nature of the action and down-played its relevance as a precedent.

Therefore, the law on humanitarian intervention post-Kosovo is as follows: it is legal with Security Council approval and illegal without it as a general matter, however there may be rare cases of extreme humanitarian necessity when unauthorized action will in effect be excused by the international community.

III. THE EVOLVING LAW OF SELF-DEFENSE

What about preemptive self-defense? An instructive way of looking at where that law stands post-9/11 is by comparing the reactions to the US-led interventions in Afghanistan and Iraq.  


The official justification for the US and allied attacks on Al-Qaeda and the Taliban in October 2001, was self-defense in connection with the events of 9/11. This was a substantial stretch of the concept of self-defense in a two respects: it was invoked against a non-state actor (Al-Qaeda); and in exercising its right of self-defense, the US and its Afghan allies changed the regime in power in Afghanistan.

What is most interesting from a legal point of view is that the world was largely prepared to accept this interpretation of Article 51 of the United Nations Charter (UN Charter). There is ample evidence of this acceptance in the reactions of the Security Council itself and other international organizations such as NATO; the Organization of American States (OAS); the Asian Pacific Economic Cooperation (APEC); and even the Organization of Islamic Countries (OIC), which bent over backwards to avoid condemning the military action as a violation of international law.

Moreover, many states participated directly or indirectly in Operation Enduring Freedom, or at least expressed support for it, and they are participating in the economic and political reconstruction of Afghanistan to this day.

However, when self-defense against terrorism was invoked eighteen months later as one of the justifications for military action against Iraq, the international reaction was quite different. Few states or knowledgeable observers were persuaded that the links between Al-Qaeda and the regime of Saddam Hussein were sufficiently tight to justify the invasion of Iraq on that basis. When that became obvious, the Bush Administration largely gave up trying to make its case on the grounds of self-defense, at least to international audiences. There is no better evidence than the letter of March 20, 2003 that the United States sent to the President of the Security Council setting out the legal justification for the war. It does not contain a word about terrorism, self-defense, or preemption. The legal case is based entirely on the enforcement of existing Security Council resolutions relating to Iraq's weapons of mass destruction.

A broader legal question, which was not directly raised by the Iraq case since self-defense was not the official justification, is whether the doctrine of preemption, as articulated in the National Security Strategy of 2002, is

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5. Id.

6. Id.
consistent with the law of self-defense as traditionally understood? The central argument is that Article 51 of the UN Charter permits "anticipatory self-defense," and that the notion of anticipatory self-defense can and does encompass preemptive strikes against terrorists.

There is a long history to the doctrine of "anticipatory self-defense," going back to the Caroline case of 1842. At that time, US Secretary of State Daniel Webster claimed that self-defense was permissible when the threat of attack was "instant, overwhelming, and leaving no choice of means and no moment for deliberation." Although, that is still good law, my reading of the Bush Administration's version of the doctrine of preemption is not consistent with even the most liberal interpretation of that law. What some of the language in the National Security Strategy seems to contemplate is not preemption of a truly imminent attack when there is clear and convincing evidence that it is about to be launched, but rather preventive action. There is no self-evident line between preemption and prevention, but starting a war now in order to prevent some future, but not well-specified threat from materializing, is not what Secretary of State Webster had in mind. If accepted in its most expansive form, the doctrine stretches the term "armed attack" so far, that it becomes virtually meaningless as a legal concept.

This is not to say that self-defense can never be invoked to forestall future terrorist attacks. If the attack is truly imminent, or if there is a pattern of attacks and credible evidence of both their source and the threat of further attacks, then a state can take defensive military action. This formulation, sometimes called the "accumulation of events theory," offers a gloss on the notion of anticipatory self-defense, relaxing the test of "imminence" slightly when there is a pattern of attacks. The action against Al-Qaeda in Afghanistan could be justified on that basis. The invasion of Iraq could not!

IV. IMPROVING THE QUALITY OF SECURITY COUNCIL DECISION-MAKING

As a result, I read existing law on "unilateral intervention" (intervention not authorized by the Security Council) as less restrictive than meets the eye; humanitarian intervention will be excused in some circumstances and preemptive self-defense against some terrorist threats is lawful.

However, in setting up the High Level Panel on Threats, Challenges, and Change, the Secretary General was motivated by a sense that, while unilateral

8. Id.
action is necessary and appropriate to deal with some of these threats, greater collective action is also required. More specifically, the Security Council must do more to face its responsibilities in dealing with both kinds of threats.

The Security Council has not been idle in either field. Throughout the 1990s, it was increasingly willing to label human rights or humanitarian crises as threats to international peace and security, and to authorize coercive action under Chapter VII of the UN Charter in response. While it has not authorized military action against a terrorist threat to date, it imposed economic sanctions three times in respect of terrorism: against Libya in 1992; against Sudan in 1996; and on the Taliban in 1999. It has also adopted resolutions 1373 regarding financing and other forms of support for terrorism, and 1540 in order to prevent weapons of mass destruction from falling into the hands of terrorists. These acts of law-making by the Security Council are unprecedented in the sense that they impose binding obligations on all states in a general issue area for an indefinite period.

Is it reasonable to think the Council will do more? Without trying to anticipate what the High Level Panel might say, it seems to me that two steps could be taken to improve how these threats are dealt with: the adoption of a set of substantive principles or “considerations” to guide deliberations on intervention; and procedural innovations to make it more likely the Security Council will act, and will do so on a principled basis.

A. Substantive Principles/Considerations

The broad outline of substantive principles for intervention was foreshadowed in The Responsibility to Protect Report. Those criteria related to humanitarian intervention alone, but it is not hard to imagine how they might be converted into more generic principles.

However, instead of hard and fast criteria, I would argue that a more viable and politically realistic way of proceeding would be for the Security Council, General Assembly, and/or any other body engaged in this inquiry, to ask itself a set of questions each time the issue of intervention arises. Questions such as:

1) What is the magnitude of the threat or emergency?
2) Is the very existence of a state or ethnic group at risk?


3) Short of that extreme situation, is there a pattern or history of actions to suggest that the threat will materialize?

4) How good is the evidence of the threat or emergency? Can it be verified by credible sources?

5) Are alternatives to preemptive military action available? Have viable measures short of the use of force been exhausted?

6) What are the prospects of success? Are the interveners willing to see it through?

These sorts of considerations would not serve as an automatic trigger or set a threshold for action, but they would structure deliberations and impel the Council to deal with these threats in a more systematic, norm-based way. They would force governments proposing intervention to state their case in terms that are agreed upon in advance. In addition, it would force governments who oppose action to justify their opposition in those same terms.

B. Procedural Innovations

However, substantive guidelines will not go far towards stimulating Security Council action, as long as the veto power stands in the way. There is no self-evident reason why the veto should stand in the way and why each of the five permanent members (P5) should be the final court of appeal on these sorts of decisions. However, the Security Council is the only institutional safeguard that currently exists as a check on abuses. The resulting dilemma is that veto power can block all attempts at preemptive action and yet a right of unilateral intervention, other than in self-defense, is too open to abuse.

A procedural way out of this dilemma, suggested by Thomas Pickering at a recent speech at the Fletcher School, is for the P5 members of the Security Council to reach a gentleman’s agreement providing that decisions about the preemptive use of force will be put to a straw poll, and unless two of the P5s signal that they will vote no, the sole objector will abstain on the resolution rather than veto it.12 In other words, a veto on preemptive action to combat either terrorists’ threats or massive human rights abuses, require that two of the permanent members vote no.13

An additional safeguard that was not suggested by Mr. Pickering would be for the Council to appoint an impartial commission to assess whether the factual premises employed to justify the intervention were accurate. This assessment

12. The Honorable Thomas Pickering, Convocation Address at The Fletcher Law School at Tufts University (Sept. 9, 2004). Mr. Pickering was not referring to humanitarian intervention or preemptive action against terrorist threats per se, but his proposal could usefully be adapted to deal with those kinds of threats, where the twin problems of Security Council paralysis and unilateral abuses are especially acute. Id.

13. Id.
would have to come after-the-fact, but it could still reduce the risk of abuse by those in favor of intervention while putting pressure on those who oppose it to do so for non-arbitrary reasons.\(^\text{14}\) Accountability derives from the need to provide accurate information to justify preemptive intervention, and to do it on the basis of accepted standards.

Obviously neither of these suggestions would be easy to implement, but they offer a plausible starting point for discussion about how to improve the quality of Security Council deliberations and decisions. They are designed to make Council members more accountable for decisions to act and for decisions not to act.

V. CONCLUSION

The more radical proposal, which I am not confident I can defend, is to forget the gentleman’s agreement on the veto and instead turn to some other body for collective endorsement when a veto is cast. The other body could be a self-constituted group of twenty to twenty-five major powers. Their decisions would have to be by qualified majority vote, for example, fifteen-twenty, since all of the P5 members of the Security Council would likely be among the group. Endorsement by this body would not render the action legal, but might reinforce claims that it is excusable in the circumstances.

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APPLICATION OF CONSULAR RIGHTS TO FOREIGN NATIONALS: STANDARD FOR REVERSAL OF A CRIMINAL CONVICTION

John Quigley*

I. INTRODUCTION ............................................. 403
A. Standards as Found by Agencies of the
   Inter-American System .................................. 406
B. Burden of Proof ........................................ 407
C. Standard for Rebutting the Presumption of Unfairness ...... 408
D. Standard Applied by United States Courts .................. 409

II. ANALYSIS ............................................... 412

I. INTRODUCTION

In nineteenth century criminal procedure in the United States, extradition treaties impacted the treatment of a person surrendered by a foreign state. In a series of cases in state supreme courts, and one in the United States Supreme Court, persons surrendered invoked extradition treaties to annul criminal indictments. The cases involved persons who were surrendered pursuant to a request based on a particular criminal charge, but then were charged pursuant to a request based on a particular criminal charge, but then were charged with additional offenses after being surrendered.

That additional charging violated a concept of extradition law called the Rule of Specialty. A state that gains surrender on an extradition request is deemed to violate the rights of the surrendering state if it prefers charges additional to that on which the extradition request was based. For the United States courts, the issue was whether this was an obligation that ran only between the two states, or whether it could be invoked by the individual.

In an Ohio case, a county prosecutor added an additional charge to a man's previous charge, although he was already surrendered and extradited for that charge by England.1 The Ohio Supreme Court annulled the additional charge

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1. See State v. Vanderpool, 39 Ohio St. 3d 273 (Ohio 1883).
as a violation of the Rule of Specialty. Citing the Supremacy Clause of the United States Constitution, the court said the individual could invoke the treaty:

This treaty is ... the law of the land, and the judges of every state are as bound thereby as they are by the constitution and laws of the Federal or State governments. It is ... the imperative duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under a treaty to the same extent as if they arose under a statute of the state itself.

The court reached this conclusion even though the extradition treaty was silent on the question of whether the individual could benefit from the Rule of Specialty.

Three years later, the United States Supreme Court relied on the Ohio decision when a similar issue came before it. The Court found that allowing an additional charge following extradition would violate the treaty. Like the Ohio Supreme Court, the United States Supreme Court inferred the right of an individual to invoke the treaty and fashioned a remedy.

The Vienna Convention on Consular Relations (VCCR), a multilateral treaty regulating the activity of consuls of a sending state in a receiving state, similarly affects the treatment of persons charged with a criminal offense. One of a consul’s functions is to assist nationals charged with crimes. The VCCR creates a triggering mechanism for such assistance by giving a detained foreign national a right of access to a home state consul and by requiring the detaining authorities to advise the foreign national of the right of access.

Additionally, the VCCR requires a receiving state to provide a remedy if the obligation is violated:

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Thus, unlike the extradition treaty at issue in Vanderpool and Rauscher, the VCCR prescribes rights for the individual and requires a remedy if those rights are violated. Despite this greater specificity on these two key issues, courts of

2. Id.
3. Id.
6. Id.
the United States have been hesitant to accord rights to a detained foreign national who is not provided information about consular access and even more reluctant to give a remedy for violation of that right. That reluctance has resulted in three cases filed against the United States in the International Court of Justice (ICJ) by sending states whose nationals were not informed of the right of consular access, but who were, nonetheless, convicted of a crime. In all three cases, the foreign nationals were sentenced to death.

In the second of the two cases, brought by Germany, the ICJ said that in the event of a violation the receiving state must provide "review and reconsideration" of the conviction and sentence. The court stated:

if the United States ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.

In the third case, brought by Mexico, the ICJ elaborated on the requirement to review and reconsider. The ICJ reiterated that "review and reconsideration" must be undertaken to "take account" of the violation. The court said:

The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

In the United States, most courts entertaining VCCR claims have not reached this question because, as indicated, they have found either that no right exists invocable by the foreign national or that no remedy is required. Those United States courts that have found in favor of the foreign national on these two points have then faced the question of whether, and to what extent,

7. LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, 514 (June 27).
8. Id. at 513-14.
10. Id. ¶ 122.
prejudice must have flowed from the violation before relief is granted. A spectrum of possibilities presents itself. At one end would be no requirement of prejudice, i.e., if there has been a violation of the right of consular access, reversal follows. At the other end, one could construct a substantial barrier to relief by requiring the foreign national to sustain a burden of persuasion that the case would have ended in an acquittal had the information about consular access been given at the time of arrest. Between these two possibilities lie potential rules that would impose only a burden of production on the foreign national. This would not require a finding that there would have been a different outcome, but rather only a finding that consular assistance might have been provided, and that it might have had an impact.

A. Standards as Found by Agencies of the Inter-American System

The ICJ did not further explain how a court is to determine whether a violation requires reversal. Additional learning on that question, however, comes from the inter-American human rights system that operates under the Organization of American States (OAS). The Inter-American Court of Human Rights issued an advisory opinion in 1999 on the question of whether, specifically in the context of capital cases, a failure to comply with consular access rights violates Due Process.

The Inter-American Court of Human Rights, after finding that a judicial remedy is required for a consular access violation, stated that "non-observance of a detained foreign national's right to information, recognized in Article 36(a)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law." The court's view was that the opportunity for consular assistance is critical and may impact criminal proceedings in a variety of ways and, therefore, is an important safeguard.

The court said that "notification to a detained foreign national of the right to communicate with a consular official of his country will materially improve the possibilities of a defense," and "procedural measures, including those taken by the police will be done with greater concern for legality and greater respect for the dignity of the person." The court said that the right to be informed about consular access is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights.

12. Id. ¶121.
13. Id. ¶123.
B. Burden of Proof

Two cases were subsequently decided by the Inter-American Commission on Human Rights (IACHR), also a part of the OAS, and which is a body subsidiary to the Inter-American Court of Human Rights. The IACHR took its task as one of implementing, in regard to specific cases, the standard set by the Inter-American Court of Human Rights.

Each case concerned a Mexican national convicted of murder and sentenced to death: Ramon Martinez Villareal in Arizona, and Cesar Fierro in Texas. In each case the commission found that the foreign national had not been informed about consular access and that this failure required a reversal of the conviction.

The IACHR did not state that it needed to find that the failure to inform had led to an identifiable negative result for the foreign national, or that consular assistance would have benefited the foreign national in a particular way. Since it did not find a need for such a finding the IACHR did not impose any proof burden, either of production or of persuasion, on the petitioners to demonstrate a prejudicial impact.

To evaluate the effect of a violation of an ensuing conviction, the IACHR used a presumption. In the Fierro case, it stated:

As the Commission has previously held, fundamental due process protections, such as the right to prior notification in detail of the charges against a defendant and the right to effective counsel, are of such a nature that, in the absence of access to consular assistance, a foreign national could be placed at a considerable disadvantage in the context of a criminal proceeding taken against him or her by a state. Each case must be evaluated on its individual circumstances. Once a failure to inform a foreign national of his right to consular notification and assistance has been proven, however, a formidable presumption of unfairness will arise unless it is established that the proceedings were fair notwithstanding the failure of notification.

The IACHR thus requires an affirmative showing of fairness in the face of the consular access violation. By this standard, it would appear that if a consul

17. Under the commission’s procedures, the foreign national detainee is not a party to the proceedings. A petition may be filed by any person, to inform the commission of a violation of rights. That petitioner, whoever it may be, argues the case.
might have played a constructive role in the defense, the "formidable presumption of fairness" would remain unrebuted.

Applying this presumption to the facts of the Fierro case, the IACHR said, "it is also not apparent, from the state's observations or otherwise, that Mr. Fierro's proceedings were fair notwithstanding the state's failure to comply with the consular notification requirements." 19

C. Standard for Rebutting the Presumption of Unfairness

The Fierro case does not provide guidance on the limits of what an affirmative showing of fairness must reveal, because the harm to Fierro from lack of consular access was quite obvious. Shortly after arrest, a murder confession was taken that likely could not have been obtained had a consul been involved. 20 The El Paso, Texas, police who detained Fierro had pre-arranged with police in Ciudad Juarez, Mexico, for Fierro's mother and step-father to be arrested in Ciudad Juarez. 21 The El Paso police used Fierro's fear of what would befall his mother and step-father to convince him to confess. 22 A Texas court found the confession inadmissible but upheld the murder conviction on other evidence. 23 The commission noted the Texas court's conclusion that the El Paso officer who testified to not having coerced Fierro had perjured himself. 24

The IACHR thought that a consul's participation might have averted the coerced confession:

Mr. Fierro's confession was taken at a time when consular notification and assistance may have been highly significant in the circumstances. The consulate could, for example, have verified the status of Mr. Fierro's mother and step-father, who were being held in Mexico by the Mexican police, and thereby mitigated any detrimental impact that their detention may have had on Mr. Fierro's interrogation and the veracity of the resulting confession. 25

The IACHR thus engaged in analysis of how a consul might have impacted the proceedings, but only by way of determining whether the presumption of unfairness might be overcome on the facts of the case. The commission did not

19. Id.
21. Id.
22. Id.
24. Id.
25. Id. ¶ 39.
require that there would have been a different outcome had a consul participated.

Similarly in Martinez Villareal, the commission considered that the proceedings had failed to satisfy Due Process, but again the deficiency was so significant as to provide little indication of the outer limit. Martinez Villareal apparently had little idea of what was occurring during this trial. In the commission's finding:

the absence of notification under Article 36(1)(b) of the Vienna Convention on Consular Relations could on the information available have had a significant effect on the fairness of Mr. Martinez Villareal's criminal proceedings. According to the record, Mr. Martinez Villareal was a Mexican national who was arrested and tried in the United States, but who did not speak English and was represented by an attorney who did not speak Spanish. The record also indicates that Mr. Martinez Villareal was not familiar with the U.S. legal system and that this, together with his linguistic limitations, affected his understanding of and participation in the criminal proceedings against him despite the presence of a translator. The Petitioners claim, for example, that Mr. [Martinez] Villareal did not understand which people in the courtroom comprised the jury or what the purpose of the jury was, and that the voir dire proceedings were not translated into a language that he could understand. The record also indicates Mr. Martinez Villareal's attorney failed to contact his family in Mexico and, moreover, personally attested through an affidavit as to his overall inexperience and ineffectiveness in handling Mr. Martinez Villareal's case. Further, there is evidence suggesting that Mr. Martinez Villareal suffered from some degree of mental deficiency during at least certain stages of the criminal proceedings against him.26

D. Standard Applied by United States Courts

United States courts have not definitively addressed the issue of how to assess a violation of the obligation to inform a foreign national about consular access. In the only Article 36 case to reach the United States Supreme Court, the matter was heard only on a last-minute request for a stay of execution and without full briefing. The court rejected the request for a stay on grounds that the applicant had not raised the Article 36 issue in a timely manner.27

The court, nonetheless, speculated on the impact of an Article 36 violation. It said by way of dictum, "it is extremely doubtful that the violation should

result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial.\textsuperscript{28} The court did not specify whether by "effect" it meant a decisive effect, namely that the accused would have been acquitted, or whether it meant that a consul might have played some role. Neither did it specify who would carry proof burdens on the issue.

In a case from Illinois involving a Polish national convicted of murder and sentenced to death, a United States district court, purporting to follow the United States Supreme Court's \textit{dictum}, said, "[t]o gain relief on a Vienna Convention violation, then, a Petitioner must show: that his Vienna Convention rights were violated; and that the violation had a material effect on the outcome of the trial or sentencing proceeding."\textsuperscript{29} Applying this standard to the facts before it, the court found little reason to believe that a consul could have had an effect on the trial, because "evidence of Madej's guilt was substantial."\textsuperscript{30} Continuing, the court said:

It is possible, though, that the Consulate's participation would have had an effect on the sentencing hearing ... Particularly in this case, where trial counsel failed completely to undertake any investigation of the client's life, character, and background in preparation for the sentencing phase, the participation of the Consulate could possibly have made a difference.\textsuperscript{31}

That formulation suggested that a proof burden rested on the foreign national, but only to raise a possibility that consular assistance might have had an effect on the outcome.

In an earlier case, \textit{U.S. v. Rangel-Gonzales}, the United States Court of Appeals for the Ninth Circuit addressed more precisely the proof burden.\textsuperscript{32} This case was decided in 1980, at a time when that circuit found a remedy to be required for an Article 36 violation.\textsuperscript{33} The court of appeals said that while it is incumbent on a foreign national to raise the issue, the government must disprove that the failure of notification did not prejudice the foreign national. Applying the test to the case at bar, the court of appeals said:

the appellant in this case carried his initial burden of going forward with evidence that he did not know of his right to consult with

\begin{thebibliography}{9}
\bibitem{28} \textit{Id.} at 377.
\bibitem{30} \textit{Id.}
\bibitem{31} \textit{Id.}
\bibitem{32} United States \textit{v. Rangel-Gonzales}, 617 F.2d 529, 533 (9th Cir. 1980).
\bibitem{33} The circuit's position changed with the decision quoted above, see United States \textit{v. Lombera-Camorlinga}, 206 F.3d 882 (9th Cir. 2000).
\end{thebibliography}
consular officials, that he would have availed himself of that right had he known of it, and that there was a likelihood that the contact would have resulted in assistance to him in resisting deportation.\textsuperscript{34}

The court of appeals, moreover, did not require a decisive effect on the outcome of the proceedings. Rather, prejudice would be present if the foreign national’s contact with a consul, had it occurred, “would have resulted in assistance to him,” and if it appears that the foreign national was unaware of the right of consular access and would have requested it if informed about it.\textsuperscript{35} That approach is consistent with that of the Inter-American Court of Human Rights, which as indicated, considered a denial of the possibility of consular assistance through non-notification as affecting multiple aspects of the proceedings.

The standard employed by United States courts in more recent cases comes from the United States court of appeals in\textit{Rangel-Gonzales}.\textsuperscript{36} Those courts that have addressed the distinction between burden of production and burden of persuasion have, as in\textit{Rangel-Gonzales}, made clear that the evidentiary burden on the foreign national is one of production only.\textsuperscript{37}

These courts have not construed “prejudice” to mean that the case would have ended in an acquittal instead of a conviction. The Department of State has made clear that such an approach would be unworkable and inconsistent with the VCCR. In oral argument in \textit{Paraguay’s} case against the United States, the Department said that it would be:

...problematic to have a rule that a failure of consular notification required a return to the \textit{status quo ante} only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference.\textsuperscript{38}

In a case decided in light of the ICJ rulings, the Oklahoma Court of Criminal Appeals indicated deference to the ICJs decisions and a standard of review similar to that of the United States court of appeals in\textit{Rangel-Gonzales}.\textsuperscript{34}

\textsuperscript{34} \textit{Rangel-Gonzales}, 617 F.2d at 533.

\textsuperscript{35} Id.


\textsuperscript{37} Esparza-Ponce, 7 F.Supp.2d at 1097 (citing \textit{Rangel-Gonzales}, 617 F.2d at 530-31, for the proposition that the defendant must “produce evidence”); State v. Cevallos Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000) (stating that defendant “must produce evidence . . .”).

Hearing the case of Osvaldo Torres, a Mexican national facing imminent execution in Texas, the court stayed the execution and ordered a trial court to hold a hearing to determine “whether Torres was prejudiced by the State’s violation of his Vienna Convention rights in failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate.”39 The court issued its order without an explanatory opinion, but in a concurring opinion, Judge Chapel said that by virtue of the United States’ ratification of the Optional Protocol, his court was obligated to comport with the ICJ judgment in the Avena case.40 Prejudice would be present, Chapel, J., wrote, if Torres was unaware of his right to consular access, if he would have availed himself of it had he been informed about it, and if a Mexican consul would have provided consular assistance.41

II. ANALYSIS

A requirement is unrealistic if it would involve a court finding that a consul might have acted in a way that would have averted the conviction. The United States’ position in oral argument in the Paraguay case is sound. When a detainee has not received consular assistance for not having been informed of the right, one can never know what a consul might have done that would have affected the proceedings in the foreign national’s favor.

The approach taken in the inter-American system, and that taken in the cited United States cases, is more realistic. A violation of the obligation to inform a foreign national of the right of consular access gives rise to a “formidable presumption of unfairness,” in the words of the IACHR, because of the myriad ways in which a consul may affect proceedings.42 Where the foreign national was not informed, and where a consul did not participate, one is left only to speculate on what a consul might have done. One can, as the IACHR did in its two cases, cite unfair aspects of a particular proceeding as an indication of problems a consul might have averted. Any decision-maker seeking to make its decision as solid as possible would do so. However, once the presumption of unfairness arises, the presumption should remain unless it can affirmatively be shown that a consul would not have participated in the case. So long as it appears that a consul might have participated had the obligation to inform been met, the presumption of unfairness stands.

40. Id. at 5.
41. Id. at 9.
The *Rangel-Gonzales* approach is more consistent with international practice than is the *Madej* approach. An international law violation must be remedied by putting the situation in which it would have been if no violation occurred. If information was not given to a foreign national at the time of arrest about consular access, there should not need to be a finding that a consul might have impacted the case in a particular respect. As the United States argued in the *Paraguay* case, that approach requires too much speculation. In a case in which no information was given to the foreign national and in which no consul participated, one cannot surmise what role a consul might have played, or how a consul's participation might have altered the course of the proceedings.

Criminal trials can result in a variety of outcomes, not limited to simply acquittal or guilt on the charges filed. Charges can be reduced before or during trial, plea bargains can be reached, and prosecutors can agree to recommend a particular sentence. One can never know how a consul might have taken action that could have affected these determinations. The presumption of unfairness, as the IACHR put the matter, is "formidable."
LAGRAND AND AVENA ESTABLISH A RIGHT, BUT IS THERE A REMEDY? BRIEF COMMENTS ON THE LEGAL EFFECT OF LAGRAND AND AVENA IN THE U.S.

By Malvina Halberstam*

The United States is obligated under international law to review and reconsider the conviction and sentence of persons who were not informed of their right to request that their Consul be notified of their arrest and to meet with him, as provided for by Article 36 of the Vienna Convention on Consular Relations.¹

The International Court of Justice (ICJ) so ruled in Avena² and LaGrand³. The ICJ had jurisdiction under the Optional Protocol to the Vienna Convention.⁴ Unlike the ICJ decision in the Nicaragua case⁵ and the recent ICJ advisory opinion on the Israeli security fence,⁶ both of which raise serious questions

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3. LaGrand Case (Germany v. U.S.), 2001 I.C.J. 466 (June 27).
4. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1964, art. 1, 21 U.S.T. 326, 500 U.N.T.S. 241, 242 [hereinafter Optional Protocol]. (“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any Party to the dispute being a Party to the present Protocol.”).
6. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. – 43 I.L.M. 1009 (July 9) [hereinafter Legal Consequences].
about the propriety of the Court’s assertion of jurisdiction, there was no serious question of the Court’s jurisdiction in this case.

The United States conceded, with respect to most of the defendants, that Article 36 of the Vienna Convention had not been complied with. The remedy determined by the Court is not unreasonable. It does not require reversal and retrial. It only requires “the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences.”

The ICJ ruling is binding on U.S. courts, state and federal. Article VI of the U.S. Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The Vienna Convention on Consular Relations, establishing the right of an arrested foreign national to be informed, and the Optional Protocol, giving the

7. Although it was undisputed that Nicaragua had never accepted the compulsory jurisdiction of the ICJ, the Court ruled that it had jurisdiction under article 36(5) of the ICJ Statute, which provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.


The problem was that there was no record of Nicaragua ever having accepted the jurisdiction of the PCIJ either. Id. at 201. Nicaragua had indicated in 1939 that it would send its “instrument of ratification” accepting jurisdiction of the PCIJ. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 400 (Nov. 26). The ICJ acknowledged in its opinion that the “files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever dispatched to Geneva.”

In the case involving the wall, the Court improperly used its advisory jurisdiction to rule on a contentious matter without the consent of one of the parties. A number of states, including the United States and the European Union, urged the Court not to exercise jurisdiction. Id. For an excellent discussion of the ICJ’s exercise of the advisory function in this case, see Michla Pomerance, The Advisory Function and the Crumbling Wall Between the Political and the Judicial, 99 AM. J. INT’L L. 26 (2005).

8. See supra note 2. In Avena the U.S. challenged Mexico’s suit on jurisdictional and procedural grounds, but did not contest Mexico’s claim that it had failed to inform the defendants of their rights under article 36 of the Vienna Convention in most of the 52 cases.

9. Id. at 55.

10. U.S. CONST. art. VI (emphasis added).
ICJ jurisdiction to interpret that right, are treaties of the United States. There is no dispute about the self-executing nature of these treaties. While I and a number of other commentators have argued that non-self-executing declarations violate article VI, that question does not arise here. The United States acknowledged at the time of ratification that the treaty is "entirely self-executing."

It has been argued that "the ICJ does not exercise any judicial power in the United States, which is vested exclusively by the Constitution in the United States federal courts." That is indisputable. But, as Justice Breyer points out in his dissent from the denial of certiorari in *Torres*, "it fails to address the question whether the ICJ has been granted the authority, by means of treaties to which the U.S. is a party, to interpret the rights conferred by the Vienna Convention." The answer is yes; the Optional Protocol gives the ICJ that authority. The ICJ judgment is binding in the United States not because the ICJ has judicial authority in the United States, but because the Vienna Convention as interpreted by the ICJ is binding on the United States under article VI of the U.S. Constitution.

The problem is implementing the ICJ ruling. If the state has a procedure under which it provides review, there is, of course, no problem. Oklahoma did so in the *Torres* case. If the state does not have a procedure that can be invoked by the defendant, it has an obligation to create one. That is so, because article VI of the Constitution requires state judges to implement the treaty obligations of the United States, and the Vienna Convention, as authoritatively interpreted by the ICJ, requires the United States to provide review. Ideally, states whose laws bar judicial review in these cases will change their laws.

Nevertheless, if a state fails to establish a procedure for review, considerations of federalism would probably preclude the federal government

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15. *Id.*


from compelling states to provide a remedy.\textsuperscript{18} The alternative is for the federal government to provide review. The difficulty, of course, is that in recent years Congress and the Supreme Court have greatly narrowed the scope of federal \textit{habeas corpus}.\textsuperscript{19} Nevertheless, some federal courts have held that federal courts may review such cases under §2254,\textsuperscript{20} notwithstanding the failure to raise the claim as required by state law. For example, in the \textit{Madej} case the federal district court took the position that a state's procedural default rules would not bar federal review.\textsuperscript{21} It distinguished the Supreme Court's decision in \textit{Breard},\textsuperscript{22} saying,

The Supreme Court's declaration in \textit{Breard} that the procedural default rules apply equally to Vienna Convention violations operated on the explicit assumption that "those rules enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The I.C.J. has now declared that those rules do interfere with giving full effect to the purposes of the treaty, undermining a major premise of the holding.\textsuperscript{23}

But other federal courts have held that such an action would be foreclosed. The Fifth Circuit has so held in the \textit{Medellin} case, which involves one of the petitioners in the \textit{Avena} case.\textsuperscript{24} A petition for certiorari has been filed in that case.\textsuperscript{25} If the Supreme Court interprets §2254 to permit judicial review in all the

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\item \textsuperscript{19} Article VI, cl. 2, of our Constitution provides that the "Laws of the United States," expressly including "all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land." The Court was unfaithful to that command when it held that Congress may not require county employees to check the background of prospective handgun purchasers, Printz \textit{v.} United States, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), that Congress may not exercise its Article I powers to abrogate a State's common-law immunity from suit, Seminole Tribe of Fla. \textit{v.} Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and that a State may not be required to provide its citizens with a remedy for its violation of their federal rights, Alden \textit{v.} Maine, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations.
\item \textsuperscript{20} 28 U.S.C. § 2254 (1996).
\item \textsuperscript{21} United States \textit{ex rel.} Madej \textit{v.} Schomig, 223 F. Supp. 2d 968 (N.D.III. 2002).
\item \textsuperscript{22} Breard \textit{v.} Greene, 523 U.S. 371 (1998).
\item \textsuperscript{23} Madej, 223 F. Supp. 2d at 979.
\item \textsuperscript{24} Medellin \textit{v.} Dretke, 371 F.3d 270 (5th Cir. 2004).
\item \textsuperscript{25} A petition for certiorari was filed on Aug. 18, 2004. Petition for Certiorari at i, 2004 WL 2851246, Medellin \textit{v.} Dretke, 371 F.3d 270 (5th Cir. (Tex.) May 20,2004) (No. 04-5928). The questions presented in the petition are the following:
\begin{enumerate}
\item In a case brought by a Mexican national whose rights were adjudicated in the [International Court of Justice's] Avena Judgment, must a court in the United
cases required by the Vienna Convention as interpreted by the ICJ, that will resolve the remedy problem. But, if the Supreme Court interprets §2254 more narrowly, there will still be cases for which the United States is required to provide review under the Vienna Convention but cannot do so under existing U.S. law.

IV. CONCLUSION

A state's domestic law is, of course, not a defense to non-compliance with its international obligations. The solution, in my view, would be an amendment to §2254, giving federal district courts jurisdiction in those cases where the United States is obligated to provide review under a treaty and no state forum is available. Such an amendment would not impose a great burden on the federal courts, as the number of cases is not very large (and hopefully will be fewer as state officials become more knowledgeable about the Vienna Convention requirements). Such an amendment would probably also be good for the United States politically. At a time when the United States is being criticized for not adhering to various treaties—which under international law it, of course, has every right not to ratify—it would demonstrate that the United States takes its international obligations seriously and respects those treaties that it has ratified.

States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?

2. In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the [International Court of Justice's] LaGrand and Avena judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?


More than two million American citizens work in civilian jobs outside of the United States.¹ Those expatriate workers are employed in a variety of industries, including banking, technology, education, and construction.² Many of them work in foreign offices of American-based corporations; others are employed by foreign corporations. While federal and New York State laws prohibiting employment discrimination generally apply to workers employed

₁. LAY & LEERBURGER, JOBS WORLDWIDE 1 (Impact Publications 1995), http://www.uc.edu/news/ebriefs/new.htm. More precise data on America’s foreign-based civilian workforce are unavailable, as, surprisingly, the United States Census Bureau, Labor Department and State Department do not maintain such data.

². See generally id. at 37, 44, 55 & 72.
in the United States or New York State, respectively, those laws may or may not protect American citizens employed abroad. Whether those laws apply outside of the United States can turn on a number of factors, including: the type of discrimination alleged; the structure of the corporate employer; the residence of the affected employee; the nature of the foreign assignment; and/or the locus of the discriminatory acts.

In this article, we will examine the principal federal and New York State laws prohibiting employment discrimination3 and their application to American citizens working outside of the United States. This examination is more than academic. Americans who suffer discrimination while employed abroad may find remedies under American laws that are unavailable under the laws of their host country.4 Moreover, such victims of discrimination may be able to assert concurrent claims under American and foreign statutes, and thereby gain strategic and substantive advantages. Assertion of such concurrent claims, in our experience, can broaden an expatriate claimant’s discovery rights, potential damages, and leverage in settlement negotiations. As a general matter, federal courts faced with such concurrent claims will exercise their jurisdiction concurrently with the foreign courts handling the related litigation.5

Because the extraterritorial application of anti-discrimination laws depends in large measure on statutory language and legislative history, we will address

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5. See Sapient Corp. v. Singh, 149 F. Supp. 2d 55 (S.D.N.Y. 2001). In Sapient, the American defendant (Singh) had worked in the English operations (Sapient Ltd.) of the American plaintiff (Sapient Corp.). Id. at 56-7. Singh commenced an action in the United Kingdom against Sapient Ltd. for wrongful termination and wrongful cancellation of his stock options. Id. at 57. Sapient Corp. then commenced an action in the United States against Singh for injunctive relief for breach of a non-disclosure, non-compete agreement. Id. at 59. The court refused to stay the U.S. action pending resolution of the U.K. action, because the U.S. action presented broader issues than those presented in the U.K. Id. at 57. Specifically, while Singh’s pre-termination conduct was at issue in both actions, his post-termination conduct was at issue only in the U.S. The court also noted that injunctive relief was not available in the U.K. and that American witnesses could only be compelled to appear in the U.S. action. Sapient, 149 F. Supp 2d at 59.
each law separately (except for Title VII and the ADA, which will be addressed together because they are applied in the same manner outside of the United States).

II. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), 29 U.S.C. § 621. ET SEQ.

The ADEA was the first of the federal employment discrimination statutes to apply beyond United States borders. Enacted in 1967, the ADEA prohibits employment discrimination on the basis of age, providing at 29 U.S.C. § 623(a): "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

The ADEA allows recovery of consequential damages (amounts owing as a result of the ADEA violation),[^6] liquidated damages for willful violations of the ADEA by a private sector employer,[^7] and attorneys' fees and costs.[^8]

The ADEA defines "employer" as a "person in an industry affecting commerce" and having a certain minimum number of "employees," now set at 20.[^9] The ADEA originally defined "employee" as "an individual employed by any employer," with certain exceptions.[^10] As originally enacted, the ADEA did not explicitly permit or preclude extraterritorial application.[^11]

Prior to 1984, several federal courts of appeal held that the ADEA, as originally enacted, did not apply to Americans employed abroad by American employers.[^12] Those courts based their rulings on Section 7 of the ADEA, 29

[^9]: 29 U.S.C. § 630(b) (2000). Under the original language of the ADEA, an entity was deemed an employer if it employed at least 25 employees; See Morelli v. Cedel, 141 F.3d 39, 44 (2d Cir. 1998). In 1974, that threshold was lowered to 20 employees. Id. For a brief period of time prior to 1974, the threshold was set at 50 employees. Id.
[^10]: Morelli, 141 F.3d at 44.
U.S.C. § 626, which incorporates certain remedial provisions of the Fair Labor Standards Act ("FLSA"), including Section 216(d), 29 U.S.C. § 216(d), which exempts from FLSA coverage work performed in a foreign country. The courts rejecting extraterritorial application of the ADEA reasoned that the ADEA’s reference to 29 U.S.C. § 216(d) evidenced congressional intent to exempt foreign workplaces from ADEA coverage.

In response to those decisions, Congress, in 1984, amended the ADEA “to assure that the provisions of the ADEA would be applicable to any citizen of the United States who is employed by an American employer in a workplace outside the United States.” The 1984 amendments accomplished this objective by expanding the definition of “employee” in Section 11(f) of the ADEA, 29 U.S.C. § 630(f), to include “any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.”

The 1984 amendments, however, restricted the extraterritorial reach of the ADEA to employees working in a foreign country for an employer controlled by an American corporation. Specifically, the 1984 amendments added a new subsection (h) to Section 4 of the ADEA, 29 U.S.C. § 623(h), which provides:

1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the:
   a) Interrelation of operations;
   b) Common management;
   c) Centralized control of labor relations; and
   d) Common ownership or financial control of the employer and the corporation.


14. Cleary, 728 F.2d at 610; Zahourek, 750 F.2d at 828-29.
15. Denty, 109 F.3d at 149; Morelli, 141 F.3d at 42-3.
Thus, the ADEA covers employment in a foreign country when the employee is an American citizen working or applying for work with an employer that is, or is controlled by, an American corporation. The ADEA will not protect an American (or foreign) citizen working abroad for a foreign employer, including a foreign parent of an American subsidiary. Nor will the ADEA protect a non-American citizen working abroad for an American corporation.

The extraterritorial application of the ADEA will not be affected by the locus of the claimed discriminatory conduct. In Hu v. Skadden, Arps, Slate, Meagher & Flom LLP, for example, a Chinese citizen legally residing in the United States applied and interviewed in New York City for a position as an attorney with the defendant in Beijing and Hong Kong. The plaintiff brought an ADEA claim for the defendant’s refusal to hire the plaintiff for those positions. The Southern District of New York held that the plaintiff, as a non-citizen, could not bring an ADEA claim for employment to be performed outside of the United States, even if the defendant made its allegedly discriminatory hiring decision in New York.

In sum, an American citizen who is subject to age discrimination in his or her employment abroad for an American company or an American-controlled company can, assuming he or she meets the other jurisdictional requirements of the statute, bring an action in the United States under the ADEA to redress that discrimination.


Title VII and the ADA also apply, in certain circumstances, to American citizens working abroad. Title VII, 42 U.S.C. § 2000e-2(a)(1), makes it an:

unlawful employment practice for an employer: 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.  

The ADA prohibits discrimination:

against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 

Title VII and the ADA authorize the recovery of compensatory damages, including front pay and emotional pain and suffering, punitive damages, consequential damages, and attorneys’ fees and costs. The amount of compensatory and punitive damages, however, are capped according to the size of the employer. For an employer with more than 500 employees, the sum of compensatory and punitive damages cannot exceed $300,000 per plaintiff.

Like the ADEA, Title VII and the ADA, as originally enacted, did not expressly authorize or preclude extraterritorial application of those statutes. Both Title VII and the ADA prohibit discrimination by an “employer,” which is defined as a “person engaged in an industry affecting commerce who has fifteen or more employees.” The original language of Title VII and the ADA defined an “employee” as “an individual employed by an employer,” with certain exceptions.

In 1991, in Equal Employment Opportunity Commission v. Arabian Am. Oil Co., the Supreme Court held that Title VII did not protect United States citizens working abroad. The Court held that federal laws may be applied extraterritorially only if they expressly authorize such application, and that the language of Title VII contained no such authorization. Shortly after the Arabian Am. Oil Co. decision, Congress enacted the Civil Rights Act of 1991,

31. Id. at 256-57.
in part to "strengthen and improve Federal civil rights laws."\textsuperscript{32} Section 109 of the Civil Rights Act of 1991, entitled "Protection of Extraterritorial Employment," expressly extended the reach of Title VII and the ADA to American citizens working in foreign countries.\textsuperscript{33}

The Civil Rights Act of 1991 expanded the definition of "employee" in Title VII, 42 U.S.C. § 2000e(f), and in the ADA, 42 U.S.C. § 12111(4)), by adding, "[W]ith respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States."\textsuperscript{34} The Civil Rights Act of 1991 also authorized extraterritorial application of Title VII and the ADA by adding the following language to those statutes: "If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [this statute] engaged in by such corporation shall be presumed to be engaged in by such employer."\textsuperscript{35} Whether an employer "controls a corporation," within the meaning of the foregoing provision, depends upon the "interrelation of operations," "common management," "centralized control of labor relations," and the "common ownership or financial control" of the employer and the corporation.\textsuperscript{36} The Civil Rights Act of 1991 also added language to 42 U.S.C. § 2000e-1 and 42 U.S.C. § 12112, respectively, stating that Title VII and the ADA "shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer."\textsuperscript{37}

Title VII and the ADA, therefore, apply extraterritorially when "the employee is a United States citizen and the employee's company is controlled by an American employer."\textsuperscript{38} Title VII and the ADA do not apply to an American (or foreign) citizen working abroad for a foreign employer, including


\textsuperscript{38} Shekoyan, 217 F. Supp. 2d at 65; Iwata v. Stryker Corp., 59 F. Supp. 2d 600 (N.D. Tex. 1999) (Title VII applies abroad only to American citizens working for American companies or their foreign subsidiaries).
a foreign parent of an American subsidiary.\textsuperscript{39} Further, although non-citizens working in the United States are covered by Title VII and the ADA,\textsuperscript{40} non-citizens working abroad for an American company are not protected by those statutes.\textsuperscript{41}

In Torrico v. International Bus. Machines Corp.,\textsuperscript{42} the Southern District of New York considered whether a temporary assignment abroad constituted foreign employment for the purpose of applying the ADA extraterritorially. The plaintiff, a non-United States citizen who was employed in the United States by an American corporation, had been temporarily assigned to work in Chile. The issue presented was whether the foreign assignment rendered the plaintiff a non-citizen employed abroad, who would not be covered by the statute, or a non-citizen employed in the United States, who would be covered by the statute. Applying traditional contract law principles, the court examined the totality of the circumstances to determine the “center of gravity” of the employment relationship.\textsuperscript{43}

Although Torrico involved a non-United States citizen, the “center of gravity” test employed in that case could be used to ascertain the place of employment of a United States citizen employed in the United States by a foreign corporation, but temporarily assigned to work abroad. If the “center of gravity” of such an employment relationship was found to be the United States, then the United States citizen could assert claims under Title VII and the ADA. If the “center of gravity” was found to be the foreign workplace, then Title VII and the ADA would not apply to the foreign corporation’s discriminatory acts.

In sum, an American citizen who is subject to discrimination on the basis of sex or disability while employed abroad by an American company or a company controlled by an American employer can, assuming he or she meets the other jurisdictional requirements of those statutes, bring an action in the United States under Title VII or the ADA, respectively, to redress that discrimination.

\textsuperscript{39} Shekoyan, 217 F. Supp. 2d at 68.

\textsuperscript{40} Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (citing 29 C.F.R. § 1606.1(c) (1972) (“Title VII ... protects all individuals, both citizens or non-citizens, domiciled or residing in the United States” from unlawful discrimination in the United States)).


\textsuperscript{42} Torrico, 213 F. Supp. 2d at 399.

\textsuperscript{43} Id. at 409.

Section 1981 is a general civil rights statute which prohibits race discrimination in, among other contexts, employment. Section 1981, which was enacted by the Civil Rights Act of 1866 and amended by the Voting Rights Act of 1870, grants “[a]ll persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts....” Section 1981 allows a prevailing plaintiff to recover consequential damages, uncapped compensatory and punitive damages, and attorneys’ fees.

The Supreme Court, in Patterson v. McLean Credit Union, held that Section 1981 did not prohibit racial harassment or other forms of racial discrimination in the employment context. Congress enacted the Civil Rights Act of 1991, in part, to overrule Patterson and amend Section 1981 to expressly prohibit all forms of racial discrimination in employment. Specifically, the Civil Rights Act of 1991 expressly defined the phrase “make and enforce contracts” in Section 1981, to include the “making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” The Civil Rights Act of 1991 strengthened Section 1981 by amending it to cover, in the employment context, “the claims of harassment, discharge, demotion, [lack of] promotion, transfer, retaliation, and hiring” based on race. The Civil Rights Act of 1991, however, did not address extraterritorial application of Section 1981, as it did for Title VII and the ADA.

The federal courts have refused to apply Section 1981 to persons working outside of the United States. Courts have held that the plain language of Section 1981, granting rights to all “persons within the jurisdiction of the United States” and “in every State and Territory,” expressly confines the reach of Section 1981 to the United States.

50. Theus, 738 F. Supp. at 1254.
Courts have also examined the legislative history behind Section 1981 and found that it evidenced no congressional intent to apply Section 1981 outside of the United States. In *Theus v. Pioneer Hi-Bred Int'l, Inc.*, the Southern District of Iowa examined Section 1981’s enabling statute, the Civil Rights Act of 1866, which granted “citizens,” defined as persons born in the United States, certain rights within the United States. The court observed that, although the Voting Rights Act of 1870 amended Section 1981 to change “citizens” to “persons” and thereby extended the protections of the statute to aliens, the 1870 amendment did not change the statute’s reference to “every State and Territory.” Therefore, the court concluded, the legislative history of Section 1981 does not show a congressional intent to expand the statute’s scope beyond United States boundaries.

In sum, Section 1981 cannot be applied to American citizens employed outside of the United States, and an employment discrimination claim under that statute must arise out of occurrences within the United States.

V. NEW YORK STATE HUMAN RIGHTS LAW, N.Y. EXEC. L. § 296 (“NYSHRL”)

The NYSHRL is the central anti-discrimination statute under New York State law. That statute provides, at N.Y. Exec. L. § 296(1)(a), that it shall be “an unlawful discriminatory practice”:

> [f]or an employer or licensing agency because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The NYSHRL authorizes the recovery of uncapped compensatory and consequential damages, but no punitive damages or attorneys’ fees. Thus, the NYSHRL, which may be enforced through a plenary action in state court, a

51. *Id.*
52. *Id.*
53. *Id.* The court also analogized Section 1981 to its “legislative cousin,” the Fourteenth Amendment to the U.S. Constitution, which contains language similar to Section 1981 (No state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1) and relied on the fact that the Fourteenth Amendment does not apply extraterritorially. *Theus*, 738 F.Supp. at 1254.
pendent state claim in federal court or a state administrative proceeding, offers claims and damages unavailable under federal anti-discrimination laws, i.e., unlimited compensatory damages and protection from discrimination on the basis of sexual orientation and genetic predisposition.

The NYSHRL can be applied extraterritorially, i.e. outside of New York State, in circumstances quite different from those that permit extraterritorial application of the ADEA, Title VII and the ADA. Section 298-a of the NYSHRL states that the law applies to acts of discrimination: committed in New York State; or committed extraterritorially by a state resident or a non-state resident against a New York State resident. Discrimination committed extraterritorially by a non-resident gives a state resident the right to an administrative proceeding before the New York State Division of Human Rights, while discrimination committed extraterritorially by a state resident against a state resident gives the state resident the right to a private civil action.

To show that discrimination was "committed" in New York State for the purposes of Section 298-a of the NYSHRL, a plaintiff employed outside of New York must show that the decision to act in a discriminatory manner originated in New York. This is a difficult standard to meet. In *Iwankow v. Mobil Corp.*, the plaintiff claimed that he was discriminated against on the basis of age after he was employed by the defendant in England for three and one-half years and then terminated as part of a world-wide reduction in force. The Appellate Division, First Department held that the plaintiff could not state a claim under the NYSHRL even though the termination occurred as "part of a world wide reduction in force . . . decided upon at corporate headquarters in New York" without an allegation that "the decision to implement the reduction in force in an age-discriminatory manner originated at corporate headquarters."
If an employee employed outside of New York State cannot show that the discrimination at issue was “committed” in New York State, he or she can assert an NYSHRL claim only by showing that he or she is a New York State resident.\(^6\) The NYSHRL, however, does not define the term “resident” for the purposes of Section 298-a. In *Torrico*, the Southern District of New York observed that, where, as in the NYSHRL, “a statute prescribes ‘residence’ as a qualification for a privilege or the enjoyment of a benefit, New York courts have interpreted the statutory term ‘residence’ to mean ‘domicile.’”\(^6\)\(^3\)

“Domicile,” in turn, is defined as residence or physical presence in New York State plus an intent to remain in the state indefinitely,\(^6\)\(^4\) or an intent to return to the state from some other location.\(^6\)\(^5\) A trip to or a stay in a foreign country, “no matter how long continued, without any intention of remaining there permanently, does not result in a change of domicile.”\(^6\)\(^6\) Courts generally ascertain domicile by considering the “the entire course of a person’s conduct,” including, but not limited to, “the place of his family ties, voter registration, tax liability, driver’s license and vehicle registration, business activities, bank accounts, social activities and religious affiliations.”\(^6\)\(^7\)

In the context of foreign employment of American citizens, courts have adopted a “strong presumption in favor of a domestic [U.S.] domicile rather than a foreign domicile.”\(^6\)\(^8\) That presumption appears to only hold, however, if the plaintiff exhibits an intention to return to the United States. In *Kavowras v. Pinkerton, Inc., U.S.A.*, the plaintiff, a native New Yorker, sued for defamation after his employment was terminated in China. The plaintiff paid taxes in New York State, listed his family’s Brooklyn, New York house as his permanent residence on his visa, had a New York State driver’s license, registered his car in New York State, maintained a bank account in New York State, and was certified as an emergency medical technician in New York State. The Southern District of New York found, however, that the plaintiff lacked domicile in New York State for the purposes of diversity jurisdiction, because the plaintiff had no articulable plan to return to the state permanently, as evidenced by the fact

\(^{62.}\) N.Y. Exec. L. § 298-a.
\(^{63.}\) *Torrico*, 213 F. Supp. 2d at 407-08.
\(^{64.}\) *Id.*
\(^{66.}\) *Torrico*, 213 F. Supp. 2d at 409.
\(^{67.}\) *Morrison*, 1996 WL 403034 at 1; *Bevilaqua*, 642 F. Supp. 1072 (S.D.N.Y. 1986) (in which the plaintiff remained domiciled in New York after he returned to his parents’ home in Virginia, where the plaintiff had an apartment in New York, attended classes in New York, had had a full-time job in New York, paid New York State income taxes, and was registered to vote in New York).
that he obtained employment with two other companies in China after the

Significantly, although non-United States citizens working for an Ameri-
can employer abroad cannot bring an action under federal anti-discrimination
laws, they may be able to bring an action under the NYSHRL, if they can show
domicile in New York State.\footnote{Torrico, 213 F. Supp. 2d at 408-9.} In Torrico, a Chilean citizen resided in New
York State before commencing a four-year temporary assignment to Chile for
a New York employer. During that temporary assignment, the plaintiff’s
employment was terminated. The Southern District of New York held that the
plaintiff could claim domicile in New York State because the plaintiff had, prior
to the temporary assignment, resided and worked in New York and because the
assignment to Chile was temporary. Accordingly, the court held, even if the
alleged discrimination was committed outside of New York State, the plaintiff
could pursue a claim under the NYSHRL as a New York resident.\footnote{Id. at 410.}

VI. CONCLUSION

The ADEA, Title VII, the ADA and the NYSHRL can, under certain cir-
cumstances, offer significant protection to American citizens and/or New York
State residents who suffer discrimination while working abroad. If those
statutes can be applied extraterritorially, they can provide expatriate workers
with claims, remedies, discovery and litigation advantages that may be other-
wise unavailable. Applying these anti-discrimination statutes to expatriate
workers, however, requires careful legal and factual analysis, given the many
variables that bear upon the issue.
What is the connection between international law and literature—the subject of this meeting? The connection of course, is to be found in the practice of storytelling and narrative. It is the act of storytelling that brings international law and literature together as disciplines and as practices. International law lives on narrative and so does literature. Reasoning in international law depends on the ability to tell a good story, and good story telling in literature depends on the ability of the storyteller to do exactly the same thing. Of course, it is in the telling of the story where the creative art is to be found. Good storytelling requires that one construct the story in a way that is interesting, compelling, and simply enjoyable.

It is in the construction of reality that international law and literature relate and intertwine. A good lawyer knows how to construct facts by constructing a word story of reality, and a good writer of literature will do exactly the same in constructing a good story for the reader. Of course, not all narratives are equal. Sometimes the world changes and then the narratives of the past no longer make sense. Then, one would expect that a new story would be constructed to make sense of the current situation. On the other hand, some stories are so powerful that they are slow to die. When this happens, the continuation of the story itself comes to construct the reality for its readers.

One would have thought that the narrative of public international law, at least as it was once described by legal scholars such as Myers McDougal, Harold Lasswell, and Eugene Rostow, had long since past.¹ In the golden age of international law, McDougal and others helped to develop the notion that international law could be something other than “political authority” or just “politics” by any other name. The self-image of international law, as being something other than politics, developed at a time when legal scholars fell in love with the idea of policy analysis and used it to defend “Rule of Law” thinking in international law. International lawyers following McDougal’s lead adopted the view that law could be used as an instrument to remodel the world.

in accordance with American democratic principles and values. The goal was to develop international legal relations on the basis of policy, which was soft and flexible. Instead of viewing international law as merely a collection of rules and doctrines, McDougal insisted that we regard international law as a process that was slowly evolving into a system of world government that resembled American liberal democracy.

The realities of the Cold War and then later the Vietnam War made it apparent, however, that the McDougal-Lasswell story of international legal relations—the one based on the notion of "one world governed" by democratic policies—was a pipe-dream. During the Cold War, policy analysis of international law became a cloak for Cold War chauvinism; during the Vietnam War we learned how futile it might be to use American military power to remodel a foreign culture in accordance with American ideals of liberal-democracy. If we learned anything from Vietnam, it was that the "best and brightest" policy analysts were blind to the international relations of the diverse culture in Vietnam. We also paid a dear price in terms of blood and money in our attempt to remodel Vietnam in accordance with American values. Consider the results of that war. At the end of the Vietnam war, the communist regime in North Vietnam remained in control of not just South Vietnam, but Cambodia, and Laos as well, and not one of the democratic goals of the United States was ever achieved by military intervention.

By the end of the Vietnam war, international law had lost confidence in its ability to define itself as being separate from political authority. Contrary to the story that was told about international law by scholars who continued to believe in the McDougal-Laswell theory of international law, the world was not ready to be remade in the image of the Untied States. Yet, there is an important aspect of the McDougal-Laswell story that remains alive today and continues to construct our reality about international public law. Even while many modern international lawyers are quick to dismiss the policy-science storyline of the McDougal-Laswell story, these same lawyers continue to believe that the Rule of Law governs international legal relations. International law continues to be taught in American law schools as a collection of rules, treaties, and conventions that are slowly evolving into a global Rule of Law. Of course, the reality of our world is far from being ruled by anything like the Rule of Law imagined by American international legal scholars. The reality of the run up to the war in Iraq reminds us that international law is something that is brushed aside in the face of Western values and politics. The law schools, nevertheless, continue to teach international public law as if the Rule of Law did in fact govern the world. It was as if, as David Kennedy put in 1988, the discipline of
international law as taught in North American law schools had taken on the appearance of a "discipline which had lost its way and kept its jobs."2

The idea that "the rule of law, not man" governed the world, powerful as it is, continues to be dogged by the reality that laws are not self-enforcing; someone had to interpret the rules and in the act of interpretation, the rules will always be subject to manipulation of powerful elites. The narratives of public international legal scholarship, nonetheless, seem legitimate and compelling because we are motivated to believe that international law can be something other than just "political authority." There may have been reason for believing in the Rule of Law story before September 11, 2001 (9/11). Recall what the world was like in the 1990s.

By 1989 we witnessed the collapse of various communist regimes and the fall of the Berlin Wall. The fall of the Berlin wall gave new hope for those who continued to cling to the "one world" narrative of the Rule of Law. The fall of communism reinforced the belief that the world could be remodeled in accordance with the values and social practices of Western democracies. For a brief moment in history, it did seem that the entire world was evolving into a free society, democratically organized in light of Western values. There is now reason for believing, however, that the "woven world" optimism of the 1990s was just another pipe dream of global enthusiasts who thought that American capitalism and globalization would soon take over the task of world governance.

First, there was the terrorist attack on 9/11; then the war on terror; followed by the Iraq war; and homeland security. We were back to building walls that separate us from dangerous "others." The world did change after 9/11; the Rule of Law "collapsed" on March 19, 2003, when President George W. Bush delivered his war letter to Congress and issued his order to launch three dozen Tomahawk cruise missiles on a "target of opportunity" in Baghdad. With the submission of a letter and the launching of three dozen cruise missiles, the President made it clear as never before, that the United States would no longer rely on the authority of the international legal community in deciding when and where to use force against other nations of the world community.

In refusing to wait for Security Council approval for the use of force against Iraq, the United States went on record that it would no longer comply with the Rules of International law in the war on terror. The Unites States, as the single dominant super world power, would instead permit a single person, the President of the United States, to decide when force would be used in waging future wars against terror. The idea that war would be used as a legitimate tool of foreign policy was now an acceptable instrument of international legal relations. Preventive use of force, once thought to be a reason for declaring war and something that was thought to be unacceptable in

2. David Kennedy, A New Stream of International Law Scholarship, 7 Wis. INT' L J. 1, 6 (1988).
civilized international relations, was now part of the official international policy of United States and the so-called "coalition of the willing."

What gave the President of the United States the appearance of legal authority was not the Rule of Law, but rather a war resolution enacted by Congress on the eve of a mid-term election year, which many now regard as an act of strategic political opportunism. Congress gave the President the authority of a war resolution so he could have leverage in the United Nations. However, when the French and Germans threatened to veto the United States in the Security Council, then the President was able to say to the world that he did not need the permission from the United Nations or from anyone because he was already authorized to go to war. The war in Iraq was, without a doubt, a huge exercise of political opportunism; remember how the President was able to persuade lawmakers in the United States to ignore their own Constitutional duty to declare war by raising fears about Weapons of Mass Destruction (WMD) in the hands of Saddam Hussein. The narrative about the meaning of 9/11 and the fears generated about imaginary WMD made it relatively easy for lawmakers in the United States to go into denial about the Rule of Law.

With a congressional war resolution in hand, the President was able to claim that he was authorized to wage war against Iraq unilaterally and that he was required to go to war to defend the Rule of Law from the threat of future terrorist attacks. Ironically, the narrative about the Rule of Law became a reason and rationale for preventive war and for violating international law. For the first time in American history, a President took the nation to war before anyone, Congress, the United Nations, or even the President himself could declare a "war emergency." Rule of Law thinking had thus come full circle in justifying the kind of raw power that was once exercised by tyrants and kings. Where there had been two checks on presidential war power in the first Gulf War of 1991: one in the Security Council of the United Nations; the other in Congress, there were no checks in the second "Iraq" War. International law now seems rather quaint when viewed in the Post-Iraq war context.

In the face of the fears of another 9/11 and WMD, it is far from clear whether the American people want their President to obey international legal conventions and rules. It may well be that the rules of international law have "collapsed," as Michael J. Glennon stated in an article in Foreign Affairs, written shortly after the invasion of Iraq. What was "lawful" or "unlawful" no longer seemed to be pertinent to the question of whether force should be used. If the terrorists are not going to play by the rules, why should we? Would it not be better to cut down the Rule of Law to get to the terrorists?

Michael Glennon asserted that the use of force prevailed over the Rule of Law because the threat of WMD proliferation and the danger of global terrorism

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had created a new world reality based on unsupported threats to the national security. As Glennon put it: “That the world [was] at risk of cascading disorder [and this danger] place[d] a greater rather than a lesser responsibility on the United States to use its power assertively to halt or slow the pace of disintegration.”\(^4\) However, once America announced its decision to maintain its world preeminence as a superpower by essentially deciding for itself whether to go to war, the United States placed itself in the position of rejecting the Rule of Law, and in effect announced that it favored the use of political authority of nationalism in deciding international disputes. Of course, the danger is that someday a nation state will decide to use its power against a rival and the example of the Iraq war will be a powerful narrative legitimating such action. In this way, the fault lines of world power have been shifted to a new terrain where war becomes, once again, a thinkable alternative to diplomacy.

Michael Glennon says that we must go “back to the drawing board” and rediscover a new legal order to deal with reality of a unipolar world with the United States “at the wheel” of power.\(^5\) Going back to the drawing boards would require that we construct a new narrative about international legal relations; one that would permit the super power to pick and choose the rules other nations of the world must obey. Now that story will be hard to tell. However, before we submit to the fears of terrorism and accept a world dominated by United States military power, and before we begin the task of constructing a new narrative for international legal relations, we might want to consider narratives about what can happen when we ignore international legal community and take on the task of remodeling the world in accordance with the values of the United States. This is where literature comes into my narrative. There are important lessons we can learn from the narratives found in literature about what can happen when one person or one nation seeks to govern the world.

We might start with a classic from the Greek tragedies. Homer’s *Iliad*, for example, may be the right literary text for our time. Within the story of the *Iliad* one can find the narrative of the conquering hero turned tyrant.\(^6\) The story starts with noble intentions of a Conquering Hero, the defeat of Troy, and then later the Conqueror’s descent to tyranny and corruption. The story can be heard today in media interviews with American soldiers in Iraq who report that they are no longer sure who the “bad guys” are and that they are not even sure if they are the “bad guys.” Tony Amersterdam and Jerome Bruner in their book, *Minding The Law*, demonstrate how this Greek tragedy sets out a plot that

\(^4\) Id. at 34.

\(^5\) Id. at 31.

\(^6\) See THE ILIAD OF HOMER (Richmond Lattimore trans., 1951).
reoccurs in constitutional law and perhaps it can be a useful text for understanding exactly what is at stake in the war on terror. \(^7\)

We also might want to consider how the narrative of preventive war resonates with stories from literature about the clashes of fidelity to law in the face of evil. One classic story that comes to mind is the story of Sir Thomas More and Roper in Robert Bolt’s *A Man for All Seasons*. Sir Thomas More and Roper argue about the validity of obeying the law in the face of evil and Roper objects to the notion that the Devil should be given the benefit of the law. \(^8\)  Sir Thomas challenges him: “What would you do? Cut a great road through the law to get after the Devil?” “Exactly so,” Roper declares, “I’d cut down every law in England to do that.” \(^9\)  Sir Thomas retorts:

Oh? And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? This Country’s planted thick with laws from coast to coast—man’s laws, not Gods—and if you cut them down—and you’re just the man to do it—do you really think you could stand upright in the winds that would blow then? \(^10\)

These lines resonate powerfully with presidential war rhetoric that justified taking the nation to war without United Nation consent, and in clear violation of the United Nation Charter. Roper sounds a lot like President Bush on the eve of the Iraq War, and Sir Thomas can be heard in the critique of preventive war made by France and Germany in the Security Council of the United Nations. Is there not a point to Sir Thomas’ retort to Roper? Didn’t France and Germany have a point in objecting to the idea that United States should be given *carte blanche* authority to decide for itself when war should be waged against a member of the United Nations (UN)? If we cut down the Rule of Law to get to the terrorists, will we be able to stand up in the winds that blow after international law is no longer relevant? Of course, not everyone would agree that this is the lesson to be gleaned from a reading of Robert Bolt’s story.

Maybe, the Rule of Law is simply undefinable; maybe “there is no there, there.” \(^11\)  For many, the Rule of Law is nothing more than a cliché, an expression used for rhetorical purposes. However, even if one is doubtful about

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9. Id.

10. Id.

the Rule of Law, the narratives found in literature about law can be useful in determining how Rule of Law thinking can be twisted to support tyranny. Is that not, as Richard Weisberg has argued, the lesson of the Jews when Germany occupied France, and when the Rule of Law supported and legitimated official tyranny in France during World War II. Is this not a lesson for the world we now inhabit after 9/11? A critical reading of Melville's *Billy the Budd, Sailor*\(^2\) can be fruitful for understanding how justice can suffer in the face of narratives of national emergency brought about in times of war. We need to remind ourselves of the lessons of these stories, because they provide needed insight for understanding what is at stake, now in America with the Home Land Security, and the United States of America Patriot Acts. The war on terror is still too young to know the full implications for international legal relations of the future. It is not too early, however, to assess whether mistakes have been made in the narratives we tell to justify the commission of war in violation of the Rule of Law.

In *War and Responsibility*, the late John Hart Ely, writing in the 1990s, looked back on the Vietnam war, including: the secret war in Laos; the bombing in Cambodia; and the notorious Tonkin Gulf Resolution of 1964 that authorized President Johnson to commit the nation to war, concluding that war powers of the United States presidency were in a real mess and that if something was not done soon, we might lose sight of the importance of placing checks on presidential war powers.\(^3\) Nothing was done and we seem to be stuck with a series of wars, justified by war emergency and brought about by imaged fears of terrorism and *WMD*. This has presented unique dangers of major disruptions in normal international legal practices and good world governments. We will not be able to do anything unless we first understand how the narratives of the past continue to shape and limit the possibilities for the future direction of international legal relations. Understanding the narratives of international law and learning from the lessons to be found in the stories from literature about similar human dilemmas posed by times of great emergency, can help us find our way once again to a more peaceful and sane world order.

I am not an idealist. I am not suggesting that by reading Dickens or Melville we will come to discover the mistakes of the Iraq war. On the other hand, I am saying that literature and poetry can be a fertile ground for self-discovery of the human condition and just might enable us to better understand other people of other cultures. Three billion people live on less than two dollars a day; two billion lack electric power. Narratives of international law that fail to come to grips with these realities will always be the subject of suspicion.


Rule of Law thinking will never survive if it is nothing more than an expression of American self-interest. We say we are for free trade, but then we adopt trade rules that favor American interests at the expense of the interests of other nations. If there is to be an enduring Rule of Law, it must be one that understands and speaks to the stories of all people of the international community without falling prey to politics of self-interest.

In the emerging new world after 9/11, the “international” is no longer something that is “out there” or “foreign” to our national identity. What was once foreign and dangerous is now part of our national identity, whether we like it or not. We have closer contact with aspects of diverse new cultures that are hostile and dangerous to our world. We can either build walls that attempt to keep others out to keep the homeland safe, or we can begin to build new alliances based on real understanding of other people and other cultures. If we want to understand other people and other cultures then we need to know something about their culture, their law, and their literature.

Ironically, international legal policy-makers continue to rely upon the old McDougal-Lasswell story about international legal relations that once proclaimed that liberal-democratic values could transform the world into a democratic global “free society.” Hence, we wage war in Iraq so that the Iraqi people can embrace Jeffersonian democracy. We send missiles to Iraq so that we can liberate the Iraqi people from tyranny. We destroy the infrastructure of their cities so that we can liberate the cities and free the inhabitants. It is as if we forgot the story of Vietnam War where American international policy sought to remodel a nation in accordance with American liberal-democratic ideals to no avail. The world was not ready to accept American values in 1969 and we can not expect the world to have a change of heart in our time. The ongoing struggle on the streets of Baghdad should have reminded us by now of that lesson.

The point is not that reading a great classic will tell us what to do in the war on terror, rather the point is that literature may give us pause to consider what is at stake in this war and what it is that is worth fighting for. As my friend and colleague Lawrence Joseph recently explained in an editorial in the Metro section of the New York Times: “Writing a poem does not stop the killing of innocent people, but it is an act of resistance. The arc of all our lives is accumulated violence, but with this also comes intensification of the will to live and to love.”14 It is the inherent human struggle between love and hate that now seems to be embroiled in the war on terror. There is an essential human lesson to be discovered in our great literary classics about this struggle, and those lessons can be useful to us in deciding how to construct stories about a world we want and deserve.

I. INTRODUCTION

Academic perspectives on the issue of Self-Determination are in abundance as the International Standards with respect to the Rights of People and their Rights to Self-Determination have taken huge steps in the last two decades. This has resulted in a large number of a secessionist movements, claiming various forms of Self-Determination, in today’s geo-political landscape. Furthermore, when these movements of Self-Determination embrace terrorism as their only act of expression, we find ourselves immersed in a quagmire hitherto seen in the World stage. Against this challenging backdrop, we will
revisit the issue of Self-Determination within the evolving framework of International Law, where the Right of sovereign Nations must be taken into account while conferring legitimacy to a People’s movement. This issue of sovereignty of a Nation is critical in our study to develop the proper context in which a legitimate People’s Right to Self-Determination can be distinguished from the multitude of illegitimate ones mushrooming every nook and corner of the globe. In this context, we must identify the relevant actors, the minorities asserting their Rights to Self-Determination and the Nation State being accused of illegally depriving those very Rights. This is because, more often than not, international politics and the alignment of Nations either over dramatize or trivialize the legitimacy of claims for Self-Determination. This is done by casting blinders on the real issue or lumping the various forms of pseudo or illegitimate Self-Determination under one thread. Therefore, our objective in this monograph is to clarify some of these misconceptions that accompany legitimate Rights of Self-Determination.

The controversy surrounding the legitimate Rights of People for sovereignty gets murkier in the quagmire of international politics as the Rights of a minority within a Nation State gets misconstrued as the Rights of a People. Often times a Nation State is accused of demeaning and degrading the status of People to that of a minority by use of State power and thereby hindering their legitimate Right of sovereignty. On the other side of the coin, rogue States, or terrorist outfits utilize the misguided concept of Self-Determination for the fulfillment of their nefarious intentions. How is this possible? Particularly, when and if in fact, the status of People is clearly defined in International Law. We will examine this apparent quandary.

The issue before us is to determine as to what extent a government may redefine fundamental Rights of minorities with respect to the demands for the Right to Self-Determination by the use of referenda and legislation. This is because, the idea of a Nation State changing the constitutional ground rules affecting citizens without their consent has cropped up in recent years in cases dealing with People’s Right to Self-Determination. However, the legitimacy of such rights can be best understood within the broader context of a Nation’s sovereignty. This will eventually address the issue of legitimacy for various secessionist movements by either recognizing them as a violation of People’s fundamental Rights by the Nation State or treason threatening the sovereignty of a Nation.

International covenants, working groups, and legal writings in this regard have been very successful in developing context and scope regarding Self-Determination. Moreover, International Law has gone through a tremendous metamorphosis during the last decade. But many questions still remain. Our objective in this study is to establish the premise that, Self-Determination must be addressed in the context of original secession of the relevant Nation State.
during de-colonization. This will help us identify legitimate movements for the Right to Self-Determination from the scores of secessionist movements all over the World. One such case we present here is that of Kashmir, where the evolving legal framework on the very concept of Self-Determination is being pitted against the historical context of the region.

We begin our analysis by revisiting the history of Self-Determination in Section II, which is followed by a discussion on the evolving norms of Self-Determination in Section III. We present our case study on Kashmir in Section IV, which is followed by our discussion in Section V.

II. HISTORY OF SELF-DETERMINATION

To trace the evolution of Self-Determination through historical documents and political actions, we must first clarify our understanding of People’s Right as it has emerged over the years. This contextual necessity has historical significance, as Self-Determination cannot exist without it being the Right for the People.

A. Self-Determination As a Right For the People

Both the Right to Self-Determination of People and the Right to sovereignty of Nations regardless of its size has been recognized as a basic norm of International Law. In this context, International Covenant on Civil and Political Rights develops the framework of early versions of Self-determination. The documents entail the following principle:

In those States where 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.

1. U.N. CHARTER art. 1, para. 2.
2. International Covenant on Civil and Political Rights, Dec. 16, 1966, 99 U.N.T.S 171 [hereinafter ICCPR]. The International Covenant on Civil and Political Rights was to take effect ten years later in all nations that had become state parties. Id. at 394. A sufficient number of states had become parties so the ICCPR took effect as planned in 1976. Id. The United States Senate ratified the ICCPR in June 1992. Id. The ratification was with declarations and understandings. Id. at 394-95.
3. The Organization and Functioning of Democracy and the Expression of Ethnic Diversity as a Means of Ensuring the Stability of All States, Economic Development and Better Use of the Peace Dividend for the Benefit of the Third World, INTER-PARLIAMENTARY UNION (Apr. 11, 1992) http://www.ipu.org/conf-e/87-2.htm. The resolution was adopted without a vote by the 87th Inter-Parliamentary Conference on April 11, 1992, where Article 27 of the International Covenant on Civil and Political Rights was recalled. Id. An additional reference can be obtained from the Assembly debate on October 1, 1990 (14th Sitting). See Doc. 6294, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Brincat; Doc. 6302,
Thus, religious, ethnic and cultural minorities have come to be recognized in International Law as *People* that have a Right to Self-Determination. Although States remain the main subjects of International Law, social institutions other than the State have long been recognized as entities with standing in International Relations. People have thus come to be repositories in International Law for the Right to Self-Determination.

**B. Self-Determination Through Historical Documents and Records**

Before we begin to apply the concept of Self-Determination in specific situations, let us analyze the evolution of the theory of Self-Determination. In this context, our thought process is influenced by three main caveats. First, the concept of Self-Determination has evolved over the years. As a result, we must clearly distinguish among the different shades of meaning the concept has attained. The second issue comes from the meaning attributed to Self-Determination in particular instances. That means, in order to legitimize the claim for the Right to Self-Determination, we must determine the identity of the People who have a claim to that Right. Lastly, the concept of secession should not be considered as a necessary condition for the Right to Self-Determination. Because, Right to Self-Determination is not the only vehicle through which secession is achieved. Current State practices have shown that the Right of secession has its own merit and can stand on its own feet. However, we will show in the discussion that follows that, secession is not even considered in cases involving movements where Self-Determination has already been addressed once before.

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Opinion of the Political Affairs Committee, Rapporteur: Mr Baumel.

4. Over the years the definition of People has taken different shades and evolved. The United Nations has recognized the following six categories in which the right to Self-Determination would apply to People:

1. People that constitute independent and sovereign States.
2. People of States which had lost their independence and sovereignty and wish to regain it.
3. People which although constituted in independent sovereign States are prevented by their own dictatorial governments from exercising their right to Self-Determination.
4. People who form part of an independent and sovereign State, but consider themselves absolutely different from the other elements in the country and wish to set up a separate State.
5. People constituting States that were formerly or nominally independent and sovereign but whose independence was forcibly controlled by another State.
6. Non self-governing people whose territories were administered by the so-called colonial powers.
By delving into the archives of recorded history, we find the Right to Self-Determination dates back to World War I, when it was introduced as a norm of International Relations. Since then the concept has evolved in meaning, and has gone through the maturation process via distinct stages. While trying to develop a legal framework for the secession of People from the old empires, the process of legitimizing the Right to Self-Determination witnessed the first phase of its development. It was made clear during the negotiations that ensued, that the Right of disposing of national territory is not in conflict with the Right of sovereignty. In this context, we must be cognizant of the fact that the positive International Law does not legitimize the Rights of national groups to secede any more than the States to dispose of their national territory. Therefore, the Right to Self-Determination cannot be invoked by a simple expression of interest, nor could certain disenfranchised communities within a State use it as

5. Please note the concept of Self-Determination has been in the process of development and modification in international jurisprudence. Two salient points relating to the concept are observed by Professor Garth Nettheim of University of Sydney, as follows:

The United Nations practice has been virtually to confine the right to Self-determination to People in the classic colonial context of governance from a distant European power. For such People, Self-Determination came to be regarded as virtually synonymous with independence. Partly for this reason, national governments appear reluctant to extend the right of Self-Determination to other People, including indigenous People within independent states; for fear that acknowledgment of a right to Self-Determination would threaten the territorial integrity of established states.

Also note that the concept of Self-Determination is beginning to impinge on emerging international instruments relating to indigenous People. In 1989 the International Labor Organization completed revision of its earlier 1957 Convention No. 107. The Convention Concerning Indigenous and Tribal People in Independent Countries, June 27, 1989, 28 I.L.M. 1382. It treated the question of Self-Determination with great caution and even qualified the titular reference to People by article 1(3) by stating, "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." Id. at 1385.


Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963, 2103 (XX) of 20 December 1965, 2181 (XXI) of 12 December 1966, 2327 (XXII) of 18 December 1967, 2463 (XXIII) of 20 December 1968 and 2533 (XXIV) of 8 December 1969, in which it affirmed the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States, having considered the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which met in Geneva from 31 March to 1 May 1970.

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a political tool. When then, can the Right of Self-Determination be exercised? According to Nathaniel Berman,

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 'People' may either decide to form an independent state or choose between two existing ones. In circumstances where sovereignty has been disrupted, the principle of Self-Determination of People may be called into play.

Thus, the legal framework for the concept of Self-Determination originated from the end of colonial rules, and was incorporated as a vehicle to provide Rights to the People dominated by the colonial powers. However, as the colonial powers started crumbling, the Right to Self-Determination started assuming different hues. The Right to Self-Determination was extended to People subjugated by racism by expanding the concept of People from the populations in colonial rule to a larger community under foreign occupation or racist regime. This began the process of an evolving legal framework where the concept of Self-Determination encapsulates a larger section of People.

The scope of the Right to Self-Determination has further broadened by 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 called on

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Recognizing that, in fulfillment of the principle of self-determination, the General Assembly, in the Declaration on the Granting of Independence to Colonial Countries and People contained in resolution 1514 (XV) of 14 December 1960, stated its conviction that all Peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, and that, by virtue of
all States to, "respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect to 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."¹¹

Self-Determination has further been given legal grounds within Article 1 of the International Covenant on Civil and Political Rights of 1966.¹² This constituted a newer development in the Rights of Self-Determination that evolved after the colonization phase passed. Additionally, this entitlement signified the entitlement of a broader spectrum of People, coming from independent, non-racist States. The International Covenant on Economic, Social and Cultural Rights of 1966 was not restricted to only People subjugated under foreign powers, but also to People belonging to national or ethnic groups. Several important references can be made in this context. The United Nations 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 guaranteed the Right to Self-Determination applicable to "all States."¹³ Similarly, the Helsinki Final Act of 1975 defines the principle of Equal Rights and Self-Determination of People as entitlement that belongs to "all People always ... in full freedom, to determine ... without external interference, and to pursue as they wish their political, economic, social, and cultural development."¹⁴ This certainly seems to include the People of that right, they freely determine their political status and freely pursue their economic, social and cultural development, Recalling that in the Universal Declaration of Human Rights the General Assembly proclaimed that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, without distinction of any kind. 

¹². See supra text accompanying note 2.
¹³. Declaration on Principles, supra note 6, at 124. This was adopted by consensus on October 24, 1970. Id. at 121. An assertion in that declaration is worth repeating. It says, "[t]he principles of the Charter which are embodied in this Declaration constitute basic principles of International Law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." Id. at 124.
¹⁴. The Conference on Security and Co-operation in Europe, which opened at Helsinki on 3 July 1973 and continued at Geneva from 18 September 1973 to 21 July 1975, was concluded at Helsinki on 1 August 1975 by the High Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia.
independent States. Again in this context, we are reminded of the definition of Self-Determination as the Right of People to "freely determine their political status and freely pursue their economic, social and cultural development", and do not in itself exclude ethnic sections within a political community. More recently, the People within an independent and sovereign State with a claim to Self-Determination have been more clearly identified as national or ethnic, religious and linguistic minorities.

III. CHANGING NORMS OF SELF-DETERMINATION

The above historical excursion has shown that the Right to Self-Determination developed over time and that its substantive meaning has changed over the years. Most of the current threats to international peace and security emanates from the struggles of groups of People claiming or trying to assert their Rights to Self-Determination. Whether legitimate or not, these claims are creating tensions among States, casting doubts in the nature of democracies, to say the least. Thus, the concept of democracy and Self-Determination is interconnected and we must take a closer look at this concept. One of the controversies surrounding the concept of Self-Determination is that it immediately conjures up the notion of territorial secession. However, Self-Determination should not be misconstrued to mean secession at all times; rather it should lend legitimacy to retention of territorial integrity.

We begin by identifying a path of evolution for Self-Determination in International Law. Self-Determination has originated as enforceable Right to freedom from colonial rule. The United Nation has recognized three types of situations where the Right of Self-Determination is deemed inalienable and enforceable. First and foremost, when the People's Right of Self-Determination emanates from the colonial rule, Self-Determination must be enforced, if no...
other condition makes it unable to enforce. The second situation arises when People claim Self-Determination as a result of having been under the occupation of foreign power. Thirdly, the United Nation has given legitimacy to the situation when racist domination enables the emergence of People’s Right of Self-Determination.

Let us examine the concept of Self-Determination in the context of de-colonization a bit further. Impregnated in the concern for People under colonial rule was the realization that conflict and chaos as a means to break the shackles of the colonial power could also easily escalate into total chaos and destruction of balance of power in the globe. Therefore, it was asserted in the Declaration on Granting Independence to Colonial Countries and People at the United Nations General Assembly on December 14, 1960, “The subjection of People to alien subjugation, domination and exploitation (i.e., the denial of Self-Determination) constitutes a denial of fundamental human rights.”

Not only does this interrelate with the concept of Self-Determination and the Human Rights movement but also enshrines Self-Determination under solid legal principles. However, this provides legal binding to the idea of People’s Right to Self-Determination only when it relates to People Rights under colonial rule. Subsequently the word Self-Determination finds its way as an emancipated principle in the United Nation charter as linked to the notion that “People have equal rights.” This has alone been incorporated into the preamble to the International Covenant on Economy, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Stepping back to our discussion to identify the roots of Self-Determination in International Law, we highlighted three main themes, and questioned whether the United Nation has legitimized the People’s Right of Self-Determination. There are several means through which People can exercise the rights to Self-Determination. One of which is the Declaration of Principles of International Law concerning friendly relations and cooperation among States which notes, “that the creation of a sovereign and independent state, the free association or integration with an independent state or the acquisition of any other friendly decided political states.”


18. On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Following this historic act the Assembly called upon all Member countries to publicize the text of the Declaration and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.” Id. at 78.
In spite of the above, the International instruments do not provide a succinct definition for the Rights to Self-Determination of People; and there does not exist a perfect definition of Self-Determination. This has, therefore, created more shades of gray in today's global arena when we are confronted with trying to determine whether a certain People claim for the Right to Self-Determination is truly legitimate or not. This leads us to examine two distinct frameworks within the broader concept of Self-Determination. The first is concerned with the Right to External Self-Determination, i.e., the Right of People to undertake external roles, such as foreign policy and defense; issues reserved for sovereign States to deal with. The second is the Internal Self-Determination, i.e., the concept of Self-Determination that asserts the Right of People or minorities in a variety of jurisdictions over affairs internal to State, and could range from enhanced participation in governance to autonomy under a sovereign States control.\footnote{International Law, the Right to secede is only one of the options and even that option cannot be exercised unilaterally. Reference re Secession of Quebec, [1998] 2 S.C.R. 217. In fact this question was posed by the Governor in Council of Canada to the Supreme Court (1998) as follows: “[I]s there a right to Self-Determination under International Law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?” Id. at 218. In response, the Supreme Court of Canada (1998) set out its opinion very clearly: The recognized sources of International Law established 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 the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. The International Law principle of Self-Determination has evolved within a framework of respect for the territorial integrity of existing states. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a ‘people’ to achieve a full measure of Self-Determination. A state whose government represents the whole of the people or People resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to the protection under International Law of its territorial integrity. Id. at 282-84. A number of commentators have further asserted that the Right of Self-Determination may ground a right to unilateral secession, when a people is blocked from the meaningful exercise of its Right to Self-Determination internally. Id. The Vienna Declaration adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. Id. We note that the Canadian Supreme Court and much of the literature on the subject (e.g., Steiner and Alston, 2000) draw a clear distinction between Internal and External Self-Determination. “Effective provision for internal Self-Determination (e.g., federalism combined with non-discrimination), far from paving the way for unilateral secession, de-legitimizes any recourse to it. On the other hand, the denial of due internal Self-Determination could legitimize a right of secession. Is there a widely recognized understanding of the term internal Self-Determination?” In this context, the broad definition offered in the above quoted judgments of the Canadian Supreme Court, viz. “a people’s pursuit of its political, economic, social and cultural development within the frame work of an existing state.”}
Determination emanates from cases where it has been determined that the legitimacy of External Self-Determination does not exist. There are several instances where relevant People or territory of a State cannot claim the Right to External Self-Determination. For example, when the issue of Self-Determination has already been determined once during the course of evolution of the relevant People, there should be no claims for External Self-Determination. Similarly, when the relevant minority People forms part of a sovereign Nation and are in no way subjected to a systemic oppression due to their minority status, there cannot be a legitimate cause to entertain Self-Determination. By the same argument, claims for the External Right to Self-Determination cannot be legitimized for part of a Nation State when such State originally emerged as a result of the de-colonization process, unless evidence of systemic oppression can be proven against such State. In the next Section, we present our analysis of the Right to Self-Determination related to Kashmir.

IV. ANALYZING THE LEGITIMACY OF SELF-DETERMINATION OF KASHMIR

Kashmir presents a test to our premise that, a claim for Self-Determination must be dealt with within the dual context of the sovereignty of a Nation and the original secession of the State. As will be clear from our discussion below that, giving legitimacy to any claim for Self-Determination of Kashmir will argue for a case of a faulty de-colonization process that led to the independence of both India and Pakistan. In some parlance, Kashmir is viewed as a disputed territory, whereas in some quarters, there is no question about the legality of Kashmir as an integral part of India. The issue before us is then to analyze this situation with respect to the existing concepts of Self-Determination. Before getting into the legitimacy of the claim for Self-Determination, let us take a look at the historical context through which Kashmir was annexed as part of India.

A. History and Legitimacy of Annexation

The State of Jammu and Kashmir (J&K) acceded to the dominion of India on the 26th October 1947, as one of the remaining acts of de-colonization of British territory. In order to understand the Kashmiri’s Right to Self-Determination, the legality of this accession of Kashmir has to be analyzed. The accession took place under the provisions of the Constitution of India as in force on 15th August, 1947,20 as well as the Government of India Act 1935 as adopted under


Now, therefore, I Shriman Inder Mahander Rajrajeshwar Maharajadhiraj Shri Hari Singhji Jammu and Kashmir Naresh Tatha Tibbet adi Deshadhipathi, Ruler of Jammu and Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession; and I hereby declare that I accede to
provisions of the *Indian Independence Act* 1947. The provision states, “An Indian State shall be deemed to have acceded to the dominion, if the Governor General had signified his acceptance of an instrument of accession executed by the ruler thereof.”\(^{21}\)

Consequently, when the ruler of Kashmir executed the *Instrument of Accession*\(^ {22} \) (26 October, 1947) and Lord Mountbatten\(^ {23} \), then Governor General, accepted the Instrument (27 October 1947), the whole of Kashmir became an integral part of India. This accession was provided within the stipulations granted by the British Government for the Independence of the India. Under this plan, the Muslim majority area in British India would constitute the Dominion of Pakistan and the Hindu majority would constitute the Dominion of India. Additionally, it also was made clear that the decision about Partition related only to British India and the Rulers of the Princely States would be restored their earlier Paramount power. In other words, the Princely States\(^ {24} \) were to become ‘independent’ and the communal basis of the division of India would not affect those States at all. Therefore, the Rulers of the Princely States were free to choose, for example, if they would join India or Pakistan, as long as the accession is agreed upon by the powers granting them that.

Since the Act was enacted by the British Parliament to create the Dominions of India and Pakistan, it cannot be questioned either by India, Pakistan or the United Kingdom, all parties to the agreement. One of the players sponsoring the current air of illegitimacy of Kashmir as an integral part of India is the neighboring country of Pakistan. However, historical events point out that the Government of the Maharaja of Kashmir was recognized by Pakistan. It

\[^{21}\) *Id.*

\[^{22}\) *Id.* To view the actual letter that Maharaja Hari Singh wrote requesting accession into India and also requesting for the Government of India to help protect the people from the invading Pakistan soldiers that were infiltrating Kashmir and causing great instability, http://www.kashmi-information.com/LegalDocs/Maharaja_letter.html.


\[^{24}\) With the exit of the British and the independence of India in 1947 there were 562 Princely States. Aharon Daniel, *India History: Princely States and Provinces*, at http://adaniel.tripod.com/princely.htm. These Princely States were actually ruled by Kings, and some of them, such as Kashmir, and Hyderabad were as large as England. *Id.*
was with this Government that Pakistan signed a *Standstill Agreement* by the exchange of telegrams on August 12 and 16, 1947.\textsuperscript{25} At that time the Pakistan Government did not question the validity of the Agreement with the Government of Maharaja of Kashmir. India’s Right, as well as its duties with regard to Jammu and Kashmir flowed from the fact that accession was recognized and viewed as legitimate since the birth of the two nations. Mr. Warren Austin, the representative of the United States in his speech on February 4th 1948, during the 240th meeting of the Security Council, where he asserted the following, which further corroborated, “The external sovereignty of Jammu and Kashmir is no longer under the Maharaja. With the accession of Jammu and Kashmir with India, this sovereignty went over to India and is exercised by India.”

It is significant that the legality of the accession has never been questioned either by the Security Council or by the United Nations Commissions for India and Pakistan (UNCIP). On the contrary, with regard to the question of accession, the UNCIP legal advisor examined this issue and found that it was legal and authentic and could not be questioned. This fact clearly influenced the proposals made by the UNCIP. The most significant recognition of India’s legal status in Kashmir was contained in the Commission’s reply to protests from the Pakistan Government against the decision of the Indian Constituent Assembly to reserve four seats for the representatives of Jammu and Kashmir. The Commission declined to take up this matter and observed, “In the Commission’s view, it is difficult to oppose this measure of the Indian Government on purely legal grounds.”\textsuperscript{26}

The issue of armed conflict with Indian Military forces has been raised in several quarters in trying to establish legitimacy of the Self-Determination of

\textsuperscript{25} Three days before the transfer of power, the Maharaja of Kashmir sent telegrams bearing identical dates, asking for Standstill Agreement on 12 August 1947 to both the Dominions India and Pakistan to maintain the normal amenities of life such as post office, communications and so on. The agreement, as provided in the Indian Independence Act 1947, would guarantee that till new agreements were made all existing agreements and administrative arrangements would continue. Any dispute in regard to this would be settled by arbitration and “nothing in this agreement includes the exercise of any paramount functions” Pakistan immediately accepted the agreement on 15 August through a telegraphic communication. But the Government of India asked the Prime Minister of Kashmir to fly to Delhi to negotiate the Agreement, or to send any other authorized Minister for the purpose. The non-acceptance of the Standstill Agreement by India immediately aroused suspicion in the minds of Pakistan and it complained that India’s failure to conclude the agreement was indicative of some plan to effect the accession immediately. Before any Minister could reach Delhi, the Pakistan sponsored tribal invasion had altered the situation altogether.

\textsuperscript{26} KASHMIR PAPERS: REPORTS OF THE UNITED NATIONS COMMISSION FOR INDIA AND PAKISTAN (JUNE 1948 TO DECEMBER 1949) 194.
some Kashmiri People. However, based on the legality of accession of Kashmir to India, there should be no confusion to the use of force for the law and order situation in Kashmir. Because, an essential attribute of sovereignty is the Right to maintain an army for national security. Based on the UNCIP resolutions of August 13th 1948 and January 5th, 1949, there has always been recognition of the Rights and obligations of the Government of India to maintain a sufficient force "for the support of the civil power in the maintenance of law and order." In this way, the UNCIP, and authorized World body, not only recognized the Right of India to retain her troops in Jammu and Kashmir in sufficient numbers consistent with the security of the State, but also recognized the responsibility of India for the maintenance of law and order throughout the State.

B. Granularization of Self-Determination or Faulty De-colonization?

It is imperative that the Right of Self-Determination in Kashmir is analyzed within the context of the Instrument of Accession discussed above. We have shown that, the instrument of accession was a legitimate process born out of de-colonization. The independence of India and Pakistan came about as a result of this de-colonization, which in essence was driven by a broader concept of Self-Determination. Thus, granting the territory of Kashmir to an independent India via the process of Instrument of Accession was an act precipitated by invoking the concept of Self-Determination. Therefore, any further granularization of this Self-Determination by responding to an illegitimate demand for Self-Determination of any territory within a sovereign State would question the legitimacy of the de-colonization process that in the first place started this chain of events. It is therefore of utmost importance to take out the blinders of political rhetoric and try to understand the legitimacy of the accession via historical truth.

The Instrument of Accession executed by the Kashmir Maharaja was in no way different from that executed by some 500 other Princely States. It was unconditional, voluntary and absolute. It was not subject to any exceptions. And as Alan Campbell-Johnson wrote in 1951, "The legality of the accession is beyond doubt." The legitimacy of Kashmir's accession to India has further been corroborated as recent as February 11, 1975 Sheikh Abdullah, the Lion Leader of Kashmir, wrote a letter to India's Prime Minister saying, "The accession of the state of J&K is not a matter in issue. It has been my firm belief that the future of J&K lies with India because of the common ideal that we share." More than twenty years thereafter, the same sentiments are being reiterated by the present Chief Minister of Kashmir, Mufti Md. Sayed, and it is worth noting, the people democratically elected him.

Taking a peek at history of the United States of America, we can compare the accession of Jammu and Kashmir (Kashmir) to India with the annexation of Texas by the USA in 1845. Threatened by the menace of predatory incursions from Mexico, independent Texas requested the US government to annex it. The US Congress sanctioned the proposal. When Mexico protested, the US government did not consider its action of annexation as a violation of any of the rights of Mexico. However, when Texas opted out of the Union in February 1861, so as to be unhindered in preserving and propagating slavery, Lincoln battled against the secession, committed as he was to freedom and democracy. If, therefore, minorities of Kashmiri people instigated and nurtured by Pakistan are alienated against India, should not India act like Lincoln?

Even as arguments on the Kashmir issue lingered in the United Nations Security Council for years, two important events of historical significance have further ratified the issue of accession. Firstly, in June 1949 the Prince of Kashmir, on the advice of his council of ministers, nominated four representatives to the Indian Constituent Assembly which was then framing a Constitution for free India. At that time, it was made clear by the Kashmir government, “the accession of the J&K State with India was complete in fact and in law”, the State would be governed by its own Constitution as permitted by the Instrument of Accession. Secondly, the Constituent Assembly comprising representatives duly elected in August 1951 on the basis of universal adult suffrage started deliberations, which ratified the accession on February 15, 1954. This ratification irrevocably incorporated the State of Kashmir as an integral part of the Union of India in the non-amendable Section 3 of its Constitution that came into effect from January 26, 1957.

The above series of acts by the State of Kashmir in no way violated its legal status vis-à-vis India or the United Nations Security Council. Moreover, at no time did any one doubt the representative nature of Kashmir’s Constituent Assembly. Once the People of Kashmir had taken a final decision regarding their future status, the question of any further Self-Determination or plebiscite does not arise either legally or morally. Entertaining the demands of Self-Determination will only undermine the earlier Self-Determination, which in turn will create the illusion of a faulty de-colonization process. This is because, Self-Determination is a one-time process, and any movement to further granularize this would imply reopening the issue of the accession of Kashmir. This would mean going 57 years back in time and examining the legitimacy of the Independence of India and Pakistan. This lies in the simple fact, that the document that called for the accession of the Princely States including Kashmir

28. More information can be found at http://www.kashmir-information.com/.
also legitimized the Independence of both India and Pakistan. We must understand, that reopening and dividing Kashmir on the basis of religious compulsion will surely lead to a replay of the communal Indian and Pakistan Holocaust of 1947. Therefore, it is high time we engage ourselves in a bit of historical revisionism and duly recognize that the Security Council was exceeding its reach by presenting a plebiscite proposal with respect to Kashmir.

We are reminded by a more recent reaffirmation by the United Nations General Assembly where the conflict between the People Right to Self-Determination and the sovereignty of a Nation has been addressed. The declaration says,

The right of Self-Determination of all People, taking into account the particular situation of People under colonial or other forms of alien domination or foreign occupation, recognized the right of People to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of Self-Determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and Self-Determination of People and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

VI. CONCLUSION

The concept of Self-Determination has broadened since the formative days of the post World War I. Along the way, various International bodies, Human Rights groups and the comity of Nations worked hand-in-hand to ensure freedom for all groups. The issue of Kashmir however opened up a whole set of new questions. Firstly, can the Right to Self-Determination be conferred upon a community or a group of People more than once? This situation is somewhat akin to attaching double jeopardy in common Law criminal jurisprudence,

29. The famous Mohandas Gandhi was known for his help in gaining India’s independence from the British. Generally it is accepted that Gandhi lead the largely Hindu movement, and Mohammed Ali Jinnah lead the Muslim majority in Pakistan. While Gandhi promoted inclusion and wanted Hindu and Muslim represented together, Jinnah advocated the division of India into two separate states, Muslim and Hindu. This division came at a painful cost. When the land was divided, violence erupted when Muslim and Hindu minorities were stranded in various areas, and raced to join their new lands. Within a few weeks half a million people had died, and resulted in nothing shy of a Holocaust.

when a defendant cannot be tried twice. If the Right to Self-Determination is enshrined in the framework of International Law, can People’s Right of Self-Determination be judged more than once? We argue, that unless evidence is presented in which a minority group is systematically subjected to State-sponsored oppression, demand for Self-Determination in any form should never be entertained.

This brings us to the legitimate issue of considering whether the current modalities of determining the Right of Self-Determination can actually work in the future. We submit, when the claim of Self-Determination is mixed with terrorism, as has been in the case of Kashmir, a sovereign State cannot ignore the threat to fragment its territorial and political unity. Especially, in the present case, if we consider that the legitimacy of the Instrument of Accession fulfilled the Kashmiri’s Right to Self-Determination. Re-opening the issue of Kashmir’s Self-Determination vis-à-vis the sovereignty of India would mean nullifying the Instrument of Accession, which in turn would nullify the independent status of both India and Pakistan. Can the World body afford to open that Pandora’s box?

Finally, the Right to Self-Determination should always be analyzed in the context of the relevant group’s original secession from the Colonial rule, if such event existed. As the rise of religious fundamentalism continue to influence political agendas all over the World, we will see an escalation of illegitimate demands for the Right to Self-Determination. The issue of Kashmir, and so many other territories in the world should be viewed with the same yardstick and be dealt with according to the sovereign decisions of the relevant Nation State. Otherwise, the whole issue of Self-Determination, in the words of Robert Lansing, (President Woodrow Wilson’s Secretary of State), “would likely breed discontent, disorder and rebellion”, and the world would indeed be a less safe place.
THE EXTRATERRITORIAL APPLICATION OF ANITRUST LAWS

Caterina Ventura*

I. CANADA’S POSITION ON EXTRATERRITORIALITY ................. 461
II. EMPAGRAN ................................................................. 462
III. CANADA’S AMICUS CURIAE ........................................ 462
IV. APPLICATION OF THE REASONABLENESS TEST ............... 463

"An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"1

Chief Justice Marshall articulated this fundamental canon of U.S. statutory construction, reflective of customary international law, in 1804 in Murray v. Schooner Charming Betsy, an admiralty case commonly referred to as the "Charming Betsy" case. As the foreign government representative on this panel, I would like to provide an extraterritorial perspective on the extraterritorial application of domestic law following the Charming Betsy principle.

I. CANADA’S POSITION ON EXTRATERRITORIALITY

Let me start by saying that Canada does not object to the assertion of extraterritorial jurisdiction per se. Canada exercises extraterritorial jurisdiction pursuant to multilateral treaties for egregious offences such as those found in the Convention against Torture. However, Canada is opposed, in principle, to broad assertions of extraterritorial jurisdiction over Canadian individuals and entities arising out of activities that take place entirely outside of the state asserting jurisdiction. This assertion of jurisdiction interferes with the sovereignty of governments and is not in conformity with international law. Under international law, the limitations on the extent to which any single nation can extend its own jurisdiction are generally recognized as flowing from the sovereignty and equality of nations.

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II. EMPAGRAN

It was on the basis of this principle that Canada intervened as amicus curiae in the F. Hoffmann-Laroche Ltd et al v. Empagran case (referred to as Empagran) heard by the United States Supreme Court on April 26, 2004, decision rendered on June 14, 2004.

I will be focusing my comments on the Empagran decision as it articulates the Supreme Court’s views on the extraterritorial application of antitrust law. It also cited the Canadian brief and supported the Canadian position.

The Empagran case involved vitamin sellers (a vitamin cartel) around the world that agreed to fix prices, leading to higher vitamin prices in the U.S. and independently to higher prices in other countries. Foreign purchasers filed a class action under U.S. antitrust law (the Sherman Act) alleging the vitamin sellers had engaged in a price-fixing conspiracy. The Court stated that a purchaser of the vitamins in the United States could bring a claim under U.S. antitrust legislation. However, the plaintiffs in the Empagran case never asserted they purchased vitamins in the United States. Therefore, the Court was essentially left to determine first whether the conduct in question involved trade or commerce with foreign nations and if so, did the conduct have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce. These were the criteria to determine if the Sherman Act would apply.

In its consideration of the issue, the Court referred to the amici curiae filed by Germany, Canada, Japan, and the United States.

III. CANADA’S AMICUS CURIAE

Before I get to the Court’s analysis of the application of the Sherman Act, I would like to give you a sense of the perspective Canada presented to the Court. The Government of Canada submitted that recognized legal principles militate against the broad extraterritorial application of the Sherman Act under the circumstances of this case. United States legal principles limit the exercise of extraterritorial jurisdiction over non-nationals when such exercise is “unreasonable.” These principles parallel principles of international law and comity that are recognized and applied by Canada and other nations.

The legal principles that foreclose the unreasonable exercise of extraterritorial jurisdiction had ready application to the facts of this case. The four factors applied by U.S. courts to determine the reasonableness of an exercise of extraterritorial jurisdiction relate to a nexus with U.S. territory, to a nexus with U.S. nationals, to other countries’ interest in regulation, and to conflict with other countries regulation. Canada argued, that from the perspective of the United States, the respondents were foreign nationals. The transactions on

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which they base their claims occurred solely in foreign commerce and had no effects in the United States or on U.S. commerce. Canada and other nations have a strong interest in regulating, and do regulate the type of activity on which respondent’s claim are based. In Canada, members of the vitamin cartel were prosecuted under the Competition Act in respect of criminally sanctioned cartel activity and its domestic effects. Prosecutions also occurred in the European Union, Australia, and the U.S. Record fines were levied within these jurisdictions against the cartel members.

The laws of some countries, including those of Canada and the U.S., enable private parties to seek compensation in a civil suit for damages for financial injury suffered as a result of the activity of cartel members in the domestic market. While Canada, and most other countries, allow recovery only of the actual damages suffered, plaintiffs in the U.S. are entitled to treble damages if their suit is successful. The assertion of U.S. jurisdiction would conflict with Canada’s enforcement of its own antitrust regime as it would, inter alia, undercut Canada’s immunity program that gives cartel members incentive to report their illegal activity and cooperate with other authorities, because criminal immunity from Canadian authorities would come at the increased cost of punitive treble damages under U.S. law for its worldwide transactions. Canada concluded that it would be unreasonable for U.S. courts to exercise the jurisdiction requested by the foreign plaintiffs.

IV. APPLICATION OF THE REASONABLENESS TEST

The Court concluded that the Sherman Act did not apply. Citing, *inter alia*, the *Charming Betsy*, the Court commenced its analysis with the principle that it ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This allows potentially conflicting laws of different nations to work together. The Court found that application of U.S. antitrust laws to foreign anticompetitive conduct to redress domestic antitrust injury that foreign anticompetitive conduct has caused is reasonable. It is however not reasonable to apply U.S. law when it is foreign harm alone that gives rise to the plaintiff’s claim. The Court asked why should American law supplant Canada’s or Great Britain’s or Japan’s own determination on how to protect their own people from anticompetitive conduct engaged in by their own companies. It noted that several nations filed briefs (Germany, Canada, Japan) arguing that applying U.S. remedies would unjustifiably permit the German, Canadian, and Japanese citizens to bypass their own less generous remedial schemes and that permitting foreign plaintiffs to pursue private treble damages remedies would undermine foreign nations own antitrust enforcement policies by diminishing foreign firms incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.
The Court then concluded that “if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”

The Supreme Court could not have been more clear on the facts. Statutes are to be construed to avoid unreasonable interference with other nations sovereign authority—effectively a restatement of the Charming Betsy, customary international law—200 years later.

3. Id. at 2369.
CURRENT ISSUES IN EXTRATERRITORIALITY: HOW LONG IS THE LONG ARM JURISDICTION OF INTERNATIONAL HUMAN RIGHTS BODIES?

Christina M. Cerna*

I. EXTRATERRITORIALITY IN GENERAL ................................................................. 465
II. DEFINING THE ISSUE .................................................................................. 466
III. THE BANKOVIC CASE .............................................................................. 467
IV. CONCLUSION ................................................................................................. 470

I. EXTRATERRITORIALITY IN GENERAL

One line of cases involving extraterritoriality revolves around the issue of effective control over persons as a result of military occupation and also involves jurisdictional issues. In the European system, the *Cyprus v. Turkey* case developed the doctrine of effective control by Turkish forces of Northern Cyprus as its basis for jurisdiction.1 In the Inter-American system, the leading case is *Coard*, which involved United States control over seventeen Grenadian petitioners who remained under United States detention and had been involved in the overthrow of the Grenadian government.2 The United States contested the admissibility of this case, asserting that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate. The Inter-American Commission held that the petitioners had been subjected to the extraterritorial authority and control of the United States authorities and declared the United States in violation of the American Declaration.3

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3. *Id.*

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II. DEFINING THE ISSUE

The United States has deployed massive military power into Afghanistan to fight against the Taliban regime and al-Qaida. The United States also sent troops to Iraq to attempt an overthrow of Saddam Hussein’s regime and the attempted pacification of the country. During this worldwide war against terror, the United States has also taken into custody, hundreds or perhaps thousands of individuals, at various United States Military bases. These bases include the United States military base at Guantanamo Bay, at the Bagram air base in Afghanistan, and at other undisclosed locations. In addition, the United States has turned over captured al-Qaida suspects from United States custody to other countries where they were allegedly tortured, such as the case of Maher Arar, a Canadian citizen of Syrian origin. Further, northern Alliance forces in Afghanistan, allied to the United States in the Afghan armed conflict, reportedly engaged in atrocities as the Taliban was retreating in November 2001. Should any of these cases reach the international human rights bodies, should the human rights bodies take jurisdiction over them?

In January 2002, the United States started bringing individuals it termed enemy combatants to the United States Naval Base at Guantanamo Bay, Cuba. These individuals were not given the status of prisoners of war and they were not charged with criminal offenses, or any other crimes for that matter. At the domestic level, lawyers who were not granted access to the detainees sought habeas relief on their behalf in federal court in order to have their status clarified. It was unclear what legal regime, if any, they were being held under. Two United States federal courts refused to take jurisdiction, with one declaring that the detainees fell under Cuban sovereignty since no United States federal court had jurisdiction over the territory where the Cuban base was located.

Since it appeared that no federal court would or could take jurisdiction, on February 25, 2002, the public interest lawyers requested precautionary measures from the Inter-American Commission on Human Rights to protect the detainees’ rights to be treated as prisoners-of-war, to be free from arbitrary, incommunicado and prolonged detention, unlawful interrogations and trials by military commissions in which they could be sentenced to death. On March 12, 2002, the Inter-American Commission granted the request and called upon the United States to “take urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.” The Commission justified its assumption of jurisdiction invoking the authority and control exercised by the United States over these detainees:

Accordingly where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be
considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person, under the authority and control of a state, regardless of his or her circumstances is devoid of legal protection for his or her fundamental and non-derogable human rights. The United States ignored the precautionary measures issued by the United States in 2002, but earlier this year, the United States Supreme Court corrected the lower courts' interpretation that federal courts in the United States had no jurisdiction and remanded the cases for reconsideration.

The first hurdle a human rights victim must overcome when presenting a petition to an international human rights body is the jurisdictional hurdle. The petitioner must show that the petition is prima facie admissible, *ratione personae, ratione materiae, ratione temporis* and *ratione loci*.

Admissibility becomes more complicated when looking at the exercise of jurisdiction by a regional human rights body that is requested to extend its jurisdiction to acts that occurred outside the region, as defined by the territorial circumference of the membership of the regional organization. At the regional level, the landmark case in this area is *Bankovic*.

### III. THE BANKOVIC CASE

The *Bankovic* case involved an Application filed before the European Court of Human Rights against seventeen States party to the European Convention that are also members of NATO. The complaint alleges that the NATO bombing in 1999 of a Serbian Radio and TV station (RTS), in Belgrade, violated provisions of the European Convention. The Application was filed on behalf of the victims, both dead and injured, of that bombing. The European Court declared the Application inadmissible because the matter was held not to come within the jurisdiction of the respondent states within the meaning of Article one of the European Convention.

The Application raised important issues of State responsibility under human rights treaties for the killing of civilians during bombing campaigns, with ramifications that extended far beyond this case. Michael O’Boyle, one of the senior lawyers in the court’s registry, noted that few inadmissibility decisions [...] have given rise to such adverse comment and controversy as the inadmissibility decision in the *Bankovic* case. One need only contemplate the

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possible scenarios: For example, do Iraqi civilian bombing victims have a case under the American Declaration, against the United States, for violation of their human rights before the Inter-American Commission? A similar fact situation was dealt with in an earlier Commission case, involving the United States bombing of Panama, during the December 1989 invasion to remove Manuel Noriega from power. A petition was filed on behalf of Panamanians who were killed, injured, or suffered material damage during the bombing campaign. The petition was declared admissible by the Commission in 1993.7

What then is the difference between the European Convention and the American Declaration of the Rights and Duties of Man, to warrant such contradictory decisions on admissibility by the two international human rights bodies? First, the American Declaration, unlike the European Convention, contains no limits on the obligations assumed by states under the Declaration. The European Convention, however, like the American Convention, limits the obligations assumed by states. States must ensure all persons, subject to their jurisdiction, the free and full exercise of the rights and freedoms set forth in the respective treaty.

Bankovic was declared inadmissible on December 12, 2001, because the European Court considered that the NATO respondent states did not have the required effective control of Serbia. The Court stated:

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. (Emphasis added).

Although the respondent States did not exercise public powers normally exercised by the Government, it is a fair but unexplored question to ask of the Court, precisely how much bombing is required to assert effective control of the relevant territory and its inhabitants. Perhaps the bombing of the radio station did not reach such a threshold, but perhaps carpet-bombing of a territory, sustained over an extended period of time, might.

Since the applicants in Bankovic were arguing admissibility, ratione loci, they never really argued the question of admissibility ratione personae, or refuted the incontrovertible fact that the inhabitants of the FRY were outside the system and consequently, outside the scope of jurisdiction of Article one of the European Convention. The applicants stated that they were nationals of the Republic of Yugoslavia and would be left without a Convention remedy, but the respondent states replied that "the FRY was not and is not a party to the

Convention and its inhabitants had no existing rights under the Convention. This is a crucial point since the inhabitants had no rights under the European Convention they could not have had a reasonable expectation of protection or indemnification from the European Court.

Although some human rights activists have advocated that the Inter-American Commission take jurisdiction over victims who were killed or injured by United States firepower in Iraq, similarly one might argue that the inhabitants of Iraq have no reasonable expectations or rights under the instruments of the inter-American system, any more than the Serbs had a reasonable expectation of protection under the European system. This position, however, results in a fundamental unfairness, for why should Iraqis or other aliens, detained by United States forces at Guantanamo, be entitled to protection, whereas Iraqis, detained by United States forces at Bagram or Diego Garcia, are denied the same protection? The only logical response is that regional human rights bodies must draw the lines that circumscribe the limits on the exercise of their jurisdiction somewhere. Perhaps the line should be drawn to coincide with the exercise of authority and control anywhere in the world, or perhaps it should be drawn geographically to limit their jurisdiction to the territorial circumference of the region.

Why this is so is perhaps best explained by the characteristics of a regional arrangement for the protection of human rights. A regional system, like the European system or the Inter-American system, unlike the United Nations Human Rights Committee, which is part of a universal system, is first and foremost defined by geography, i.e. what states and territories comprise the region? The European Court in Bankovic defined its espace juridique:

In short, the Convention is a multi-lateral treaty operating, subject to Article Fifty Six of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the contracting states. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect to the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favor of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.

The United Nations which functions largely through regional groupings, does not conform the composition of these groupings to the composition of the regional organizations. For example, the UN Group of Latin American and Caribbean countries (GRULAC), which most closely corresponds to the Americas region, does not include the United States and Canada, which are members of the Organization of American States (OAS). On the other hand, the

UN Group of Western European and other states (WEOG), corresponds to the European region, but also includes the United States, which is not a member state of the Council of Europe.

Another problem is the fact that regional organizations, such as the Council of Europe, do not include all the states that geographically comprise Europe in their membership. With the tearing down of the Berlin Wall and the end of Communism, states previously defined as Eastern or Central Europe began to be admitted for membership into the Council of Europe. Even Russia was admitted to membership. Other states, geographically within the European region, such as Bosnia and Herzegovina and the Former Republic of Yugoslavia (today Serbia and Montenegro) were considered during the period of armed conflict in former Yugoslavia, not to have reached the requisite threshold of human rights observance required for admission. Absurdly, a regional system created in large part to promote and protect human rights in the region, excluded from its protection and membership within that regional system, the states in which the greatest number of human rights violations were occurring.

IV. CONCLUSION

In my view, this is the central problem with Bankovic, and it has nothing to do with the reasoning of the Court, but with the unwillingness of the Council of Europe to include all independent states within the European region in its membership. This is now being remedied, as Serbia and Montenegro and Bosnia and Herzegovina are both now members of the Council of Europe, as is Monaco, which joined on October 6, 2004. The only remaining European State that is a member of the United Nations and not of the Council of Europe is Belarus.

The Inter-American system has not pushed the jurisdictional envelope much further than the European system, although the larger question of the Inter-American Commission’s exercise of jurisdiction outside the region is still one of first impression, since the Commission has not yet had to confront the issue. Given the charges of torture by United States forces in Abu Ghraib, however, it is not inconceivable that a detainee will file a petition at some point with the Inter-American Commission.
A BILL OF RIGHTS FOR THE EUROPEAN UNION

Elizabeth F. Defeis

The inclusion of the Charter of Fundamental Rights in the Draft Treaty Establishing a Constitution for Europe has a curious history that in some ways is similar to the history of the Bill of Rights of the United States Constitution. The Draft Constitution for the European Union, signed on October 29, 2004 in Brussels by the member states, was the product of a Convention that commenced its work on February 28, 2002 and completed its drafting process on July 10, 2003. The first European Convention drafted the Charter of Fundamental Rights proclaimed at Nice in 2000. The mandate of the second Convention was to simplify the constituent treaties, to increase the democratic legitimacy, transparency and efficiency of the European Union institutions, and to consider the unification of the treaties into a basic treaty, including the Charter of Fundamental Rights. While incorporation of the Charter will have little immediate substantive impact, it is an important symbolic step for the European Union.

Neither the United States Constitution as originally adopted, nor the Treaty on European Union (also referred to as the Treaty of Rome) establishing the European Economic Community and the subsequent constituent treaties contain what can be considered a Bill of Rights. This omission in these documents can be attributed to similar causes relating to the perceived limited power or competence of the central authority.

The United States Constitution was intended to set forth a plan of governance for the new nation in which the central government was to act pursuant to specific enumerated powers set out in the Constitution. Human

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* Professor of Law, Seton Hall University School of Law. Professor Defeis would like to thank her research assistant Jessica Hargis, Class of 2006. This article is a revised reproduction of oral remarks presented at the International Law Weekend 2004, held at the House of the Association of the Bar of the City of New York, from October 20 to 22, 2004.


2. DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, July 18, 2003, 2003 O.J. (C 169) 9 [hereinafter DRAFT TREATY ESTABLISHING CONSTITUTION]. Although the Draft Treaty establishing a Constitution for Europe is technically a treaty, the term Draft Constitution for the European Union or Draft Constitution will be used throughout to refer to this document.


rights were hardly considered during the debates at the Constitutional Convention in Philadelphia although human rights provisions were featured prominently in all of the state constitutions then in effect. In the Federalist Papers, Alexander Hamilton argued that a Bill of Rights would not only be unnecessary but also dangerous. He argued that a Bill of Rights would refer to power not granted to the Federal Government and on this very ground it could be asserted that the Federal Government had more powers than had specifically been granted in the Constitution. The omission of a Bill of Rights proved to be one of the most formidable stumbling blocks for the ratification of the Constitution and it became the unifying force of the anti-Federalists who were opposed to a strong central government and wished to defeat the Constitution. Faced with this development, the supporters of the Constitution pledged that if the Constitution were adopted, the adoption of a Bill of Rights would be the first order of business for the new Congress. If the pledge were not kept, a new constitutional convention would be convened that could once again reargue the issue of redistribution of powers between the states and the national government.

We now know the argument that the federal government of the United States is one of limited enumerated powers did not stand the test of time. Through the expansion of the Commerce Clause and the Necessary and Proper Clause, the activities of the national government have expanded into areas unanticipated by the framers at the Philadelphia Convention, such as education and social welfare. It is only recently that the Supreme Court has once again begun to question the limits of federal power.

What are the similarities between the experiences of the European Union and the United States with respect to human rights? When the European Union was first established in 1957, its primary goal was the attainment of economic integration, albeit with political overtones. Moreover, its competence to act was limited to specific areas designed to further economic integration. Since it was necessary to harmonize the work force throughout the community, the Treaty of Rome did contain a social chapter, which gives limited mention to human rights and addresses worker's rights. Nevertheless its primary focus was to improve working conditions on a harmonized basis throughout the European community.

The Treaty of Rome was not viewed as a guarantor of rights and indeed, its only substantive provision pertaining to rights was former Article 119 now

5. The Federalist No. 84 (Alexander Hamilton).
Article 141, which guaranteed equal pay for equal work to women.\(^8\) However, even this provision was put in for economic rather than human rights concerns. Since some states already had such a guarantee (i.e. France), the guarantee was necessary so that such states would not be placed at an economic disadvantage.

As originally envisaged, human rights were to be protected by the individual member states through their respective national constitutions and laws;\(^9\) indeed each of the original members of the European Union had strong rights protections in their national Constitution or national law. In addition each of the member states were also party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and rights would be protected through the Strasbourg process.\(^10\)

However, when the European Court of Justice ("ECJ") announced the doctrine of supremacy of community law over national legislation in 1964,\(^11\) the doctrine was resisted by some states that had strong human rights provisions in their national constitutions. These states argued that as long as the Community lacked specific human rights guarantees, Community legislation must be viewed through the lens of national constitutional guarantees. In response, the European Court of Justice increasingly stated that the Union would be guided by constitutional traditions of the member states and by the provisions of European Convention on Human Rights and Fundamental Freedoms.\(^12\) In addition, subsequent treaties, primarily designed to strengthen a single internal market and foster monetary integration, acknowledged the goal of promoting democracy on the basis of fundamental rights.

Although the European Court of Justice early recognized human rights as a fundamental aspect of community law, its approach to human rights lacked a coherent policy. For example, although it ruled that the content of human rights protections derived from the constitutional traditions of member states and later

\(^8\) ROME TREATY art. 141.


\(^10\) Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome, Nov. 4, 1950, 213 U.N.T.S. 222. See also Peter Leuprecht, Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998). The European Court of Human Rights sits in Strasbourg, and individuals, as well as Member States, may take complaints of human rights violations directly before the court. Id. at 316. Jurisdiction over Member States is compulsory. Id. at 326. All Member States of the EU and most potential members, such as Russia and Macedonia, have ratified the Convention. Id. at 327. The European Court of Human Rights is separate and apart from the European Court of Justice (ECJ) and the other mechanisms of the EU, such as the Commission and the Council. Id. at 316.


to international agreements to which states are party,\textsuperscript{13} it did not initially apply the provisions of the European Convention on Human Rights to cases before it, nor did it refer to the decisions of the European Court of Human Rights in its opinions. Although it had referred to decisions of the European Court of Human Rights, it had also ruled that without an amendment to the EEC Treaty, the EU could not itself become a party to the European Convention on Human Rights.\textsuperscript{14} The Draft Constitution for the European Union now provides that the Union will enjoy legal personality and is mandated to accede to the European Convention on Fundamental Rights and Freedom.\textsuperscript{15}

As the Union directives and regulations emanating from Brussels become more complex and comprehensive in scope, so the momentum for a charter of rights for the European Union has developed. In July of 2000, the Charter of Fundamental Rights of the EU was proclaimed at the Nice Summit.\textsuperscript{16} However, even though the document has political force, it is not legally binding on member states. Under pressure from the Parliament and various non-governmental organizations, the impetus to include the Charter as a binding document gained momentum. One representative who worked on the new European constitution remarked, "It was a Bill of Rights that created American identity . . . it will be the same with Europeans." Thus, consistent with its mandate, and with relatively little discussion at the Convention itself, a Charter of Fundamental Rights is included in the Draft Constitution for the European Union.\textsuperscript{17}

The Charter contains seven chapters:

1) Dignity;
2) Freedoms;
3) Equality;
4) Solidarity;
5) Citizens' Rights;
6) Justice;
7) General Provisions.

The Equality Chapter prohibits "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion

\textsuperscript{15} DRAFT TREATY ESTABLISHING CONSTITUTION art. 6. See also Re Accession by the Community, 1996 E.C.R. at 265 (discussing that the ECJ ruled that absent Amendment to the treaty, the European Union lacked competence to accede to the Convention).
\textsuperscript{16} NORMAN, supra note 3, at 19.
\textsuperscript{17} Draft Treaty establishing Constitution art. II-1–52.
or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation."\textsuperscript{18}

The Draft Constitution's Charter of Fundamental Rights of the Union incorporates fifty paragraphs enumerating extensive rights including a "right to life" (with the death penalty proscribed); a "right to respect" for "one's physical and mental integrity" (including a ban on the sale of human body parts); a "right to respect" for "private and family life"; a "right to the protection of personal data"; a "right to marry"; a "right to conscientious objection"; the "freedom to hold opinions"; a right "to form and join trade unions"; a right "to have access to vocational and continuing training" and the right "to receive free compulsory education"; a "right to engage in work"; a right for children to "express their views freely" and to have those views "taken into consideration"; "rights of the elderly to lead a life of dignity and independence"; a "right of persons with disabilities to benefit from measures designed to ensure their independence"; the "right of access to a free placement service" for employment; the right of workers' and employers to take "collective action"; and the "right to paid maternity leave and to parental leave."\textsuperscript{19} "Sexual equality is to be ensured in all areas, but so is the government's ability to allow 'advantages in favor of the under-represented sex.'"\textsuperscript{20}

Although a few countries, including France, Germany, Denmark and Sweden, have accepted the Charter of Fundamental Rights, the document is not without controversy. Some member states have been very vocal with their apprehension. For example, initially Great Britain was reluctant to accept the Charter as an integral part of the Constitution in part because it might be used to overturn recently enacted labor legislation.\textsuperscript{21} Great Britain then proposed that the Charter not be a legally binding document but a declaration of the rights of European citizens.\textsuperscript{22} However, the U.K. ultimately accepted incorporation of the Charter with the additional assurances\textsuperscript{23} that its provisions would apply to member states only when they are implementing Union law. Further, in a bow to state autonomy, the Charter is to be interpreted consistent with constitutional provisions of member states. In addition, at the meeting of member states in 2004, the U.K. succeeded in having a new paragraph inserted into the text

\begin{itemize}
\item \textsuperscript{18} \textit{Id.} at art. II-21.
\item \textsuperscript{19} \textit{Id.} arts. II-2-II-52; see also Edward Rothstein, \textit{Europe's Constitution: All Hail the Bureaucracy}, \textit{N.Y. Times}, July 5, 2003, at B9.
\item \textsuperscript{20} See Rothstein, \textit{supra} note 19.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Norman, supra} note 3, at 89.
\end{itemize}
Concerning the application of the Charter of Fundamental Rights. It states that the "explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the Courts of the Union and theMember States." These explanations were drawn up during the Charter drafting process in 2000 and were enlarged and modified during the Convention. They were intended to provide some guidance concerning which rights are merely aspirational and which are intended to be binding and to provide some parameters for certain rights. A special Declaration has been added to the treaty which includes texts of the Explanations in full. However, it is not at all clear how the ECJ will treat the Declaration.

Now more than fifty years after the adoption of the Treaty of Rome, it seems clear that the time has come for a Bill of Rights for the European Union. Certainly, the experience of the United States can provide guidance. While originally thought of as unnecessary and possibly even dangerous, the United States Bill of Rights has proven to be pivotal in protecting rights and keeping the government on course. Clearly, the incorporation of the Charter of Fundamental Rights in the Draft Constitution will have important long term effects, particularly as the Union moves into areas not contemplated in the Treaty of Rome.

U.S. MEMBERSHIP IN UNCLOS: WHAT EFFECTS FOR THE MARINE ENVIRONMENT?

Howard S. Schiffman

I. INTRODUCTION ........................................... 477
II. THE HISTORICAL CONTEXT OF UNCLOS:  
    THE NEED FOR A BETTER TREATY ........................... 478
III. THE BASIC STRUCTURE OF UNCLOS AND ITS OBJECTIVES .... 478
IV. THE U.S. PERSPECTIVE AND PRESENT RATIFICATION STATUS .... 479
V. PROPOSED DECLARATIONS AND UNDERSTANDINGS  
    AFFECTING THE ENVIRONMENT ................................ 481
VI. CONCLUSIONS ........................................... 482

I. INTRODUCTION

The issue of whether or not the U.S. should ratify the United Nations Convention on the Law of the Sea (UNCLOS or the Convention) has been debated since the treaty was concluded in 1982. UNCLOS itself is one of the most significant achievements in international law in the Twentieth Century. The Convention consists of 320 articles and eight annexes. It is comprehensive, if not definitive, in its treatment of ocean usage. A hallmark of UNCLOS is the balancing of interests between coastal states and other maritime users. From the perspective of living marine resources such as fisheries, for example, UNCLOS offers a balance between the conservation and utilization of those resources. Without a doubt, UNCLOS contains numerous provisions addressing matters of the marine environment.

This article attempts to highlight in very broad strokes some of the key issues surrounding U.S. accession to UNCLOS, particularly with respect to the marine environment. It is neither a comprehensive review of the treaty provisions pertaining to the marine environment nor an exhaustive discussion of the law and politics of the advice and consent process as it presently stands in the U.S. Senate. With this parameter in mind, it is instructive to begin by

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understanding the context of this most recent attempt at the codification of the modern law of the sea.

II. THE HISTORICAL CONTEXT OF UNCLOS: THE NEED FOR A BETTER TREATY

The need for a more comprehensive treatment of ocean space became apparent after the four 1958 conventions (produced by UNCLOS I) did not establish a sufficient legal order of the oceans. Although these treaties added considerably to the ocean governance of the time, they were not entirely successful because they were unable to fix the breadth of the territorial sea.

Following the inability of the 1960 conference (UNCLOS II) to improve on the 1958 agreements, specifically the lack of agreement about the limit to the territorial sea, in 1970 the UN General Assembly adopted Resolution 2570 calling for a new conference (UNCLOS III) to produce a comprehensive treaty. From 1973 to 1982, multiple rounds of negotiation produced the bundle of compromises that is UNCLOS. The growing concern for the marine environment of the 1970s was reflected in various parts of UNCLOS. The most significant of which is Part XII entitled, "Protection and Preservation of the Marine Environment." Numerous other provisions express concern for conservation and sustainable use of resources. Of course, the marine environment was just one of several aspects of ocean governance addressed by the Convention. Other key aspects include allocation of maritime zones, delimitation of maritime boundaries, navigation and overflight, mineral exploitation, marine scientific research, recognition of authority to exercise prescriptive and enforcement jurisdiction, the settlement of disputes and many others.

III. THE BASIC STRUCTURE OF UNCLOS AND ITS OBJECTIVES

The most basic goal of UNCLOS is to divide the ocean into maritime zones that more or less allocate the rights and responsibilities of coastal states and other maritime users in those zones. Unlike its predecessors, UNCLOS adopted a limit to the territorial sea. The territorial sea, out to a maximum of 12 nautical miles, is adjacent to a state's coastline. It is that part of the ocean where the coastal state enjoys its greatest rights for applying its prescriptive and enforcement jurisdiction, providing for its defense, exploiting its marine resources and protecting its marine environment. In addition to the territorial sea, UNCLOS provides for coastal states to have an Exclusive Economic Zone (EEZ) out to a maximum of 200 nautical miles. In the EEZ, the coastal state has considerable authority to provide for the exploration, conservation, and utilization of resources. In the EEZ the coastal state specifically has jurisdiction to protect

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and preserve the marine environment.\textsuperscript{3} From the standpoint of fisheries, the regime of the EEZ is significant not only because it allows the coastal state to determine the allowable catch limits in these waters,\textsuperscript{4} but also because many living marine resources are found within 200 miles of a coastline. Perhaps most importantly, the regime of the EEZ allows coastal states to use their prescriptive and enforcement jurisdiction to address a variety of environmental concerns in what amount to wide sections of the ocean.

Apart from the allocation of maritime zones, some of the provisions generally directed to the environment include Article 194, which requires states to take action to prevent, reduce and control pollution. Article 195 requires states to act so as not to transfer "damage or hazards" from one area to another. UNCLOS addresses marine pollution originating from land-based sources,\textsuperscript{5} seabed activities,\textsuperscript{6} dumping,\textsuperscript{7} the ordinary operation of vessels,\textsuperscript{8} and the atmosphere.\textsuperscript{9} In addition, Articles 65 and 120 favor the conservation of marine mammals, cetaceans in particular, over their exploitation.

A particular innovation of UNCLOS is its dispute settlement mechanism. The dispute settlement provisions found in Part XV are flexible and can lead to binding decisions. Part XV creates a tribunal, the International Tribunal for the Law of the Sea (ITLOS), which is dedicated to the interpretation and application of UNCLOS. Under Part XV, UNCLOS members are permitted to designate certain enumerated dispute settlement options should disputes arise with other UNCLOS parties.

IV. THE U.S. PERSPECTIVE AND PRESENT RATIFICATION STATUS

Understanding the U.S. history with the Convention is a useful starting point to address the potential impact of the treaty on any number of maritime uses. Although the U.S. participated in UNCLOS negotiations and achieved many of its goals in those negotiations (most particularly with regard to navigation and overflight rights for military vessels and aircraft), the U.S. ultimately resisted ratification because of the perceived effect of Part XI governing the deep sea-bed. Article 136 declares the resources of the deep sea-bed to be "the common heritage of mankind."\textsuperscript{10} This provision implied an obligation to share

\begin{itemize}
\item \textsuperscript{3} UNCLOS, supra note 1, art. 56(b)(iii).
\item \textsuperscript{4} Id. art. 61(1).
\item \textsuperscript{5} Id. art. 207.
\item \textsuperscript{6} Id. art. 208 & 209.
\item \textsuperscript{7} Id. art. 210.
\item \textsuperscript{8} UNCLOS, supra note 1, art. 211.
\item \textsuperscript{9} Id. art. 212.
\item \textsuperscript{10} Id. art. 137.
\end{itemize}
deep sea-bed resources in a manner that was objectionable to the U.S. and other developed states. Despite this, President Ronald Reagan proclaimed that the bulk of the substantive provisions of UNCLOS would be applied by the U.S. on a provisional basis.

In 1994, in a separate agreement addressing the concerns of developed states, a compromise was reached on access to deep sea-bed resources. President Bill Clinton signed this additional agreement and transferred it, along with the main text of UNCLOS, to the Senate for Advice and Consent. The Senate did not act on UNCLOS until 2003.

In October 2003, the Senate Foreign Relations Committee held hearings on U.S. ratification. All of the testimony taken by the Foreign Relations Committee favored U.S. membership. Among the witnesses were John F. Turner, Assistant Secretary of the Bureau of Oceans and International Environmental and Scientific Affairs of the State Department, and Roger Rufe, President of the Ocean Conservancy. These witnesses highlighted some of the ways in which UNCLOS contributes to the stewardship of the marine environment. In March 2004, the Foreign Relations Committee ordered UNCLOS reported to the full Senate. This included the attachment of 24 declarations and understandings to accompany U.S. ratification.

At about the same time, the Environment and Public Works Committee held additional hearings on UNCLOS. The stated purpose of these hearings was to include some voices opposing U.S. ratification of the Convention. The opponents emphasize the surrender of decision-making ability to the Sea-Bed Authority provided for in Part XI and its accompanying agreement as well as the potential impact of decisions by the ITLOS on U.S. activities. In support of the latter concern, it should be noted that even though the U.S. does not intend to designate the ITLOS as a method of dispute settlement there are certain circumstances under which it might still be subject to its jurisdiction.

As of November 2004, the full Senate had not yet voted on the question of ratification, however, the proposed declarations and understandings of the Senate Foreign Relations Committee, many of which address environmental concerns, are worthy of review. At the outset, it is useful to recall that because of the highly coordinated and integrated nature of its provisions, UNCLOS

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11. The statements of these witnesses can be found at the following website: http://foreign.senate.gov/hearings/2003/hr031021a.html (visited Nov. 13, 2004).


specifically prohibits reservations. On the other hand, UNCLOS does permit a state, when signing, ratifying or acceding, to make "declarations or statements" with a view to the harmonization of its domestic laws with the Convention.

V. PROPOSED DECLARATIONS AND UNDERSTANDINGS AFFECTING THE ENVIRONMENT

The most substantive declaration proposed by the Senate addresses the U.S. option for dispute settlement under Part XV. In this declaration, the U.S. designates a "special arbitral tribunal" to hear disputes arising from the Convention related to:

1) Fisheries;
2) Protection and preservation of the marine environment;
3) Marine scientific research; and
4) Navigation, including pollution from vessels and by dumping. This type of declaration is perfectly permissible under Article 287(1) of UNCLOS. For all remaining disputes, the U.S. opts for arbitration. Arbitration is not only an option under Article 287(1) but is also the default method of dispute settlement under the treaty.

Another declaration proposed by the Senate that affects the environment emphasizes the right to impose and enforce conditions for the entry of foreign vessels into U.S. ports and internal waters. This declaration is specifically directed at the introduction of alien species from ballast water discharge as well as oil spills. In a similar declaration, the U.S. expresses the understanding that UNCLOS supports the authority of a coastal state to regulate the introduction of alien species into the marine environment. Another declaration emphasizes the right of the coastal state to determine allowable catch limits of living resources in its EEZ and to establish terms and conditions for access by other states to those resources. This same declaration expresses the understanding that these determinations are not subject to binding dispute resolution.

Still, another declaration asserts that Article 65, the UNCLOS provision pertaining to conservation and management of marine mammals, lends direct support to the present moratorium on commercial whaling and the establishment of sanctuaries and other conservation measures. The same declaration also asserts that states must cooperate with respect to all cetaceans not just large ones. This declaration is a clear reference to the work of the International

15. UNCLOS, supra note 1, at art. 309.
16. Id. art. 310.
17. Id. art. 287, paras. 3 & 5.
Whaling Commission (IWC) although it does not identify the IWC by name. To understand the context of this declaration, the moratorium on commercial whaling, which has been in effect since the mid-1980s, has come under assault in recent years by pro-whaling states that find no basis in law for the continuation of the moratorium. Furthermore, the reference to "all cetaceans" not just large whales speaks to an ongoing debate in the IWC: that is, whether or not the IWC is competent to regulate small cetaceans (i.e., dolphins and porpoises) as well as the great whales. The effect of this declaration will likely be to lend greater U.S. support to the efforts of the IWC which today has a solidly conservationist agenda.

VI. CONCLUSIONS

By most accounts, U.S. ratification of UNCLOS will have a positive effect on the environment. This is not because the U.S. will be binding itself to any new substantive norms. On the contrary, most substantive provisions of UNCLOS are already part of U.S. policy and have been for many years. Despite this, the conservation of ocean wildlife, the protection of delicate marine ecosystems, and the control of marine pollution are by their very nature multilateral issues. U.S. ratification will demonstrate U.S. commitment to address these problems in a cooperative manner at a time when some view U.S. policy as generally antithetical to multilateral arrangements. The environmental community strongly favors UNCLOS and U.S. ratification would send a message of support.

Among the benefits the U.S. will receive from UNCLOS membership is the ability to have a judge of U.S. nationality serve on the ITLOS and the right to participate in the amendment process of the treaty as provided for in Article 312. The power to amend the treaty is vested in the parties 10 years after the treaty has entered into force.18 The 10-year anniversary was November 16, 2004. The U.S. would be entering the game just as amendments become possible. Admittedly, the question of amendment to such a comprehensive legal instrument is fraught with difficulties, but U.S. membership ensures that any future amendments will only be adopted when the U.S. is a full participant in the process.

The U.S. has a golden opportunity to take a more respected leadership role in ocean governance by embracing a treaty that offers a meaningful, if imperfect, framework for ocean governance. Even though the U.S. has already proven its commitment to the marine environment and willingness to work both independently and with responsible partners to achieve environmental goals, U.S. ratification will highlight those objectives in international affairs. U.S.

18. Id. art. 312.
ratification will energize and elevate the status of UNCLOS in international law. Undoubtedly, the marine environment would be an immediate beneficiary of U.S. participation.
I. INTRODUCTION—AVOIDING HUMAN RIGHTS STANDARDS ........................................ 485
II. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN WARTIME ........................................ 489
III. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW EXTRATERRITORIALLY ........................................ 491
IV. CONCLUSION ........................................... 495

I. INTRODUCTION—AVOIDING HUMAN RIGHTS STANDARDS

When the prisoner abuse scandal in Abu Ghraib prison in Baghdad, Iraq, broke in the Spring of 2004, Lord Lester, a British Parliamentarian, submitted a written parliamentary question to the U.K. government asking the following:

[W]hether the Coalition Provisional Authority or the Coalition Forces are required by law to respect the fundamental human rights of Iraqi people, as defined in the bill of rights contained in the transitional administrative law for Iraq or otherwise; and if not, what recourse is available to the people of Iraq for breaches of those rights by the Authority or the forces.¹

Baroness Symonds, a U.K. Foreign Office Minister, responded, stating that:

[t]he Coalition Provisional Authority (CPA) and the coalition forces as occupying powers in Iraq are required to conduct themselves in accordance with the rules of international law, which includes

respecting the human rights of the Iraqi people. The CPA and the coalition are also responsible for upholding the law of the land, which until a new constitution has been agreed by the Iraqis is the Transitional Administrative Law (TAL). We take very seriously any allegations alleging breaches of human rights. Iraqis will have recourse to the Iraqi justice system for any infringements of their rights in the TAL. For incidents relating to U.K. personnel, it is standard practice for an independent investigation to be undertaken if there is any doubt as to whether the appropriate rules of engagement have been adhered to. If an investigation concludes that there was wrongdoing on the part of U.K. personnel, appropriate disciplinary measures will be taken, including criminal proceedings where necessary.²

Baroness Symonds invokes the “law of the land” somewhat ambiguously as far as its applicability to the CPA and coalition forces is concerned, but even if this law is applicable, judicial remedies in Iraq involving the application of this law to particular cases are barred because of the jurisdictional immunities granted to the coalition in Iraq under CPA Order No. 17,³ which like other CPA Orders continues in force in the post-CPA period under the Transitional Law.⁴ As then acting U.N. High Commissioner for Human Rights Bertrand Ramcharan described this regime of immunity during the CPA period: “[i]n effect, there is immunity for Coalition Forces personnel for any wrongful acts, including human rights abuses, committed in Iraq as far as Iraqi jurisdiction is concerned.”⁵

Baroness Symonds also mentions “the rules of international law, which includes respecting the rights of the Iraqi people.” But which areas of international are being invoked here? In particular, does Baroness Symonds mean only international humanitarian law (the law of armed conflict), or also international human rights law?

Although both the United Kingdom and the United States are parties to the International Covenant on Civil and Political Rights (ICCPR),⁶ neither state

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² Id.
³ Coalition Provisional Authority, Order No. 17, Section 2, CPA Doc. CPA/ORD/27 (June 17, 2004), available at http://www.iraqcoalition.org/regulations/ (last visited April 9, 2005).
appears to have entered a derogation to the Covenant and the United Kingdom has not entered a derogation to the European Convention of Human Rights (ECHR) with respect to its presence in Iraq from 2003. The derogation provisions of the two instruments enable states parties to temporarily suspend the operation of certain rights obligations in times of war or other public emergency. If the ICCPR and the ECHR were applicable to these states in Iraq, one would imagine that the United States and the United Kingdom would regard the entering of some kind of derogation as required in order for them to carry out some of the activities considered necessary in a situation of military occupation and ongoing hostilities, for example prolonged detention of enemy combatants without trial.

In fact the states concerned do not appear to consider their obligations in these treaties to be applicable to their presence in Iraq at all. According to a secret memo prepared for the Department of Defense in March 2003 and leaked in June 2004, "[t]he U.S. has maintained consistently that the Covenant does not apply outside the U.S. or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict." Here, then, applicability is rejected on two alternative bases; in reverse order, these are: (1) subject matter—the ICCPR does not apply to operations of the military during international armed conflict; and (2) territorial—the ICCPR does not apply to the United States outside its territory.

The United Kingdom rejects applicability of the ECHR on different grounds. Adam Ingram MP, the U.K. Armed Forces minister (equivalent to a senior government official in the U.S. Department of Defense), wrote to British Parliamentarian Adam Price MP on April 7, 2004 in the following terms:

The ECHR is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the U.K. in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces. Further, although the U.K. Armed Forces are an occupying power for the purposes of the

Geneva Convention, it does not follow that the U.K. exercises the degree of control that is necessary to bring those parts of Iraq within the United Kingdom's jurisdiction for the purposes of article 1 of the Convention.10

A similar position seems also to have been taken by the United Kingdom Foreign Secretary (equivalent to the U.S. Secretary of State), Jack Straw MP.11 Here, then, we again have two alternative arguments for non-applicability, but of a different character. The first argument is a variant on the territorial argument put forward by the United States: that the ECHR only applies in the territory of contracting states. This does not necessarily rule out applicability to a contracting state acting outside its territory (as the U.S. argument does), so long as that state is acting in the territory of another contracting state. The second argument focuses on the degree of control exercised: Ingram seems to assume that a certain degree of control, apparently over territory ("those parts of Iraq"), is required for the Convention to apply to the U.K. extraterritorially, and asserts that such a situation does not prevail in Iraq.

This article considers whether these views on inapplicability are sustainable. It is divided into two parts based on the two U.S. reasons for rejecting the application of the Covenant: (1) the "wartime" situation in Iraq; and (2) the extraterritorial nature of Iraq as far as the United States and the United Kingdom are concerned.12 The analysis in the second part will require an analysis of the two U.K. arguments.


11. The U.K. Foreign Secretary made the following statements in a Parliamentary Written Answer to parliamentarian Sir Menzies Campbell MP on 17 May 2004: "[t]he government's position is that ECHR rights have no application in Iraq." Jack Straw, Written Answer, House of Commons, 'European Convention on Human Rights,' 17 May 2004, Hansard Vol. 421, Part No. 87, Columns 674W-675W. In a later written answer to Sir Menzies, the Foreign Secretary made the following statement in relation to the applicability of the ECHR to the United Kingdom in Iraq, invoking by contrast the situation in Turkish-occupied northern Cyprus, which the European Court of Human Rights had found engaged Turkey's responsibility under the ECHR: "[T]he citizens of Iraq had no rights at all under the ECHR prior to military action by the coalition forces; furthermore, the United Kingdom does not exercise the same degree of control over Iraq as existed in relation to the Turkish occupation of northern Cyprus." Id. at Part No. 89, Column 1083W. For an example of a case concerning northern Cyprus before the ECHR, see Loizidou v. Turkey (1996) 11 IIHRL 112 ECHR.

12. There are other potential reasons why states might consider international human rights law not to apply extraterritorially. These include situations where the acts in question are not imputable to them but to a separate juridical entity, for example on the grounds that the entity performing the acts has been "placed at the disposal of" a third state for the purposes of the acts in question. See, e.g., Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the work of the Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at art. 6, UN Doc. A/56/10 (2001).
II. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN WARTIME

We begin our consideration of the applicability of human rights law with the question of the relevance of the "wartime" situation in Iraq which renders international humanitarian law applicable. It might be thought that humanitarian law, on the one hand, and human rights law, on the other, are mutually exclusive in terms of the situations in which they apply. When one area of law is in play, the other is not, and vice versa. Humanitarian law applies only in times of "war"; human rights law applies only in times of "peace." Whereas indeed the first contention is correct, the second runs counter to a basic understanding of human rights law. In the Coard case of 1999 concerning the detention of an individual by U.S. military forces during the 1983 U.S. invasion of Grenada (which deposed the revolutionary government instituted following the assassination of the Prime Minister), the Inter-American Commission on Human Rights stated that:

while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict, and this is reflected, inter alia, in the designation of certain protections pertaining to the person as peremptory norms (jus cogens) and obligations erga omnes, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. Both normative systems may thus be applicable to the situation under study.

The applicability of human rights law in times of war is assumed by the aforementioned derogation provisions of human rights instruments. Of course,

15. See id. at paras. 1-4.
16. Id. at para. 39.
a valid derogation by a state is not the same as the non-applicability of that state's human rights obligations. In the first place, the state must make a formal declaration of derogation. In the words of the U.N. Human Rights Committee, this "requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed." Moreover, only those derogations necessary to meet the needs of the war, and proportionate to that need, are permissible. As the Human Rights Committee stated in relation to the obligations under the ICCPR, "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."

Even if a broad series of derogations meet this test, certain obligations are incapable of any derogation, including the obligation not to commit torture and inhuman and degrading treatment and punishment. It follows, then, that in all circumstances, both wartime and peacetime, there will always be a core set of human rights obligations in play, operating in tandem with the obligations under humanitarian law.

As the International Court stated in the Nuclear Weapons Advisory Opinion (reaffirmed in the Wall Advisory Opinion) in relation to the ICCPR, "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." Thus the U.N. Human Rights Committee stated that:

[the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the

17. ECHR, supra note 7, at art. 15(3); see also ICCPR, supra note 6, at art. 4(3).
19. Supra note 17.
20. Supra note 18, at para. 3.
21. ECHR, supra note 7, at art. 15(2); ICCPR supra note 6, at art. 4(2).
interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.\textsuperscript{23}

It is notable that none of these statements make a distinction, as the U.S. memo extracted above does, between international and non-international armed conflict.

It might be asserted that human rights law has no place in a wartime situation. In such a situation, different considerations prevail and to consider the niceties of human rights one would respect in peacetime is to misunderstand the needs of the battlefield. In part, this is an argument for total war—that no standards should operate on the battlefield at all. Such an approach would do away with much of the laws of war. If, however, one accepts the premise of humanitarian law—that military necessity must sometimes be trumped by certain basic standards—then this particular objection to human rights law falls away. The question then becomes whether the restrictions placed on the state during wartime by human rights law strike the correct balance between the need to preserve order and the need to safeguard human dignity. If one examines the law in this area, one sees if anything a somewhat generous latitude accorded to states when the derogation provisions of human rights instruments are interpreted by human rights bodies, especially under the European Convention through the invocation of a broad “margin of appreciation” involving deference to state’s own decision as to what restrictions on rights are necessary to respond to threats to public order. If, then, the application of international human rights law is not somehow excluded by the wartime context in which some of the activities discussed in our study take place, is it excluded because these activities occur extraterritorially, as the U.S. memo suggests in the alternative?

III. APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW EXTRATERRITORIALLY

Most human rights treaties do not conceive state responsibility simply in terms of the acts of states parties, as is the case, for example, in Article 1 of the third Geneva Convention (on the treatment of prisoners of war), in which contracting parties undertake “to respect and to ensure respect for the present Convention in all circumstances.” Instead, responsibility under most human rights treaties is conceived in a particular context: the state’s jurisdiction. The

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23. Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter General Comment 31]. In its earlier General Comment 29, the Human Rights Committee made the following remark: “[D]uring armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State’s emergency powers.” Supra note 18, General Comment 29, at para. 3.
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state is obliged not merely to secure the rights contained in the treaty, but to do so within its "jurisdiction." Thus, a nexus to the state—termed jurisdiction—has to be established before the state act or omission can give rise to responsibility.

The consistent jurisprudence of the main human rights treaty bodies and the International Court of Justice has been to interpret the term jurisdiction under human rights treaties so as to operate extraterritorially in certain circumstances. The second basis for rejecting the application of the Covenant offered by the U.S. Department of Defense memorandum is, therefore, incorrect. The key question is the precise circumstances in which jurisdiction operates extraterritorially.

It is here that the United Kingdom rejects the operation of the ECHR to its presence in Iraq, on two alternative grounds. In the first place, the United Kingdom adopts an argument that echoes part of the dictum of the European Court of Human rights in the Bankovic case relating to the NATO bombing of the radio and TV station in Belgrade in what was then the Federal Republic of Yugoslavia (FRY), now Serbia and Montenegro. In that case, the Court stated that the European Convention applies "in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States." 

Taken out of context, we might read this dictum to suggest that a particular action taken by one state in the territory of another state would not be governed by the human rights treaty obligations of the first state, if the second state is not also a party to that treaty. Under this view, although the concept of "jurisdiction" under human rights treaties is not limited to a state’s own territory, it is limited to the overall territory of contracting states. So states acting outside the territorial space of the human rights instrument are not bound by their obligations in that instrument, thus excluding the ECHR from applying to the United Kingdom in Iraq, and the Inter-American Declaration on Human Rights from applying to the United States in Iraq.

24. See e.g. ECHR, supra note 7, at art. 1; ICCPR, supra note 6, at art. 2. Some obligations are limited to the state’s territory, see e.g., Protocol No. 4 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 46), entered into force May 2, 1968, available at http://www.law.nyu.edu/kingsbury/fall01/intllaw/basicdocs/Protocol4.htm (last visited April 13, 2005).

25. See General Comment 31, supra note 23, at para. 10.

26. Many human rights treaties include a special clause allowing for the application of the rights they contain to be extended to dependent territories. Whether such rights can also apply because of the extraterritorial exercise of "jurisdiction" by the state concerned is beyond the scope of this paper; this question is potentially mediated by the agency issue discussed supra note 12.

However, a closer evaluation of the context of the Banković dictum suggests that this reading is incorrect. In the first place, although out of context it reads like a general statement of principle, in the context of the judgment it is something quite different: a specific response to one of the submissions of the applicants. The applicants had submitted that to find that the acts of NATO states in the then FRY did not take place within those states' "jurisdiction" for convention purposes would "leave a regrettable vacuum in the Convention system of human rights' protection," a problem that the Court had seemed to suggest it was trying to avoid in its earlier case Cyprus v. Turkey. The Court chose to respond to this submission in terms of the specific type of vacuum in protection that had prevailed in the Cyprus v Turkey case, a gap created where a population reside in a state that is a party to the Convention—and have therefore already been granted rights under it—but the state is unable to secure those rights because the territory is occupied by another Convention state.

Clearly in situations like the then FRY in 1999, and Iraq today, this policy consideration does not apply, because the populations affected did not already have rights under the convention by virtue of their state being a party to the Convention. The court was right to reject its application in the Banković case, and would be right to reject it in any case on Iraq. To reject the application of this particular policy basis for extending human rights obligations extraterritorially is one thing, however; to say that such a basis has to prevail in order for such obligations to apply is quite another. The United Kingdom seems to suggest that it does, even though the Court’s dicta in Banković do not make this assertion.

Quite apart from examining the Court was responding to when it made these comments in Banković, two further factors mitigate against the U.K. position. In the first place, the Court’s comments can be considered obiter dicta given that the Court had already reached a conclusion that rendered the case inadmissible, having concluded that the nature of the air strikes by NATO states in the FRY did not render this territory under the jurisdiction of the states concerned as far as the exercise of effective control was concerned.28

In the second place, other cases before the Court before and since Banković have in fact found that states’ Convention obligations can be in play in relation to their activities in other states that are not parties to the Convention. One things here of the Öcalan case, where the Court held that the actions of Turkish agents in relation to the alleged abduction of Abdullah Öcalan in Kenya—not a Convention state—took place within Turkish “jurisdiction” and similarly declared admissible the Issa case brought against Turkey in relation to its

28. Id. at para. 75.
actions in northern Iraq, the very country in relation to which the United Kingdom insists its Convention obligations cannot apply.  

The U.K. argument is limited to the ECHR, and it is notable that of course the United Kingdom is a party not only to the ECHR, but also, like the United States, party to other human rights treaties and of course is subject also to customary human rights law. One other notable treaty is the ICCPR. Here, crucially, Iraq is also a party, and is thus, unlike with the Convention, part of the espace juridique of the Covenant.  

Even if one accepted the United Kingdom’s assertions about the inapplicability of the ECHR, then, clearly the same assertions could not be made about the obligations of the United Kingdom and the United States under the ICCPR.  

However, the United Kingdom offers an alternative basis for rejecting the application of the ECHR: that “those parts of Iraq” — presumably a reference to the areas under U.K. military control — are not within the United Kingdom’s jurisdiction for the purposes of the Convention, because the United Kingdom does not exercise the necessary level of “effective control” over the areas concerned. This argument is significant because it is potentially applicable to human rights law generally, not just the law of the European Convention. Thus, even though the United Kingdom may have read Banković wrong, and that limb of its argument fails, the second argument, if successful, would by itself render all those areas of international human rights law conceived in relation to the United Kingdom’s “jurisdiction” inapplicable to Iraq.  

One might be somewhat surprised to hear an assertion by the United Kingdom that no part of Iraq is under its effective control; ultimately the answer to this question depends on a detailed factual analysis of the level of control asserted by U.K. forces in that country, something that is beyond the scope of this article. However, even if the United Kingdom, despite having almost 9,000 troops in the country, does not actually exercise effective control over any part of it, it is far from clear that the only basis on which jurisdiction can operate extraterritorially for the purposes of international human rights law is in circumstances where the state exercises effective control over territory. A number of cases from the European Commission and Court of Human Rights, the Inter-American Commission on Human Rights, and the U.N. Human Rights Committee have actually established the existence of extraterritorial jurisdiction on the basis of a relationship between the foreign state, on the one hand, and the individual or individual complainants, on the other.  

In the aforementioned Öcalan case, for example, in establishing the exercise of extraterritorial jurisdiction the Court makes no mention of any

30. See ICCPR ratifications, supra note 6 (Iraq ratified the ICCPR on Jan. 25, 1971).  
31. See Coard, supra note 14; see also Öcalan, supra note 27.
control over territory—effective or otherwise—on the part of Turkey, focusing instead only on the actions of Turkish agents in relation to the individual concerned. This conception of jurisdiction based on the exercise of control over an individual rather than an area of territory is reflected in the U.N. Human Rights Committee General Comment 31, on Article 2 of the ICCPR, which states that the jurisdictional test in Article 2.1 "means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." It would seem, therefore, that the exercise of effective control over individuals by the United Kingdom in Iraq would bring those individuals within the United Kingdom's jurisdiction for the purposes of its obligations under the ECHR and ICCPR, regardless of whether in a broader sense the territory in which such control is exercised is also under U.K. control.

IV. CONCLUSION

Despite the suggestions being made by the United States and the United Kingdom, we have seen that the obligations of these two states under the ICCPR, and the obligations of the United Kingdom under the ECHR, continue to apply to acts and omissions in Iraq insofar as such acts and omissions occur in the context of the exercise of control by the state concerned over individuals or territory. It is regrettable that suggestions are being made which challenge the established position in international human rights law in a manner that would attenuate the application of this law.

32. See Öcalan, supra note 29, at para. 93.
33. General Comment 31, supra note 23, at para. 10.