TIME WARP TO 1945 — RESURRECTION OF THE REPRISAL AND ANTICIPATORY SELF-DEFENSE DOCTRINES IN INTERNATIONAL LAW

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> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.
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> John Stuart Mill, *On Liberty* (1859)

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I. INTRODUCTION

Prior to 1945, the laws and customs of warfare were a commonly understood set of principles and doctrines that governed use of force among states of equivalent and disparate power, be they nation-states, empires, colonial powers or kingdoms. Some of these rules had been reduced to writing in military field manuals, domestic articulations like the Leiber Code, and multilateral treaties like the early Hague Conventions.[1] Others were defined and clarified in decisions by judicial tribunals like the Permanent International Court of Justice. Still others remained in the murky netherworld

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1. *See* WILLIAM W. BISHOP JR., INTERNATIONAL LAW: CASES AND MATERIALS 962-967 (3d ed. 1971).

of customary international law – subject to individual state interpretation.

But while these laws of war helped guide countries in their conduct of hostilities with one another down through the centuries, they did little to actually prevent warfare in the first place. So it was, after experiencing the devastation and destructive force of "total warfare" wrought by the belligerents of World War II, the Allied Powers decided to bind the ability of states to wage aggressive war. The Charter of the United Nations, signed in 1946, is a collective security arrangement that prohibits war in general and limits the ability of states to use force except in the case of self-defense to repel an armed attack.

During the ensuing five decades, aggressive military engagements continued to erupt on a smaller scale. Old customary law war doctrines allowing forcible reprisal, in response to a prior wrong, and preemptive strikes, justified by anticipatory self-defense, were occasionally argued by individual states as rationales for continued military action, but were universally and uniformly condemned by the international community. Thus, they never passed back into customary norms.

However, after the September 11th, 2001 terrorist attacks on the United States that destroyed the World Trade Center and damaged the Pentagon, the American approach to use of force began to change. President Bush, although legally allowed to attack Afghanistan under the U.N. Charter by acting in self-defense, was careful to match his responsive form also to the requirements of customary reprisal doctrine. After suffering an injury from Afghanistan's breach of international law during peacetime, an ultimatum was issued that was not complied with, the Taliban regime was toppled, and the Al Qaeda terrorist network disrupted as a necessary and proportional response to the prior injury.

In the case of Iraq, after the threat of Saddam acquiring nuclear weapons was analyzed as realistic, the Bush administration decided that it had to disarm him. Two avenues were open: the multilateral approach through the U.N. system; and the unilateral approach. The president pursued both simultaneously. Multilaterally, the Security Council restarted its weapons inspection program with reserved authority to act militarily if Baghdad failed to disarm. Unilaterally, the United States articulated its right to act preemptively to eliminate the threat posed by a potentially nuclear-armed Iraq. However, because the existence of an imminent threat could not be established, when the president brought the old anticipatory self-defense doctrine back to life, he eliminated that threshold and replaced it with the showing of only an "emerging" threat.

As will be discussed below, there are inherent dangers in resurrecting such pre-Charter doctrines. One of the very reasons the world community decided to do away with them was to reduce legal justifications for, and thus the possibility of, unilateral military action. The pre-Charter doctrines were used erratically and unreliably prior to 1945. Now, if these doctrines are returned to service by the world's superpower and are allowed to pass into customary practice once again, we will find ourselves in a time warp back to 1945 – a period of fear, uncertainty and suspicion; a period of global dominance by a handful of nations; a period defined by the geopolitics of raw power and militaristic influence; a period of instability devoid of collective security. Even more disturbingly, some of the re-articulated rules have been watered down to allow more latitude in unilateral action. And this time we will be returning to that world with weapons of mass destruction in our arsenals.

II. THE REPRISAL DOCTRINE

Generally speaking, a reprisal is "an action that a state undertakes to redress an injury suffered during time of peace."[2] Reprisals can be broken up into several categories, including forcible reprisals and belligerent reprisals. Forcible reprisals have been defined (post-Charter) as "a quick, limited, forcible response by one state against a prior action by another state that did not rise to the level of an armed attack."[3] In the case of belligerent re-prisals, hostilities are presumed to exist, and the laws of armed conflict, *jus in bello*, govern hostilities.[4] Belligerent reprisals occur "where a party to a conflict resorts to what is normally an unlawful act in response to another belligerent's unlawful violation of the laws of armed conflict."[5] The objective of a belligerent reprisal is to "use coercion to bring both parties back to an even playing field governed by the laws of armed conflict."[6] Belligerent reprisals will not be discussed further in the context of this article.

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2. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 17 (1993).

3. *Id*. at 42.

4. Paula B. McCarron & Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 FLETCHER F. WORLD AFF. 203, 220 (2001).

5. *Id*.

6. *Id*.

A. Historic Evolution

Reprisals are as old as international law, if not older. The concept of reprisal was born in notions of equity – if one was wronged by another's illegal action, then the wronged individual was vested with a right of redress (forcible if necessary) against the wrongdoer that would, itself, normally be considered illegal.[7] Indeed, before states acquired the formal right of reprisal as a tool of foreign policy under international law, it existed as a right of individuals during the Middle Ages. "Letter[s] of Marque and Reprisal" could be obtained from the king to secure satisfaction beyond the bounds of the law.[8] But even at its inception, as a private right, individuals were restrained in carrying out reprisals against others by the rule of proportionality.[9] Thus, the amount of property a wronged individual could seize from the wrongdoer was determined by the original injury, and could not exceed its satisfaction.[10]

By the 17th and 18th centuries, as the Westphalian system of nation-states and accompanying ideas of state sovereignty were securing themselves, reprisals were allowed beyond the national frontiers against individuals of offending states.[11] Indeed, in 1789, the American Constitution vested the power "to grant letters of marque and reprisal" in Congress under Article I, Section 8.[12] In this regard, Yale's President Woolsey states in his 1877 treatise on international law that "[e]very authority in those times, which could make war, could grant letters of reprisals. But when power began to be more centralized, the sovereign gave to magistrates, governors …and [the] courts, the right of issuing them, until at length this right was reserved for the central government alone."[13] Woolsey also traces the usage of both general (public) and special (private) reprisals back to the Greek period:

> The Greeks here present to us two forms of reprisals, the one where the state gives authority to all, or in a public way attempts to obtain justice by force, which is called *general*, and the other, where power is given to the injured party to right himself by his own

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7. Major Philip A. Seymour USMC, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221, 225 (1990).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power,* 134 U. PA. L. REV. 1035, 1041-1044 (1986).

12. U.S. CONST. art. I, § 8.

13. THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 118, at 184 (6th ed. 1892).

> means, or *special* reprisals. The latter has now fallen into disuse, and would be regarded as an act of hostility….[14]

Because nascent state police power failed to extend much beyond national borders, rules of proportionality and restraint gradually faded. Disruption of trade and seizure of ships and cargo, bordering on piracy, occurred more often.[15] Predictably, as more private reprisals led to more public warfare involving the state, governments increasingly took control of this doctrine, and it eventually became a recognized right that could only be exercised by the state.[16]

Thus, the distinction between general (public) and special (private) reprisals was such that states gradually stopped allowing private reprisals altogether. Ambassador Wheaton records the status of reprisals in his 1866 treatise on international law this way:

> Reprisals are also either *general* or *special*. They are *general*, when a state which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war…. *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.

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14. *Id.* at 183.

15. Seymour, *supra* note 7, at 225-226.

16. *Id.*; Woolsey provides a 13th Century example of how private reprisals can quickly escalate into public wars:

> In 1292, two sailors, a Norman and an Englishman, having come to blows at Bayonne, the latter stabbed the former, and was not brought before the courts of justice. The Normans applied to Philip the Fair for redress, who answered by bidding them to take their own revenge. They put to sea, seized the first English ship they met, and hung up several of the crew at the masthead. The English retaliated without applying to their government, and things arose to such a pitch, that two hundred Norman vessels scoured the English seas, hanging all the sailors they caught, while the English, in greater force, destroyed a large part of the Norman ships, and 15,000 men. It was now that the governments interposed, and came at length into a war which stripped the English of nearly all Aquitaine, until it was restored in 1303.

WOOLSEY, *supra* note 13, § 118, at 183-84.

> Reprisals are to be granted only in the case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the state…. Thus, in England, the statute of 4 Hen. V, cap. 7, declares, 'That if any subjects of the realm are oppressed in time of peace by any foreigners, the king will grant marque in due form to all that feel themselves grieved;' which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV of 1681, prescribed the forms to be observed for obtaining special letters of marque by French subjects against those of other nations. But these special reprisals in time of peace have almost entirely fallen into disuse.[17]

Thus, as the "private reprisal" faded from usage, the "public reprisal" began its career as a component of customary international law.[18] This career evolved over decades, and the doctrine of reprisal was redefined time and again by states, judicial bodies, and international legal scholars. The ability of this doctrine to emerge in ancient Greece, survive the Roman period (in which it was not recognized), re-emerge in medieval Europe, vest itself in the sovereign power of the King, then transform itself into a state power as nation-states replaced monarchies, and continue guiding international legal practice up into the twentieth century is surely a testament to its grounding in immutable notions of justice and equity and its ability to control uses of force short of war. Nevertheless, as the world eschewed warfare altogether after World War II, it was once again relegated to the dustbin of history – although perhaps not forever.

1. The Rules of Reprisal

Legal definitions for reprisal and its components are somewhat slippery, yet necessary for understanding how the rules work. Reprisals have generally been regarded by international law as "injurious acts by a state against an aggressor state to compel the aggressor to consent to a settlement of a conflict it has created by its own international delinquency."[19] International delinquency, in

17. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 2, at 210-211 (Leonard W. Levy ed., De Capo Press 1972) (1836).

18. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 45 (1963).

19. EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND

turn, has been defined as "non-compliance with treaty obligations, violation of the dignity of a foreign state, violation of foreign territorial supremacy, or any other internationally illegal act."[20] It is vital to emphasize here the transformative nature of reprisal doctrine. While acts that constitute reprisals would normally be illegal, they *become* legal because of the aggressor's previous illegal act.[21] Moreover, reprisals contain a distinctly punitive purpose and are frequently viewed as justified sanctions.[22]

Reprisals can be distinguished from both self-defense and retorsions. A retorsion is used to coerce a state to suspend a legal act, and differs markedly from reprisal in that retorsion uses legal means to accomplish the coercion.[23] Reprisals, on the other hand, use what would be illegal acts to coerce another state to cease an illegal act.[24] Self-defense is also very different from reprisal, although both are forms of self-help.[25] "While the essence of self-defense is the use of armed force directly to ward off a physical danger threatening a state, a reprisal action is essentially aimed at applying coercion with a view to inducing another state to change its unlawful policy."[26]

At the turn of the century, a reprisal could be legal if it followed certain rules.[27] According to international legal scholars, "reprisals were admissible for all international delinquencies."[28] The rules were as follows:

> (1) The occasion for the reprisal must be a previous act contrary to international law;
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> (2) the reprisal must be preceded by an unsatisfied demand;
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> (3) if the initial demand for redress is satisfied, no further demands may be made;

MATERIAL FIELDS OF APPLICATION 130 (1992).

20. *See* LASSA OPPENHEIM, II INTERNATIONAL LAW 35 (1906).
21. KWAKWA, *supra* note 19, at 130.
22. *See id*. at 131.
23. *Id*. at 130.
24. *Id.*
25. *Id*. at 131.
26. *Id*. at 130-31.
27. ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 41 (2d ed. 1995).
28. KWAKWA, *supra* note 19, at 131.

(4) the reprisal must be proportionate to the offense.[29]

These rules, except for the third one, were supported and re-articulated by the tribunal in the *Naulilaa* arbitration decision.[30] In addition, the *Naulilaa* decision added a fifth criteria that only a state can attempt a reprisal[31] and set forth a good overview of the reprisal doctrine as it had developed up until the First World War:

> Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State…. They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation…or the return to legality in avoidance of new offenses.[32]

This case grew out of Portugal's neutrality during World War I. In October of that year, German officials entered Portuguese Angola to secure the purchase of supplies.[33] Misunderstandings ensued, a Portuguese man fired a weapon, and three Germans wound up dead.[34] German troops, in alleged reprisals, destroyed forts and posts in Angola.[35] In 1928, the Arbitral Tribunal found the reprisals illegal because the Portuguese act was a misunderstanding that was not violative of international law, the German government did not make any demand on the Portuguese government prior to the reprisals, the reprisals actually consisted of six separate acts, and they were not proportionate to the prior offending act.[36]

After the opinion in *Naulilaa*, reprisals under customary international law were delineated as generally comprising these elements:

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29. D'AMATO, *supra* note 27, at 42.

30. Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 489 (1999); *See* Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa [hereinafter *Naulilaa*], 8 TRIB. ARB. MIXTES 409 (Port.-Ger. 1928), translated and discussed in BISHOP, *supra* note 1, at 903-04.

31. Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 158 (2001).

32. *Id.* at 156 (quoting *Naulilaa*, 8 TRIB. ARB. MIXTES at 422-25).

33. D'AMATO, *supra* note 27, at 42.

34. *Id.*

35. *Id.*

36. *Id.*

A. Prior Illegal Act (violation of international law) – The "offending state must have committed an act contrary to international law."[37]

B. Unsatisfied Demand – Reprisals should only be used after the injured state has attempted to resolve the matter (made demands) with the offending state and the attempt has failed.[38]

C. Proportionate Response
   1. Traditional view – "[R]eprisals should be proportionate to the initial violation of international law."[39]
   2. Some commentators argue that "reprisal must be sufficient but not excessive in forcing compliance with international law, not necessarily proportionate to the initial violation."[40]

2. Usage up to 1945

Although not always categorized as reprisals, many incidents are now viewed as having that character. For instance, the United States bombardment of Greytown (Nicaragua) in 1853 and the British occupation of Corinto (Nicaragua) in 1895 have both been viewed as having the "character of reprisals."[41] The Greytown incident was over tariffs and control of a transit route. The Corinto incident occurred after the British demand for redress for injuries to the British vice-consul and other British subjects by Nicaraguan authorities was not met. In 1850, the British blockaded Greece to get compensation for Don Pacifico, whose house had been looted. Brownlie states that the British blockade of Greece in 1850 "must be regarded as a reprisal, although it did not satisfy the conditions for resort to reprisal, or as an anomalous and unlawful attempt to coerce the Greek government into acceptance of British demands."[42]

There were transitional problems with reprisals prior to the formation of the U.N. Charter in 1945 stemming from the Covenant

37. Scharf, *supra* note 30, at 489.
38. *Id*.
39. Mitchell, *supra* note 31, at 160; Scharf, *supra* note 30, at 489.
40. *Id.*(discussing M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 682 (1961)).
41. BROWNLIE, *supra* note 18, at 291.
42. *Id.*

of the League of Nations and the Kellogg-Briand Pact. The Covenant of the League of Nations allowed resort to war as "a mode of self-help and execution where there was no other means of enforcing legal rights."[43] Article 15, in fact, allowed war when peaceful settlement had failed.[44] This "resort to war formula," coupled with the fact that some states were not members of the League, led a number of writers "to regard hostile measures short of 'war' in the formal sense, and, in particular, reprisals, as [continuing] legal modes of redress."[45] Thus, under the Covenant, "whenever there could be a lawful war there could be a lawful reprisal also."[46] The Kellogg-Briand Pact did not help clear up any of the confusion surrounding reprisals because it used the term "war"[47] and failed to "impose any [meaningful] restrictions on the use of force short of war."[48]

This led to counter trends in reprisal usage. A number of treaties during this period began to restrict a state's ability to resort to reprisal. For Instance, The Locarno Pact prohibited invasion, attack, and acts of aggression, and the Second Hague Convention of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts only allowed armed force under certain conditions.[49] Simultaneously, other incidents that occurred in the years preceding World War II and the U.N. Charter have been viewed as having the character of reprisals, including the United States landing at Vera Cruz and the Corfu incident.[50]

In 1914, a Mexican squad arrested two American seamen and a paymaster of the U.S.S. *Dolphin*; they were arrested at Tampico without cause.[51] After their release, the head of Mexico's government, General Huerta, made a personal apology.[52] However, the United States admiral in that area wanted the Mexicans to salute the United States flag in a special ceremony; General Huerta accepted this conciliation on the reciprocal condition that the United States fire a "like salute."[53] The United States declined and President Wilson got a joint congressional resolution to use military force "to enforce his demand for unequivocal amends for certain

43. *Id.* at 217.
44. *Id.*
45. *Id.* at 219.
46. *Id.* at 220.
47. BROWNLIE, *supra* note 18, at 222.
48. AREND & BECK, *supra* note 2, at 23.
49. BROWNLIE, *supra* note 18, at 222-23.
50. D'Amato, *supra* note 27, at 42-43.
51. *Id.* at 42.
52. *Id.*
53. *Id.*

affronts and indignities."[54] After he obtained the resolution that denied "any purpose to make war upon Mexico," U.S. Marines landed at Vera Cruz and seized the customhouses.[55] The Army took over for the Marines and proceeded to occupy the economically strategic area for the next several months.[56]

Likewise, the Corfu incident is often viewed as "the most recent 'classic' case of a reprisal."[57] In 1923, the Italian representative and three of his assistants on the commission marking out the frontier between Albania and Greece were shot by Greek bandits.[58] Mussolini had a fleet bombard Corfu – the attack killed many civilians.[59] The Italians then occupied Corfu and insisted on indemnity.[60] Greece paid 50,000,000 lire to Italy.[61] The incident then went to the League of Nations' Council, which referred specific questions to a committee.[62] The Committee of Jurists stated that under the Covenant of the League of Nations:

> Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[63]

The Council adopted this statement, even though some of the individual members replied with statements indicating positions that would limit reprisals. For instance, M. Branting of Sweden accepted the above reply after stating that in his government's view "the use of armed force is not compatible with the Covenant [of the League of Nations] in the circumstances indicated …."[64]

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54. *See id.* at 43 (quoting Joint Resolution Justifying the employment by the President of the armed forces of the United States, Pub. Res. No. 22, 38 Stat. 770 (1914)).
55. D'Amato, *supra* note 27, at 43.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. D'Amato, *supra* note 27, at 43.
62. BROWNLIE, *supra* note 18, at 221.
63. *Id.* (quoting LEAGUE OF NATIONS O.J. 524 (1924)).
64. *Id.* (quoting LEAGUE OF NATIONS O.J. 526 (1924)).

B. Dormancy of Reprisal under the U.N. Charter?

Sweden's view permeated the multilateral meetings underway in San Francisco during 1945 to establish a system of collective security that would curtail the ability of individual states to wage aggressive war.[65] Weary from two global conflicts comprising ten years of the past three decades, the nations participating in the conference negotiating the U.N. Charter sought to secure international peace and security above all other considerations.[66] Indeed, that underlying purpose resonates throughout the entire document. Thus, it seemed unnecessary to specifically issue a death sentence on the old reprisal doctrine; since subsequent treaties, like the Charter, take precedence over conflicting customary rules.

The U.N. Charter was, therefore, seen to legally outlaw reprisals. Article 2(3) requires states to "settle their international disputes by peaceful means,"[67] and Article 2(4) bars the "threat or use of force against another state."[68] Article 33(2) then gives the Security Council the power to call upon states to settle disputes peacefully.[69] Article 51 contains an exception to Article 2 for self-defense, allowing that "nothing in the present Charter shall impair the inherent right of individual…self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[70]

International law scholar Ian Brownlie noted this illegality: "The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force."[71] In fact, in 1974, Acting U.S. Secretary of State Kenneth Rush "stated that the United States believes that 'for reasons of the abuse to which the doctrine of reprisal particularly lends itself, we think it desirable to endeavor to maintain the distinction between lawful self-defense and unlawful reprisal.'"[72]

This *de jure* prohibition on reprisal found its way into documentary form in 1970. The Declaration on Principles of

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65. AREND & BECK, *supra* note 2, at 177.

66. Id. *See generally* Asbjorn Eide, *Outlawing the Use of Force: The Efforts by the United Nations*, *in* THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 99 (1987).

67. D'AMATO, *supra* note 27, at 41 (quoting U.N. CHARTER).

68. Michael Ratner & Jules Lobel, *Bombing Baghdad, Revisited; Lawful Self-Defense or Unlawful Reprisal?*, CONN. L. TRIB., July 19, 1993, at 24; U.N. CHARTER art. 2(3), 2(4).

69. D'AMATO, *supra* note 27, at 41.

70. Mitchell, *supra* note 31, at 158.

71. BROWNLIE, *supra* note 18, at 281.

72. Ratner & Lobel, *supra* note 68.

International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the U.N. Charter provided that "states have a duty to refrain from acts of reprisal involving the use of force."[73] With the customary right of reprisal thus outlawed by subsequent treaties, the continued relevancy of the rules set forth in the *Naulilaa* case may be called into question. However, the rules remain important because, just as common law does not die in American or British jurisprudence when confronted with a conflicting statute, merely lying dormant during the statute's life and resurrected when that statute is repealed, customary law may become dormant when faced with conflicting treaties. It has the potential to resume operation once the particular treaty regime fails or is terminated. Professor D'Amato also notes that "these rules may be said to add a special dose of legal obligation to the nation which decides to violate the law in the first instance by resorting to reprisals."[74]

Although the general view is that reprisals are illegal,[75] that does not mean that states have not engaged in them. Professor Kwaka observes that "recent trends in state practice indicate a continued resort to reprisals in peace-time, euphemistically referred to as 'counter-measures.'"[76] For example, the 1986 bombing of Libya is cited as a peacetime reprisal and not an act of self-defense.[77] Therefore, while writers state emphatically that reprisals are illegal, state practice continues to resort to them on occasion, cloaking them in terms of self-defense while remaining careful to comply with *Naulilaa* criteria. And after all, "[i]nternational law is made and applied more through the practice of states, than in legal scholarly opinions and writings."[78]

Following are some examples of reprisals undertaken after adoption of the Charter during the Cold War period. Each of these was condemned by the world community:

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73. Scharf, *supra* note 30, at 489.

74. D'AMATO, *supra* note 27, at 41.

75. KWAKWA, *supra* note 19, at 132; *see also* Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972). Bowett states that few propositions in international law have had more support than the idea that the use of force through reprisal is illegal under the U.N. Charter. *Id.*

76. KWAKWA, *supra* note 19, at 132.

77. *Id.*

78. *Id.*

• 1964 — British Air Attacks in Yemen

After Yemen attacked the South Arabian Federation several times, the British commenced air attacks on Yemen in 1964.[79] The United Kingdom Representative, after discussing the series of Yemeni attacks, stated:

> It will also be abundantly plain that, contrary to what a number of speakers have said or implied, this action was not a retaliation or a reprisal…. There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisals;' the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack…it is clear that the use of armed force to repel or prevent an attack – i.e. legitimate action of a defensive nature – may sometimes have to take the form of a counter-attack.[80]

However, the Security Council denounced reprisals and "deplore[d]" the British action.[81]

• 1972 — Israeli Raids against Lebanon

Israel, suffering from seemingly constant terrorist attacks, reminded neighboring Lebanon that it had an international legal "obligation to prevent its territory from being used as a base for armed attacks against Israel."[82] Israel warned that if Lebanon did not prevent its territory from being used by terrorists to strike Israel, it would be necessary for Israel to attack the Palestine Liberation Organization (PLO) in Lebanon.[83] On February 25, 1972, Israel sent forces, tanks, armored cars, heavy artillery, and air support into Lebanon to attack PLO bases.[84] The operation continued until February 28, 1972.[85] In response, the Security

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79. Bowett, *supra* note 75, at 8.
80. *Id.* (quoting U.N. SCOR, 19th Sess., 1109th mtg. at 4, U.N. Doc. S/PV.1109 (1964)).
81. *Id.* (quoting S.C. Res. 188, U.N. SCOR, 19th Sess., 1111th mtg. at 10, U.N. Doc. S/INF/19/Rev.1 (1964)).
82. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 426 (1990).
83. *See id.* at 427.
84. *Id.*
85. *Id.*

Council issued Resolution 313 on February 28, which demanded "that Israel immediately desist and refrain from any ground and air military action against Lebanon and forthwith withdraw all its military forces from Lebanese territory."[86] By June of 1972, however, Israel was back in Lebanon attacking PLO bases in response to terrorist attacks and bombing the town of Deir el Ashair.[87]

Security Council Resolution 316 of June 26, 1972, denounced Israel's actions as violating the U.N. Charter.[88] Israel continued to claim that its actions were self-defense and intended to deter future terrorist attacks.[89] However, there was some reaction in the international community that defined Israel's attacks as reprisals. For instance, when debating Resolution 313, France denounced "these intolerable reprisals"[90] and, when debating Resolution 316, Belgium stated that "[t]he Belgian Government has never ceased to repudiate energetically the military reprisal actions undertaken by Israel against Lebanon …."[91]

- 1985 — Israeli Raid on Tunis

On September 25, 1985, Israel conducted a raid on the Lebanese bases of PLO member Abu Musa after Palestinian terrorists killed three Israelis in Cyprus.[92] On October 1, Israel attacked Arafat's headquarters in Borj Cedria, which is a suburb of Tunis; this action also involved an attack against the headquarters of "Force 17," which was believed to be behind the Cyprus incident and others.[93] Yitzhak Rabin, Israel's defense minister, said, "[w]e decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities."[94] Security Council Resolution 573 censured the Israeli attack and demanded that Israel cease and desist.[95] Both Third World and Communist States also criticized the action.[96]

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86. S.C. Res. 313, U.N. SCOR, 27th Sess., 1644th mtg. at 13, U.N. Doc. S/INF/28 (1972)
87. O'Brien, *supra* note 82, at 427-28.
88. *Id*.
89. *Id*. at 433-34.
90. *Id*. at 436, n.87.
91. *Id*.
92. *Id*. at 460.
93. O'brian, *supra* note 82, at 460.
94. *Id*. (quoting *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8.)
95. *Id*.
96. *Id*. at 461.

• 1986 — U.S. Air Strike Against Libya

On December 27, 1985, airline offices in Rome and Vienna were bombed; the attack killed five Americans, fifteen other people, and injured another eighty.[97] The attacks were traced back to Libya.[98] One week later, President Reagan sent a United States carrier group into the Mediterranean.[99] Two weeks after Libyan fighter planes "reportedly flew within 200 feet of a U.S. Navy surveillance plane over the Mediterranean Sea" on January 13, 1986, the Navy started an exercise in the Gulf of Sidra.[100]

In March 1986, after the U. S. Department of Defense stated that a naval exercise designed to "gather intelligence, assert the right of innocent passage, and the right to sail in international waters," would take place in the Gulf of Sidra during the week of March 23.[101] On March 24, Libya fired six missiles at United States planes over twelve miles away from the Libyan coastline.[102] The Navy then attacked four Libyan patrol boats and two missile sites.[103]

On April 5, 1986, two Americans and one Turkish woman were killed when a disco in Berlin was bombed. Moreover, 154 people, 50 to 60 Americans, were injured.[104] United States officials stated that the attack looked like part of a "pattern of indiscriminate violence" against United States citizens by Libya.[105] About a week later, officials in Reagan's administration claimed that there was "incontrovertible evidence" that Libya was connected to the Berlin bombing.[106]

Ten days later, the U.S. Air Force bombed targets at the Tripoli Military Air Field, Tarabulus (Aziziyah) Barracks, and Sidi Balal Training Camp.[107] On that same day, the U.S. Navy bombed targets at the Benina Military Air Field and Benghazi Military Barracks.[108] As a result of the United States action, 37 people, including Omar

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97. Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 182 (1987).
98. *Id.*
99. *Id.*
100. *Id.* at 183.
101. *Id.* at 184.
102. *Id.*
103. Intoccia, *supra* note 97, at 184-85.
104. *Id.* at 185.
105. *Id.* at 183 (quoting Gerald M. Boyd, *U.S. Sees Methods of Libya Attacks*, N.Y. TIMES, Apr. 6, 1986, at A1).
106. *Id.* at 184 (citing Bernard Weinraub, *Officials Say U.S. Warned of Bomb, Minutes Too Late,* N.Y. TIMES, Apr. 11, 1986, at A1).
107. *Id.* at 179.
108. *Id.*

Qadhafi's stepdaughter, died, and 93 people, including two of Qadhafi's sons, were wounded. Two Americans on an American aircraft were also killed.[109] Before any military action, the United States did first impose both diplomatic and economic sanctions against Libya.[110]

Both the U.N. General Assembly and the U.N. Secretary-General (Javier Perez de Cuellar) stated that the United States action violated international law.[111] When a Security Council resolution echoed that condemnation, the United States, the United Kingdom, and France vetoed it.[112] In addition, Arab nations and the Organization of Petroleum Exporting Countries censured the action.[113] Greece called the air strike "set[ting] dynamite to peace," and Italy stated that it was "provoking explosive reactions of fanaticism…."[114] While France vetoed the Security Council resolution along with the United States and the United Kingdom, it did call the air strikes "reprisals that itself revives the chain of violence."[115] Still other members of the international community denounced the raid, including foreign ministers of the Movement of Non-Aligned Nations, while Vietnam suspended talks on American MIAs after citing the United States action in Libya.[116]

The United States likened the mounting attacks by Libya to an armed attack.[117] While United States' officials claimed that the action was actually self-defense, they still argued that self-defense could involve more than warding off an armed attack.[118] The White House stated:

> In light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right of self-defense. It is our hope that action will *preempt* and *discourage* Libyan attacks against innocent civilians in the *future*.[119]

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109. Intoccia, *supra* note 97, at 179.
110. Seymour, *supra* note 7, at 239.
111. Ratner & Lobel, *supra* note 68.
112. *Id*.
113. Intoccia, *supra* note 97, at 187.
114. *Id*. (quoting Robert A. Manning, *Little Fallout for NATO Expected; In Western Europe, Strains Among Friends*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 24-25).
115. *Id*.
116. *Id*. at 189.
117. *See* AREND & BECK, *supra* note 2, at 43.
118. *Id*.
119. Statement by the Principal Deputy Press Secretary Speakes on the United States Air Strike Against Libya, PUB. PAPERS 468 (Apr. 14, 1986) (emphasis added).

This attitude is more indicative of retaliation and reprisal. President Reagan, for instance, stated that the air strikes would cause Qadhafi to "alter his criminal behavior."[120] Reagan further stated, "I warned that there should be no place on Earth where terrorists can rest and train and practice their deadly skills. I mean it. I said that we would act with others, if possible, and alone if necessary to insure that terrorists have no sanctuary anywhere."[121] A month before the United States action in Libya, Vice President George Bush said that, in combating terrorism, there would be a willingness in United States policy to "retaliate."[122] Therefore, although the United States officially used self-defense as justification for its action, reprisal was probably also a justification.[123]

- 1988 — U.S. Destruction of Iranian Oil Platforms

Iran resumed laying mines in international waters in the Persian Gulf in 1988; as a result, the U.S.S. *Samuel B. Roberts* was damaged.[124] In response, on April 18, 1988, United States warships decimated two Iranian oil platforms.[125] The next day, President Reagan stated that the United States action was "to make certain the Iranians have no illusions about the cost of irresponsible behavior"[126] and that it was supposed "to deter Iranian aggression, not provoke it."[127] Once again, self-defense was used to justify the United States action. However, statements by the Reagan administration claimed the strike was in "retaliation"[128] for the minelaying and that "any further mining by Iran would bring harsher military reprisals."[129]

That same year, after Pan American Flight 103 was destroyed "in apparent retaliation for the accidental shoot-down of the Iran airbus by the guided missile cruiser U.S.S. *Vincennes*," President Reagan ordered that a report be prepared on aviation and terrorist

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120. AREND & BECK, *supra* note 2, at 43 (quoting Address to the Nation on the United States Air Strike Against Libya, PUB. PAPERS 469 (Apr. 14, 1986)).
121. Intoccia, *supra* note 97, at 191.
122. *Id.*
123. *See id.* at 191-92.
124. Seymour, *supra* note 7, at 223.
125. *Id.*
126. *Id.* (citing John H. Cushman Jr., *U.S. Strikes 2 Iranian Oil Rigs and Hits 6 Warships in Battles Over Mining Sea Lanes in Gulf,* N.Y. TIMES, Apr. 19, 1988, at A10).
127. John H. Cushman Jr., *U.S. Strikes 2 Iranian Oil Rigs and Hits 6 Warships in Battles Over Mining Sea Lanes in Gulf,* N.Y. TIMES, Apr. 19, 1988, at A10.
128. Seymour, *supra* note 7, at 224.
129. *Id.* (quoting David Hoffman & Lou Cannon, *U.S. Retaliates, Hits Iran Oil Platforms in Gulf,* Washington Post, Apr. 18, 1988, at A1).

prevention.[130] The President's Commission included these recommendations: (1) "state sponsors of terrorism should be made to pay a price for their actions;" (2) that "active measures are needed to counter more effectively the terrorist threat;" and (3) that "[t]he United States should ensure that all government resources are prepared for active measures – *preemptive* or *retaliatory*, direct or covert – against a series of targets in countries well-known to have engaged in state-sponsored terrorism."[131]

C. Resurrection of Reprisal Doctrine

In 1990, two authors advanced the argument that Israel's repeated use of the reprisal doctrine against terrorists should in effect by legitimized by adoption as American policy. Major Philip A. Seymour of the U.S. Marine Corps suggested that the reprisal doctrine's employment against terrorists and not states would save it from general condemnation as would strict compliance with the proportionality rule.[132] Drawing on prior work by Tel Aviv University's Professor Yoram Dinstein, Georgetown Professor William V. O'Brien goes a step further and proposes bringing this doctrine back into play as part of a re-written and expanded self-defense doctrine, against terrorist organizations only, but with new operational rules grafted onto the ones that exist in customary law:

> A realistic and fair *jus ad bellum* law governing counterterror attacks on terrorist positions in sanctuary States would recognize that such measures [forcible reprisals] are a legitimate form of self-defense. This right of self-defense extends to the protection of a State's nationals abroad, including protection against hijacking. Despite Security Council practice and the opinions of the majority of publicists, the reprisal/self-defense distinction and the judgment that reprisals are legally impermissible should be abandoned.[133]

O'Brien goes on to argue that "[a] more sensible approach would be to assimilate armed reprisals into the right of legitimate self-defense."[134] Noting that, "[i]n counterterror operations, defensive

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130. *Id*. at 221.

131. PRESIDENT'S COMMISSION ON AVIATION SECURITY AND TERRORISM, REPORT TO THE PRESIDENT 125 (1990) (emphasis added).

132. *See generally* Seymour, *supra* note 7, at 224-225.

133. O'Brien, *supra* note 82, at 475.

134. *Id.* at 476.

reprisals are indispensable," he further suggests that "[r]equirements for reasonable, legally permissible counterterror measures of legitimate self-defense should be as follows:

> (1) The purpose of the counterterror measures should be to deter and render more difficult further terrorist attacks.
>
> (2) Counterterror measures should be proportionate to the purposes of counterterror deterrence and defense, viewed in the total context of hostilities as well as the broader political-military strategic context.
>
> (3) Discrimination in counterterror measures should be maximized by target selection and Rules of Engagement governing operations.
>
> (4) Counterterror measures must not be influenced by demands for vengeance but should conform strictly to the functional necessities of their purpose.[135]

Although no express statement issued from the White House after September 11, 2001, announced the inclusion of reprisal in American foreign military engagement policy, the actions undertaken by the Bush Administration in response to Afghanistan carefully complied with all of the rules of reprisal even though they were legally allowed under Article 51 of the Charter as self-defense alone.[136] Indeed, the suggestions put forward by Major Seymour

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135. *Id.* at 477.

136. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 47 (Winter 2002). Professor Murphy asserts that even though the blow against the United States on Sept. 11, 2001, fell from a terrorist organization, the "armed attack" standard of Article 51 was met for six reasons: "First, the scale of the incidents was akin to that of a military attack." *Id.* "Second, the United States immediately *perceived* the incidents as akin to that of a military attack." *Id.* (emphasis added). "Third, the U.S. interpretation…was largely accepted by other nations." *Id.* at 48. "Fourth, there is no need to view the September 11 incidents as presenting a binary choice between being regarded either as a criminal act or as … an armed attack. In fact, the incidents can properly be characterized as *both*…." *Id.* at 49. "Fifth, there is some prior state practice supporting the view that terrorist bombings can constitute an armed attack triggering a right of self-defense." *Id.* (citing, as an example, the 1998 American cruise missiles sent against Sudan and Afghanistan in response to the al Qaeda bombing of American embassies in Kenya and Tanzania). Sixth, Article 51 does not require "the exercise of self-defense to turn on whether an armed attack was committed directly by another state." *Id.* at 50.

and Professor O'Brien appear to have gained currency in the government's pattern of reaction to the terrorist attacks inflicted by al Qaeda.

Clearly, the United States suffered a grievous peacetime injury as a result of Afghanistan's violation of international law (harboring al Qaeda, supporting their *jihad* against America, and serving as an accomplice in mass murder). President Bush's ultimatum to the Taliban regime that followed on September 24th encompassed all the criteria that Afghanistan had to meet in order to avoid a military reprisal:

> [T]onight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens…. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist…. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation…. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.[137]

Upon Kabul's non-compliance with the peaceful terms of redress, the American-led coalition invasion of Afghanistan, and resulting disruption of the al Qaeda terrorist network, toppling of the Taliban fundamentalist regime, and pursuit of Osama bin Laden and Mullah Omar were proportional and necessary re-sponses to the original illegal act – destruction of the World Trade Center, damaging of the Pentagon, killing of over 3,000 civilians and hijacking/destruction of four passenger airliners.

Thus, the argument for return of the reprisal doctrine, at least in the context of responding to terrorist attacks, has found a mooring in the current administration. Arguably, President Bush's linkage of states to the terrorists they harbor in almost a legal agency relationship means that he is not actively resurrecting the reprisal doctrine against states *a priori*. On this line of reasoning, states are only on the receiving end of reprisals *through* the

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137. Address Before a Joint Session of the Congress on the U. S. Response to the Terrorist Attacks of September 11th, PUB. PAPERS (Sept. 20, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/#.

terrorists, who are the actual targets of the reprisals. True, this may be a distinction without a meaningful difference, but it nevertheless may provide the United States some cover in its military actions and also limit the usage of the doctrine by other countries to states involved in terrorism. Thus, states not directly involved in terrorism may escape reprisal.

This raises the question of how America can propose to invade Iraq – a country controlled by a brutal regime to be sure, but one that is not overly involved in the international terrorism business. And, absent a significant link to al Qaeda, another doctrine must be used to legitimize a United States attack on Baghdad. If a plain reading of Article 51 disallows striking Iraq absent an armed attack, the Bush Administration is required to return to the legal history books and pull out another disused doctrine to justify any unilateral military action it may take. The one that seems to fit best, albeit imperfectly, is the doctrine of anticipatory self-defense.

III. THE ANTICIPATORY SELF-DEFENSE DOCTRINE

Anticipatory self-defense was a species of self-help available to states in their relations with one another, coexistent with reprisal and traditional self-defense in pre-Charter customary international law.[138] It is based on the precept that if a state is about to be invaded, it may attack the invading force before the actual invasion has begun in order to stave off the imminent attack or otherwise ameliorate the effects of it.[139] Unlike its doctrinal cousin, traditional self-defense, the state under imminent threat of attack is not required to absorb the first blow before responding with military force.[140]

A. Historic Evolution

Like reprisal, the concept of self-defense as an equitable response to a prior wrong is "one of the oldest legitimate reasons for states to resort to force."[141] Aristotle, Aquinas, and the framers of the Kellogg-Briand Pact all recognized the right of self-defense.[142] In customary practice, this concept was rather expansive and could take several forms; before adoption of the U.N. Charter, a state could use self-defense "not only in response to an actual armed

138. *See* BROWNLIE, *supra* note 18, at 257-258; AREND & BECK, *supra* note 2, at 72.
139. AREND & BECK, *supra* note 2, at 72.
140. *Id.*
141. *Id.*
142. *Id.*

attack, but also in anticipation of an imminent armed attack."[143] The example usually cited for this latter principle is the *Caroline* case of 1847, discussed in the next section, which set out essential criteria for when anticipatory self-defense could be undertaken. Woolsey acknowledged the premise for a legitimate preemptive strike in his treatise of 1877: "[a] wronged nation, or one fearing sudden wrong, may be the first to attack, and that is perhaps its best defense."[144]

Self-defense, both individual and collective, is recognized under Article 51 of the U.N. Charter.[145] However, it is questionable whether Article 51 recognizes any right of anticipatory self-defense. Article 51 states that "[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defence *if an armed attack occurs* against a Member."[146] This could mean that the right of self-defense can only be exercised once an armed attack actually happens, thus limiting customary international law.[147] The other interpretation centers around the word "inherent" that is used to describe self-defense; this interpretation would be that the framers of the U.N. Charter did not intend to limit customary international law but "merely desired to list one situation in which a state could clearly exercise that right."[148]

There are basically, then, two schools of thought on the right of anticipatory self-defense.[149] "Restrictionists" follow the first view of Article 51 being a limit on customary international law.[150] "Counter-restrictionists" either argue that Article 51 is not a limit on customary international law, that it actually incorporates customary law as it existed in 1945, or that their reading of Article 51, combined with post-1945 developments like the failure of collective security and the development of nuclear weapons and inter-continental ballistic missiles, show that the right of anticipatory self-defense exists as a practical matter.[151]

The International Court of Justice has never addressed the question of anticipatory self-defense expressly,[152] even in the *Nicaragua* case.[153] While one of the dissenting judges in the

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143. *Id*.
144. WOOLSEY, *supra* note 13, §117, at 179.
145. AREND & BECK, *supra* note 2, at 72.
146. U.N. CHARTER art. 51 (emphasis added).
147. *See* AREND & BECK, *supra* note 2, at 72.
148. *Id*. at 73.
149. *Id*.
150. *Id*.
151. *Id*.
152. AREND & BECK, *supra* note 2, at 73.
153. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter the *Nicaragua* case].

Nicaragua case expressed support for a right of anticipatory self-defense under Article 51, the Court "noted that since 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised…the Court expresses no view on that issue.'"[154] Even though the debate seems far from settled, states continue to invoke Article 51 to justify their actions even when the situation seems to be one of anticipatory self-defense.[155]

The Security Council's role under Article 51 is important.[156] States not only are supposed to report actions taken in employing the right of self-defense, such a right is only temporary, lasting "until the Security Council takes measures 'necessary to maintain international peace and security.'"[157] However, even though Article 51 assigned the Security Council such a role, few of that body's resolutions have expressly referred to the article.[158] States usually do comply with Article 51's reporting requirement, apparently heeding the International Court of Justice's statement in the *Nicaragua* case that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence."[159]

While necessity and proportionality are not expressly required by the U.N. Charter, these principles are a part of customary international law. Both the *Nicaragua* case and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* "reaffirmed that necessity and proportionality are limits on all self-defence, individual and collective."[160] While discussion of necessity and proportionality is almost always a factual inquiry particular to a certain incident, agreement has been reached on two points: self-defense (1) cannot be retaliatory in nature; and (2) must be designed to stop and ward off an attack.[161]

1. The Rules of Preemption

The evolution of anticipatory self-defense into a working customary law doctrine prescribing use of force short of war and proscribing certain conduct under its justification, like the reprisal doctrine, is accompanied by a fairly well-articulated set of rules for

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154. *Id*. (quoting the *Nicaragua* case at 343).
155. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 87 (Malcolm Evans & Phoebe Okowa eds., 2000).
156. *See id*. at 88.
157. *Id*. (quoting U.N. CHARTER art. 51.)
158. *Id*. at 89.
159. *Id*. at 90 (quoting the *Nicaragua* case at para 200).
160. *Id*. at 106 (citing Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8)).
161. *See* GRAY, *supra* note 155, at 106.

usage. As noted above, the case of the *Caroline* from the mid-19th Century provides the classic articulation of when preemptive military action may be taken. The *Caroline* case stemmed from events that took place between unauthorized American supporters of Canadian rebels and British forces in 1847.[162] Towards the end of the rebellion against Britain, Canadian rebels and their American supporters, around 1,000 people, took over Navy Island to use as a base for raids on the Canadian shore.[163] The *Caroline*, which shipped arms and supplies to the group, was docked at Fort Schlosser in New York when the British boarded it at nighttime and started shooting at the crew.[164] The crew was unable to defend itself and abandoned the ship.[165] Two of the Americans in the crew were killed and two others were temporarily taken prisoner.[166] The British soldiers then set the steamer on fire and sent the *Caroline* over Niagara Falls.[167]

Eventually, Daniel Webster, the Secretary of State at that time, and Lord Ashburton, the British Foreign Minister at that time, corresponded through diplomatic notes.[168] Webster wrote that the British were responsible and in violation of the law of nations unless they could show:

> [A] necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supporting the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.[169]

Lord Ashburton accepted these criteria of necessity and proportionality arguing that the facts of the *Caroline* case fit these standards.[170] The criteria the *Caroline* case established were applied to anticipatory self-defense.[171] Thus, before the U.N. Charter,

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162. D'AMATO, *supra* note 27, at 33.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 33-34.
168. D'AMATO, *supra* note 27, at 34-35.
169. *Id.* at 34 (quoting Daniel Webster).
170. *Id.* at 35.
171. AREND & BECK, *supra* note 2, at 72.

customary international law acknowledged that anticipatory self-defense could be used if both necessity and proportionality had been met.[172] While these criteria are not precise, a state first must show that it was necessary to use anticipatory self-defense because of an impending attack, i.e. that the "attack was truly imminent and there were essentially no other reasonably peaceful means available to prevent such attack."[173] The state also has to show that the self-defense was proportionate to the impending attack.[174]

2. Usage up to 1945

Despite establishment of the doctrine in formal terms a century and a half ago, use of the anticipatory self-defense doctrine was rare prior to adoption of the U.N. Charter.[175] Transient examples include the Soviet Union's reliance on it for short military actions against Outer Mongolia in 1921 and against Manchuria in 1929.[176] Interestingly, it was raised as a defense by both the Germans and the Japanese before the International Military Tribunals following World War II.[177]

Germany argued that its 1941 attack on the Soviet Union "was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end."[178] The Nuremberg Tribunal dismissed that contention for lack of evidence.[179] Likewise, Japan argued that its invasion of the Dutch East Indies (Indonesia) that same year was in response to a declaration of war by the Netherlands' government in exile.[180] The International Military Tribunal for the Far East, acknowledging Tokyo's premeditated plans to attack the Dutch colonial possessions, rejected the anticipatory self-defense assertion, stating:

> The fact that the Netherlands, being fully apprised of the imminence of the attack, in self-defence declared war on the 8th December and thus officially recognised the existence of a state of war which had been begun by Japan cannot change that war from a

172. *Id.*
173. *Id.*
174. *See id.*
175. *See* BROWNLIE, *supra* note 18, at 260-61.
176. *See id.* at 257 n.6.
177. *Id.* at 258.
178. *Id.* (quoting International Military Tribunal, Judgment, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER – 1 OCTOBER 1946: OFFICIAL DOCUMENTS 171, 215 (1947)).
179. *Id.*
180. *Id.*

> war of aggression on the part of Japan into something other than that.[181]

Japan's December 7, 1941, attack on Pearl Harbor, largely sinking the American Pacific Fleet, has also been regarded, though not asserted as such by the Japanese, as a preemptive strike.[182] It has been regarded by others as a preventive war, also illegal under the U.N. Charter. As the New York Times' David Sanger reports:

> [For some,] Iraq looks less like a preemptive strike and more like a preventive war. And there the classic example is one the White House is unlikely to cite with approval: Dec. 7, 1941. Every schoolchild in Japan is taught that the United States-led embargo on Japan was slowly killing the country's economy and undermining its ability to defend itself. That's why Japan has kept a museum celebrating the heroes of Pearl Harbor.
>
> The logic goes something like this, says Graham Allison of Harvard's Kennedy School of Government. 'I may some day have a war with you, and right now I'm strong, and you're not. So I'm going to have the war now. That, of course, was Japan's thinking, and in candid moments some Japanese scholars say – off the record – that the country's big mistake was waiting too long.' But Mr. Allison notes that historically, preventive war has been regarded as illegitimate, because if countries act simply because rivals are getting relatively stronger, you end up having a lot of wars.[183]

A senior fellow at the Council on Foreign Relations, Max Boot argues that it is time to blur the artificial distinction between anticipatory self-defense and preventive war on a disturbingly outcome-determinative basis.[184] According to Boot, it is precisely *because* England's preemptive/preventive attack in 1587 on Philip

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181. *Id.* (quoting United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4-12, 1948), *reprinted in* 1 The Tokyo Judgment: The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, at 382 (B.V.A. Röling & C.F. Rüter eds., 1977)).

182. *See generally* ROBERT SMITH THOMPSON, A TIME FOR WAR: FRANKLIN DELANO ROOSEVELT AND THE PATH TO PEARL HARBOR 381, 400 (1991).

183. David E. Sanger, *Beating Them to the Prewar*, N.Y. TIMES, Sept. 28, 2002, at B7.

184. *See* Max Boot, *Who Says We Never Strike First?*, N.Y. TIMES, Oct. 4, 2002, at A27.

II's Spanish fleet at Cadiz helped Sir Francis Drake defeat the Armada the following year that such actions are justified.[185] Of course, this argument distorts the legal doctrine and stretches into the realm of political realism. The inherent weakness in Boot's assertion is that it hearkens back to a time of trial by combat, a time the world has since renounced. Moreover, outcome cannot always be predicted, and after-the-fact justification is no way to prosecute hostilities in what the international community has endeavored to mold into a more predictable field of foreign relations.

B. Dormancy of Preemption under the U.N. Charter?

Like reprisal, anticipatory self-defense was arguably outlawed in 1945 by adoption of the U.N. Charter.[186] Traditional self-defense in response to an armed attack was the only form of self-help that made it into the Charter.[187] The collective security apparatus of Chapters VI and VII under the aegis of the Security Council were designed to be the methods of international response to states breaking the rules against armed aggression.[188] However, old habits are hard to break.

During the Cold War period, although preemptive military strikes were reduced considerably, they continued to occur as the political dynamic of the Security Council (veto stasis between communist and non-communist permanent members) kept that body in a deep freeze.[189] With the U.N. unable to act on many instances of military aggression, individual powers resorted to the actions that were necessary to keep the peace, legal or not, while trying to justify them on varying legal grounds in the process. Some examples follow.

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185. *Id.* Boot also cites other examples:

> In 1756, as Austria, Russia and France plotted to crush Prussia, Frederick the Great did not wait to be attacked. He struck first, invading Saxony and Bohemia, and eventually winning important victories against his far more numerous foes.
>
> In 1967, as Arab armies gathered on Israel's borders, Prime Minister Levi Eshkol did not wait to be attacked. Israeli forces struck first and defeated their enemies in just six days.

186. *See* U.N. CHARTER arts. 33, 51.

187. *See id.*

188. *See generally* U.N. CHARTER chs. VI., VII.

189. AREND & BECK, *supra* note 2, at 75.

• The Cuban Missile Crisis

In 1962, it came to President Kennedy's attention that the Soviet Union was putting together delivery systems for ballistic missiles in Cuba. Kennedy, who stated that this was "a deliberately provocative and unjustified change in the status quo," ordered a naval blockade (a "quarantine") so that the Soviet Union could not transport the material to Cuba.[190] When President Kennedy addressed the United States, he stated that he was acting "in defense of our own security and of the entire Western Hemisphere."[191]

A blockade is a violation of Article 2(4) of the U.N. Charter under international law unless it falls within an exception.[192] In 1962, the official justification for the United States' action centered on the authorization by the Organization of American States; however, the question of the right of anticipatory self-defense was debated in legal circles.[193] When the Security Council considered the Crisis, "there was no specific rejection of the concept of anticipatory self-defense. Instead, there seemed to be an underlying acceptance by most members of the Council that in certain circumstances the preemptive use of force could be justified."[194] While the Security Council certainly did not sanction anticipatory self-defense, neither did the discussions reject the concept.[195] This, combined with the fact that states that opposed the United States' actions during the Crisis failed to denounce the action, suggests that the doctrine of anticipatory self-defense had some accep-tance.[196]

• The 1967 Six-Day War

On June 5, 1967, Israel attacked the United Arab Republic (UAR), a short-lived pan-Arabic political merger between Egypt and Syria, as well as simultaneously attacking Jordan and Iraq. Defeat of the Arab nations was quick.[197] Israel's justification for the attack was that actions by the United Arab Republic and its neighbors showed that an invasion of Israel was impending. While Israel pressed the "anticipatory nature" of its action, other states (Syria, Morocco, and the Soviet Union) put more emphasis on the idea that Israel was the first to use force and that the first use of force was

190. *Id*. at 74-75.
191. *Id*. at 75.
192. *Id*.
193. *Id.*
194. AREND & BECK, *supra* note 2, at *75.*
195. *Id*. at 76.
196. *Id*.
197. *Id*.

illegal.[198] Thus, these states did not seem to care about the intent behind military action and the distinction between aggression and defense – just that the state who used force first was the aggressor.[199] Even states sympathetic to Israel (the United States and Britain) abstained from debating anticipatory self-defense.[200]

- The 1981 Israeli Bombing of the Osarik Reactor

In June 1981, the Israeli Air Force decimated an Iraqi nuclear reactor by Baghdad.[201] When the Security Council addressed the matter, the Iraqi Foreign Minister, Saadoun Hammadi, denounced Israel's action as an "act of aggression."[202] Ambassador Blum from Israel stated, "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the United Nations Charter."[203] Blum proceeded to cite several legal scholars, including Bowett, for the principle that anticipatory self-defense is acceptable; he further justified Israel's actions by stating that only when diplomatic channels failed did Israel resort to force.[204]

Despite Mr. Blum's statements, every delegate thereafter condemned Israel's action.[205] However, several of the delegates did talk about anticipatory self-defense; many of these delegates sided with the restrictionist school of thought, including Syria, Guyana, Pakistan, Spain, and Yugoslavia.[206] For example, when discussing preemptive strikes, the delegate for Syria said:

> [It was] a concept that has been refuted time and again in the Definition of Aggression…and [has been] dismissed as unacceptable, since it usurps the powers of the Security Council as set forth in Article 39 of the Charter and curtails the Council's authority.[207]

198. AREND & BECK, *supra* note 2, at 76-77.
199. *Id.* at 77.
200. *Id*. *See also* Matt Donnelly, *Hitting Back? The United States' Policy of Pre-Emptive Self-Defense Could Rewrite the Rules of Military Engagement*, ABC News, Aug. 28, 2002, *available at* http://abcnews.go.com/sections/world/DailyNews/preempt020828.html.
201. AREND & BECK, *supra* note 2, at 77.
202. *Id.* at 77-78.
203. *Id*. at 78.
204. *Id*.
205. *Id.*
206. *Id*.
207. AREND & BECK, *supra* note 2, at 78.

However, several other delegates instead sided with the counter-restrictionist school of thought.[208] The basic argument for anticipatory self-defense was that it was permissible if an imminent threat could be shown and other ways to approach the threat had been exhausted.[209] This approach was supported by delegates from Sierra Leone, Britain, Uganda, Niger, and Malaysia.[210] Sierra Leone's representative, Mr. Koroma, for instance, stated that "the plea of self-defence is untenable where no armed attack has taken place *or is imminent*."[211] Still other states condemned Israel without debating anticipatory self-defense, including Ambassador Kirkpatrick from the United States.[212] In summary, there seemed to be more support for the counter-restrictionist arguments than in previous discussions.[213]

C. Resurrection of Anticipatory Self-Defense Doctrine

Clearly, there is still a division concerning the right of anticipatory self-defense. However, "many states…take the counter-restrictionist view and support the proposition that in certain circumstances it may be lawful to use force in advance of an actual armed attack."[214] While the concept of anticipatory self-defense might have its supporters, rarely does a state invoke the right of anticipatory self-defense.[215] Not only do states usually instead rely on traditional self-defense, "they prefer to take a wide view of armed attack rather than openly claim anticipatory self-defence."[216]

Since there is no established endorsement or rejection, "it would seem to be impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for preemptive self-defense."[217] Nevertheless, that is not the last word. The fact that states rarely use anticipatory self-defense as a justification shows a certain reluctance:

> This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force. States

208. *Id.*
209. *Id.*
210. *Id*. at 78-79.
211. *Id*. at 78-79.
212. *See id*. at 79.
213. AREND & BECK, *supra* note 2, at 79.
214. *Id.*
215. GRAY, *supra* note 155, at 112.
216. *Id*.
217. AREND & BECK, *supra* note 2, at 79.

> take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states."[218]

However, in the post-9/11 world, the American government has made it an official policy to return this doctrine to service; the Bush Administration's National Security Strategy, released to Congress in September 2002, stated this in no uncertain terms:

> [T]he United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.
>
> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack.
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means….
>
> The greater the threat, the greater the risk is of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.
>
> The United States will not use force in all cases to preempt *emerging* threats, nor should nations use

218. GRAY, *supra* note 155, at 112.

> preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.[219]

How exactly is this new "emerging threat" standard to be quantified? The National Security Strategy is silent on that point and no policy clarifications have been forthcoming from the government. Clearly, the trigger is a lower threshold of evidence that would be required to establish existence of an imminent threat. It perhaps might be a commitment beyond some "point of no return" to carry forth an aggressive act.[220] A report by ABC News correspondent Matt Donnelly encapsulates the conundrum:

> Critics warn that the evidence the United States needs to attack – the point of no return – has not been clearly defined, and has no precedent. Would the United States wait to invade until there was proof Iraq had built a chemical, biological or nuclear weapon? Or would Bush send in troops as soon as Iraq had all the components?[221]

George Washington University Law School Professor Sean Murphy appreciates the unpredictable long-term consequences of returning this old doctrine into service: "The standards for invasion now are pretty cut-and-dry: If you're attacked, you can respond.… But if you make anticipatory self-defense the standard, you open an enormous Pandora's box."[222] Who else can use it once the United States brings it back into play? If there are no clear guidelines and a high threshold for its employment, then each state is free to interpret when a threat has sufficiently "emerged" to justify military preemption. Almost any country could conceivably avail itself of the doctrine's legitimizing effect against "emerging threats" in neighboring states under this watered-down trigger mecha-nism.[223]

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219. The National Security Strategy of the United States, at 15 (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nssall.html (emphasis added).

220. Donnelly, *supra* note 200.

221. *Id.*

222. *Id.*

223. Michael J. Kelly, *Bush's Pre-emptive Strategy is a Recipe for Chaos*, HOUSTON CHRON., Sept. 24, 2002, at 20A:

> Without establishing a high threshold demanding clear and convincing evidence of an imminent threat, chaos could ensue. If America invades Iraq on its own, outside the U.N. system, on the basis of pre-emptive self-

Secretary of Defense Donald Rumsfeld, however, is willing to take that risk now that weapons of mass destruction are on the table. In a September 2002 interview, Secretary Rumsfeld noted that it is the object which now justifies the preventive action to be taken, not necessarily the underlying legal rationale:

> Q: What is the concept of the preemptive strike that seems to be coming into play here? How do you foresee it looking beyond Iraq [inaudible]? How do you foresee it being used around the world in the future? How does this set a precedent?
>
> Rumsfeld: I think what one has to do is…recognize that we're in a new security environment in the 21st Century. It is different than the 20th Century. It's different because then we were dealing essentially with conventional capabilities. Today we're dealing …with weapons of mass destruction, biological weapons, chemical weapons, in the hands of people who are quite different than was the standoff between the United States and the Soviet Union.
>
> That different circumstance it seems to me forces us to think about the meaning of war. How does one defend itself against a terrorist? Do you absorb the attack and then decide to do something about it? What about the historic concept of anticipatory self-defense? When one sees a threat developing to do something to deal with that? Preventive action.
>
> Think of John F. Kennedy in the Cuban Missile Crisis. He didn't sit there and let Soviets put missiles in Cuba and fire a nuclear missile at the United States; he decided to engage in preemptive action, preventative action, anticipatory self-defense,

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defense against an emerging threat suddenly…each nation could use a different yardstick to measure the immediacy and gravity of a threat to its national security.

In other words, the pre-1945 system of warfare and reprisal would be resurrected. Does the Bush Administration realize its proposed action could transport us back to a time of aggressive war? The world outlawed such action at the Nuremberg Trials. German, and later Japanese, commanders and leaders were hanged for it. A value judgment was made that world order was best achieved by constraining the military options of individual states. Were we wrong after World War II?

> self-defense, call it what you wish. And he went out and blockaded them. Called it a quarantine but blockaded them and put the world into a very tense, dangerous … circumstance[]. And prevailed because he did take preventive action.
>
> So I don't think that it's a new thing as such. I think what's new is that we could afford, countries could afford…the historical blow with conventional capabilities. Lose hundreds or thousands of people. Today the question people are debating properly is how do you feel about absorbing a blow that is from a weapon of mass destruction and it's not 100 people or 1,000 people but it's tens of thousands of people? What is the responsible course of action for our country, for our people? That's the issue that is front and center for the American people and indeed for the people of the world.[224]

Professor Michael J. Glennon, a National Security Law expert at the University of California - Davis, supports Secretary Rumsfeld's view: "Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safe-guarding the well-being of their citizenry."[225] Professor Glennon's realpolitik analysis that leads him to this conclusion is that, because the collective security apparatus of the U.N. Charter has failed, the legal prohibitions on use of force contained in that charter should no longer continue to restrict state action in the *de jure* sense (noting they have already been abandoned in the *de facto* sense).[226]

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224. John Shirek, NBC Affiliate - WXIA Channel 11, *Atlanta Georgia Interview with Secretary of Defense Donald H. Rumsfeld*, Sept. 27, 2002, *available at* http://www.defenselink.mil/news/Sep2002/t09302002_t927wxia.html.

225. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 552 (2002)

226. *Id.* at 540-41:

> The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in the real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.
>
> The upshot is that the Charter's use-of-force regime has all but collapsed. This includes, most prominently, the restraints of the general

IV. CONCLUSION

The almost sixty-year slumber of reprisal and anticipatory self-defense as actionable doctrines justifying and defining the parameters for international use of military force may be over. As creatures of customary law, their use by states was curtailed with adoption of the United Nations Charter in 1945. The only place they could plausibly continue to lurk was within the ill-defined self-defense clause of the U.N. Charter, which arguably enshrined the concept in its "inherent" form as it stood when the Charter entered into force.

On that basis, states termed the reprisals and preemptive strikes they continued to engage in after 1945 as "self-defense" actions permitted by Article 51, while simultaneously adhering to the traditional rules for carrying out those actions required by customary law. Thus, while the old doctrines were prohibited *de jure*, they remained *de facto* foreign relations and national security tools. Now, with the implied resurrection of reprisal against terrorists and the express resurrection of anticipatory self-defense against both terrorists and states by the Bush Administration in its conduct of the post 9/11 War on Terror, the prospect of their return to *de jure* usage is a real possibility. It is a possibility that this author is more comfortable with in the context of reprisal against terrorist organizations than in the context of preemptive strike capability.

Nevertheless, left unchallenged, the American interpretation of Article 51 that broadens the permissiveness of unilateral or multilateral military engagements to include such actions on their own merits (and not as shadowy aspects of traditional self-defense) may carry the day. If the world does not condemn this interpretation, states act in accordance with it, and state practice congeals in support of it, then there is a real risk of the customary rules (as altered by the United States) finding their way legally into the U.N. Charter.

This would amount to a significant regression in the progress made after the end of the Cold War toward stability through collective security. The dangers of returning to pre-1945 rules of engagement with nuclear weapons are manifold. Legal constraints, and therefore political and moral constraints, on use of force by new

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> rule banning use of force among states, set out in Article 2(4). The same must be said…with respect to the supposed restraints of Article 51 limiting the use of force in self-defense. Therefore, I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.

nuclear powers such as India, Pakistan, North Korea and Israel would be swept away. Countries with emerging nuclear arsenals, such as Iran, would be doubly encouraged to proceed quickly in acquiring those weapons. Non-proliferation goals will evaporate more than they already have as non-nuclear states near nuclear ones are forced to "go nuclear" themselves in order to achieve the only deterrence that can bring security in a world devoid of military restraints.

Moreover, under the new, looser threshold of identifying "emerging" threats before preemptively striking a neighbor instead of imminent ones, almost any threat can be defined as emerging in some stage or another. Unfortunately, this is true whether it involves terrorists in Kashmir or Lebanon potentially striking at targets in India or Israel, increased missile armament in Taiwan aggravating China, renewed drug trade in Afghanistan infiltrating Iran, or the occupation of uninhabited nominally Spanish islets in the Strait of Gibralter by Moroccan forces.

Is this really the kind of world in which we want to live? Is it going to be a safer one for our children and grandchildren? Is it going to provide more stability? The answer is "no" to all of the above. The United States is the sole superpower today. However, America cannot propose to articulate one set of rules defining military engagement for itself and another set for the rest of the world. Nations are fed up with Washington's hypocrisy in this regard. They will most assuredly follow America's lead for the short-term benefits it may provide, ignoring — as the Bush Administration now does — the long-term problems it will certainly create.

Secretery General Kofi Anan specifically identified the core problems surrounding anticipatory self-defense in his remarks opening the 58th session of the U.N. General Assembly in September 2003. In so doing, he placed the recurrence of this practice squarely before that body as an issue for consideration:

> Since this Organization was founded, States have generally sought to deal with threats to the peace through containment and deterrence, by a system based on collective security and the United Nations Charter.
>
> Article 51 of the Charter prescribes that all States, if attacked, retain the inherent right of self-defence. But until now it has been understood that when States go beyond that, and decide to use force to deal with broader threats to international peace

> and security, they need the unique legitimacy provided by the United Nations.
>
> Now, some say this understanding is no longer tenable, since an "armed attack" with weapons of mass destruction could be launched at any time, without warning, or by a clandestine group.
>
> Rather than wait for that to happen, they argue, States have the right and obligation to use force pre-emptively, even on the territory of other States, and even while weapons systems that might be used to attack them are still being developed.
>
> According to this argument, States are not obliged to wait until there is agreement in the Security Council. Instead, they reserve the right to act unilaterally, or in ad hoc coalitions.
>
> This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years.
>
> My concern is that, if it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification.
>
> But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some States feel uniquely vulnerable, since it is those concerns that drive them to take unilateral action.
>
> We must show that those concerns can, and will, be addressed effectively through collective action.
>
> Excellencies, we have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.[227]

Whether either body of the U.N. can muster the political will necessary to address this issue is an open question. Nevertheless,

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227. *Adoption of Policy of Preemption Could Result in Proliferation of Unilateral, Lawless Use of Force, Secretary-General Tells General Assembly,* U.N. Doc. SG/SM/8891-GA/10157 (2003) *available at* http://www.un.org/News (last visited Sept. 29, 2003).

with the Secretary-General's backing, there is at least room for hope.

SURINAME-GUYANA MARITIME AND TERRITORIAL DISPUTES: A LEGAL AND HISTORICAL ANALYSIS

THOMAS W. DONOVAN*

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I. INTRODUCTION

The maritime, land, and river boundary disputes between the adjacent South American nations of Suriname and Guyana existed long before the two nations gained independence from colonialism. Both countries claim sovereignty over three regions: the Courantyne River, which separates them; the New River Triangle, which lies at the southern edge of the adjacent countries; and part of the Caribbean Sea, which extends north from their coastlines. The issue was of relatively little importance until both countries discovered important natural resources in the contested regions; gold deposits were found in the New River Triangle area and offshore petroleum opportunities arose on the continental shelf. When both nations began to realize that timely resolution was economically crucial, their renewed efforts to achieve a comprehensive bilateral demarcation seemed promising. However, after years of negotiations, during which time both sides may have sponsored and encouraged unilateral development of the disputed regions, a mutually agreeable settlement has proved far more elusive than originally anticipated.[1]

As both nations continue to resist compromise, it becomes increasingly probable that an international tribunal will have to become involved. Such a tribunal would be called upon to review the histories of these nations and the region itself, from the pre-colonial era to the present, and to evaluate the boundary claims over time and the operative legal principles supporting these claims. What would the tribunal ultimately decide? What legal and historic precedents should the tribunal consider in arriving at its decision? This paper will address these questions and offer predictions about the likely outcomes. It will indicate that Guyana has the stronger claim to the New River Triangle, that Suriname will likely maintain title to the entire Courantyne River, and that Guyana has the stronger claim to the "triangle of overlap" in the offshore economic zone.

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1. For more information on the history of this dispute see generally, http://www.guyana.org/features/guyanastory/guyana_story.html.

Guyana's claims to the New River Triangle are supported by fundamental laws of occupation. The twin elements of occupation (*animus occupandi* and *corpus*)[2] are fulfilled, detailing a clear intent and consistent occupation of the area. On the other hand, Suriname's claims to the New River Triangle are based primarily on possible prescription and colonial hinterland claims. In terms of the boundary river dispute, Suriname maintains a strong argument for sovereignty over the entire river based upon inheritance of historic title through *uti possedetis*. This title to the boundary river will affect the land boundary terminus and reward Suriname with a beneficial territorial sea immediately adjacent to the coast. However, this trajectory was not envisioned to apply to the outlying maritime Exclusive Economic Zone or continental shelf. These areas, therefore, would most probably use different precedents for the demarcation. Any international arbitration body following international jurisprudence would most likely award these offshore areas to Guyana given the existence of a *de facto* maritime line created by long-standing Guyanese concessions.

II. DESCRIPTION OF DISPUTED AREAS

The area of the New River Triangle comprises over 6,000 square miles.[3] It is the northern extension of the Amazon River containing dense forests and snaking waterways. Large tracts of area have not been surveyed, nor has there been any long-term substantial inhabitation. The following section describes the geographical and maritime areas in dispute, estimated extent of natural resources contained, and current inhabitants.

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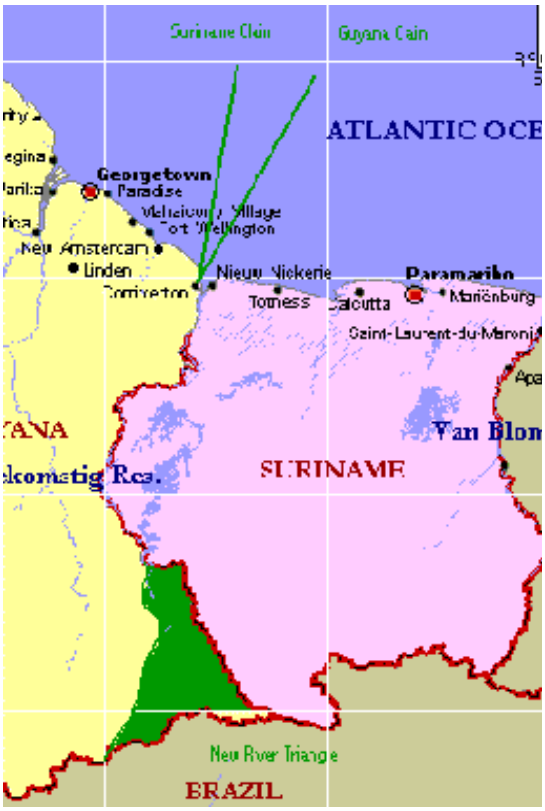
2. *See generally,* http://www.seanhastings.com/havenco/sealand/opinion01.html (last visited Oct. 23, 2003).

3. GUYANA – SURINAME BOUNDARY, THE GUYANA MINISTRY OF INFORMATION § 4 (1968). Other sources indicate that the New River Triangle is as large as 8,000 square miles. *See* Government of Suriname Homepage *at* http://www.suriname.nu (last visited Oct. 6, 2003).



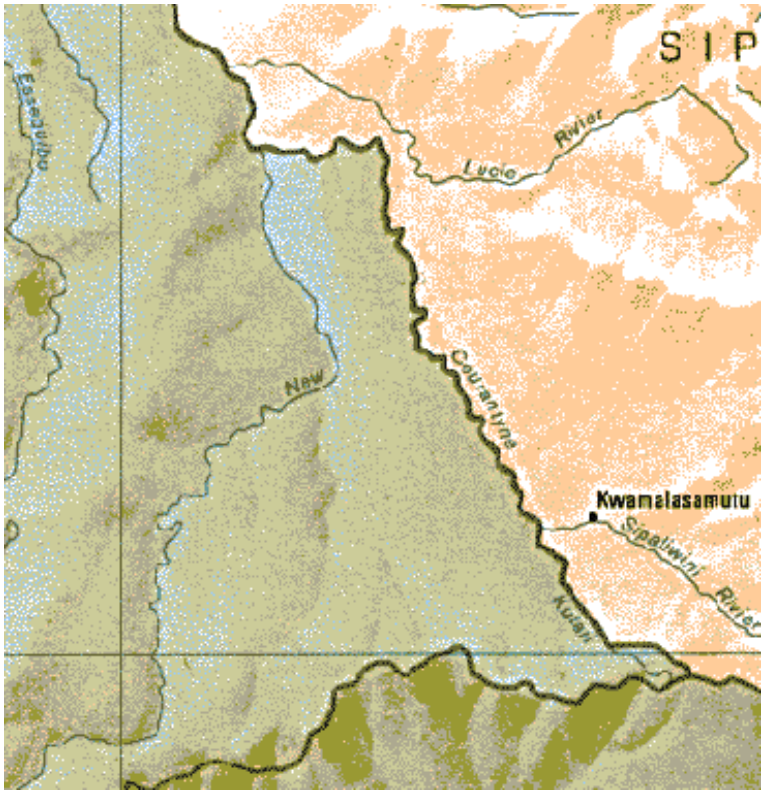
A. Geography and Indigenous Inhabitants of the New River Triangle

The New River Triangle is located between the Courantyne[4] River to the east and the New River to the west. The southern border extends to a watershed that forms the northern border with Brazil. An agreement in 1799 established that the border between the predecessor states of British Guiana and Dutch Guiana would be the Courantyne River.[5] However, when this agreement was

4. For this paper a consistent spelling of Courantyne River is used. In parenthetical citations other spellings are used such as "Corentyne," "Corentin," "Corentyn," "Korentyn," "Corantine," or "Corentine" Rivers.

5. The 1799 Agreement will be discussed infra as it pertains to the relationships between separate colonies before the British and Dutch formalized their present colonies. For this paper, colonial Guyana is referred to as "British Guiana" during its colonial experience and "Guyana" since 1966. The formal name of Guyana is the Cooperative Republic of Guyana. The entire population of Guyana is 861,000. ATLAS A-Z 229 (Sam Atkinson ed., 2001). Likewise, Suriname is referred to as "Dutch Guiana" during its colonial period. Since its independence in 1975, it has been referred to as the Republic of Suriname. The entire population is 417,000. *Id.* at 327.

ratified, neither the colonial government of British Guiana nor Dutch Guiana knew how far the Courantyne River extended into the northern Amazon. Different expeditions surveying the headwaters of the Courantyne reached incompatible conclusions. It is the differing opinions of these surveys that form the modern boundary dispute over the New River Triangle. Guyana claims the Kutari River,[6] a river breaking from the Courantyne and flowing from a southeast direction, as the true headwater of the Courantyne River, and therefore, the boundary. Suriname claims the New River, a river breaking from the Courantyne and flowing from a southwest direction, as the larger tributary, and therefore, the correct border. The area between these two rivers is called "The New River Triangle."



Today, the Maroon Indians are the only indigenous peoples living in the New River Triangle. Their numbers are no more than 5,000, and of that number, most are seasonal gold and diamond

6. For this paper a consistent spelling of Kutari is used. In parenthetical citations other spellings are used, such as "Cutari," or "Cutari-Curuni," or "Curuni."

prospectors who move intermittently throughout the unfortified border region.[7] Most Maroons have descended from escaped slaves and Amerindians of Dutch and English colonial rule.[8] Although they have had a tenuous cultural and historical connection to Suriname, they have still asserted a right of self-determination in the past.[9]

B. Economic Activity

Within the New River Triangle there are significant timber and mineral resources,[10] and both nations have been active in exploiting them. The Government of Guyana awarded a Malaysian corporation a 500,000 hectare logging concession in the New River Triangle.[11] There is also evidence of significant aluminum and bauxite deposits.[12] In 1984, SURALCO, a subsidiary of the Aluminum Company of America (ALCOA), formed a joint venture with the Royal Dutch Shell-owned Billiton Company to explore the interior of Suriname.[13] The survey did not refer to the New River Triangle directly, but did assert that there are commercial amounts of bauxite and aluminum throughout the interior.[14]

There is also the possibility of gold and diamond resources.[15] Both Suriname and Guyana have encouraged individual prospectors to venture into the disputed area to seek gold.[16] Guyana is a significant gold producer from the Omai Gold mine and other open pit mining sites.[17] Suriname's gold mining operations are still

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7. Garry D. Peterson & Marieke Heemskerk, *Deforestation and Forest Regeneration Following Small-Scale Gold Mining in the Amazon: The Case of Suriname,* 28(2) ENVTL CONSERVATION 117, 117-126 (2001).

8. *Id.* at 118. Other minor Native American tribes inhabit the area, although they are also described as "Maroon." *See* Government of Suriname Homepage, *supra* note 1.

9. The largest established human presence in the area of the New River Triangle is the indigenous community of Kwamalasemutu. In 1995, the village of approximately 1,500 persons demanded that mining companies abandon the concessions and their rights to own and control those lands. *See* Press Release, Forest Peoples Programme, People Of Kwamalasemutu Want Golden Star Resources To Leave Their Land and Ask That Their Land Be Recognized By The Government (Feb. 4, 1997), *at* http://nersp.nerdc.ufl.edu/~arm/FPP-Maroon.html (last visited Oct. 6, 2003).

10. Philip Szczesniak, *The Mineral Industry of Suriname,* 16 U.S. GEOLOGICAL SURVEY MINERALS YEAR BOOK 1 (2000).

11. *Timber Concessions Freeze Feels the Heat: New Timbers Permits Imminent While Mining Moves South* (March 14, 1996) *at* http://forests.org/recent/1996/guymelt.htm (last visited Oct. 6, 2003).

12. Aluminum exports accounted for 70% of Suriname's estimated $485 million export earnings in 2000. Szczesniak, *supra* note 10.

13. SURALCO is a dependant corporation of ALCOA but with state owned branches. Id.

14. *Id.*

15. *See* Peterson, *supra* note 7, at 117-119.

16. *Id.* at 119.

17. In 1998, Guyana produced 400,000 troy ounces of gold, amounting to 17% of the overall

restricted to small-scale operations. However, over the past few years, exploration efforts have intensified.[18] The Sella Kreek gold district is the country's largest producer with 50,000 troy ounces to date.[19] Suriname Wylap Development Corporation operates the Sella Kreek gold mine which produced 10,000 troy ounces in 2000.[20]

In 1997, the Government of Guyana secured World Bank financing to embark on a protectionist environmental policy in the area. [21] The grant refers to the New River Triangle as a possible site for a wildlife refuge.[22] It is not clear from the grant if the World Bank refers to the exact area in question or understands the ramifications of granting aid to a territory in dispute. In any case, the project is still in the implantation stage. It is expected to take six years and total project costs are estimated at approximately $9 million.[23]

The large Courantyne, Kutari, and New Rivers have virtually unlimited hydroelectric capacity.[24] There is speculation that the Government of Guyana invited foreign bids to build a large hydroelectric plant on the New River, however, the plan was later abandoned due to the long-distance and topographical obstacles between the New River and the population centers located on the Caribbean Sea.[25]

Gross Domestic Product (GDP). Diamond production was $1.5 million in 2000. The Omai gold mine is located north of the New River Triangle but connected to the same geographical formations that created the gold and mineral deposits. *See* Marcus Colchester et al., *Mining and Amerindians in Guyana, Final Report of the APA/NSI project on Exploring Indigenous Perspective on Consultation and Engagement within the Mining Sector in Latin America and the Caribbean*, *at* http://www.nsi-ins.ca/ensi/pdf/guyana/guyana_final_report.pdf (last visited Oct. 15 2003).

18. *See* Peterson, *supra* note 7, at 121. The Sella Kreek Gold mine is located north of the New River Triangle claims asserted by Suriname, however, it is located on the same geographic plateau and adjacent to the known gold producing areas in Suriname. *See id.* at 118-19.

19. Heemskerk, Marieke. *Livelihood Decision-Making and Environmental Degradation: Small-Scale Gold Mining in the Suriname Amazon*, 15 Society and Natural Resources 327-344 (2002) a*vailable at* http://www.drs.wisc.edu/heemskerk/goldmine/ (last visited Oct. 24, 2003).

20. *See* http://www.canarc.net/suriname-sarakreek.asp (last visited Oct. 21, 2003). Production in 2001 was approximately 10,000 ounces of gold from the small, open pit placer mine and gravity recovery systems. A second high grade, open pit lode mine is also ready for development subject to financing. *Id*.

21. The World Bank-funded project is formally called the Guyana National Protected Areas System Global Project, *available at* http://wbln0018.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/4e5833f2b0a3edde 852567cc0077f970?OpenDocument (last visited Oct. 6, 2003).

22. *Id.*

23. *See id.*

24. Szczesniak, *supra* note 10, at 1.

25. Alternative Sources of Energy Homepage, *at* http://www.tda.gov/region/latin.html (last visited Oct. 6, 2003).

C. Extent of Resources in Disputed Maritime Zone

The disputed maritime area between Guyana and Suriname, called the Guyana Basin, is an under-explored area on the continental shelf of South America extending from present day Venezuela to Suriname.[26] The Guyana Basin is geographically next to Trinidad and Venezuela, both important oil producers on the Caribbean plateau and the Venezuelan extension, which are two large and productive oil fields. Throughout this area, large commercial petroleum consortiums such as Exxon, Agip, and Burlington have successfully drilled for petroleum.[27]

Limited exploration in the Guyana Basin has been carried out to date. However in June 2000, the United States Geological Survey's *World Petroleum Assessment 2000* estimated that the resource potential for the Guyana Basin is 15.2 billion barrels of oil. This estimate indicates that the Guyana Basin is the second most important unexplored region in the world in terms of oil potential. If the potential is reached, it would be the twelfth most productive site in the world.[28] CGX Resources, a Toronto based corporation, estimates the risk factor (the probability of striking commercially viable oil) on the Guyana Basin at 35%.[29]

III. HISTORICAL BACKGROUND

The first inhabitants of the general area were the Carib Indian tribes.[30] The first European explorers were Spanish, although they

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26. CGX Resources Homepage, *at* http://www.cgxresources.com/2001_page1.html (last visited Oct. 6, 2003).

27. Interview with Dr. Edris K. Dokie, Director, CGX Resources, Inc., New York, NY (May 7, 2003).

28. *Id.* The United States Geological Survey (USGS) projected that the Guyana Basin would have more than thirty "elephants" (deposits containing 100 million barrels of oil), six of which could be "giants" (deposits containing more than 500 million barrels). The Guyana basin is also estimated to contain 42 trillion cubic feet of gas. *Id.* However, certain oil consortiums have not been convinced of the extent of resources. Shell Oil, for instance, ceased specific operations in the disputed area before June 2000 asserting lack of resources and relinquished its licenses. *Id.*

29. *Id.* The "risk factor" of striking commercially viable oil in the Guyana Basin is extremely high as compared to other areas of the world. The deposits also have a 75% seal rating (the ability of the deposit to remain sealed until drained by extrapolation). Due to the extent of petrochemicals on the continental shelf off Guyana and Suriname, this find could yield enormous financial benefits for any corporation or industry involved in its extraction. Near the area in dispute, Suriname has granted a concession to a joint venture between Burlington Resources, Totalfina, and The Korean National Oil Company to drill on the continental shelf. *See Consortium Zoekt Olie in Zee Suriname,* NRC Handelsblad, Aug. 24, 1999. Offshore concessions in Suriname are valid for 40 years. *See Petroleum Law of 1990, reprinted in* HYDROCARBON LEGAL FACTS OF SURINAME (February 2002).

30. The Organization of American States (OAS), *Annual Report of the Inter-American Commission on Human Rights, available at* http://www.cidh.oas.org/annualrep/89.90eng

never held a sustainable claim to the area. The Dutch and English came later, and supported long-term colonization procedures.

A. First European Exploration and Occupation of Area

In the beginning of the European colonialist experience in the Guianas, modern day Suriname was controlled by British interests and modern day Guyana was controlled by the Netherlands.[31] Dutch mercantile concerns were the first Europeans to settle the area; their primary focus was on trade with indigenous tribes and gold exploration.[32] In subsequent years, after deforestation and dike-building, tobacco and dye cultivation became an important economic justification for maintaining the colonies.

By the early 1600s, Dutch traders had established an important and sustained settlement on the mouth of the Essequibo (in modern-day Guyana).[33] Subsequent waves of Dutch colonization followed in Berbice (also in modern-day Guyana).[34] In 1604, English colonies were established near modern-day Paramaribo.[35] By 1663, the English settlers were granted full recognition and colonial status under the Governorship of Lord Willoughby by royal grant from King Charles II.[36]

/toc.htm (May 17, 1990). Although the Maroon Indians were the first inhabitants, the Government of Suriname has reportedly violated property and human rights of the small tribes that live in the New River Triangle. *Id.*

31. ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY 12-16 (Sandra W. Meditz & Dennis Hanratty eds., 1989).

32. VERE T. DALY, THE MAKING OF GUYANA 35-37 (1974). Daly asserts that the first European inhabitants of the Guianas did not venture inland because of health concerns and poor transportation abilities. During this era the coast was cultivated to produce tobacco and sugar which were the most important commodities at the time. *Id.* at 35-37, 46.

33. CORNELIUS CH. GOSLINGA, THE DUTCH IN THE CARIBBEAN AND ON THE WILD COAST 1580-1680, 430 (1971). The Courteen and Company was created by the fact that the largest company and colonizing entity in the Netherlands, the Dutch East Indian Company, did not want to do business in Guyana. In the absence of the large corporation, Courteen & Company established itself in the colony of Essequibo. *See* http://www.guyana.org/features/guyanastory/chapter9.html (last visited Oct. 21, 2003).

34. Berbice was settled in 1627 by a wealthy and well-known Dutch businessman, Abraham van Peere, acting on behalf of Courteen & Company. *See Conditions for Colonies, adopted by the West India Company on November 28, 1628, reprinted in* U.S. COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA VOL. II, EXTRACTS FROM NATIONAL ARCHIVES at 57 (1897). In the original Dutch version, Guyana is referred to as the "Wild Coast." *See* MICHAEL SWAN, BRITISH GUIANA THE LAND OF SIX PEOPLES 3 (1957). The Dutch described the "Wild Coast" as "stretching…from the Amazon to the Wild or Caribbean Islands." GOSLINGA, *supra* note 33, at 431.

35. The land rush in the Guyanas coincided with the establishment of European colonies across North and South America, and in particular, the Caribbean. The main rival during this era was Spain, which later abandoned its position in the Guyanas. *See* DALY, *supra* note 32, at 14-20.

36. *See* http://www.guyanaca.com/suriname/guyana_suriname_colonial.html (last visited Oct. 21, 2003)

Disputes between the early English and Dutch settlers eventually grew into overt hostilities. An invasion by the English was eventually repelled and the Dutch regained control of the area in modern-day Guyana. This was formally acknowledged in the 1667 Treaty of Breda[37] in which the English ceded colonies in Guyana in exchange for Dutch relinquishment of New York.[38] In 1674, the English settlements in Suriname were conquered by Dutch forces operating out of Guyana. Following the annex of territories, the early leaders of Dutch and English settlements decided that their plantation land should be separated.[39] The relatively minor river called Devil's Creek (*Duivels Kreek)* was decided as the suitable boundary between the two adjacent colonies.[40] Devil's Creek lies roughly eighty miles west of the current border of the Courantyne River. The following map shows Devil's Creek (*Duivels Kreek*) as lying west of the Courantyne River. Devil's Creek is now located in present day Guyana, under the administrative region of Berbice.[41]

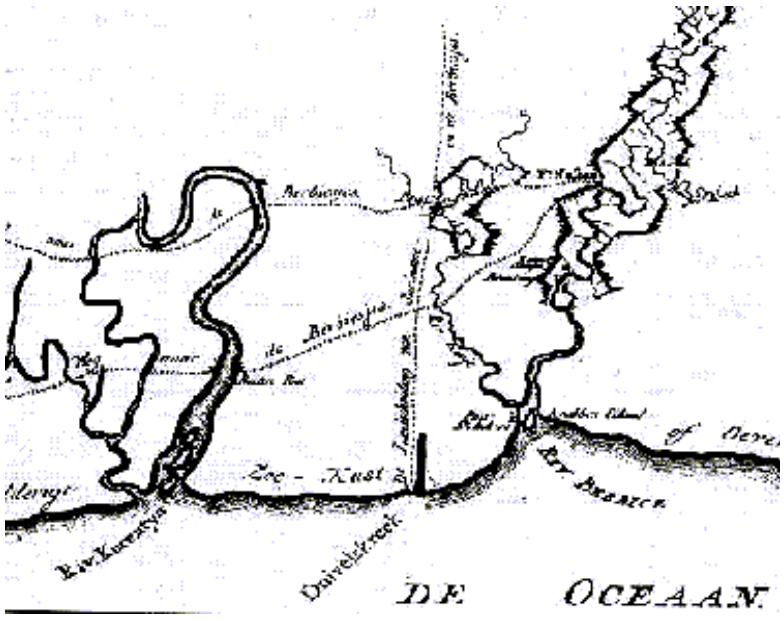
37. The 1667 Treaty of Breda (also called Peace of Breda) ended the Second Anglo-Dutch war. "By this treaty the Dutch republic's possession of islands in the West Indies and of Suriname was confirmed, while the Dutch gave up their possessions in what is now New York and New Jersey." Benjamin Hunnigher, *Breda, in* 4 ENCYCLOPEDIA AMERICANA 494 (1998).

38. ROBERT H. MANLEY, GUYANA EMERGENT 3 (1979).

39. During the colonial period Governors Van Peere of Berbice and Van Somelsdyk of Suriname agreed that their plantations should be separated by a River. The Devil's Creek River was chosen because it already was being used as a de facto boundary line between plantations. *See* HENRY BOLINGBROKE, *A VOYAGE TO THE DEMERARY, CONTAINING A STATISTICAL ACCOUNT OF THE SETTLEMENT THERE, AND OF THOSE ON THE ESSEQUIBO, THE BERBICE, AND OTHER CONTIGUOUS RIVERS OF GUYANA* 109-112 (1809).

40. *Id.* at 108-110.

41. *See* ATLAS A-Z, *supra* note 5, at 229.



Devil's Creek lasted for nearly one hundred years as the boundary between the colonies of Suriname and Berbice. In 1794, the Governor of Berbice challenged the legality of the Devil's Creek boundary line stating, "in keeping with the grant of Charles II to Lord Willoughby the western limit of Suriname could not be regarded as extending further than one English mile [past the Courantyne River]."[42]

In the Second Anglo-Dutch War, the Dutch colonies of Berbice and Suriname both returned to the control of Great Britain.[43] In 1799, the two Governors moved the Devil's Creek border east and concluded that Berbice (modern-day Guyana) should control all territory up to the west-bank of the Courantyne River.[44] This accord ("1799 Agreement") is the basis of the modern Surinamese claim that the boundary between Guyana and Suriname lies on the western bank of the Courantyne River, not in the middle of the river

42. *See* GUYANA-SURINAME BOUNDARY, *supra* note 3, at § 6. Governor Van Battenburg referred to the Devil's Creek boundary as "an illegal act from which it is not to be inferred that the true boundary limit between Berbice and Suriname could be at that place (i.e., at Devil's Creek)." *Id.*

43. *See* BOLINGBROKE, *supra* note 39, at 121-129. Berbice was taken in 1796 and Suriname in 1799 by British troops and conscripted farmers. *Id.*

44. *Id*. The area between Devil's Creek and the Courantyne River was put to immediate cultivation after the 1799 Agreement, although no navigation was commenced on the Courantyne River which was attributed to the colony of Dutch Guiana. Although under British control, the new British sovereign allowed Governors Van Battenburg and Van Peere to remain in control of the colonies for administrative reasons. *See* GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 6.

which is customary in international law. It is also the basis of Suriname's argument that the islands located in the Courantyne River are under full Surinamese sovereignty.[45] The terms of the 1799 Agreement provide that "the west sea coast of the River Corentyne, up to the Devil's Creek, besides the west bank of the said River, hitherto considered belonging to the government of the colony of Surinam be declared and acknowledged henceforth to belong to the Government of the Colony of Berbice." [46]

Guyana has since claimed that, although the 1799 Agreement was bilaterally ratified, the proclamation did not constitute a formal boundary agreement.[47] Guyana asserts that the 1799 Agreement was intended to be only an interim agreement, lasting only until a final demarcation could be established. There is evidence to substantiate this claim; the foremost of which is the 1799 Agreement itself. As it states, "some arrangements by which all the Ends wished for might be obtained without precluding the final Regulations which, on determining the future fate of the Colonies, their Sovereign or Sovereigns in time being, might judge proper to establish with respect to the Boundary."[48] Suriname asserts that the 1799 Agreement was subsequently incorporated in later international treaties and relied on by both parties over time.[49]

In 1802, the Treaty of Amiens stipulated that both the principalities of Suriname and Berbice (then under British control) would be returned to the Netherlands. [50] However, the peace did not last and Berbice in 1803, and Suriname in 1804, were re-captured by the British. The Articles of Capitulation, ratified

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45. The Suriname main claims of 1936, 1958-1962, and 2002 will be discussed infra. All are common in that they rely upon the 1799 Agreement as a basis for the establishment of sovereignty over the Courantyne River and the islands therein. ALAN J. DAY, BORDER AND TERRITORIAL DISPUTES 378 (1982). There are three major islands located in the Courantyne River which are firmly under the control of Suriname. These islands are not disputed in the current Courantyne River dispute.

46. 1 LAWS OF BRITISH GUIANA 5-6 (1870), *reprinted* in Duke E. Pollard, *The Guyana/Surinam Boundary Dispute in International Law,* CARIBBEAN Y.B. OF INT'L REL. 217, 219 (Leslie F. Manigat ed., 1976).

47. *See* DAY, *supra* note 45, at 378.

48. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 8.

49. The fact that an international peace treaty referenced and relied upon the 1799 Agreement, would add more strength to its credibility and perception with the European Colonial time. The 1815 Agreement references the border agreement and was submitted by Suriname as evidence of sovereignty over the Courantyne in the 1899 negotiations between Venezuela and British Guiana, and in the Draft Treaty of the 1936 Mixed Commission (both to be discussed infra). Peggy A. Hoyle, *The Guyana-Suriname Maritime Boundary Dispute and its Regional Context*, IBRU BULLETIN 99, 107 (2001).

50. *Treaty of Amiens,* RESEARCH SUBJECTS: GOVERNMENT AND POLITICS, *available* at http://www.napoleon-series.org/research/government/diplomatic/c_amiens.html#III (last visited Oct. 6, 2003). Articles 3 and 18 of the Treaty of Amiens deal with the return of colonies between the Batavian Republic (the Netherlands) and Great Britain. *Id.*

between Britain and the Netherlands in September 1803, acknowledged and reaffirmed the 1799 Agreement as the boundary line. Article II of the Articles of Capitulation stated that "[t]he Grants of Lands on the West Coast and West Bank of the River Corentin made by Governor Frederici of Surinam which territory was formerly held to make part of and belonging to that Colony, but since December, 1799, has been placed and considered as belonging to the Government of Berbice, shall . . . be respected as conclusive."[51]

"As part of the peace settlement of 1814, Britain and Holland signed an agreement known as the London Convention by which Britain undertook to pay $14,000,000 in return for…Berbice" (captured by the Dutch in 1803).[52] The 1815 Peace of Paris returned the Suriname colony to the Netherlands.[53] This colony would remain under Dutch control until its independence in 1975. Likewise, Guyana incorporated Berbice under the later colonial trusteeship of British Guiana and controlled it until Guyana's independence in 1966. Since 1799, Dutch Guiana, and later the Republic of Suriname, has consistently maintained control over the entire Courantyne River.[54]

B. Divergent Surveys of Courantyne: The Schomburgk Expedition and Barrington Brown Survey

In 1840 the British Government commissioned Sir Robert Schomburgk to survey the interior boundaries of the newly formed colony of British Guiana.[55] Schomburgk explored the Courantyne River and claimed the Kutari River to be the principal source of the Courantyne.[56] Schomburgk mapped the boundary between British Guiana and Suriname designating the Kutari as the Southwest extension of the Courantyne, and therefore, forming the boundary.[57]

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51. GUYANA-SURINAME BOUNDARY, *supra* note 3, at § 9.

52. DALY, *supra* note 32, at 130.

53. The boundary between Berbice and Suriname was not dealt with in the 1815 Agreement. *See* GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 10.

54. Controlling an entire boundary river is somewhat contrary from international practice. Normally, when two nations are adjacent but divided by a river, the equidistant median line is used as the actual boundary demarcation. CLIVE H. SCHOFIELD, WORLD BOUNDARIES, 76 (Vol. 1, 1994).

55. *See* RICHARD SCHOMBURGK, TRAVELS IN BRITISH GUIANA DURING THE YEARS 1840-1844. The Governor of British Guiana suggested to the Governor of Dutch Guiana that he should send a commissioner to cooperate in the exploration of the river which was regarded as the boundary between the two colonies. However, the Government of Suriname declined to participate in the survey on the grounds that the Governor "having no instructions to that effect, was unable to appoint a commissioner and that as he was not aware of any difference of opinion as to the boundary and did not anticipate any, he saw no occasion for sending a representative." *Id. See also* Pollard, *supra* note 46, at 220.

56. *See* SCHOMBURGK, *supra* note 55, at map 10 (*From Watuticaba to the Corentyn*).

57. *Id.* Subsequent maps drawn by both Dutch and English cartographers reiterated

Thirty years later, in 1871, a British geologist named Barrington Brown conducted a geological survey of the interior. It was his opinion that another tributary was the larger extension of the Courantyne and therefore should be the border. The New River, as Brown labeled it, merges with the Courantyne from a southeast direction. Brown "regarded [the New River] as being only a branch," and viewed the border between Dutch and British Guyana as following the New River.[58] Brown did not map the New River as forming the boundary, however, and labeled the Kutari, the original river suggested by Schomburgk, as the border between Suriname and British Guiana.[59] Both the British and the Dutch continued to publish maps on this basis until 1899 when a land surveyor in Suriname drew a map which, for the first time, depicted the New River as the continuation of the Courantyne. The difference between these surveys and the maps that represented their findings originally created the debate over the New River Triangle.

1. 1899 Paris Arbitration Tribunal Regarding Boundary Demarcation Between the Colony of British Guiana and Venezuela

The 1899 Arbitral Award established the borders between Eastern Venezuela and Western British Guiana.[60] The Commission referred to British Guiana's boundary with Suriname as continuing, "to the source of the Corentyne called the Kutari River."[61] The 1899 Arbitration was the first time the Netherlands Government formally objected to the use of the Kutari River as the extension of the Courantyne. The Netherlands insisted that, based on Barrington Brown's 1871 survey, the New River, not the Kutari, should be

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Schomburgk's findings. For example, in 1892 in Dornseiffen's *Atlas*, published at Amsterdam, Schomburgk's depiction was followed. This delineation remained unchallenged until after the turn of the twentieth century. *See generally*, DAY, *supra* note 45, at 379.

58. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 13.

59. *Id.*

60. *Id. See also* COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA: REPORT AND ACCOMPANYING PAPERS VOL. III (1897). The British claimed westward to "the Schomburgk line," while the Venezuelan interest claimed as far East as the Moruca River. The final decision of the 1899 arbitration directly splits these two claimed boundary lines. However, the Venezuela – Guyana boundary has not been permanently settled, as Venezuela still claims eastward until the Essequibo River. If this claim would be acquiesced, the total land mass of Guyana would be cut into approximately half. More notably, Guyana and Venezuela also have a maritime dispute in the Caribbean Sea which is affected by bilateral agreements on both sides with neighboring Trinidad and Tobago over the continental shelf. These claims are not dealt with in this paper, but for a general discussion see DAY, *supra* note 45, at 381.

61. *See* COMMISSION ON BOUNDARY BETWEEN VENEZUELA AND BRITISH GUIANA, *supra* note 60. *See also* GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN 201 (1974).

considered as the boundary between the two colonies.[62] Lord Salisbury, the British Secretary of State, reacted to the Dutch assertion in 1900 stating that it was "now too late to reopen this particular issue as the Kutari had long been accepted on both sides as the boundary."[63] Lord Salisbury further reacted to the Dutch protest against the 1899 Arbitration Tribunal to the Venezuela British Guiana boundary, stating that, "a definite and easily ascertainable boundary which had been accepted in good faith [by both parties] for over fifty-six years and in no way challenged during that time, should not be upset by geographical discoveries made long after the original adoption of the boundary…."[64]

2. Contradictory Dutch Statements Regarding the Courantyne River

Ten Years after the 1899 Venezuela–British Guiana Arbitration, surveys of the Courantyne River continued. In 1909, Lieutenant Kayser[65] of the Dutch Navy surveyed the area showing inconclusive results.[66] The differences between the Brown, Kayser, and Schomburgk expeditions did not resolve but contributed to ongoing debates. Dr. Yzerman, one of the leading Dutch authorities on the Guyanas, discussed the issue before the Dutch Royal Geographical Society in the late 1920s.[67] He asserted that the Kutari Basin was considerably more extensive than that of the New River, a fact that diminished Dutch claims that the New River was the principal source of the Courantyne.[68] Other officials also seemed to argue against the Dutch claim that the New River formed the upper reaches of the Courantyne, and consequently, the border

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62. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 14.

63. *Id.*

64. Pollard, *supra* note 46, at 222. Lindley added in 1900 that it was "now too late to reopen this particular issue as the Kutari had long been accepted on both sides as the boundary." *Id.*

65. GUYANA—SURINAME BOUNDARY, supra note 3, at § 15.

66. *Id.* at § 16. Lt. Kayser discovered another large tributary of the Courantyne River which converged with the Courantyne roughly twenty miles below the New River, and this he called the Lucie River. The Lucie River runs in an eastward direction. Both the colonial government of Dutch Guiana and Suriname asserted that the Lucie is not a true tributary of the Courantyne and is instead "drainage." If this was to be seen as the true Courantyne tributary, then the territory of Suriname would be cut in approximately half. *See* http://www.guyana.org/features/guyanastory/ chapter88.html (last visited on Oct. 21, 2003). There were other minor surveys of the area including the Farabee-Ogilvie party which further explored the upper Courantyne estuaries. Contrary to Barrington Brown's survey, however, the Farabee-Ogilvie expedition believed the Kutari to be a larger tributary than the New River. *See id.*

67. *See* Pollard, *supra* note 46, at 222.

68. *Id. See also* DAY, supra note 45, at 379.

between the two colonies.[69] On April 28, 1925, the Netherlands Minister of the Colonies declared to the Dutch Parliament, "[w]hat Dr. Yzerman set forth before the Royal (Dutch) Geographical Society …I doubt somewhat whether the pronouncement that the New River, and not the Curuni really forms the upper reaches of the Corentyne River."[70]

On June 23, 1925, the Netherlands Minister for Foreign Affairs further argued before the Dutch Parliament that, "the territory on the other side of these rivers" [i.e., the Curuni-Kutari] is not within the authority of the Netherlands.[71] However, other Dutch statements seem to assert that the Government viewed the New River as the correct extension of the Courantyne. In 1925, a Dutch Minister stated, "[t]he desire may be cherished that at a future date it may transpire that the New River will be regarded on both sides as the right boundary, but to base political claims to it, on the existing data, seems to me to be precluded for the present."[72] The debates coincided with Brazilian efforts to formalize its Northern border with French, Dutch, and British Guianas in the 1920s.

C. The Brazilian — Guyana — Suriname Tri-point Junction

In 1926, the British Foreign Office and Government of Brazil ratified a treaty providing for the demarcation of the Southern Boundary of British Guiana bordering Brazil.[73] The treaty concluded that, "[t]he British Guiana/Brazil frontier shall lie along the watershed between the Amazon basin and the basins of the Essequibo and Corentyne Rivers as far as the point of junction or convergence of the frontier of the two countries with Dutch Guiana."[74] Because Brazil had ratified its northern border demarcation with Dutch Guiana twenty years earlier, it now became necessary to establish and clarify the tri-point junction between the three countries. The Netherlands made its recommendations in the *Note Verbale* of February 27, 1933, stating that the point should be

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69. In a later statement to the Parliament on June 23, 1925, the Dutch Minister added, "[t]he river with the largest basin that is the main affluent; and, as Dr. Yzerman has shown…this would…not be the New River but the Curuni." GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 16. *See also* Pollard, *supra* note 46, at 225.

70. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 16. *See also* Pollard, *supra* note 46, at 224.

71. Pollard, *supra* note 46, at 225.

72. *Id.*

73. *See* DAY, *supra* note 45, at 379.

74. *Id.* (quoting Treaty and Convention between His Majesty and the President of the Brazilian Republic for the Settlement of the Boundary between Guiana and Brazil, April 22, 1926, Britain-Braz.).

located at the "Trombetas-Cutari [Kutari] from its extremity on the Cutari…till its point of contact with the Brazilian frontier."[75] The Dutch representative, Admiral Kayser, signed the map that described the tri-junction point as the upper branch of the Courantyne River, placing it at the Kutari. In 1936, all parties agreed that this point would constitute the border between the three countries.

D. Sovereignty Over the Courantyne River and the 1936 Mixed Commission

In the period between 1920 and World War II, Dutch Guiana and British Guiana moved closer to achieving an agreeable boundary demarcation. The Petrochemical Age ushered in a new urgency to define exact borders and coincided with a trend in Dutch colonial governance to establish firm boundaries in the international arena.[76] During this period, the Dutch Government was amenable to concluding a final treaty ceding the Kutari as the upper reaches of the Courantyne in exchange for complete sovereignty over the Courantyne River.[77]

Accordingly, on August 4, 1930, the Netherlands Government informed the British Foreign Office that they were willing to ratify a treaty which proposed that, "[t]he frontier between Surinam and British Guiana is formed by the left bank of the Corentyne and the Cutari up to its source, which rivers are Netherland territory."[78]

In the reply to the Dutch proposal on February 6, 1932, the British Government stated, "His Majesty's Government are gratified to learn that the Netherlands Government are prepared to recognise the left banks of the Courantyne and Kutari Rivers as forming the boundary, provided that His Majesty's Government recognize the rivers themselves as belonging to the Netherlands Government."[79]

The foundation of the argument asserting Dutch control of the entire Courantyne River is the original 1799 agreement. This

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75. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 19. For discussions of the boundary commission at work, *See generally* EVELYN WAUGH, NINETY-TWO DAYS: THE ACCOUNT OF A TROPICAL JOURNEY THROUGH BRITISH GUIANA AND PART OF BRAZIL (1936).

76. *See* Hoyle, *supra* note 49, at 100. The Netherlands and the United States arbitrated the *Isle of Las Palmas* case before the Permanent Court of International Justice dealing with a sparsely inhabited island in the Pacific during this time. *Id.*

77. Secondary British sources refer to the Courantyne as the complete sovereign possession of Dutch Guiana. As Michael Swan stated in 1956, "[b]y some strange boundary agreement, the Courantyne is Dutch territory up to the high water mark on the British side and the Dutch are insistent on their rights…not to let the British fish." This "strange agreement" was, of course, the 1799 Agreement. SWAN, *supra* note 34, at 116.

78. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 21.

79. *Id.* at § 22.

agreement for the separation of Berbice and Suriname colonies, "specifically provided not only that the territory west of the Corentyne River be regarded as British territory but also that the islands in the river should be regarded as belonging to Suriname."[80] This firm Dutch claim to the whole width of the Courantyne is contrasted to the delimitation based upon the deep point of the river ("*thalweg"),* which normally forms the boundary in international rivers.[81] Customary international law states that generally, if a river is navigable, the boundary will be in the middle of the navigable channel.[82] However, the 1930 Dutch overtures to control the entire river were approved and in 1936 culminated in a comprehensive draft treaty (1936 Mixed Commission), agreeing in principal on final borders. The Mixed Commission defined the extent of the New River Triangle and erected boundary pillars on the mouth of the Courantyne River to determine the maritime extension of the land boundary terminus. It is the consensus of commentators that the 1936 Mixed Commission stipulated that, for the abandonment of Dutch claims in the New River Triangle, Dutch Guiana would be granted sovereignty of the entire Courantyne River. This Treaty was not signed because of the Second World War, although the agreement had, in principle, been reached. Its precedence would be reflected in ensuing discussions as well as modern boundary discussions. [83]

The 1936 Mixed Commission, based on the 1799 agreement, assumes the full width of the Courantyne River to be Dutch Guiana territory. Therefore, the two sides agreed to a point on the west bank of the Courantyne River (the so called Kayzer-Phipps point, or Point No. 61) which would be the land boundary terminus for the maritime extension. Commentators agree that the 1936 Mixed Commission asserted a 10º prolongation of the territorial sea from Point No. 61.[84] The modern notions of Exclusive Economic Zone and

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80. *Id.* at § 23.

81. *See, e.g.,* STEPHEN B. JONES, BOUNDARY MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS AND BOUNDARY COMMISSIONERS 116-17 (1945); S.W. BOGGS, INTERNATIONAL BOUNDARIES (1940). The term for midpoint of the river, or deepest part of the river is *thalweg*, which is used consistently through the different treaty negotiations. *Id.* at 117.

82. R. Lauterpacht, *River Boundaries: Legal Aspects of the Shatt-Al-Arab-Frontier,* 9 INT'L & COMP. L. Q. 208, 216 (1960). The deepest point of the river principle has been applied in: Arkansas v. Tennessee, 246 U.S. 158 (1918); New Jersey v. Delaware*,* 291 U.S. 361 (1934); Louisiana v. Mississippi, 282 U.S. 458 (1940). The *thalweg* principle has also been applied to dry river beds, known as *wadis*. *See* MENDELSON AND HUTTON, IRAQ-KUWAIT BOUNDARY 160 (1995).

83. Letter by Ambassador Ismael on the New River Triangle *available at* http://www.guyana.org/guysur/new_river.html.

84. A 28º prolongation from Point No. 61 was originally asserted, but a 10º trajectory was finally settled upon. This trajectory was intended to only cover a three mile territorial sea. *See* Hoyle, *supra* note 49, at 103. *See also* GUYANA–SURINAME BOUNDARY, *supra* note 3, § 18.

continental shelf were not envisioned in the original 1936 negotiation process but were discussed in the ensuing 1958-1962 discussions.[85]

E. Maritime Boundary and 1958-1962 Negotiations

Boundary negotiations between Suriname and Guyana were re-commenced in the late 1950s, coinciding with the first draft of the United Nations Law of the Sea. During the recess, the territorial seas of a particular country were expanded from the three-mile sea, as probably envisioned by the 1936 Mixed Commission, to twelve miles as codified by the Law of the Sea. Distinctions were also drawn between territorial seas (a twelve-mile extension of state sovereignty) and the Exclusive Economic Zone (an area where a state could have the exclusive ability to extract resources, but other nations could transport or ship).

In making these distinctions, there was much international debate as to whether offshore exclusive economic zones and continental shelves should be based on *equidistance* (the geographic median of two adjacent land masses projected outward) or on *equity* (taking into consideration agreements or common usage of the ocean). [86] Thus in 1954, Britain claimed the continental shelf for British Guiana, and in 1958 granted a concession to the California Oil Company (later Exxon) which operated partly in the far eastern area of overlap.[87] This grant and claim, if it is to be reaffirmed in

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Two names are used to describe the boundary pillars established by the 1936 Mixed Commission. The Kayzer-Phipps Point (named after the Dutch Boundary Commissioner, Lt. Kayser, and the English Boundary Commissioner, Phipps) and Point No. 61. Throughout this paper Point No. 61 is used to describe the boundary pillars. The exact location of the boundary pillars is 5º59', 53.8"N, 57º08' 51.5"W. *See* Hoyle, *supra* note 49, at 100. The 1936 Commission refers to the 10º extension as one country being responsible for the buoys marking the navigable river channel. *Id.*

85. *See* Hoyle, *supra* note 49, at 103.

86. David A. Colson, *The Delimitation of The Outer Continental Shelf Between Neighboring States*. 97 A.J.I.L. (2003). In international law, it is customary to take treaties into account when determining the extent of a Continental Shelf. *See* D.W. GREIG, INTERNATIONAL LAW, at 184-188 (2d ed. 1976).

87. Alteration of Boundaries. Order in Council of 1954. Statutory Instruments, 1954, No. 1372, Colonies, Protectorates, and Trust Territories, *see* U.N. Doc. ST/LEG/SER.B/6 at 48 (1954), *cited in* KARIN HJERTONSSON, THE NEW LAW OF THE SEA 65 (1973). The 1954 British claim to the Continental Shelf was intended to be used against Venezuela, but can be applied to the Suriname – Guyana instance. During the 1950s, the British Government divided the continental shelf between British Guiana and Venezuela in a treaty dated Feb. 26, 1942. JURAJ ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA 49 (1970). It was customary in this era to claim continental shelf areas, even if there was no international statute allowing countries to claim these areas. The United States claimed its Continental Shelf in the Caribbean in 1945 under President Truman. The Truman Proclamation (White House Press Release of Sept. 28, 1945, 13 Dep't St. Bull. 484-486 (July-Dec. 1945)), *cited in Andrassy* at 49-50. The Truman Proclamation "expressed that the submarine and subsoil was

modern boundary discussions, would extend the Guyanese Exclusive Economic Zone past the 10º-agreed line in the 1936 Mixed Commission. The reason for this apparent incongruity is that nothing more than a three-mile territorial sea was envisaged by the 1936 Mixed Commission during its debates. Suriname did not object to these concessions, although it was probably aware of their existence. Later drilling operations re-affirm this position. Shell drilled at one site in 1974 on its concession in the area now disputed by Suriname. Shell relinquished its concession, but Guyana reissued concessions in the same area to other parties. These concessions still exist and operate today.[88]

The final opportunity for the colonial powers to demarcate the maritime boundary before independence came in 1961-1962. In this round of negotiations, British Guiana asserted the following: "1) Dutch sovereignty over the Corentyne River; 2) a 10ºE line dividing the territorial sea; and 3) British control over the New River Triangle…."[89] In;June 1962, the Dutch rejected this British proposal and responded with new claims to the New River Triangle[90] and to locating the boundary in the Courantyne in the deep water mark *thalweg* rather than on the left bank, as in the first draft.[91] This Dutch response was contrary to the earlier positions and has not been reiterated by the Suriname government since independence. This 1962 Dutch response is the basis of Guyana claims that the Courantyne River was unsettled at independence. This response can be understood by the "Land Boundary Component," whereby neither Dutch Guiana nor British Guiana has ever indicated a willingness to concede their claimed maritime sea if they were to forego the New River Triangle.[92]

During the 1961-1962 negotiations, the British Colonial Government did not continue to grant concessions. The original concession on the Continental Shelf to the California Oil Company lapsed in 1960. After this lapse, the British Government took constructive steps to ratify the borders before the ensuing independence of Guyana; yet in 1965, when final demarcation did

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the exclusive jurisdiction of the United States." Andrassy at 50. The ability to claim a continental shelf was not codified until 1958 with the Geneva Convention on the continental shelf, but many nations believed it was customary to do so. ZDENEK J. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 89 (1968).

88. CGX Resources Homepage, *supra* note 26.

89. Hoyle, *supra* note 49, at 104.

90. *Id.*

91. The British were prepared to concede the 10-degree line (to a distance of six miles) so far as the territorial sea was concerned because it was not considered to represent the median line. *Id.*

92. *Id.*

not materialize, Britain granted a concession to Shell Oil in the same area extending the 33º boundary into the outlying exclusive economic zone. There is no record of Dutch Guiana objecting to the 1965 concession to Shell Oil.

F. Independence of Suriname and Guyana from Colonialism

As the date for Guyana's independence from Great Britain grew near, the Dutch Government abandoned its position on the possibility of exchanging the New River Triangle for maritime claims (embodied in the 1936 and 1958-1962 claims). [93] Instead, the Dutch Government asserted a claim for the entire New River Triangle and for the original claim of the 10º north maritime boundary.[94] A Suriname representative stated in April 1966 that "in view of the forthcoming independence of British Guiana the Suriname Government wishes the British to make it clear when sovereignty was transferred that the frontier is disputed."[95]

When Guyana became independent on May 26, 1966,[96] the new nation asserted its claim to the New River Triangle. Meanwhile, Dutch Guiana commenced various activities to demonstrate its actual control over the region. In December of 1967, Guyana expelled Surinamese surveyors thought to be conducting preliminary sightings for a hydroelectric dam.[97] In mid-August 1969, the Guyana Defense Force patrol expelled a group

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93. DAY, *supra* note 45, at 380.

94. *Id*. at 380-381. During this time, British negotiators, conscious of the doctrine of state succession, re-submitted a draft treaty to the Netherlands. In 1965, the British Government, after consultation with the British Guiana Government, proposed a new draft restating the 1961 British draft and suggesting a maritime delineation following the median line from the left bank along the line where the two markers intersect the low waterline and following the equidistance principle. This proposal elicited no response from the Dutch. *Id.*

95. *See* MANLEY, *supra* note 38, at 43. Dr. Walston, a boundary negotiator for the British, asserted that "on the New River Triangle Her Majesty's Government maintain very firmly their sovereignty over the territory of British Guiana as defined by its present frontier." One month later Guyana became independent having as its boundaries the boundaries of British Guiana and as its sovereignty that which Britain had exercised undisturbed for over a century. GUYANA – SURINAME BOUNDARY, *supra* note 3, § 17.

96. Guyana gained independence on Sept. 20, 1966 and joined the United Nations the same year. Guyana at a Glance, *available at* http://www.un.org/cgi-bin/pubs/infonatn/dquery.pl?lang=e&guy=on (last visited Oct. 6, 2003). Guyana is also a member of CARICOM, The Law of the Sea, the World Trade Organization (WTO), and the World Bank Group. All international agencies have methods of international dispute resolution. At independence, Guyana laid claim again to the New River Triangle in Article I of the new constitution, "The territory of the State comprises the areas that immediately before the commencement of this Constitution were comprised in the area of Guyana together with such other areas as may be declared by Act of Parliament to form part of the territory of the State." GUY. CONST. chap. 1, art. 2, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert Blaustein & Gisbert Flanz eds., vol. 8, 2003). *See also* Pollard, *supra* note 46, at 217.

97. DAY, *supra* note 45, at 380.

attempting to finish a Surinamese airstrip west of the Courantyne River.[98] On August 19, 1969, skirmishes were reported west of the Courantyne River between the Guyana Defense Forces and Surinamese individuals. On August 21, 1969, Prime Minister Burnham informed the Guyana National Assembly that the Guyana Defense Forces would stay in the New River Triangle.[99] He stated that "there can be no doubt that the New River Triangle is part of the territory of Guyana and has been in our possession from time immemorial. This Government is pledged to maintain traditional friendly relations with Suriname, and at the same time, our country's territorial integrity."[100]

This statement was later rescinded in a 1971 Joint Statement in Trinidad, which asserted that both Suriname and Guyana would withdraw military forces from the New River Triangle. This has not occurred, and Guyanese forces remain in the area. On November 4, 1975, Suriname gained independence from the Netherlands and reiterated its claim for the New River Triangle.[101] Incidents continued to occur between the two countries. For example, in 1977 the Guyanese authorities confiscated four fishing trawlers, one of which was owned by the Surinamese Government, alleging that they were trespassing in the 200-mile exclusive economic zone.[102] Even though the presidents of both Suriname and Guyana held urgent bilateral talks, no demarcation of the maritime or territorial areas took place.[103]

In terms of determining the outlying Exclusive Economic Zone and the Continental Shelf, the newly founded Republic of Guyana retreated to the original policy of equidistance demarcation of the territorial sea rather than equity. In doing so, the Republic of Guyana wished to nullify the original 1799 Agreement by co-sponsoring a United Nations bill that asserted that the equidistance principle would be the only means of maritime demarcation. It

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98. DAY, *supra* note 45, at 380. *See Guyana – Suriname Boundary, supra* note 3, at § 17.

99. *See* DAY, *supra* note 45, at 380. Shortly after, the Guyana Defense Forces (GDF) established a permanent military post called Camp Jaguar. This coincides with other Amazon-based developmental schemes to populate border regions in dispute. Venezuela, Colombia, and Brazil have all taken similar actions. JACQUELINE ANNE BRAVEBOY-WAGNER, THE VENEZUELA-GUYANA BORDER DISPUTE: BRITAIN'S COLONIAL LEGACY IN LATIN AMERICA 192 (1984).

100. http://www.guyana.org/suriname/guysuri_boundary.html.

101. DAY, *supra* note 45, at 380.

102. *Id.* at 380-381.

103. The President of Suriname during the 1979 negotiations was Henck Arron, while Linden Forbes Sampson Burnham represented Guyana. Less than one year later, a military coup took place displacing Arron's government in place of a military commander, Desi Delano Bourtese. Despite the militaristic regime, the Bourtese Government ensured that they would honor all international agreements of the previous Governments. *See* DAY, *supra* note 45, at 381.

states "the delimitation of the Exclusive Economic Zone/Continental Shelf between adjacent or opposite states shall be effected by agreement employing, as a general principle, the median or equidistance line."[104]

Accordingly, the Government of Suriname, conscious of how the 1799 Agreement might affect any maritime delimitation, sponsored a bill asserting the equitable delimitation of maritime claims which states that, "the delimitation of the exclusive economic zone (or continental shelf) between adjacent or/and opposite states shall be affected by all relevant circumstances and employing any methods, where appropriate to lead to an equitable solution."[105] Relying on these precedents and concessions awarded by Guyana, in 1974 Shell Oil drilled an oil well (Abary #1) about ten miles within the "area of overlap" (and roughly ten miles west of CGX's intended drill site in July 2000). Between 1972 and 1975, Oxoco and Major Crude carried out petroleum exploration in some portions of the maritime "area of overlap." In 1975, all concessions lapsed. In 1981, Guyana awarded a concession to Seagull Petroleum extending as far as 33º. Seagull Petroleum entered into a joint venture agreement with Denison; the joint ventures conducted seismic surveys to the 33º boundary. These concessions have also since lapsed.

G. Recent Developments and Current State of Bilateral Diplomatic Activities

In 1988, Guyana awarded the lapsed petroleum licenses within the maritime "area of overlap" to Lasmo. Lasmo carried out a seismic program in 1989. That same year, the President of Suriname, Ramsaywak Shankar, and his Guyanese counterpart, Desmond Hoyte, agreed to joint petroleum development in the maritime area pending a final resolution of the border.[106] This was codified in the 1991 Memorandum of Understanding which provided for joint exploitation pending a resolution of the final border and respect of concession rights.[107] Negotiations proceeded through the 1990s until Guyana independently granted new petroleum concessions in the "area of overlap" to Maxus, CGX, and Exxon for

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104. OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS 161 (Douglas Johnston & Phillip Saunders eds., 1988) (quoting NC7/10/Rev. 2 co-sponsored by Venezuela, Nicaragua and Suriname).

105. *Id.* at NG7/10/Rev.2, co-sponsored by Venezuela and Nicaragua.

106. GUYANA – SURINAME BOUNDARY, *supra* note 3, at § 18. The "area of overlap" is highly prospective for petroleum exploration, having the concentration of petroleum. *See* CGX Energy Homepage, *supra* note 26.

107. Hoyle, *supra* note 49, at 99.

1997-1999 without informing Suriname.[108] Maxus entered into a joint venture with AGIP. In 1999, CGX and the Maxus-AGIP joint venture carried out a seismic survey to the 33º boundary and obtained permission from Suriname to enter Surinamese waters for research. In 2000, CGX commenced drilling, and on May 6, 2000, Suriname navy gunboats evicted CGX's oil rig from the "area of overlap."[109] The Suriname government claimed that the oil platform was in Surinamese territorial waters and in violation of the 1989 Memorandum of Understanding.[110]

A few weeks prior to the expulsion, Suriname sent a *Note Verbale* to the Guyana Government asserting that the proposed CGX drilling would be in its territorial waters.[111] Suriname reiterated that the boundary in the Exclusive Economic Zone and Continental Shelf was a straight-line extension of the 1936 line of 10º east of true north from Point No. 61.[112] Guyana responded by asserting that any CGX exploration activities were in Guyana territory and valid under the Hoyte/Shankar Agreement.[113]

The Hoyte/Shankar Memorandum and the expulsion of CGX dictate modern Suriname-Guyana relations. A Joint Communiqué was issued on January 29, 2002, asserting that the presidents of Suriname and Guyana establish border commissions and report on alternatives to assist the governments in managing the joint maritime exploration. Despite a positive tone in January 2002, no agreement has materialized. Suriname continues to claim a boundary of 10º, based on the precedent of the 1936 Mixed Commission, which supports Suriname's claim for the entire Courantyne River and a territorial sea of 10º. In an April 2003 statement, Suriname asserted that it does not wish to divide the issues of the New River Triangle and the offshore area of overlap, believing that a more beneficial solution is available under a full demarcation.

Guyana believes the New River Triangle should be decided under the constructive law of occupation and the Courantyne River must be demarcated with the traditional norms of *thalweg*

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108. CGX was granted the original license in 1998 by Guyana to "carry out its oil drilling operation in an area of some 15,464 square kilometers and said to have deposits of more than 800 million barrels of oil." The concession is in good standing until the end of 2003. *Resolving Old Controversies*, TRINIDAD GUARDIAN, Jan. 14, 2002.

109. Arny Belfor, *Suriname and Guyana Sign Cooperation Agreement, Will Negotiate Territorial Dispute,* SOUTH FLORIDA SUN-SENTINEL, Jan. 16, 2002.

110. *World Watch,* WALL ST. J., Jan. 21, 2002, at A9.

111. *Id.*

112. *Id.* The 10º extension is based upon the 1936 Mixed Commission. These negotiations were never ratified but laid the framework for the 1958-1962 Negotiations. *See* GUYANA – SURINAME BOUNDARY, supra note 3, at § 19. *See also* Hoyle, *supra* note 49, at 100.

113. *Id.*

delineation accepted by international law.[114] Additionally, Guyana relies on the 1936 Mixed Boundary Commission to substantiate its claim for the New River Triangle. It also maintains that maritime borders were never formalized during colonial rule, evidenced by the 1962 Dutch counterproposals. However, Guyana has made overtures to separate the issues of the New River Triangle from the offshore maritime zones and to decide them independently of one another.[115]

Due to this diplomatic impasse, the Guyanese Foreign Minister stated on December 22, 2002, that a possible international tribunal would be a "last resort" if diplomacy fails.[116] However, given the length of this dispute, it appears that arbitration will likely be the only option for a final demarcation.

The Caribbean Community, known as CARICOM, attempted to mediate the offshore dispute in July 2000 (both Guyana and Suriname are members of the international agency). All attempts by CARICOM to settle this dispute have failed thus far. CARICOM did issue a statement urging the two sides to:

> return to the spirit of the [1991]…. Memorandum of Understanding which together created the environment and the prospects not only for a peaceful resolution to a potential area for problems but also for the joint utilization of the resources in the area of dispute…[and] designate the disputed maritime area as a Special Zone for Sustainable Development to be jointly managed….[117]

The efforts of CARICOM were unsuccessful, but they highlight the regional importance of the offshore boundary issue, and display one international tribunal that might be called upon to facilitate the resolution.

IV. OPERATIVE LEGAL PRINCIPLES

The various arguments put forward by Suriname and Guyana provide different versions of who should be allocated title to the New River Triangle and where the offshore maritime boundary should

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114. *See World Watch*, *supra* note 110.

115. Patrick Denny, *Guyana/Suriname Talks: Joint Explanation Independent of New River Triangle Issue,* Starbroek News.

116. *Id.*

117. THE GUYANA-SURINAME BOUNDARY: A HISTORICAL REVIEW, MINISTRY OF EXTERNAL AFFAIRS OF GUYANA (2000), *available at* http://www.guyana.org/suriname/guysuri_boundary.html (last visited Oct. 6, 2003).

lie. This section describes the operative legal principles that must justify each party's claim. Guyana will likely argue that British Guiana demonstrated clear and consistent effective occupation of the New River Triangle, and thus the Republic of Guyana inherited these claims with independence. Guyana can argue that the entire Courantyne River could not be in Suriname control, because this is not in general acceptance of international law. Thus, the maritime extension should be demarcated at the *equidistant* median of the Courantyne River, which the Dutch Government offered in 1962. Further, Guyana can argue the 10º prolongation of the land boundary terminus applied only to the three-mile limit of the territorial sea, not to the outlying Exclusive Economic Zone, which was not contemplated at time of drafting. Therefore, *de facto* methods of delineation must be incorporated.

Suriname, on the other hand, will likely assert that since the entire boundary issue was unsettled at the end of colonialism, the new republics inherited unsettled borders under varying theories of *uti possedetis*. Any maritime claim should not ignore the work of the 1936 Mixed Commission which established a 10º extension. The claim should take into account the different agreements over time. That would put the 1799 Agreement (as incorporated in the Mixed Commission of 1936 and 1958-1962 negotiations) on center stage to be the deciding factor in determining a more westward extension of its territorial sea and the entire Courantyne River.

Evaluating such claims requires an understanding of the law governing the acquisition of land and marine territory. Section *A* describes the relevant principles of international law with respect to the ability of gaining title to land. That section will focus on the requirements of demonstrating effective control and intent to control a territory as embodied by the classical legal tenants of *animus occupandi and corpus*. Section *B* describes the legal concept of *terra nullius* and subsequent abandonment and hinterland theories. Section *C* describes *uti possedetis*, a doctrine by which colonies inherit the boundaries of the former colonial power at independence. Section *D* describes the legal theory of prescription, which is analogous to the common law property term of adverse possession. Section *E* describes the theories of recognition, acquiescence, and estoppel from a legal perspective, which prevents states from asserting claims if they have effectively relied on de facto border demarcations without protest. Section *F* describes relevant portions of the United Nations Law of the Sea Convention and case law from international tribunals relevant to maritime demarcation.

A. The Law of Occupation to Determine Title to the New River Triangle

The legal basis for acquiring large amounts of territory through occupation and control was formulated during the European colonial era.[118] Gaining territory though occupation was seen as "a valid — in fact, desirable — means of acquiring territory…."[119] This occupation was subject to following a prescribed set of international legal norms for the occupation. However, there was substantial disagreement on the extent and scope of these occupation conditions.[120]

This section discusses the international legal tenets govern the occupation of conquered territory. It traces the basic requirements under customary international law and the continuous and simultaneous display of both the intention and the ability to effectively occupy a territory. As applied to the New River Triangle, it can be seen that Guyana has consistently displayed the twin elements of *animus occupandi* and *corpus,* and Suriname, although displaying the intent intermittently through its colonial and nationalist experiences, does not demonstrate the actual physical occupation of the area as compared to Guyana.

Throughout international law there have been two requirements for control over a territory, *animus occupandi* (intent to control a territory) and *animus corpus* (actual control of a territory). These twin requirements were first seen in the arbitral award between Brazil and Dutch Guyana in 1904.[121] It held that in

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118. *See* Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 Yale J. Int'l L. 301, 385 (1992). The ability to control territory over colonial possessions increased European power vis-à-vis other colonial powers, as well as, increased the amount of raw materials that could be extrapolated from the area. *See* Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*, 1 Across Borders Int'l L. J. 5, Section A (2003), *available at* http://www.across-borders.com.

119. *Id*. at 385. Ricciardi asserts that the overwhelming majority in colonial Europe supported the taking and development of colonies. The need for a prescribed set of rules to define their conquest came after the intense drive to acquire territory. *Id.* at 385-91.

120. The 1885 Act of Berlin "fixed two important rules for the occupation of territory. First, the occupation had to be effective, and second, the occupying state had to notify other powers of the occupation." *Id.* at 391.

121. This dispute was referred to King Vittore Emanuelle III of Italy for arbitration. The colonies of Portugal and Spain were gaining independence throughout South America and there were no uninvolved arbitrators to refer disputes. Once Brazil emerged from colonialism, it attempted to ratify its borders, which included its northern border with Dutch Guiana. *See* SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 70 (1997). "The international agreement of May 5, 1906 (signed in Rio de Janeiro, approved by the law of July 11,1908, and ratified on Sept. 15, 1908, in The Hague), established the boundary between Suriname and the Federal Republic of Brazil." *Suriname,* Regional Location and Boundaries, *at* http://home.student.uva.nl/selwijn.pengel/boundaries.html (last visited Oct. 6, 2003).

order to acquire sovereignty over territory not under the control of any state, a state must intend to control the territory, and this intent must be accompanied by effective, uninterrupted, and permanent possession of the territory."[122]

The concept of effective control gained greater recognition in the 1933 *Eastern Greenland* case before the Permanent Court of International Justice. According to the Court, "a claim to sovereignty based…upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority."[123] Intent and constructive occupation within a given territory are the two elements that constitute the basic criteria any international tribunal will use to measure occupation.[124]

The majority of scholars assert that in order to state a claim of intent (*animus occupandi*), it is necessary to look toward objective factors performed by the State.[125] The court in *Eastern Greenland* stated that intent did not need to be a comprehensive inhabitation of a disputed land. In areas that were uninhabited, intent could be as perfunctory as raising a flag or reading a proclamation signifying a government's control over an area.[126] However, it was an act that a State organ needed to perform. State organs could be military officers (as in *Clipperton Island),* large state run corporations, such as the Dutch East Indies Corporation (as in *Island of Palmas),* or informal Ministry proclamations (as in *Eastern Greenland).*[127] In general terms, any act demonstrating a State's willingness to claim the territory, as simple as publicly stating so, satisfied the *animus occupandi* intent criteria.[128]

The necessary second element of *corpus* to create title by occupation is considered to be more stringent and has received large amounts of judicial review by arbitral panels.[129] It was first elucidated in the *Island of Palmas* case over a sparsely populated island in the Pacific. In that case, the United States asserted title

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122. *Id. at* 71.

123. Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 [hereinafter Eastern Greenland].

124. MALCOLM N. SHAW, INTERNATIONAL LAW, 342 (4th ed., 1997).

125. Some writers assert that subjective criteria may also be incorporated in determining intent (*animus occupandi*). Other commentators have labeled the state's subjective intent an "empty phantom." *Id.* at 343-345.

126. Eastern Greenland*, supra* note 123, at 48.

127. If a non-state organ was to assert a claim for the title it would have no legal effect and would not be taken into consideration by any international body. *See* SHAW, *supra* note 124, at 349.

128. Eastern Greenland*, supra* note 123, at 48.

129. The second element of *corpus* is dealt with in Island of Palmas (U.S. vs. Neth.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) [hereinafter Island of Palmas].

based on continuity of title, supported by the 1648 Treaty of Munster. The United States argued that good title continued until the conclusion of the 1898 Treaty of Peace by which Spain ceded the Philippines to the United States. Due to this transfer of title by cession, the United States argued it was unnecessary to establish facts seeking to prove actual displays of sovereignty. On the other hand, the Netherlands asserted that its predecessor, the Dutch East Indies Company, had possessed and exercised examples of occupation as early as 1677.[130]

In the *Island of Palmas* award, Judge Max Huber stressed that occupation is seen as the "actual display of State activities, such as belongs only to the territorial sovereign."[131] Elements such as tax rolls, jurisdictional legal courts, administration, civil servants, etc., are signs of a government's effective occupation and control. The Court stated that, "[t]he Netherlands title of sovereignty, [was] acquired by continuous and peaceful display of State Authority during a long period of time...."[132]

However, in cases of uninhabited and distant territories, it is clear that an award tribunal will hold a less stringent standard in determining effective occupation. As Judge Huber stated in the *Island of Palmas* award, "manifestations of sovereignty over a small island and distant island, inhabited only by natives, cannot be expected to be frequent."[133] In these instances, international tribunals have consistently required a lesser showing of effective occupation of *corpus,* and instead look toward more symbolic, rather than effective, instances of occupation.[134] Various international tribunals have asserted specific aspects of State sovereignty acts which demonstrate elements of *corpus* in unpopulated territories, including, having a police force in *The Southern Boundary of the*

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130. *Id.* at 830.

131. *Id.*

132. SHARMA, *supra* note 121, at 72, *citing* Island of Palmas, *supra* note 129.

133. Island of Palmas, *supra* note 129, at 830-839. This is the classical notion of effective occupation. In the exercise of territorial sovereignty there are necessarily gaps, intermittence in time, and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited. The fact that a State cannot prove or display sovereignty with regard to such a portion of territory cannot forthwith be interpreted as showing sovereignty is nonexistent. Each case must be appreciated in accordance with the particular circumstances. *Id.* at 833-839.

134. *See* Ricciardi, *supra* note 118, at 389. This less stringent and more symbolic test was seen in various countries' control over territories on the continent of Antarctica. The Antarctic Treaty is the most widely known and cited instance. The race to acquire land in the uninhabited Antarctic areas has been called "the land rush of the century." *See* Sir ARTHUR WATTS, INTERNATIONAL LAW AND THE ANTARCTIC TRADING SYSTEM 9 (Grotius Pub. Ltd. 1992). *See also* Antarctica Case (U. K. v. Arg.), 1956 I.C.J. 12-14 (March 16); and Antarctica Case (U. K. v. Chile), 1956 I.C.J. 15-17 (March 16).

Territory of Walfisch Bay,[135] the granting of hunting concessions in *The Legal Status of Eastern Greenland*, [136] and sporadic fishing and pearl diving in the *Hanish Islands*.[137] The holding of *Eastern Greenland* was later confirmed in the *Case of Clipperton Island* (Mexico vs. Spain) where it elucidated the second element of occupation in terms of an occupied and populated territory.[138] The Permanent Court of International Justice stated that "the actual, and not the nominal, taking of possession is a necessary condition of occupation."[139]

Because both Suriname and Guyana intended to control the New River Triangle, any international tribunal will hinge upon an examination of actual control extended over the area. In doing such, it is clear that Guyana has demonstrated a consistent presence in the area both in military and economic terms. It has established bases for the Guyana Defense Forces, granted concessions, taxed logging operations, and is today planning on constructing a road to access the secluded areas. The nominal subsistence gold mining, as encouraged by Suriname, will not be enough to satisfy any international tribunal of clear and consistent presence.

This standard is relevant in the New River Triangle where Guyana granted concessions to logging and gold mines. Guyana further established World Bank funding for conservation projects in the New River Triangle, incorporating the area into the national identity of Guyana. The economic activities of lumber and road construction allow for economic development within this territory at a pace faster than that of Suriname. If the tribunal considers the constructive measures, productivity, and development already established by Guyana, as compared to Suriname, the Guyanese claim to sovereignty would have the most weight.

B. The Principle of Terra Nullius in the New River Triangle

Due to the undeveloped area that compromises the New River Triangle, a crucial issue is whether it was possible to occupy the

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135. Southern Boundary of the Territory of Walfisch Bay (Gr. Brit. v. F.R.G.), 104 Brit. & Foreign St. Pap. 50, 100 (May 23, 1911).

136. *See* Eastern Greenland, *supra* note 123.

137. *See* Island of Palmas, *supra* note 129.

138. Clipperton Island Award (Fr. v. Mex.), 26 A. J. INT'L L. 390 (1932). Clipperton concerned a dispute between France and Mexico over an uninhabited island. The arbitrator emphasized the nominal acts which translated toward possession over the actual occupying and ruling the island. In the case, title was ultimately determined by the nominal act of a French Naval Officer proclaiming the island to be French and publishing an article in a Honolulu newspaper. This was deemed sufficient in creating valid title in this specific circumstance. *See* SHAW, *supra* note 124, at 348.

139. Clipperton Island Award, *supra* note 138, at 390.

territory throughout the colonial era. Either party may argue that the former colonial governments of Great Britain or the Netherlands did not effectively occupy the New River Triangle because it was inhabited by indigenous sovereign people. In the absence of these tribes, the territory would have been *terra nullius* (the property of no one) and thus able to be controlled by either Suriname, Guyana, or Brazil, as determined by the elements of intent (*animus occupandi*) and actual control (*corpus*). This section will define the concept of *terra nullius*, its historical roots, and legal applications.

1. Terra Nullius as Defined and Applied

Throughout the colonial era, European scholars agreed that "any land that was *terra nullius* was open to occupation."[140] This was seen in the colonization of North and South America, Australia, and, in some instances, Africa.[141] In the colonial era, *terra nullius* was seen as any part of the Earth's surface which was not yet occupied by a central developed government.[142] However, determining the governing presence and signs of a central government posed certain problems. The majority of scholars agreed that non-European, but still cohesive governments, such as China, Japan, and Turkey had claim to their inhabited lands not qualifying as *terra nullius*.[143] It was argued that these non-Western cultures may not have achieved the developmental level of European powers but were still central and organized enough to maintain title over their inhabited territory.[144] There was consternation, however, as to what developmental level an indigenous tribe needed to be at before they were accorded the same consideration. The question of whether a land was *terra nullius*,

140. Ricciardi, *supra* note 118, at 395.

141. Minquiers and Ecrehos (France v. U.K.), 1953 I.C.J. 47 (November).

142. *See* Shaw, *supra* note 124, at 335. The Australian case of *Mabo v. State of Queensland* dealt with *terra nullius* in Australia when dealing with an indigenous population that was not organized, coherent, or central. "Whatever differences of opinion there may have been among jurists, the [s]tate practice of the [colonisation] period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*." *Mabo v. State of Queensland*, 107 A.L.R. 1, 40.

143. A minority of scholars asserted that if any substantive population inhabited an area that land could not be *terra nullius* and is therefore unable to be occupied. *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 11-20 (1926); J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141-42 (1894).

144. In the *Lotus* instance, France brought suit against the Turkish government asserting that it had violated its jurisdiction by a collision in the Mediterranean. It is assumed that, since France brought suit against Turkey, the colonial power of France assumed Turkey to be a cohesive political unit. *See* SS Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10.

therefore, depended not on the land, but on the European view of the developmental level achieved by the inhabitants.[145]

In the instance of the New River Triangle, neither Guyana nor Suriname in the early colonial era was aware of the interior of their countries.[146] Historical records give inconsistent accounts of the area and the inhabitants. Early records indicate that Dutch traders went inland up to two hundred miles yet were confined to the waterways and tributaries of major rivers.[147] No scientific expeditions were convened until 1840, and, even then, there were discrepancies in their findings. [148]

Because of the lack of records discussing the New River Triangle, abandonment issues arise. If a state subsequently abandons a territory after acquiring it, that territory reverts back to *terra nullius*.[149] International law, however, is unsettled as to what objective acts determine abandonment.[150] This question is crucial in the New River Triangle because it could potentially be argued by either Suriname or Guyana that the occupied positions in the New River Triangle were occupied and subsequently abandoned.

The majority of scholars assert that to find a territory effectively abandoned, both physical abandonment and the desertion of *animus occupandi* must occur.[151] Jurists have allowed exceptions where it was seen that if an uprising occurs that drives government forces from a particular area, this is not seen as abandonment.[152] However, if a general withdrawal from an area occurs, even with an express intent to return, abandonment would be seen if the government does not return for a sufficient length of time.[153]

In the New River Triangle, the inhabitants of the area did not meet the European standards of a developed and cohesive state. The Arawak and Carib tribes were migrant, had no written language, and moved intermittently throughout the Northern

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145. *Terra nullius* was dealt with recently by the International Court of Justice in *The Indo-Pakistan Western Boundary Case Tribunal.* 1968 I.C.J. (Feb. 19). Both India and Pakistan submitted evidence of partial claims to a border area that was primarily wasteland, yet neither submitted evidence that they claimed the entire area. In deciding this case, the justices asserted that since both countries understood that the land was there, yet could not, and did not exert influence over the territory, the areas do not qualify as *terra nullius.* Conversely, it can be inferred that *terra nullius* is the land which, although may be inhabited, must be not claimed by any power, European or otherwise. *Id.*

146. *See* Odeen Ishmael, THE TRAIL OF DIPLOMACY, Part 1 (c)(4).

147. *Id.*

148. *Id.* at Part 1 (c)(10).

149. *See* Ricciardi, *supra* note 118, at 415.

150. *Id.* at 416.

151. *Id.*

152. *See* Lindley, *supra* note 143, at 48-51.

153. *Id.*

Amazon watershed.[154] Even by the modern standards, as asserted by the United Nations in *Reparations for Injuries Suffered in the Service of the United Nations*,[155] the Carib and Arawak Indians did not comprise a state. Therefore, in the absence of any codified politic entity, the twin requirements of *animus occupandi* and *corpus* indicated that the area was open for inhabitation.

2. The Scope of Occupied Territory under Terra Nullius: Hinterland Territories

In dealing with the concept of *terra nullius*, it is important to note the extent of the unoccupied land. According to the traditional view, a state could claim no more territory than it effectively occupied. Another view asserts that a country was entitled to control not only the land that it effectively administered but also a hinterland.[156] Hinterland theory asserts that attaching hinterlands to colonial possessions is crucial based upon basic considerations of "geographical proximity, natural features, or … strategic need."[157] Hinterland theories were asserted in the Guianas during the 1899 Paris Arbitration regarding the maritime and territorial boundaries between British Guiana and Venezuela.[158]

Some states asserted claims based upon the first theory of geographical contiguity to justify claims to an unoccupied territory that was adjacent to the previously inhabited and structurally occupied area. Jurists generally denied that proximity alone, without effective occupation, could support valid title. "They argued that if proximity conferred upon a state superior faculties for occupying a territory, that the state should exercise those faculties."[159] In the *Island of Palmas* award, Judge Huber addressed the contiguity theory and concluded that it had "no foundation in international law."[160] Huber wrote that this is "by its very nature…uncertain,"[161] and that it conflicted with the clear requirement in international law of effective occupation. Huber

154. *Id.* at Part 1 (b) 1-4.
155. Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 174-178 (Apr. 11).
156. *See* Ricciardi, *supra* note 118, at 405. Hinterland as used in this context applies to territory which, while known to the colonial or administering power, is not effectively controlled under western notions of territorial sovereignty. *Id.*
157. *Id.* at 406.
158. See Ishmael, supra note 146, at Part Chapter 13 (f)(4).
159. *Id.*
160. See Ricciardi *supra* note 118, at 405-406.
161. *Id.*

thus concluded that even isolated displays of occupation would defeat claims based on a hinterland theory.[162]

Under the second natural boundaries theory, states could invoke claims based on geographical contiguity extending to a geographic natural boundary. Prominent natural boundaries such as oceans, mountains, and rivers created natural boundaries that allowed for easy demarcation and division. [163] Britain asserted the natural boundary theory in the *1899 British Guiana – Venezuela Arbitration*.[164] Britain wanted natural boundaries to be the boundary between Guyana and Venezuela because they are "both easy to distinguish and hard to cross."[165] Huber asserted that where the claimed additional feature had a geographical relation to the effectively occupied area, the state could assert a hinterland theory. Yet, even in cases where there existed linguistic, ethnic, and geographical consistency with the hinterland, international law has always stated that the claiming state must effectively occupy the territory within a reasonable time.[166]

Geographical boundaries were seen in the maritime context in the case between Yemen and Eritrea. Yemen argued that the group of disputed islands in the Red Sea should be viewed as one geographical entity, based upon "the principle of natural or geophysical unity."[167] In the final award, the International Court of Justice stated that the principle of boundaries based upon natural geographical principles is "not an absolute principle."[168]

The third justification for hinterland extensions is that the area is needed for the safety and security of the state. During the negotiations in the 1885 Conference of Berlin, the British government instructed its delegate to assert "as a general principle…if a nation has made a settlement it has a right to assume sovereignty over all adjacent vacant territory which is necessary to the integrity of the settlement."[169] This theory has gained little respect from international panels in deciding hinterland arguments. "At a time when colonizing states had ample knowledge of the geography of the region, claims based on strategic

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162. *Id.*

163. *See* Riccardi, *supra* note 118, at 406.

164. Clifton J. Child, *The Venezuela-British Guiana Boundary Arbitration*, 44 AM. J. INT'L L. 682 (1951). *See also* William Cullen Dennis, Editorial Comment, *The Venezuela-British Guiana Boundary Arbitration of 1899,* 44 AM. J. INT'L L. 720 (1951).

165. See Ishmael, *supra* note 146, at Part 3 Chapter 13 (f)(4).

166. See Ricciardi *supra* note 118, at 406.

167. Eritrea-Yemen Award Award. Phase II: Maritime Delimitation. Chapter X, § 459. *Available at* http://www.nic.gov.ye/.

168. *Id.* at para 461.

169. See Ricciardi, *supra* note 118, at 406.

importance made after the occupation rang hollow, because the state could have occupied all the necessary land from the beginning."[170]

If no other state asserts claim to a hinterland, it is clear from the *Eastern Greenland* case that an international tribunal will grant title as long as there is a showing of occupation.[171] In *Eastern Greenland*, no other state challenged Danish control over a hinterland claim, and therefore, solely on the basis of Danish domestic legislation decreeing control over the territory, the area was Danish. There was no evidence of the actual display of sovereignty. In framing this decision, the Court noted the need to take into account "the extent to which the sovereignty is also claimed by some other [p]ower."[172] The Court laid particular emphasis on the fact that until 1931, no other state had either disputed Denmark's claim to the area, nor had any other power asserted a claim until 1931.[173] Given the lack of any claim to sovereignty by another state and the inaccessibility of the area, even Denmark's scant occupation was deemed enough to be granted title to the territory.[174]

Eastern Greenland is therefore considered the first international arbitral award to sanction hinterland possession in the absence of conflicting claims.[175] In these rare instances, it is possible to claim large tracts of hinterland territories with small acts of occupation. However, the later *Island of Palmas* award states that those directing hinterland territory claims could not defeat an opposing claim based on "continuous and peaceful" possession of the same territory.[176]

During the early colonial era, claims to hinterland territories were unclear. Neither the British nor the Dutch entities seemed to be concerned about control over the hinterland, when it was the opportunity to trade with the seafaring inhabitants and cultivate sugar and tobacco which mattered.[177] Throughout the existence of early Dutch interests, sporadic settlements dot the interior of

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170. *Id.*
171. *See* Eastern Greenland, *supra* note 123, at 46.
172. *Id.* at 46-48.
173. *Id.*
174. Ricciardi, *supra*, note 118, at 409.
175. This case is confirmed and contrasted by the *Island of Palmas* case, where it states explicitly that hinterland theories of state sovereignty are not valid when they compete with another nation's claim to the same territory. It is possible to reconcile the two countries by noting the extreme isolation experienced by Danish claims in Denmark as contrasted to the Island of Palmas, which contained various population centers that were intermittently inhabited. *See* Isle of Palmas, supra note 129.
176. *Id.*
177. See Ishmael, *supra* note 146, at Part 1 (c) (4).

Guyana and Suriname.[178] The trading between native Indians and Dutch/English settlers seems to have been limited to less than six hundred miles inland.[179]

However, during the later and more developed colonial rule in the Guyanas, the surveys that were enacted seem to cut against any possible hinterland theory claim. This is because a claim for title based solely upon a hinterland theory will be defeated upon showing clear and consistent occupation of the disputed land. In the Guyana — Suriname instance, Guyana demonstrated a consistent constructive occupation in the New River Triangle, developed the area, policed the area, and defended the area from incursions. Therefore, Suriname may not state a hinterland claim to the area based upon the colonial view of the interior by the predecessor state Dutch Guiana.

C. The Principle of Uti Possidetis

The doctrine of *uti possidetis* is the most essential operative legal principle involved in the Suriname—Guyana border dispute. The concept was first applied during the break-up of the Spanish colonial holdings on Latin and South America in 1820.[180] It asserts that a country gaining independence from colonial rule inherits the original borders of the previous state.[181] However, if the former colonial powers maintained unresolved borders before independence, then the new republics inherit the unresolved claim at issue. The doctrine originated in South America as many former colonies of Spain and Portugal gained independence.[182] It has been applied in the Northeastern section of South America in cases of Venezuela from Spain, Cuba from Spain, and Brazil from Portugal.[183]

This section will discuss the doctrine of *uti possidetis*, its historical development, recent application, and applicable case law. This section asserts that, since the border in the New River Triangle

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178. *Id.*

179. *See* GOSLINGA, *supra* note 33, at 428.

180. SHAW, *supra,* note 124 at 356. Frontier Dispute (Burkina Faso v. Mali) 1986 I.C.J. 545, §§ 19-26; EC Arbitration Commission on Yugoslavia (1993) 92 I. L. R. 162, 162-66. *See also* Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), 97 I.L.R. 266, 351, 514, 598 (1994) [hereinafter El Salvador v. Honduras].

181. *Id. See also* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States,* 90 Am. J. Int'l. L. 590, 590 (1996); Michael Reisman, *The Government of the State of Eritrea and the Government of the Republic of Yemen; Award of the Arbitral Tribunal in the First Stage of the Proceedings, (Territorial Sovereignty and Scope of the Dispute)* 93 Am. J. Int'l L. 668, 668 (1999).

182. *See* SHAW, *supra* note 124, at 356-57.

183. *Id.*

was not resolved during the colonial rule, neither Suriname nor Guyana can claim title to the area incorporating solely a claim of *uti possidetis.* However, *uti possidetis* does not preclude inheriting the original *animus occupandi* and *corpus* exhibited by its colonial predecessor in the New River Triangle. In terms of the Courantyne River, the successor state of Suriname inherited the historic title of the 1799 Agreement, and therefore, may extend complete sovereignty over the river, contained islands, and re-affirm Point No. 61 as the land boundary terminus. This would suggest a 10º extension into the territorial sea, as envisaged in the 1936 Mixed Commission, and as claimed by Suriname. However, Guyana could likewise inherit the 1954 British claim to the continental shelf, the ability to grant concessions in the far eastern "area of overlap" as seen in the 1958 Shell and Exxon concessions, and the original *animus occupandi* and *corpus* that was noted by the 1936 Mixed Boundary Commission in the New River Triangle.

The doctrine of *uti possidetis*[184] is closely related to the doctrine of state succession,[185] whereby one state displaces another in an area by means of a treaty.[186] In succession mechanisms, the new state inherits all the rights and obligations of the former sovereign.[187] Thus, under the independence agreements between Guyana and Great Britain and Suriname and the Netherlands, the two countries inherited rights and obligations entailed with statehood.[188] It is distinct, however, because state succession does not directly apply to international boundaries of the successor state.[189] The doctrine of *uti possidetis,* in these instances, refers directly to the inheritance of boundaries at state succession.[190]

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184. *Uti possidetis* translates to "as you possess, so you may possess." *See* RATNER, *supra* note 181, at 593.

185. State succession may be briefly defined as "the replacement of one state by another in the responsibility for the international relations of territory." *See* SHAW, *supra* note 124, at 676. State succession is dealt with in Article 2 of both the Vienna Conventions of 1978 and 1983, and Opinion No. 1 of the EC Arbitration Commission on Yugoslavia 92 I.L.R. 165 (1993). The foremost International Court of Justice decision is Guinea-Bissau v. Senegal*,* 83 I..L.R. 1, 22 (1990) and El Salvador v. Honduras, *supra* note 180.

186. SHAW, *supra* note 124, at 674.

187. Badinter Commission in *Opinion No. 3 in 1992 delineating the boundaries between Serbia and Yugoslavia. See Peter Radan Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission,* 24 MELB. U. L .Rev. 50 (2000).

188. *See* independence discussion in *Id.* at 59.

189. See Shaw, *supra* note 124, at 676. It is seen where a former state disappears in whole or in part and is succeeded by another state occupying roughly the same territory of the original sovereign. *See* D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (Cambridge) (1967). *See also* IAN BROWNLIE PRINCIPLE OF PUBLIC INTERNATIONAL LAW. (4th ed. 1990) at Chapter 28.

190. *Id.*

In the Case Concerning the Frontier Dispute (Burkina Faso v. Mali), the International Court of Justice discussed *uti possidetis*.[191] The Court dealt with a boundary award regarding the "principle of the intangibility of frontiers inherited from colonization."[192] In its holding, the International Court of Justice stated that *uti posiedetis* was "a firmly established principle of international law where decolonization is concerned."[193] The court further stated that "[*u*]*ti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs."[194]

The majority of scholars agree that there are two distinct versions of *uti possidetis*.[195] Through the first mechanism of *uti possidetis juris,* boundaries "are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence."[196] *Uti possedetis juris* was seen in the *Colombia-Venezuela* Arbitration in 1922. In this award, the court held, "[t]he principle of [*uti possidetis*] asserted that the boundaries of the newly established republics would be the frontiers of Spanish provinces which they were succeeding…. These territories, although not occupied in fact…were by common agreement as considered as being occupied in law." [197] Therefore, in an *uti possidetis juris* setting, a state could lay claim to an area, although not exactly administering within the territorial notions of the former Spanish administrative division.

The second concept of *uti possidetis de facto* was seen in the later case of *El Salvador v. Honduras,* where the court held that borders may be demarcated by territory which was "actually possessed and administered by the former colonial unit at the time of independence, irrespective of the legal definition of former colonial borders."[198] In this case, the court dealt with a boundary award between three states that had ratified international treaties determining the applicable law. The International Court of Justice held that the ruling in the Burkina Faso-Mali instance does not apply "if parties to any dispute…specifically agree to the contrary

191. *See Frontier Dispute (Burkina Faso v. Mali)*, *supra* note 180, at 554.
192. Id. at 565.
193. *Id.*
194. Id. at 566.
195. See Radan, *supra* note 187, at 59.
196. *Id.*
197. Colombia-Venezuela Arbitration, 1 U.N.R.I.A.A. 223, 288 (1922).
198. *See* Radan, *supra* note 187, at 59.

that the principle of *uti possidetis* should not be applied."[199] Therefore, in a *uti possidetis de facto* setting, a state could only claim to an area that the former colonial division administered and controlled.

The principle of *uti possidetis* applies to territorial as well as maritime zones.[200] The principle can be applied to the Suriname-Guyana context by inheritance of the 1799 Agreement for the Courantyne River. *Uti possidetis* asserts that, where there is a relevant applicable treaty, an international frontier achieves a status of permanence so that even if the treaty itself were to cease to be in force, the continuance of the boundary would be unaffected and may only be changed with the consent of the states directly concerned.[201]

This inheritance of the entire Courantyne would, therefore, reaffirm the land boundary terminus of Point No. 61 on the west bank of the Courantyne. If the 1936 Mixed Commission or the 1958-1962 negotiations had ratified the treaty, a 10º extension into the territorial sea (to the three-mile limit) would have been inherited by the new republics. As this is not the case, the question arises of who actually controlled the territorial waters during the late colonialism era. This *corpus,* or actual control of the area, could be inherited through *uti possidetis juris* to the successor states. As the record marginally indicates, since Suriname maintained trawling and fishing rights to the mouth of the Courantyne, Suriname is not prevented from asserting an *uti possidetis juris* argument that Dutch Guiana's occupation of the mouth of the Courantyne re-affirms the 10º extension in the territorial sea as seen in the un-ratified 1936 Mixed Commission.

If *uti possidetis juris* is applied to the outlying Exclusive Economic Zone and Continental Shelf areas, Guyana inherits a *de facto* maritime delineation that incorporates a 1954 British claim of the Continental Shelf. Moreover, British Guiana granted California Oil and Shell two specific concessions which were not objected to by Suriname before independence, and Guyana has subsequently

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199. Ratner, *supra* note 181 at 594. *See also,* http://www.lawschool.cornell.edu/library/cijwww/icjwww/igeneralinformation/ibbook/Bbook8-1.56.htm. The territorial concepts and boundaries of the former colonial power are often accompanied with other forms of governance that are implanted in the colonial country. See Thomas W. Donovan, *Jurisdictional Relationships Between Nations and Their Former Colonies*, 1 Across Borders Int'l L. J. 5, (para. 1-5) (2003) *available at* http://www.across-borders.com.

200. The International Court of Justice has emphasized that the *uti possedetis* principle applies to territorial as well as boundary problems. *See* El Salvador v. Honduras, *supra* note 180, at 387.

201. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 23 (Feb. 24) (citing the Special Agreement between Tunisia and Libya, Art. 1).

awarded numerous concessions as enumerated above, again without timely objection by Suriname.[202] Reconciling a 10º Suriname territorial sea with a 33º Guyanese Exclusive Economic Zone will be a difficult task for any international tribunal. One solution asserts a maritime delineation which, although possibly projecting at 10º immediately from the shore, would move towards the Guyanese position of 33º past the territorial sea and respect the concession rights given by each country.[203] Another solution is to impose an equidistant median line through the area, a common practice in offshore boundaries. In practice, such a median line is a set of line segments. The outlying continental shelf and Exclusive Economic Zone are located past the territorial sea. At this distance, the location of the median line is completely unaffected by the demarcation of the boundary in the territorial sea which could be demarcated upon separate principles.[204]

In terms of the New River Triangle, Guyana can state a strong claim to title based upon *uti possidetis juris*, which asserts that, even though Guyana did not effectively administer the territory in dispute during the colonial period, it still may inherit the lands which it effectively occupied. This effective occupation will be determined by the twin criteria of *animus occupandi* and *corpus*, which dictate how a colonial state may lay claim to title in lands that are *terra nullius*. In doing such, the *animus occupandi* and *corpus* will be judged against a similar Suriname claim that Dutch Guiana also exhibited these objective notions. Any tribunal will, however, overlook the intermittence of Dutch outlying settlements and concentrate on the clear, consistent, and objective showings of state sovereignty exhibited on behalf of British Guiana and, by the principle of *uti possidetis juris,* the Republic of Guyana.

D. Prescription

The twin elements of occupation (*animus occupandi* and *corpus*) "permitted a state to acquire territory only when no other state had perfected title to it."[205] When the land was under the power of one state, international law provided other means for acquiring title to the disputed land. One such mechanism relevant to the New River Triangle dispute is the gaining of title through prescription. Prescription, analogous to the common-law property doctrine of adverse possession, generally requires the same

202. Provided by CGX Petroleum, Oct. 17, 2003, on file with author [hereinafter Historic Operators].
203. *See* Hoyle, *supra* note 49, at 100-104.
204. *Id.* at 102.
205. Riccardi *supra*, note 118, at 413.

conditions. The adverse possession has to be open, conspicuous, notorious, and uninterrupted for a reasonable period of time.[206] This possession must not be contested or challenged by the original possessor.[207]

Prescription is defined as "legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign…."[208] The doctrine of prescription was dealt with most recently in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia).*[209] In prescription, if the state, which initially maintained control of an area that was adversely possessed, actually did not maintain actual control over the area, scholars suggest that this land was not territory of the original sovereign but rather *terra nullius*, and open for occupation based upon showing *animus occupandi* and *corpus* or other constructive occupation realities.[210] To gain title by prescription, the intruding elements need to be part of a nation-state. In the *Botswana/Namibia* instance, it was seen that title can not be perfected by non-state actors (private citizens) encroaching upon sovereign territory. In both instances of prescription and *terra nullius*, the outcome is similar: the state constructively occupying the territory maintains sovereignty.

The requirement for a "reasonable amount of time" is imprecise and has gained little judicial review.[211] It is not possible to define any precise amount of time and determining a proper time frame will depend on the circumstances involved in deciding the title to the area, competing claims, and the nature of the dispute. The one international case that dealt with the time element of prescription was the *Minquiers and Ecrehos* case.[212] In *Minquier,* France and England were disputing a group of islets in the English Channel where titles could be traced back before 1066. The court

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206. Prescription is dealt with in three major international awards. *See* Clipperton Island Arbitration (France v. Mexico*)*, 26 Am. J. Int'l. L. 390, (1932); Western Sahara, 1975 I.C.J. 12, 43 § 92; and Minquiers and Ecrehos (France v. United Kingdom*),* 1953 I. C. J. 47, 65-66 [hereinafter Western Sahara]. The doctrines of adverse possession and prescription are similar in that they reward a party in equity reflecting the actual occupier of the land. *See id.*

207. The reasonable amount of time and the objection of the state are dealt with in two major awards: Eastern Greenland (Denmark v. Norway) 1933 P.C.I.J. (ser. A/B) No. 53, at 45-46 (June 14); Western Sahara*, supra* note 206, at 42 § 91. The type of encroachment needed to manifest sovereignty is analogous to the *terra nullius* requirements of *animus occupandi* and *corpus. See* Minquiers and Ecrehos (France v. United Kingdom*),* 1953 I.C.J. 47; Anglo-Norwegian Fisheries (United Kingdom v. Norway*)* 1951 I.C.J. 116, 184 (Dec. 18).

208. SHAW, *supra* note 124, at 343-344.

209. 39 I.L.M. 310 (2000).

210. *Id.* at 344.

211. *Id.* at 345.

212. *See Minquiers and Ecrehos*, *supra* note 141, at 47.

did not concentrate on the historic titles offered, but concentrated its decision on the recent acts of prescription that occurred throughout the last century.[213] In the 1899 arbitration between Guyana and Venezuela, prescription was agreed to be a constructive occupation of an area for 50 years.[214] As the 1897 agreement to arbitrate the dispute states:

> (a) Adverse Holding or prescription during a period of fifty years shall make good title. The Arbitrators may deem exclusive control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.[215]

Under a prescription theory, Suriname or Guyana could argue that although one side effectively demonstrated *animus corpus* and *occupandi* throughout the colonial era, the fact that each entity has ignored a conspicuous encroachment onto the territory would preclude title. Each side would cite encroachment by elements of their military as prescription, because encroachment needs to be performed by a state organ. A prescription argument would be especially beneficial for Suriname, which otherwise lacks objective manifestations of intent and control of the New River Triangle. Through a prescription argument, Suriname could effectively gain title to the New River Triangle simultaneously with Guyana demonstrating intent to occupy the land. The issue would center on whether Guyana objected to Suriname's encroachment.

E. Recognition, Acquiescence, and Estoppel

Recognition, acquiescence, and estoppel are concepts that revolve around the common term of state consent.[216] They reflect the presumed will of a State, either expressly or implicitly, concerning an encroachment on the State's borders.[217] This section will discuss the theories of recognition, acquiescence, and estoppel in international law. It asserts that Guyana may be prevented from raising legal arguments related to Suriname's control of the Courantyne River because it *acquiesced* to Surinamese control. Conversely, it will be even more difficult for Suriname to assert a

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213. *See* SHAW, *supra* note 124, at 349-350.
214. http://www.guyanaca.com/features/trail_diplomacy.html (last visited Oct. 24, 2003).
215. *Id.*
216. *Id.* Consent is important because it denotes cession of territory to the other state, reflecting the will of one State not to occupy and administer a specific area of territory. *Id.*
217. *Id.* at 350.

claim of title for the New River Triangle because Dutch Guiana *recognized* British Guiana control of the territory, and recognized the Kutari as the Southern extension of the Courantyne River, forming the boundary between the two states. In terms of the maritime area of overlap, Suriname has *acquiesced* to the long-standing Guyanese concessions stemming from 1958 and granted its own concessions respecting their existence. Recognition and acquiescence are inherited by *uti possedetis juris* mechanisms, and therefore, both states may be *estopped* from raising these claims in an arbitration award, based upon the conduct of their former colonial powers.[218]

Recognition is defined as a positive act by a state which accepts a particular situation.[219] This was seen poignantly in the case of *Eastern Greenland*, where Norway accepted Danish control over an area of Greenland by agreeing to treaties with third parties that recognized and relied on the Danish control.[220] Although it does not expressly bind a state to the boundary that they have recognized, "it is nevertheless an affirmation of the existence of a specific factual state of affairs."[221]

In the colonial histories of the Guyanas, Dutch Guiana made frequent positive statements labeling the Kutari as the southern extension of the Courantyne, and therefore, the border. The most notable is the Tri-point junction where the Dutch Representative, Lt. Kayser, signed the Brazilian and British junction point allowing the Kutari to be seen as the border. The debates in Parliament, where many Dutch officials and the geographical society stated that they believed the Kutari to be the border, assert that the Netherlands recognized that British Guiana controlled the area in dispute.

Acquiescence, as defined in international law, "occurs in circumstances where a protest is called for and does not happen."[222]

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218. http://www.guyanaca.com/suriname/guyana_suriname_colonial.html (last visited Oct. 26, 2003).

219. *See* BROWNLIE, *supra* note, 189 at 163. *See also* CHARLES S. RHYNE, INTERNATIONAL LAW: THE SUBSTANCE, PROCESSES, PROCEDURES AND INSTITUTIONS FOR WORLD PEACE WITH JUSTICE 77 (1971).

220. *See* Eastern Greenland*, supra* note 123, at 47. *See* BROWNLIE, supra note 189, at 164-65. Brownlie asserts that recognition, estoppel, and acquiescence have played a large role in determining boundary awards. Brownlie makes a distinction between recognition and acquiescence by asserting that "acquiescence has the same effect as recognition, but arises from conduct, the absence of protest when this might reasonably be expected." *Id*. at 164.

221. *See* SHAW, *supra* note 124, at 350. *See also* Brownlie, *supra* note 189, at 165 (defining express recognition as "recognition in the treaty of the existence of title in the *other party* to a dispute (as opposed to recognition by third states) [which] creates an effect equivalent to that of estoppel").

222. SHAW, *supra* note 124, at 350. *See also* BROWNLIE, *supra* note 189, at 164. Brownlie asserts that recognition, estoppel, and acquiescence are not essential to gaining title over a

These are instances where the available time for asserting a protest acknowledging a State's disagreement over a circumstance has lapsed. If a lapse of time occurs, the state that did not object is tacitly understood to accept the event that transpired. This instance was seen in the *Libya v. Chad* case where the International Court of Justice noted that "[i]f a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty."[223]

In terms of the Courantyne River, Guyana has 'acquiesced' to Surinamese control over the entire river. That is, Guyana has allowed Point No. 61 to be considered for the land boundary terminus in two draft treaties and did not protest the established Dutch control over navigation rights in the Courantyne. If Guyana was to protest the incorporation of Point No. 61 in the 1936 Mixed Commission, it could have done so before the 1958-1962 negotiations, which also used Point No. 61 as the land boundary terminus. These actions indicate that the Government of Guyana considers, either tacitly or expressly, the entire width of the Courantyne River to be in Surinamese control.[224] The significant lapse in time between the 1799 Agreement, granting Dutch control over the River, and its independence, could have allowed the English foreign office to raise an objection that the boundaries of British Guiana were being infringed upon. Yet, since there was no protest noted, modern day Guyana inherited the acquiescence to Surinamese control over the Courantyne River through the concepts of *uti possedetis juris.*

In terms of the maritime boundary, a court may hold that Suriname *acquiesced* to a 33º extension to the Exclusive Economic Zone and the Continental Shelf because they did not object to the 1954 British claim to the Continental Shelf or to the concessions granted to California Oil and Shell in 1958. Subsequent drilling occurred in the same area and did not elicit a protest from Dutch Guiana. Additionally, while Suriname has awarded offshore concessions (including 1965 concessions to Shell), its concessions have more or less gone only as far as the 33º line claimed by Guyana. Suriname has never awarded a concession in the "area of overlap." [225]

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disputed territory, but are of great significance to any international tribunal. Brownlie further distinguished acquiescence from estoppel by saying that recognition is a more persuasive element than acquiescence. *Id.*

223. Territorial Dispute (*Libya v.Chad*), 1994 I.C.J. 6, 35 at § 66 (Feb. 3).

224. *See* Hoyle, *supra* note 49 at 100-104.

225. For more information on where Guyana is drilling see http://www.businessweek.com/2000/00_41/c3702238.htm (last visited Oct. 26, 2003) and http://www/cgxresources.com/

The notion of estoppel asserts that if one party has acquiesced or recognized a particular situation, it is prevented from arguing otherwise during an arbitral panel. The leading case on estoppel is *The Temple of Preah Vihear*[226] between Cambodia and Thailand. In *Preah Vihear*, boundary commissioners negotiated a final demarcation between Thailand and the former colonial government of France. During the boundary negotiations, the Thai prince visited a temple that was in disputed territory and saw a French flag clearly flying over the temple. The prince did not object at that time, and in future negotiations was prevented from raising an argument based upon his conduct. In sum, any tribunal which might hear the Suriname-Guyana case could prevent Guyana from raising claims to the Courantyne due to an acquiescence principle; it also could prevent Suriname from claiming the New River Triangle on a recognition concept, or the Continental Shelf on acquiescence.

F. Relevant Law to Territorial Sea Delineation, International Rivers, Exclusive Economic Zone, and Submarine Continental Shelf

The delineation of an outlying maritime zone is usually dependent upon choosing a land boundary terminus and extending the land boundary terminus in a mutually agreed direction.[227] The Suriname-Guyana dispute over the maritime zone seems to be complicated by the fact that the two states are divided by a

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press/other/020204_toronto_business_journal.htm (last visited Oct. 26, 2003). For information as to where Suriname is drilling see http://www.olade.org.ec/idiomas/ingles/EnergiaEnLosPaises/sr/carsec-contenido.htm (last visited Oct. 26, 2003).

226. The Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15) (Spender, J. , dissenting) (asserting there must be a higher degree of acquiescence and recognition for a party to be estopped from raising protests). *See also* D. H. Johnson, *The Case Concerning the Temple of Preah Vihear,* 11 INT'L & COMP. L.Q. 1183 *(1962); The Temple of Preah Vihear* opinion on recognition in international law was later confirmed by Queen Elizabeth II in her ruling between Argentina and Chile. *See Award of Her Majesty Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile*. (1966). *Argentina-Chile Frontier*, R.I.A.A. Vol. 16 (1969) 109-182.

227. *See* U.N. CONVENTION ON THE LAW OF THE SEA part II, art. 15, *available* at http: www.un.org/Depts/los [hereinafter UNCLOS]. Suriname and Guyana, both parties to the Law of the Sea Convention, have committed themselves to a system of dispute resolution dictated by treaty. Article 188 expressly states that parties must submit "to a special Chamber of the Law of the Sea Tribunal or an ad hoc Chamber of Sea-Bed Disputes or to binding arbitration." *See id.* part XI, § 5, art. 188. BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW 989 (2d ed. 1985). The Territorial Sea is the twelve mile extension immediately adjacent to the land territory of a state. *See*, A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE CONVENTION ON THE LAW OF THE SEA 270 (1987) (asserting that jurisdiction under the Law of the Sea extends to the seabed and continental shelf areas.

boundary river with the boundary in dispute. However, the impact of the precise land boundary terminus is only relevant to the immediate territorial sea, as the outlying Exclusive Economic Zone and continental shelf do not have to be demarcated using a straight line extension from a land boundary terminus. [228]

Normally the land boundary terminus would have been placed in the midpoint (*thalweg*) of the Courantyne River if no other special arrangements existed. The 1799 Agreement, however, gave complete sovereignty of the Courantyne to Suriname;[229] therefore, in this unusual and atypical case, the land boundary terminus is located on the Guyana side (west bank) of the Courantyne River.[230] This agreement was inherited through *uti possedetis* and state succession mechanisms and applies today as the applicable boundary between Suriname and Guyana.

Determining a boundary at a river bank instead of a river *thalweg* is not without international precedent.[231] The *Shatt al-Arab* is an example where a river bank is used to determine the border between Iraq and Iran. In the *Shatt al-Arab*, the Ottoman Empire, and its successor state, Iraq, exercised jurisdiction over the entire river despite Iranian protests.[232] A river bank boundary is therefore a special circumstance, which although valid, is uncommon. Article 15 of the Law of the Sea allows for unconventional demarcation in maritime areas, stating that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant.… The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.[233]

The exception of "historic title" applies to the 1799 Agreement which has existed as the boundary for over two hundred years. The issue therefore becomes how the 1799 Agreement affects the

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228. See Hoyle, *supra* note 49 at 104.
229. http://www.guyanaca.com/suriname/guyana_suriname_colonial.html (last visited Oct. 26, 2003).
230. http://nationmaster.com/country/ns/Transportation (last visited Oct. 26, 2003).
231. *See* Jones, *supra* note 81, at 118.
232. *Id.* at 119.
233. UNCLOS at part II, art 15.

immediate twelve-mile territorial sea.[234] If Point No. 61 is to be assumed as the land boundary terminus, then any offshore delineation towards the original 10º can be asserted by Suriname relying on the precedent in 1958-1962 and 1936 Mixed Commission. Because Guyana has *acquiesced* to this terminus in practice, it appears as though Guyana has consented to Point No. 61 as the land boundary terminus.[235] Implied or express consent is of great relevance to boundary delineation. As seen in *British Guiana vs. Venezuela Boundary Arbitration,* it is possible to alter boundaries where circumstances indicate consent.[236]

In dealing with a continental shelf or outlying marine areas, Article 6 of the Continental Shelf Convention is the applicable law. This convention is concerned with cases where the same continental shelf extends between two adjacent states.[237] The convention asserts that the boundary between two adjacent states shall be determined by agreement, but in the absence of any agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by a median line based upon the principle of equidistance.[238] Therefore, a respected international tribunal will look first to ascertain whether an equidistance line is possible, taking into consideration the relationship of the maritime zone to the land mass, and then see if any equitable reasons

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234. Coastal states are entitled to claim, absent any bilateral or multilateral treaties obliging otherwise, a twelve-mile territorial sea that is the exclusive jurisdiction of the coastal state. The outlying zone of the Exclusive Economic Zone and the Continental Shelf are not the territorial extension of the sovereign coastal state, but may be used solely by the state for economic purposes such as fishing or extrapolation of resources. *See* BROWNLIE, *supra* note 189, at 228.

235. Acquiescence, as defined in international law, occurs "in instances where a protest is called for and does not happen." *See* Shaw, *supra* note 124, at 340-344. Brownlie asserts that recognition, estoppel, and acquiescence are not essential to gaining title over a disputed territory, but are of great significance to any international tribunal. Brownlie further distinguished acquiescence from estoppel by saying that recognition is a more persuasive element than acquiescence. *See* Brownlie, *supra* note 189, at 228. British Guiana and the predecessor state of Guyana did not specifically protest the incorporation of the 1799 Agreement at the independence of Suriname from the Netherlands, and its presence was acknowledged in the 1936 Mixed Boundary Commission. *See* Hoyle, *supra* note 49, at 104.

236. Express consent is seen in British Guiana v. Venezuela Boundary Arbitration (1899-1900) 92 B.F.S.P. 160. This case is the most relevant to the Guyana – Surinam instance. The notion of implied consent and the court's reliance on this principle is also seen in Chamizal Arbitration (United States v. Mexico), 5 Am. J. Int'l. L. 782 (1911); Frontier Land (Belgium v. Netherlands), 1959 I.C.J. 209, 227 (Jun 20); and more recently in Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), 1992 I.C.J. 351, 401 (Sept. 11).

237. For definition of "adjacent," see North Sea Continental Shelf, 1969 I.C.J. 3, at 27-28 (Feb. 20). The North Sea Continental Shelf Case was between the Federal Republic of Germany and Denmark, and the Federal Republic of Germany and the Netherlands. *See also* W. Michael Reisman, *International Decision: Eritrea-Yemen Arbitration (Phase II: Maritime Delineation),* 93 AM. J. INT'L L. 731, 734 (1999).

238. Colson, *supra* note 86.

prohibit its use.[239] As Judge Guillaume states: "Such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature."[240]

This principle has been applied in many international boundary delineations.[241] However, in the 1969 *North Sea Continental Shelf cases,*[242] the International Court of Justice decided that Article 6 of the Continental Shelf Convention was not declaratory of existing rules of law and consequently the equidistance median was not binding on the parties.[243] Therefore, since delineation based upon equidistance was not an applicable measure, it was necessary to decide the *North Sea Continental Shelf* case based upon equitable principles. Economic concessions and usage of the continental shelf were examples of equitable principles that create a dividing line between adjacent states on the Continental Shelf. [244]

Equity was seen in Tunisia v. Libya, where the International Court of Justice treated economic concessions as creating a tacit boundary line. [245] The Court stated, the fact that a "line of adjoining concessions, which was tacitly respected for a number of years, and which approximately corresponds…to the line perpendicular to the coast at the frontier point which had in the past been observed as a

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239. *Id* at 91.

240. Gilbert Guillaume, Speech to the Sixth Committee of the General Assembly of the United Nations (Oct. 31, 2001), *available at* http://www.icj-cij.org/icjwww/ipresscom/iprstats.htm (last visited Oct. 26, 2003).

241. *See, e.g.,* Italy v.Yugoslavia (1968), 7 I.L.M. 547 (1968); USSR-Finland, 6 I.L.M 727 (1967).

242. North Sea Continental Shelf, 1969 I.C.J. 3, at § 34 (Feb. 20).

243. *Id.* The International Court of Justice has confirmed this holding in later cases. The ability to decide outlying maritime areas upon principles of equity can be seen in Delimitation of the Maritime Boundary in the Gulf of Maine (Denmark v. Norway), 1993 I.C.J. 38 (June 14); Gulf of Maine (Canada v. United States), 1984 I.C.J. 246 (Oct. 12) [hereinafter Gulf of Maine]; Continental Shelf (Libyan Arab Jamhariya v. Malta), 1984 I.C.J. 1 (March 4). *See also* CARTER AND TRIMBLE, *supra* note 227, at 1041.

244. The limits set by the Exclusive Economic Zone are two hundred miles. In these areas, the sovereign states enjoy exclusive economic rights to the exploitation of natural resources, but may also allow passage through the zone by other states. This should be distinguished from a "territorial sea" which is an extension of a state's territory. *See* BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA (1989). Most of the Caribbean countries have asserted claims ranging from three to twelve miles for their territorial sea depending upon the proximity of neighboring and opposite states which affect a clear twelve mile territorial sea claim. This was seen in the Treaty of Santo Domingo, where it states, "Every State has … the right to fix the breadth of its territorial sea up to the limit of twelve nautical miles." RENE-JEAN DUPUY, THE LAW OF THE SEA: CURRENT PROBLEMS 195 (1974) (quoting U.N. Doc A/AC.138/80, June 7, 1972).

245. *See* Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 37-38 at § 70 (Feb. 24).

de facto maritime limit."[246] The Court also noted "the appearance on the map of a *de facto* line dividing concession areas which were the subject of active claims, in the sense that exploration activities were authorized by one Party, without interference…by the other."[247]

The importance of *de facto* lines in *Tunisi v. Libya* may be contrasted with the Gulf of Maine.[248] In the *Gulf of Maine,* concessions that were "too brief to have produced a legal effect of this kind, even supposing that the facts are as claimed"[249] did not produce maritime claims. In the opinion of the International Court of Justice, the occurrence of overlapping permits or coincidental offshore grants are not sufficient in ignoring the median line determined by concessions as the preferred method of delineation.[250]

The existence of a *de facto* maritime boundary line is of relevance to the Suriname-Guyana dispute. Since at least 1958, Guyana gave concessions outside of the territorial sea claimed by Suriname on a 33º maritime extension. Suriname never objected to these concessions nor did they object to the movement enjoyed by Guyana fishermen and support personnel for the oil expeditions. This *de facto* line, if it is considered one, would be deemed relevant as seen in *Tunisia v. Libya*, where the concessions were given in good faith and not in an attempt to create a *de facto* line by its own independent volition.

The borders of the territorial waters were not formalized during colonial rule. If any state had formalized a territorial sea agreement, then the doctrine of *uti possidetis* would have passed these claims to the successor state at independence from colonialism. The British 1954 claim to the continental shelf,[251] and consequential economic concessions add to maritime delineation of the continental shelf and Exclusive Economic Zone that will most probably be based upon equity. While Guyana maintained these outlying claims, Suriname asserted claims for the territorial sea based upon having sovereignty over the Courantyne River and a 10º extension from Point No. 61.[252] Suriname did not grant concessions in the Exclusive Economic Zone or Continental Shelf claimed by

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246. *Id.* at § 96.
247. *Id.* at § 117.
248. Gulf of Maine (United States v. Canada), 1984 I.C.J. 246, 311 § 151 (Oct. 12).
249. *Id.* at 311 § 151.
250. *See id.* at §151-152.
251. *Alteration of Boundaries. Order in Council of 1954. Statutory Instruments, 1954, No. 1372, Colonies, Protectorates, and Trust Territories.* See U.N. Doc ST/LEG/SER.B/6 at 48. *Cited in* Hjertonsson, *supra* note 87, at 165.
252. *Id.* at 64.

Guyana.[253] Likewise, Guyana did not police or maintain the Courantyne River and granted no economic concessions in Suriname's maritime claim to the 10º prolongation of the territorial sea that was envisaged by the 1936 Mixed Commission.[254]

V. ANALYSIS OF SURINAME AND GUYANA CLAIMS

Both Suriname and Guyana have committed themselves to a peaceful resolution of their current territorial disputes through the Law of the Sea and the Hoyte/Shankar Memorandum of Understanding. The 1989 Memorandum of Understanding calls for a joint exploration of the continental shelf pending a bi-lateral demarcation. [255] However, the heightened state of agitation between the parties suggests that an arbitration award could be a possibility if a bilateral situation fails. Given the recent dearth of meaningful diplomatic activity, this appears increasingly likely. This section will evaluate the separate Guyana and Suriname claims to determine which legal theory of boundary delineation is the most persuasive and applicable.

A. Sovereignty Over the Courantyne River

Suriname will likely maintain title over the entire Courantyne River. Any international arbitration award would immediately note Suriname's claim over the entire Courantyne River based upon historical incorporation of the 1799 Agreement and the 1936 Mixed Boundary Commission. Although international law usually views bordering waterways as divided by the middle point of the river as determined by its deepest source (*thalweg*), Suriname has maintained a clear and consistent claim to the entire river. Suriname has provided security for the area, developed the area, and fully integrated the islands into the country of Suriname. Although rare, river bank delineation, instead of a *thalweg* delineation, has historical precedent. Likewise, Guyana relies on Suriname's control and has not undertaken any pro-active objections to challenge these notions. The 1799 Agreement has established the boundary between the two countries for over two hundred years and gained significant international recognition with the Treaty of Paris and Treaty of Amiens. Because Guyana has

253. CGX Resources working document "*Historic Operators*." Oct. 17, 2003

254. WILLIAM E. MASTERSON, JURISDICTION IN MARGINAL SEAS 387 (Kennikat Press 1929). As Masterson states, the Netherlands government, stated that it considers "the regulation of the question of territorial waters…impossible or difficult, because of the divergent views…of the various States."

255. Hoyle, *supra* note 49, at 100.

acquiesced to the 1799 Agreement, they are estopped from raising such protests.

Guyana could assert that the Courantyne River was never formalized before the countries emerged from colonialism because Suriname offered a *thalweg* delineation as late as 1962.[256] This overture may have some intuitive appeal, but when seen as politically linked to a possible territorial recognition of a Surinamese claim to the New River Triangle, it would likely be viewed as political, and not legal. Guyana would, therefore, have more success with incorporating arguments that encompass the overall concept of remedying border conflicts in the former colonial context of the Guianas.

One such argument that Guyana could assert to void Suriname title over the entire Courantyne River was that the early colonial protectorates that concluded the 1799 Agreement did not have proper legal status to conclude such a treaty.[257] The early colonial protectorates of Berbice and Essequibo, therefore, could not have concluded such a treaty because they were not authorized to do so. Their protection and existence depended upon the ruling power of Great Britain at the time, which was silent on the issue.[258] Although this is a relevant argument, the later colonial entity of British Guiana relied on the 1799 Agreement for over two hundred years. This acquiescence will estop Guyana from raising the argument, as seen in *The Temple of Preah Vihear,* while giving more credibility to Suriname claiming the 1799 Agreement as a "historic title."[259]

Modern jurisprudence towards historic title is clear;[260] historic title can confirm a nation's sovereignty over an area through continuity of cession and title. The 1936 Mixed Commission Treaty, which was never signed before World War II, also asserts that Suriname has consistently established intent and international reliance on its claim for the entire Courantyne.[261] Consequently, the modern land boundary terminus extends from Point No. 61, which is located on the high water mark on the Guyana side of the

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256. See Hoyle, *supra* note 49, at 100-104.

257. *See* Ricciardi, *supra* note 118, at 412 n. 665. Ricciardi asserts that a colonial protectorate could be "just a disguised mode of occupation that permits, by simple diplomatic notification, [a state] to acquire territories and absorb by a progressive attraction the protected populations".

258. *See Guyana – Suriname Boundary, supra* note 3, at § 19.

259. The Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15) (Spender, J. , dissenting).

260. *See Hanish Islands Award Phase I: Territorial Sovereignty and Scope of Dispute* Chapter X.

261. See Hoyle *supra* note 49, at 100-104.

Courantyne River. This point confirms the Courantyne River to be Surinamese, but obfuscates a clear and concise trajectory for a maritime delineation.

Ironically, Suriname and Guyana adopt different elements from the same 1936 Mixed Commission. Suriname points to the Mixed Commission in supporting its claim of complete sovereignties over the Courantyne River and the 10º territorial sea which Guyana rejects. Guyana, likewise, finds support for its claim to the New River Triangle from the Commission which Suriname rejects. In determining sovereignty over the Courantyne River, an arbitration body would likely award Suriname clear and uncontested title.

B. Maritime Extension of the Land Boundary Terminus

Guyana's plausible claim to the outlying Exclusive Economic Zone and Continental Shelf are strong due to parceling concessions and maintaining and policing the area. However, this claim does not include the immediate territorial sea. The 1936 Mixed Commission offered the 10º extension to delineate the territorial sea, and both states agreed to it in practice. Extending only three miles from the coast in 1936, modern territorial seas are now a proscribed twelve nautical miles. In delineating the Guyana – Suriname issue, it is probable that due to the precedent and acquiescence caused by the 1936 Mixed Commission, any tribunal will likely delineate the territorial sea and outlying maritime zones based upon different precedents. Therefore, it is likely that a Surinamese claim of 10º will be applied to the territorial sea and the outlying areas will be delineated based upon equity.

Suriname's claim to the outlying areas is difficult to support because international tribunals have consistently not awarded outlying maritime areas that were not conceived of during the time of treaty. In 1936, neither the Exclusive Economic Zone nor the Continental Shelf were envisioned. In the 1952 case of *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd.,* the court was asked whether the angle of the territorial sea should be applied to the outlying maritime areas which came into existence after an initial 1939 agreement was made to delineate the territorial sea. The court held that the "continental shelf had no accepted meaning either at the time of the drafting of the contract in 1939 nor at the time of the rendering of the award."[262] Based upon this holding, outlying maritime areas must be decided based upon contemporary applicable international precedent or through

262. *In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, ICLQ, Vol. 1 (1952) 247-261.

treaty between the bordering states. Therefore, Surinam's claim that the 10º territorial sea prolongation should extend to the outlying areas will be difficult to substantiate. Guyana has asserted that a 10º territorial sea is an unconscionable solution to the current state of affairs between Guyana and Suriname. If a 10º claim is awarded to the territorial sea and the Exclusive Economic Zone, it would greatly interfere with the ability of Guyana to enjoy its territorial sea and, given the proximity of Trinidad and Tobago and Venezuela, would prevent any wide access to the territorial sea as compared to its Caribbean neighbors. Moreover, given the long-standing concessions that Guyana has granted since 1958, a 10º Suriname extension would not be a just solution. Instead, a maritime border based upon equity will most likely be utilized, taking into consideration the concessions granted during colonial rule. The court in *Tunisia v. Libya* incorporated a boundary line determined by equity, citing long-standing offshore petroleum concessions and continuous reliance by both parties.[263]

In terms of the Guyana-Suriname instance, it appears as though Guyana will be estopped from claiming a 33º territorial sea because of the acceptance of the 1936 boundary commission and the country's acquiescence to Dutch control over the mouth of the Courantyne. Any presence in the territorial sea would be deemed too brief to create a median line. This presence will therefore be analogous to the *Gulf of Maine* instance where concessions were too brief to substantiate a claim based upon equity.

In terms of the Exclusive Economic Zone and continental shelf, the concessions awarded in 1958 by British Guiana strongly suggest constructive occupation of the outlying maritime areas. Throughout this time, British Guiana granted numerous concessions with an eastern boundary of 33º. A well was drilled by Shell in 1974 about 10 kilometers west of the attempted CGX well under a Guyanese license and is also within the Exclusive Economic Zone claimed by Suriname.[264] Dutch Guiana did not object to these concessions. These earlier wells were not in the territorial sea of Suriname because they were granted on the Continental Shelf before Suriname believed it was entitled to an Exclusive Economic Zone. Therefore, their presence is analogous to the *Tunis/Libya* case, where the International Court of Justice concluded that long-standing concessions could create a maritime claim based upon equity. Moreover, Suriname did not grant any concessions in the

263. Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 23 (Feb. 24) (citing the Special Agreement between Tunisia and Libya, Art. 1).

264. See *Historic Operators*, *supra* note 202.

same area, but did grant concessions adjacent to the boundary asserted by Suriname.

The trajectory from Point No. 61 will, therefore, not be a straight line. The territorial sea, Exclusive Economic Zones and continental shelf areas will most likely be decided upon separate principles. The territorial sea immediately bordering the two countries may be demarcated by a 10º extension (as seen in the 1936 Mixed Commission). Arguments could be made that this territorial sea only extends three miles offshore, as was the original intent of the 1936 Mixed Commission. This will likely not be entertained by an international tribunal, due to the Law of the Sea, which entitles every State to a twelve mile extension unless States opposite each other force otherwise. Since Guyana and Suriname are adjacent to one another, the 10º extension will likely be seen as extending to the twelve mile limit. This 10º was inherited by the new republics under the principle of *uti possidetis juris.* In terms of the Exclusive Economic Zone and continental shelf, a delineation based upon equity will be used which would take into account the 1958 concessions granted by Guyana, thus inherited by the successor state under *uti possedetis de facto* mechanisms.

C. Title to the New River Triangle — Summarized

Regarding the New River Triangle, any international tribunal would likely find Guyana's intent (*animus occupandi*) to the New River Triangle as consistent. The record is clear that Guyana reiterated its claim for the area during the colonial, as well as, the modern republic eras. In terms of actual occupation (the second element defined as *corpus*), the available information strongly asserts Guyana has maintained a high degree of actual control. It has maintained military bases that have been used to expel Surinamese forces, and have included the area in maps, tax rolls, and civil governance.

British Guiana was able to colonize the area of the New River Triangle because that land was *terra nullius*.[265] The Arawak and Carib tribes that inhabited the area did not satisfy the elements of contemporary colonial governments to award them with sovereign rights over the area. Therefore, the area was *terra nullius* and able to be occupied by showing the twin objective elements of *animus occupandi* and *corpus.*

Because a successor state inherits the obligations, commitments, and rights of the previous government, the intent and

265. Literally, "the land of no one," this term refers to territory that does not belong to a particular country. BLACK'S LAW DICTIONARY 1483 (7th ed. 1999).

actual control of occupying a land that is *terra nullius* would therefore pass to the Republic of Guyana at independence from Great Britain under *uti possidetis juris*. This concept states that, upon independence, the republic inherits from its colonial predecessor lands that "are defined according to legal rights of possession based upon the legal documents of the former colonial power at the time of independence."[266] Inheriting unclear borders would not preclude the inheriting of the original *animus occupandi* and *corpus* displayed by British Guiana in the uninhabited areas.

Suriname would be able to counter a claim of Guyanese *animus occupandi* and *corpus* by asserting Guyana occupied the territory during the colonial period but later abandoned the area. What exactly constitutes abandonment is not as certain as other elements of international practice. However, the intermittent presence of Guyana forces during the colonial experience does allow Suriname to make certain, although likely not tenable, claims. The claims of abandonment have not received much judicial review and will probably fail when weighed against the inherited *animus occupandi* and *corpus* that were inherited through the doctrine of *uti possidetis juris* and have been repeatedly confirmed within the South American territorial and maritime context.

Suriname would also be able to assert a claim of prescription in the New River Triangle. Under prescription, Suriname would have adversely possessed the entire area in an open and conspicuous manner that did not warrant an objection by Guyana. Although this may be an applicable argument for certain areas of the border disputes, such as the sovereignty issue over the Courantyne River and the reliance on Point No. 61, it does not by itself warrant a claim for the entire New River Triangle. Guyana did object and has forcibly ejected Suriname based contingents from the area. Although "*reasonable time"* does not explicitly state when Guyana must have objected to Surinamese incursions, Guyana did make a timely objection every time it was aware of an illegal entry into what it viewed as its territory. Therefore, Suriname is precluded from acquiring title to portions of the New River Triangle claim based solely on prescription.

Prescription, however, has not been subject to judicial review since the early twentieth century, and it is unclear whether any international tribunal would uphold its validity. Although it has been used in arbitral awards before to reflect the *equity of the current situation*, prescription cannot be relied upon to counter clear *animus occupandi* and *corpus* claims to title. Moreover, the

266. *See* Radam, *supra* note 187, at 59.

frequence of Guyanese objections makes it even less likely that any arbiter will seriously entertain a claim to the New River Triangle based upon prescription.

Suriname could lay possible claim to the New River Triangle on a hinterland theory. A hinterland claim would attach the New River Triangle onto the area that was Dutch Guiana based upon a contiguous geographical claim, natural boundary theory, or the security of the state. The contiguous geography claim seems applicable to both the English as well as Dutch colonial protectorates, because the forested areas are part of the same overall Northern Amazon watershed.[267] The availability of easily identifiable geographical boundaries and security arrangements also seem to be equally applicable to the English and Dutch colonial protectorates. That is, the area that is in dispute is not geographically linked to either Guyana or Suriname. Likewise, the area that is the New River Triangle is not necessary for the security of the either state due to the limited amount of inhabitants. Therefore, it would be difficult, although possible, to substantiate a claim to the New River Triangle for either country based upon a hinterland theory.

Hinterland theories will most likely fail to persuade any tribunal because they have been countered by claims based upon clear Guyanaese *animus occupandi* and *corpus* for a territory that was clearly *terra nullius*. As seen in the Isle of Palmas award, hinterland theories of the sort that Judge Huber asserted in the *Isle of Palmas* are easily defeated when countered with intent and actual control of a territory; and even their legal foundation is suspect.

Finally, the Dutch acquiescence of the Schomburgk expedition and the debates in the Netherlands cut against any clear intent and control over the New River Triangle, and, if anything, show a propensity to deal the New River Triangle to Guyana in return for the 10º offshore extension in the territorial sea. The case is strong that Suriname never formally intended to control the area and saw any occupation of the New River Triangle as political. Moreover, Suriname may be estopped from raising a claim for the New River title because they have *recognized,* as defined by international law, the Kutari as the Southern extension of the Courantyne and thereby formed the boundary. The instance of the tri-point junction, contradictory statements regarding the New River, debates in the Dutch Geographical society, and even parliamentary statements

267. See GUYANA – SURINAME BOUNDARY, *supra* note 3 at 5-10.

undercut an argument for intent to control a territory where no actual showing of occupation was ever noted.

VI. CONCLUSION

It would be most beneficial for the Suriname-Guyana border disputes to be adjudged through an international arbitration at an established forum. The International Court of Justice would be able to provide a comprehensive demarcation based upon accepted jurisprudence. Regional institutions, such as CARICOM, do not have enough experience or precedent to award a respected demarcation. Both Guyana and Suriname are signatories of the Law of the Sea Convention, which provides that a specialized arbitration tribunal shall be constituted and make a binding ruling once one party commences proceedings. This forum would be possible, but has not born out in practice.

Any arbitral award will likely give title of the New River Triangle to Guyana, while noting the scant Surinamise constructive occupation within the area as compared to the extent it is displayed continuously by Guyana. The work of the 1936 Mixed Boundary Commission will be re-affirmed. The Surinamese claims for the New River Triangle will be viewed as political in nature with the intent never being to occupy the territory, but instead to deal it away for recognition over the entire Courantyne and a beneficial territorial sea. Geographical and topographical arguments aside, the Kutari River will likely be the Southern extension of the Courantyne.

The New River Triangle was *terra nullius* when the British colonial government occupied the area. The Maroon Indians did not qualify as a coherent society according to European standards and, consequently, possessed no political identity. Therefore, the area was able to be occupied by British Guiana showing *animus occupandi* and *corpus*. These notions would pass to the Republic of Guyana at independence through the principle of *uti possidetis juris*. Assuming no abandonment or prescription principles are recognized by the arbitration body, Guyana will be awarded title the New River Triangle.

In terms of the Courantyne River, the precedents set forth by the 1936 and 1958-1962 Boundary Commissions will likely reward sovereignty to Suriname. Guyana acquiesced to Suriname's historic title to the River. This control of the river was inherited by Suriname at independence through *uti possedetis de facto*. The resulting territorial sea will be affected by Suriname's control of the entire Courantyne and its use of the previous land boundary terminus of Point No. 61. The degree of extension into the

territorial sea may indeed be the Suriname claim of 10º for a distance of twelve miles, given the reliance on the previous work done by the 1936 Mixed Boundary Commission. However, given international law's reluctance to reward extensions into maritime areas not envisioned at the time of ratification, the existing maritime separation established by the 1958 Guyana concessions will likely alter the projection of the maritime boundary more in line with 33º extension for the continental shelf and Exclusive Economic Zone.

The inter-linkage between the land and maritime disputes is unique to this region of South America. The colonial protectorates that were entrenched in this area left a heritage of unresolved frontiers which were not a pressing priority to settle. The new republics must now face that challenge. However, just as the colonial governments before them, Suriname and Guyana are competing for resources, for power, and for regional importance. It is difficult to define the exact motives of States in this international competition. With so much potential revenue and regional importance at stake in this boundary dispute, both sides are performing boundary negotiations with rigid stances and skeptical attitudes. It is these uncompromising positions and these clearly defined state interests that have made the boundary river, maritime and territorial boundary so difficult to resolve. Likewise, modern international law has created mechanisms and institutions for settling boundary disputes. These institutions rely on international law that depends on principle and precedent. These principles and precedents are such that the outcome of these disputes seems quite probable — even though the bilateral discussions may be inconclusive.

THE EU COMPETENCY CONFUSION: LIMITS, "EXTENSION MECHANISMS," SPLIT POWER, SUBSIDIARITY, AND "INSTITUTIONAL CLASHES"*

PETER OREBECH**

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I. INTRODUCTION

A. The Road to Federalism

It has been said that the European Union (EU) is the first illustration ever of independent states that peacefully enter into a new state construction and freely give up their own respective sovereignties for the benefit of creating a federate state.[1] The objective of a federate state has gradually ripened throughout the integration process. While the concept of a federation is less arguable, one still may dispute whether the EU has become a "state." Indeed, the road to federalism has been bridged by small stepping stones that, chained together, build an entire new super-state.

The history of the EU is based on a move towards European unification as evidenced in numerous treaties and organizations created thereby which have culminated in the EU becoming a monetary, foreign, security, and defense union. Today the constitutional basis of the EU rests in the consolidated versions of the 1992 Treaty on European Union and the 1992 Treaty Establishing the European Community[2] as amended by the 1997 Treaty of Amsterdam and the soon ratified 2001 Treaty of Nice.[3]

Member States possess no veto power and most questions are decided by qualified majority votes. Unilateral withdrawal is impossible. The EU has acquired exclusive autonomy within ever-increasing areas of common policies. The EU enjoys preemptive power, which means that Member States are deprived of all legislative authority within these subject matters.

After a long history of association limited to free trade agreements under the 1951 European Coal and Steel Community, the 1957 European Economic Community, and the 1957 European Atomic Energy Community; the EU was formed by the Treaty of Maastricht[4] and modified by the Treaty of Amsterdam.[5] In 2004, subsequent to the entry of ten new Member States, the 2001 Treaty

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1. For a more comprehensive study of whether the EU is an international organization or a "supranational federation" see Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27 (2000).

2. The two 1992 treaties are also collectively named the Treaty of Maastricht and are *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

3. Effective May 1, 2004, *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

4. The "Treaty of Maastrict" is really two treaties—the Treaty of the European Community, effective Nov. 1, 1999 and new Treaty of the European Union, *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

5. Effective May 1, 1999, *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

of Nice laid the platform for institutional changes and a somewhat different decision making structure. Through different rounds of accession treaties, no less than 20 countries have subsequently joined those that originally formed the group of "founding fathers" of the EU.[6]

The original treaties' main purpose was to introduce "four freedoms:" the free flow of labor, investment, establishment, and services and commodities. Under the Maastricht Treaty, the objective of a common monetary, foreign policy and security policy was achieved and a common defense policy was considered. And, under the 1997 Treaty of Amsterdam, a common outer borderline for asylum and criminal purposes was incorporated and implemented.[7] Thus, the Common Foreign and Security Policy (CFSP) has taken on an important role in the existence of the EU. The EU itself is based on the CFSP, which may be described as one of the three pillars on which the EU is built, the other two pillars being the other various Communities and the commitment to justice. EU law is a comprehensive system of law that partly preempts and partly is superior to domestic law.[8] The EU today possesses all the ingredients of a federal legal system and is at least as developed as the United States was in 1820 after a period of only 45 years of independence.[9]

Despite the high ideals of common policies, the EU still struggles to conduct itself as a single entity vis-à-vis foreign policy and security. This also includes defense and stability for the region. Authority for the existence of a CFSP and the European Security and Defense Policy (ESDP) is included in Title V of the Treaty on European Union. Codified in Article J.1, the defense policy has five main principles: 1) to safeguard the common values and fundamental interests of the EU; 2) to strengthen the security of the EU; 3) to preserve peace and strengthen international security; 4) to promote international cooperation; and 5) to develop democracy and the rule of law including human rights.[10] It further states that members "shall support the Union's external and security policy

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6. For some basic issues under the accession treaties, *see* Peter Orebech, *The Fisheries Issues of the Second Accession to European Union, Compared with the 1994 First Accession Treaty,* — with an emphasis on the negotiation positions of Latvia and Norway, INT'L J. MARINE & COASTAL L. (forthcoming 2004).

7. *See* the 1985 Treaty of Schengen between some main EU Member States (not the U.K. or Ireland), *available at* http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/schengen_html.

8. *See infra* discussion in section 4B.

9. *See infra* discussion in section 1B.

10. Treaty on European Union, Feb. 2, 1992, Title V, art. J.1(2), *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html. [hereinafter EU Treaty].

actively and unreservedly in a spirit of loyalty and mutual solidarity," requiring Member States to work together to enhance and develop their mutual solidarity.[11] A Member State, as per this article, *may not* take any action which is contrary to the interests of the EU or which is "likely to impair its effectiveness as a cohesive force in international relations."[12] Thus, while the original objective was freedom of trade and open markets, the ultimate goal today is state building and the establishment of a military superpower.[13] This drastic shift in political focus during the last three decades actualizes questions of power and power sharing.

At present, the EU has exclusive autonomy on all issues covered by common policies. The instrument for unification and approximation is *acquis commonautaire*, the common EU law. The unification process is, in some respects, more comprehensive and compulsory than under American federalism. EU legislation has preemptive — and not only *lex superior* — force which forecloses Member States from any form of legislation.[14] Internal EU competency is mirrored by parallel external relations competency that resulted from the case law developed principles of parallelism and implied power. The EU enjoys external competency that matches its internal common policies.[15]

Today federalism is still a "hot potato" as illustrated by the first and second drafts of the EU Constitutional Convention. The Constitution is to replace the EU Treaty and the EC Treaty. While the feature of "a federal United States of Europe" was codified in the first round,[16] that reference is lost in the last draft. This is no indication of a dropped federation, but rather this illustrates how controversial the idea has become. Now the EU is a *de facto* federation built on a common monetary policy, foreign and security policy, an upcoming defense policy, and common market policies of trade, customs, transportation, and agriculture. As I will illustrate in this article, very few competencies remain vested with the Member States.

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11. *Ibid.* at art. J.1 (4).

12. *Id.*

13. JENS PETER BONDE, AMSTERDAM TRAKTATEN 241 (Vindrose, Denmark 1998). Jens Peter Bonde is a Danish Member of the EU Parliament.

14. *See infra* section 4B.

15. *See, e.g.,* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585. For the exclusive EU competency *see* Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355, 1363; Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061; Case C-268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177 (Cooperation Agreement between the European Community and the Republic of India).

16. The European Convention, The Secretariat: Draft Articles 1 – 16 in the Constitutional Treaty, Conv 528/03, Article 1 *in fine,* Feb. 6, 2003, *available at* http://european-convention.eu.int. [hereinafter The European Convention Constitutional Treaty Draft].

B. Federal State Powers: EU — U.S. Comparative Issues[17]

In comparing the EU and the United States, two issues are raised with regard to institutional growth: first, the federative aspect of the EU; and second, whether the EU has become a state. This introduction will briefly point to the growth of the United States' federal power as an explanatory framework for the growth of the EU federal powers. Is the EU already a federal body that soon will become a state? What lessons can the EU learn from the United States' experiment in federalism? My aim is to clarify the EU federal experience for a non-European reader by comparing it with the early American federal experience and ascension to statehood. I then discuss the likelihood that the EU will develop into a strong federal state and the EU's potential to achieve "superpower" status.

As a starting point, it should be observed that "federalization is a process and not an event."[18] If we were "to judge by the current American model, the present confederal form of [EU] government is seriously flawed" in its loosely defined central authority; "perhaps hopelessly so."[19]

> However, if we were to judge the [EU] of today by the United States' original form of federal government — not the Articles of Confederation, but the U.S. Constitution of 1789 — then the distinctions are far less clear. When compared to [the United States'] present, highly centralized government, that early U.S. federation also was weak, and its eventual success far from clear…."[20]

Under such a comparison, some scholars have found more similarities with the EU and the early U.S. than differences:

> European 'federalism,' while not entirely like that of the United States in either conception or form, can, in different instances, be more and less federal than [our system]. However, it surely is tending in the

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17. On the U.S. federal law part of this section, J.D. student Ryan William Blackney at Chicago Kent College of Law has helped with the legal documentation.

18. Thomas C. Fischer, "*Federalism" in the European Community and the United States*, 17 FORDHAM INT'L L. J. 389, 391 (1994).

19. *Id.*

20. *Id*.

> same direction as did our 'federalization' over the past 200 years, and for similar reasons.[21]

I concur with the prognosis of political observers. In speaking of the new proposed EU Constitution, *The Economist* writes: "the drafters have displayed a worrying appetite for integration for its own sake …[although] the word 'federal' is to be dropped…the more meaningful demand for 'ever closer union', implying just that impulse towards European statehood, is now in the preamble…."[22]

My prediction is that the EU is becoming a federalist state. Although federalism can exist in a matter of degrees, statehood cannot. Statehood is absolute and identifiable. The U.S. experience shows us that statehood takes time:

> [C]ooperation in the world economic environment, with the goal of greater competitive success, leads economic units toward a greater degree of union. The persistent myth that America's federal "union" sprang full blown from the Constitution…is not accurate. It took a Civil War, an industrial revolution, a severe depression, two World Wars, and much more for true "federalism" [that is — statehood] to creep thoroughly into the fabric of American Constitutional government.[23]

Many scholars argue against statehood on the basis that the EU has yet to take over the sovereignty of its Member States.[24] However, this issue of sovereignty delegation is not a matter of "if," but rather of "how much" sovereignty needs to be given up for a federation to become a state. If statehood could only be achieved in the United States if all fifty states had given up *all* of their sovereignty, then the United States could not be seen as a state. Even today, the individual states of the U.S. continue to retain sovereignty in many areas. Rather, the issue is where is the threshold point when enough sovereignty has been given up to constitute the relinquishment of statehood by a Member State to a federal body.

Despite its short life, the EU's achievements are amazing; yet, the EU is still in a rapidly changing position. When comparing the

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21. *Id*. at 392.

22. *Nothing Like Good Enough, So Far*, THE ECONOMIST (May 29, 2003), at 14, *available at* http://www.economist.com/PrinterFriendly.cfm?Story_ID=1812335..

23. Fischer, *supra* note 18, at 438.

24. JO SHAW, LAW OF THE EUROPEAN UNION 178 (3d ed. 2000).

EU with that of the United States, the tendencies seem increasingly familiar. Most importantly, this comparison shows that the founding fathers of America have dealt with problems similar to the ones that are currently being debated in the EU. Let me briefly point to some similarities on the constitutional plane:

- Similar to the United States, the EU in its function of European Community, is an entity with legal personality on the domestic and the international plane.[25] Beginning in 2004, the EU as such, will enjoy legal subjectivity.[26]

- The EU's legislative force is directed towards natural and juridical persons as well as Member States. [27]

- The authority of the central government cannot rest on the impulse of its Member States, but must come from "the persons of the citizens." [28]

- The creation of a common market with external borders for custom purposes. Fischer has argued that Madison's first goal could be achieved in Europe by creating a common market in Europe. [29]

- The European Court of Justice,[30] similar to the U.S. Supreme Court,[31] enjoys the exclusive power to interpret its laws.

- While the residual jurisdictional rights, those legal rights that remain with constituent states or their citizens,[32] formally belong to the states in the United States[33] as well as the EU,[34]

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25. *See* Treaty Establishing the European Community, art. 3-281, *available at* http://europa.eu.int/eur-lex/search/search_treaties.html. [hereinafter EC Treaty].

26. *See* The European Convention Constitutional Treaty Draft, *supra* note 16, at 4.

27. *The Federalist*, No. 16 (Alexander Hamilton) (Jacob E. Cook, ed., 1961). *See* EC Treaty article 249, as implemented by case law, e.g., the direct applicability of *regulations* (Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A, 1978 E.C.R. 629), *directives* (Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337) and *int'l law* (Case 104/81, Hauptzollamt Mainz v. Kupferberg & Cie., 1982 E.C.R. 3641).

28. *The Federalist*, *supra* note 27, No. 16. For the EU, see the EU Treaty and the EC Treaty preamble: "an ever closer union amongst the people of Europe." *See also* article 8(2), The European Convention Constitutional Treaty Draft, *supra* note 16.

29. Fischer, *supra* note 18, at 416-18.

30. EC Treaty art. 220 ff.

31. *See The Federalist*, *supra* note 27, No. 10 (James Madison).

32. Fischer, *supra* note 18, at 420. *See also* Case 26/62, N.V. Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. 1.

33. "The powers delegated by the proposed Constitution to the Federal Government are few

the highest courts of these entities enjoy the right of defining the outer limits of the EU and U.S. respective competencies. This leads to "creeping federal" jurisdiction.[35]

- Membership in the EU, like national state membership in the United States, is final and irrevocable,[36] which means that no state may unilaterally withdraw from the EU.

Clearly, differences exist as well. When comparing the EU with the federal government of the United States, it is useful to relate some of the state-like competencies that the U.S. federal government has and compare those with the competencies of the EU federal government. In the United States, when the original thirteen colonies undertook to establish a central government, they gave it the following competencies: "raising and supporting armies; conducting foreign relations; printing money; regulating commerce; and levying taxes."[37] On the other hand, in the European Community (EC), when the original six members of the EU decided to delegate competencies to a central authority, they gave this authority virtually none of the competencies that the late 18th century Americans felt necessary to cede to a central government. The EU's central authority has no central military force and no real authority to raise taxes. [38] It is therefore quite notable that "of all of the hallmarks of American federalism contained in the Constitution, only the regulation of commerce [was, from the very start,] common to the two experiments in federalism.[39]

Nonetheless, "the power to regulate commerce is no small power" — for the United States has in the 20th century used this power (under the Commerce Clause) to create laws on almost any conceivable topic — "and in this area the Union is at least as federal as the United States."[40] What is more important is that "raising and

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and defined. Those which are to remain in the state governments are numerous and indefinite." *See The Federalist, supra* note 27, No. 45 (James Madison).

34. Any "competences not conferred on the Union by the Constitution rests with the Member States." article 8(2) *in* The European Convention Constitutional Treaty Draft, *supra* note 16, at 5.

35. *See* Fischer, *supra* note 18, at 418.

36. EC Treaty art. 312.

37. Fischer, *supra* note 18, at 396-97; *see also The Federalist, supra* note 27, Nos. 42, 44, 45 (James Madison).

38. Fischer, *supra* note 18, at 393. Fischer writes, "In my meetings with European scholars and government representatives, I am often amazed by their knowledge of U.S. political and legal forms. Hence, I believe it is no mistake that — with the American federal model clearly before them — the original six Member States [created a weak central government]." *Id.* at 396.

39. *Id.* at 397.

40. *Id.* at 397-98.

supporting armies; conducting foreign relations; [and] printing money" now are,[41] or will be very soon,[42] under the auspices of the EU.

C. The Division of Competency

One of the statements included among the President's conclusions of the 2001 Laeken meeting[43] conveyed the need for a "better division and definition of competence in the European Union."[44] European Parliament member Elmar Brok responded to this call by advocating a division of competency into three categories: the exclusive competences (exclusive to EU), shared competences (shared between EU and Member States), and supporting competencies. [45] However, Mr. Brok did not consider a fourth category — exclusive Member State competencies. Since Annex I explicitly mentions the possible "creeping expansion" of EU power into the "exclusive areas of competency of the Member States," this category of competency should be included as well.[46]

Section 2 of this document deals with Member States' exclusive competency as warranted by the EC Treaty, in other words, the outer limits of EU power. Section 3 focuses on EU geographical "extension mechanisms" — the association agreements, illustrated by the European Economic Area (EEA) Agreement. In section 4 both horizontal and vertical questions related to split competency are analyzed. Section 5 discusses "institutional clashes" between EU institutions — what could be called the protection of prerogatives.

Competency — a notion that is identical with 'jurisdiction' — includes legislative, executive, and dispute settlement power. The focus of this article is limited to legislative jurisdiction as demonstrated by case law. "The element of *stare decisis* in EC law has now become so strong that when the Court occasionally changes its mind it makes it clear that it is doing so."[47] In that respect, the

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41. *See* the Amsterdam Treaty, art. 105 ff. (monetarian policy) and EU Treaty art. 11 – 28 (foreign and security policy).

42. *See* the amendments under the Amsterdam Treaty, art. 17(1) on defense policy.

43. The EU meeting of member heads of state that launched the Valery Giscard d'Estain led European Constitutional Convention.

44. Presidency conclusions of 14 and 15 of December 2001, Annex I (SN 300/01 Add 1) at 5, *available at* http://www.ecre.org/eu-developments/presidencies/laconc.pdf [hereinafter Presidency Conclusions].

45. Contribution by Mr. Elmar Brok, member of the Convention: The Competences of the European Union, Conv 541/03 — Contrib 234, Brussels, February 6, 2003, *available at* http://register.consilium.eu.int/pdf/en/03/cv00/cv00541en03.pdf.

46. Presidency Conclusions, supra note 44, at 5.

47. SHAW, *supra* note 24, at 249.

prejudicates of EU dispute settlement bodies have a considerable influence.

II. OUTER LIMITS TO EU COMPETENCY?

This section examines two issues. The first is whether EC or EU treaties raise express or implicit borders with respect to EU legislative competency. This is *in casu* a question of whether the EC Treaty Articles 30 or 295 define a boundary for EU legislative competency.[48] This could also be posed as a question of whether the EU or the Member States (MS) possess "residual rights." Herein lies the important question of "kompätenz — kompätenz;"[49] who decides whether EU has exceeded its power? The second issue is whether EC Treaty Article 308 is a kind of plenipotentiary rule that trumps all else. In relation to EC Treaty texts, the issue is whether EC Treaty Article 308 predates Article 5,[50] or does Article 5 exhaust Article 308?

Under the EU Convention draft Constitution, any "[c]ompetences not conferred on the Union by the Constitution rests with the Member States."[51] This is also made clear by Annex I to the Laeken declaration.[52] However, since the European Court of Justice (ECJ) is not allowed to resort to *"traveaux preparatoire"* (the preparatory work) in its interpretation,[53] too much emphasis should not be placed on the text. As made evident by a somewhat similar expression in the 10th Amendment of the U.S. Constitution,[54] this phrase does not give any clear warranty against federal "creeping jurisdiction."[55] The solution here of course rests in the "kompätenz–kompätenz"[56] issue, "who has the *ultimate* authority to

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48. There are other borders as well, for example, the right of national states to have their own citizenship procedures. *See* Case C-396/90, Micheletti v. Delegacion del Gobierno en Cantabria, 1992 E.C.R. I-4239. This is, however, no example of preemptive legislative rights of Member States since the ECJ explicitly stated that the competence should take due regard of the requirements of EU law. Thus, the court seems to indicate that *lex superior* rules the area of law — which indicate a split power.

49. *See* Gerhard Wegen & Christopher Kuner, *Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty*, 33 I.L.M. 388 (1994).

50. This seems to be the position of Jo Shaw. *See* SHAW, *supra* note 24, at 216.

51. Article 8(2) *in* The European Convention Constitutional Treaty Draft, *supra* note 16, at 5.

52. Presidency Conclusions, *supra* note 44, at 6.

53. *See* CLAUS GULMANN & KARSTEN HAGEL-SØRENSEN, EC LAW 128 (Copenhagen 1988) and LAURIDS MIKAELSEN, EC COURT OF JUSTICE AND DENMARK 28-9 (Copenhagen 1984) [author's translation].

54. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. CONST. amend. X.

55. For the comparative aspects, see Larry Cata Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

56. A discussion of this principle is available at http://www.europarl.eu.int/workingpapers

determine the constitutionality of EC acts?"[57] Contrary to what many may think, draft EU Constitution Article 8 does not serve the purpose of protecting Member States from EU "take over," but rather lays the foundation for ultimate ECJ adjudication that trumps national constitutional court efforts to control the outer limits of EU law.[58] Once Article 8 is ratified, the European Court of Justice will finally become the supreme court of all EU Member States, ending the power struggle with the German Constitutional Court. With this in mind I proceed to the present legal situation.

A. EC Treaty Article 295

Article 295 (formerly Article 222) reserves the power to regulate substantive property laws to the Member States' legislatures.[59] On paper, the Member States' power is exclusive; the "treaty shall in no way prejudice the rules in Member States governing the system of property ownership."[60] In legal theory, the position seems to be that "*Article 295 was effectively rendered a nullity in relation to intellectual property rights.*"[61] As made evident by the following case law, this position is not correct.

Treaty texts should be interpreted within their context. EC Treaty article 30 makes it clear that whenever a Member State takes actions to protect "industrial and commercial property," it should not "constitute a means of arbitrary discrimination or a disguised restriction on trade." Apparently Member States' regulation of property ownership is limited to the free trade objective.

One of the EU's basic goals is to serve the common market. The provided *"l'effet utile"*[62] of the four freedoms requires some extensive restraint of the exclusive authority of Member States' prescriptive competency under Article 295. The specifics are best illustrated by analysis of case law. The following cases deal with the private property delimitation of EU law provisions: *Patent Protection* case,[63]

/poli/w26/adju_en.htm.

57. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 174 (Oxford University Press 2000).

58. *See, e.g.*, Wegen & Kuner, *supra* note 49.

59. EC Treaty art. 295.

60. Valentine Korah, *The Interface between Intellectual Property and Antitrust: The European Experience,* 69 ANTITRUST L.J. 801, 805 (2001) (quoting Case 56 & 58/64 *Establissements Consten SA and Grunding Verkaufs GmbH v. Comm.,* 1996 C.M.L.R. 418, C.M.R. 8046).

61. *Id.* (emphasis added).

62. The French word for the effective implementation of EU law provisions [author's translation].

63. Case C-350/92, Spain v. Council, 1995 E.C.R. I-1985.

Compulsory License case,[64] *Parke* case[65] and *Établissements Consten*.[66] My analysis begins with the latter cases.

Briefly, the *Consten* case raised questions regarding domestic regulation of national industrial property rights and the power of the Commission to prevent improper use of said rights. The contested national trademark provisions — instituted to oppose parallel imports — were allegedly frustrating the *acquis commenautaire*[67] on illegal cartels. In reality, the question for the court was whether Article 295 or Articles 28 ff were *lex specialis* and as such given priority:

> Article 222 confines itself to stating that the "treaty shall in no way prejudice the rules in Member States governing the system of property ownership". The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1). The power of the Commission to issue such an injunction for which provision is made in Article 3 of Regulation No 17/62 of the Council is in harmony with the nature of the community rules on competition which have immediate effects and are directly binding on individuals.
>
> Such a body of rules by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the Community's law on cartels.[68]

Thus, any domestic law that in its *effect* hinders free competition should be narrowly interpreted, whether or not that area of law is under special protection of EC Treaty provisions. The ECJ's concern

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64. Case C-30/90, Commission v. United Kingdom of Great Britain & Northern Ireland, 1992 E.C.R. I-829.

65. Case 24/67, Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm, 1968 E.C.R. 81.

66. Case 56 & 58/64, Etablissements Consten SARL v. Commission, 1966 E.C.R. 299 at 345-46.

67. The French word for the complete set of the current EU law [author's translation].

68. Case 56 & 58/64, Etablissements Consten SARL v. Commission, 1966 E.C.R. 299, at 345-46.

in this issue is whether EU provisions do not affect the *grant* of those rights, but only limit their *exercise* to the extent *necessary* to give effect to the prohibition under competition law. ECJ retains the responsibility of granting property rights to the exclusive competency of Member States. The sphere of ownership acquisition does, however, involve market endowment that is under exclusive EU legislative competency. Treaty competition rules should be given priority, but only to the extent provided for by the rules accommodating free flow of goods. The principle of proportionality defines the limit.

The *Parke* case[69] also invokes competition rules. This case illustrates the conflict between Article 295 and Articles 81 and 82 (former Articles 85 & 86). Further, ECJ is — *opinio juris* — stating that the "protection of industrial property" belongs to EU regulative power and as such is not reserved for the exclusive competence of Member States. The Court states that the act of granting patented rights is, in the absence of any agreement, decision or concerted practice, prohibited, or in the absence of a dominant position, not covered by competition laws. Consequently, property regulations belong to Member States' exclusive autonomy as far and as long as trade-related community rules are not invalidated.[70]

This division of *industrial property,* and now also explicitly mentioned *commercial property,* on one side and *other* properties on the other side is highlighted in the *Compulsory License* case. Here the patent holder was encouraged by domestic regulation to produce domestically instead of "out-flagging" production to other EU Member States. The ECJ could find no valid basis for such national regulation under either Article 30 or Article 295, noting "[h]owever, the provisions of the Treaty, and in particular Article 222…cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods."[71]

Here, the ECJ seems to permit Member States' legislation to cause some minor effects on the free movements of goods, as far as those effects are not adversely affecting the principle. The *ratio decidendi*[72] does not, however, make clear exactly what kind of influences would be recognized under categories of "industrial and

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69. Case 24/67, Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm, 1968 E.C.R. 55.

70. *Id.*

71. Case C-30/90, Commission v. United Kingdom of Great Britain & Northern Ireland, 1992 E.C.R. I-829, I-865 § 18.

72. The rationale of the decision.

commercial property." The *Patent Protection* case uses identical criteria in its analysis.[73] Case law, then, provides the basis for this conclusion: "[i]t follows that neither Article 222 nor Article 36 of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the matter." [74]

Community power is related to industrial and commercial property. National states are barred from producing laws that adversely affect the free movement of such property. Minor influences that do not contradict that principle seem acceptable. As the EU law now stands, property issues outside industrial and commercial EU property seem to belong exclusively to the Member States.

The ECJ will most likely reserve the exclusive competency of *designing* property systems for Member States. This presumably will include the right of each Member State to choose its own property regimes; whether it be public, common, or private ownership. Presumably a Member State will still have the competency to, for example, reserve its dry sand shores beyond the vegetation line for public ownership. At present EU seems to lack competency to interfere with such a decision.

B. EC Article 30

EC Article 30 is recognized as a "safety clause." Member States are — under strict conditions — entitled to establish national standards. However, the text of Article 30 should be read in the context of its objective. In the first *Simmenthal Case,*[75] the court stated that the purpose of Article 30 was not to reserve the legislative power to Member States, but to make States responsible for scrutinizing certain areas of society where Member States would be best positioned to implement quick reactions to harmful events.[76] "Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States…."[77] This result has been affirmed in later cases. The *Patent Protection* Case[78] applies this principle to intellectual property law. "It follows that neither Article 222 [now Article 295] nor Article 36 [now article 30] of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the

73. Case C-350/92, Spain v. Council, 1995 E.C.R. I-1985.
74. *Id*. at I-2011 § 22.
75. Case 35/76, Simmenthal S.p.A v. Italian Minister for Finance, 1976 E.C.R. 1871.
76. *See id*.
77. *Id*. at 1886 §14.
78. Case C-350/92, Spain v. Council, 1995 E.C.R. I-1985.

matter."[79] Thus, EC Treaty Article 30 does not entrust any preemptive regulation rights to its Member States. Since there are no other regulations that explicitly entitle Member States to legislative power, such rights must be sought in case law.

C. Areas of Law Implicitly Excluded

As indicated in Sections A & B, it appears at first glance that the ECJ is simultaneously excluding and narrowing Member States' exclusive rights and thus assisting the EU's "creeping jurisdiction." However, the ECJ does acknowledge "home brewed" outer barriers to EU law. Illustrative of this point is case law pushing the edge of the EC Treaty, *in casu* where the ECJ rejected the argument that Article 308 — the rubber paragraph[80] — had a bearing on the case. Does the ECJ recognize extra-treaty barriers to EU power; and if so, what are these barriers?[81]

The first issue to address is the division between the legislative filling-in of "treaty objectives" of Article 308 and the illegal "step over" that is equal to treaty amendment. Thereafter, I look to "constitutional balance of power remedies" that the court instigates. Illustrative is the *EEA Agreement Opinion 1/91* and the *Human Rights and Fundamental Freedoms Opinion 2/94.*

It has been argued that the court consistently denies the validity of solutions that bring the ECJ into subordination of other courts,[82] and that the basic motive of the ECJ in this respect is to reserve for itself the ultimate adjudicative power.[83] The court does, however, say this is not so:

> Where…an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the

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79. *Id*. at I-2011 § 22.

80. Article 308 has come to be known as the "rubber paragraph" because many legal scholars believe that the ECJ has stretched it in so many directions to allow for the creeping jurisdiction of the EU.

81. Since the ECJ follows the principle of *stare decisis* decisions — the prejudicates — barriers defined by the ECJ seems to be almost equally strict to the treaty itself.

82. A cheerful comment by Professor Miguel Poiares Maduro, during one of his lectures at the International Seminar on "The Stabilization and Association Process and the Future of Europe" (International University Center Dubrovnik March 1-9, 2003) (on file with author). *See,* more solemnly, MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 27-30 (1998).

83. As Damian Chalmers points out in his article on the Court of Justice, this would be a rather bad idea, no matter how stringently a court follows the rules of due process and impartiality, it will not be supported by society at large if its decisions are consistently at odds with societal norms. Damian Chalmers*, Judicial Preferences and the Community Legal Order,* 60 M.L.R. 164 (1997).

> Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice…in so far as that agreement is an integral part of the Community legal order.
>
> An international agreement providing for such a system of courts is in principle compatible with Community law.[84]

Thus, I acknowledge that case law sets the outer boundaries of EU law and does not merely express political concerns. Later in this article I will address the legal limitations of this case law.

The second issue is the framework and constitutional balance of power under EU law that has been a concern of the ECJ in a number of cases. Relevant questions relate to prerogatives, the balance of powers, and the procedural issues under the treaties. In general, no "step-over" of powers is recognized:

> Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights…. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.[85]

Thus, provisions amending EC and EU treaties are invalid. The competency is limited to fill-in "entitlement lacunae."

In the subsequent case law, the "amendments-clause" is scrutinized. The ECJ enjoys sole competency according to EC Treaty article 220. Clearly, ECJ competency may not be traded away without amending the treaty text. This concern is legitimate and made explicit in the *EEA Agreement Opinion of 1991*:

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84. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079, I-6081-82 § 3.

85. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 §§ 34-35.

> As far as the Agreement creating the European Economic Area is concerned, the question arises in a particular light. Since it takes over an essential part of the rules which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order, the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules….
>
> Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date….
>
> It follows that…the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.[86]

Thus, constitutional law restrains the EU from overstepping established prerogatives.[87] By comparing *Opinion 1/91* — the *First* EEA Agreement Opinion with *Opinion 1/92* — The *Second* EEA Agreement Opinion, outer constitutional borderlines are well defined.

The question is whether the *EEA* court would sustain or hamper the exclusive ECJ adjudication power. It was originally proposed that one function of the EEA Court was to police the legality of decisions made under the EEA Agreement. Decisions, for example, that provided for basic market freedoms like the free flow of goods, labor, services, and capital. The ECJ challenged this function of the new court. Since amendments are not allowed under EC Article 308, this reluctance shows that the ECJ disavowed EEA court power that paralleled ECJ constitutional prerogatives. Thus, the new adjudication system could not be pushed through without changing the EC treaty.

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86. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079 § 3.

87. *See also infra* section 4.

The ECJ found a solution to this dilemma in EC Treaty Article 220, which states that the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed."[88] The Court applied this provision in the following way:

> [t]o confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 [now Article 220] of the EEC Treaty. Under…Article 219 [now Article 292] of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.[89]

This opinion begs the question whether the ECJ's ultimate position is ruled by its desire to subordinate to other courts. Whatever the reason, ECJ found — *opinio juris* —— a way to express its denial:

> Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, *inter alia* where the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.
>
> An international agreement providing for such a system of courts is in principle compatible with Community law.[90]

However, the Court says such a court system did not rule on the EEA Agreement, because here:

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88. EC Treaty art. 220, *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

89. 1991 E.C.R. at I-6081 § 2.

90. *Id.* at I-6081-82 § 3.

> [T]he agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically worded Community rules….
>
> …[T]he agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law….
>
> …[T]he machinery of courts provided for in the agreement conflicts with Article 164 [now Article 220] of the EEC Treaty and, more generally, with the very foundations of the Community.[91]

Establishing a system of "double layer" adjudication would require treaty amendments. This could not be pushed through by decisions under EC Treaty Article 308. On a theoretical level the delimitation between valid and invalid amendments is covered by the ECJ in the *Human Rights and Fundamental Freedoms Opinion:*

> Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 [now Article 308]. It could be brought about only by way of Treaty amendment. [92]

The remaining difficulty, then, is how to define "treaty amendment." Clearly, treaty prerogatives are "sacred." New competencies can only be launched through valid legal instruments. The EC Treaty Article 308 is one such instrument. The ECJ, however, places rather strict limits on the "rubber-paragraph." The "objectives of the Community" are those codified by the EC Treaty. The purpose of Article 308 is — within these objectives — to initiate clear-cut

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91. *Id.* at I-6082.

92. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 § 35.

competencies.[93] Outside these objectives, Article 308 is invalid. The ECJ is settling what these objectives are; in the *Human Rights Opinion* the court found that:

> No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.[94] In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession.[95]

The ECJ scrutinized the system of human rights under the EC Treaty; it is "well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures."[96] One could, therefore, say that *substantially* spoken human rights objectives are part of EU law. *Systematically* and *procedurally* speaking, however, formal changes seem unavoidable. Is this spoiling the Article 308 option? The ECJ thinks so since it would "entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order." [97]

In conclusion, the ECJ stated that the modification of the system would represent a deviation from the EU constitutional order and therefore go beyond the scope of Article 308. Treaty amendment was the only solution. Thus, I draw the conclusion that to measure "objectives of the Community," not only should substantial issues be examined, but organization, form, and procedural issues should be examined as well.

D. Concluding Remarks: Does Case Law Under EC Treaty Article 308 Predate Article 5?

As illustrated, the ECJ has through case law implemented limitations that do not explicitly follow from textual interpretation. EC Treaty Article 308 could not push this outer constitutional limit beyond treaty framework. Seemingly, the ECJ is reading Article

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93. *Id.* at I-1788 § 29.
94. *Id.* atI-1787 §27.
95. *Id.* at I-1788 § 28.
96. *Id.* at I-1789 § 33.
97. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 § 34.

308 in the framework of Article 5. In contrast to Jo Shaw,[98] I would *not* emphasize that the rubber paragraph of EC Treaty Article 308 and case law predate Article 5.

III. THE *ACQUIS COMMONAUTAIRE* "EXTENSION MECHANISMS"

This section focuses on the geographical delimitation of EU law and how association agreements like the EEA agreement are expanding the legal area of EU. Section A focuses on the "extraterritorial application" of the EU. Section B discusses the extension of EU legal instruments through association agreements — illustrated here by the EEA Agreement.

A. The Extraterritorial Application of EU Law

Both codified and case law is illustrative of the fact that the EU Treaties do not prevent the application of EU law outside of EU-territory. I do not address here the part of EU law that relates to international law.[99]

EU law has several provisions that deal with extraterritorial application.[100] One provision is EC Treaty Article 49(2), which states that services provisions may be extended to "nationals of a third country who provide services and who are established within the Community."[101] In the same respect, Article 60(2) entitles Member States, "for serious political reasons and on grounds of urgency, [to] take unilateral measures against a third country with regard to capital movements and payments."[102]

The extraterritorial application of EU law is, however, not limited to instances explicitly mentioned. Extended effects may also

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98. SHAW, *supra* note 24, at 216.

99. *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1134 (4th ed. 2001).

100. For a discussion on the EU extraterritorial influences under shipping security and freedom of services, see Peter Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Frithjof Nansen Institute 1995) (shorter version published in Law and Economics, 1995) and Peter Orebech, *The Northern Sea Route: Conditions For Participation According To WTO Legislation — With A Special Emphasis On The Non-Discriminatory Treatment Principles Of Most-Favored-Nation — And National Treatment Clauses Under The General Agreement On Trade In Services* (Frithjof Nansen Institute 1996) (also published in Law and Economics, 1997).

101. Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html. For more on the interpretation of this provision, see Peter Orebech & Douglas Brubaker, *Implications of GATS/EU Law for The Russian Northern Sea Route and Russian Barents Sea* [hereinafter the EU ARCOP Project].

102. Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), *available at* http://europa.eu.int/eur-lex/en/search/search_treaties.html.

follow from an implicit reading of EU law. This is clearly the case under competition law, exemplified by the *Dyestuff* case[103] and *Euroemballage* case.[104] I will first look at the oldest case related to EC Treaty Article 81(1) – the *Dyestuff* case, where jurisdiction was upheld over concerted trade practices:

> The applicant, whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the Common Market by actions which it is alleged to have taken outside the Community.
>
> Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market.[105]
>
> The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself.
>
> The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.[106]
>
> In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressees orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers.
>
> In the absence of evidence to the contrary, it must be assumed that on the occasion of the increases of 1965 and 1967 the applicant acted in a similar fashion in its relations with its subsidiaries established in the Common Market.

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103. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619.
104. Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215.
105. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 661-62 §§ 125-26.
106. *Id*. at 662 §§ 131-32.

> In these circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.
>
> It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.
>
> The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded. [107]

Since the parent company, Imperial Chemical Industries Ltd. (ICI), was incorporated in London (which in 1969 was outside EEC), EC competition law was given direct extraterritorial application. As this case shows, the fines could easily have been addressed to the domestic subsidiaries regardless of the parent company's location. One important aspect of the Court's conclusion was its indifference to the composition of the "concerted practice." The Court's conclusion applied to *any* concerted practice, whether conducted by a single company composed of multiple subsidiaries or by different entities operated by separate legal persons.

The latter case relates to Continental Can Inc., a company that was incorporated in New York. The issue for adjudication was whether a take-over bid submitted by Continental Can was contrary to EC Treaty Article 82 (abuse of dominant position):

> The applicants argue that according to the general principles of international law, Continental, as an enterprise with its registered office outside the Common Market, is neither within the administrative competence of the Commission nor under the jurisdiction of the Court of Justice. The Commission, it is argued, therefore has no competence to promulgate the contested decision with regard to Continental and to direct to it the instruction contained in Article 2 of that decision. Moreover, the illegal behaviour against which the Commission was proceeding, should not be directly attributed to Continental, but to Europemballage.

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107. *Id*. at 663 §§ 138-42.

> The applicants cannot dispute that Europemballage, founded on 20 February 1970, is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.
>
> It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the necessary means available for this. On 8 April 1970 Europemballage took up the shares and debentures in TDV offered up to that point. Thus this transaction, on the basis of which the Commission made the contested decision, is to be attributed not only to Europemballage, but also and first and foremost to Continental. Community law is applicable to such an acquisition, which influences market conditions within the Community. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.
>
> The plea of lack of competence must therefore be dismissed.[108]

Again, EU competition law had extraterritorial effects. The fact that Continental was fully incorporated outside of EU was no obstacle to the application of EU law. Compared to the U.S. position, which opts for an explicit congressional decision on the issue of legal extraterritoriality, the EU international law doctrine is expansive, non-reciprocal, and case law developed. Professor R.Y. Jennings, who at that time was at Cambridge University[109] and consulted for ICI Inc., expressed concern over whether EEC practice was in accordance with international law: "the contemporary

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108. Case 6/72, Europemballage Corp. & Continental Can Co. v. Commission, 1973 E.C.R. 215, 241-42 §§ 14-17.

109. He later became a Judge at the International Court of Justice in The Hague.

practice of States is vigorously opposed to…the extraterritorial enforcement of anti-trust laws is not something which can be applied in one direction only."[110] However, the international law argument had little influence on the ECJ. One way of interpreting the Court's position is that the EU, as a sovereign entity, may prescribe the geographical application of its own law as far and as long as international law does not explicitly bar it from doing so.[111]

B. EEA Agreement

Next, I look at the European Economic Area (EEA) Agreement and its function as a EU law-carrying instrument abroad. To what extent does valid EU law effect European Free Trade Association (EFTA) countries? The EFTA includes Iceland, Liechtenstein, Norway and Switzerland which fall under the auspices of the EEA Surveillance Agency (ESA) and the EFTA Court. Switzerland, however, is not party to the EEA Agreement due to its "no" vote on the 1992 referendum.[112] Switzerland is now under the direction of seven different free trade agreements, none of which is supranational.

The first question to ask is whether the EEA Agreement is supranational in any respect and therefore equipped with preemptive force. Next, comes a brief analysis on *de facto* influx of EU law into non-EU member EEA countries.

1. Supranationality?

Two questions occur. First, does the EEA Agreement impede EFTA Member States from amending their own domestic laws? Second, do EU laws enjoy preemptive force in EEA countries?

The first question, whether the EEA Agreement impedes EFTA Member States from amending their own domestic laws, is addressed by EEA Agreement Article 97. Article 97 clarifies that Member States are competent to alter internal legislation.[113] Closer

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110. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 625.

111. Which is similar to Danish Law Professor Alf Ross' position in the "Smoking on the streets of Paris" debate on Danish *jurisdictione ratione terrae.* I provide the following references for Nordic readers wishing to follow the debate. *See* ALF ROSS, CONSTITUTIONAL LAW § 18 (Nyt nordisk forlag, København 1966); TORSTEN GIHL, PUBLIC INTERNATIONAL LAW IN OUTLINE § 136 (1956). *But see* MAX SØRENSEN, JOURNAL, COPENHAGEN 443 (1959); TORKEL OPSAHL, A MODERN CONSTITUTION UNDER SCRUTINY 282, 289 (J. Legal Science, Oslo 1962) [author's translations].

112. In a mandatory and decisive referendum (Schweitzeriche Bundesverfassung, May 29, 1874, art. 121) Nationalrat and Ständerrat voted yes (Nationalrat — with 128 against 58 votes), but despite that, membership plans wrecked due to the negative referendum of Dec. 6, 1992.

113. The EEA Agreement, Jan.1, 1994, art. 97, *available at* http://secretariat.efta.int/Web/EuropeanEconomicArea/EEAAgreement/EEAAgreement.

examination uncovers strict limits, such as the requirement that new laws should not discriminate on national basis, a requirement set by the EEA Joint Committee to guarantee "the good functioning of this Agreement." The amendment procedure regulations are in many instances incorporated into EEA Agreement Protocols and Annexes. As an example, the investment regulations in Annex XII include a ban on amendments reversing liberalization efforts already achieved prior to May 2, 1992, the date the EEA Agreement was signed. Thus, despite its formulation to the opposite, Article 97 is in principle, and in fact, blocking Member States' amendment rights.

The second question, whether EU laws enjoy preemptive force in EEA countries, relates to contiguous domestic lawmaking within the EEA Agreement framework. There are two questions to answer here. First, what are the decision-making criteria regarding already-established EU *acquis communautaire* at the date of signatory?[114] Second, what criteria should be followed regarding laws created after the EEA Agreement came into force (i.e. subsequent to January 1, 1994)?

EEA Agreement Article 7 states that all secondary legislation either referred to or contained in the Annexes to the EEA Agreement, or in decisions of the EEA Joint Committee, are binding upon the Contracting Parties and should be incorporated into domestic law. The transformation process differs from EU regulations to EU directives. In the latter case, only directions and goals are fixed — Member States may, with discretion, establish domestic text that corresponds to the EU directive, pursuant to Article 7(b). However, EU regulations under Article 7(a) should correspond word for word to the EU texts. If no transitional periods are granted, the Member States' integration of EU law should be completed prior to the EEA Agreement taking effect.

New EU legislation subsequent to January 1, 1994, is incorporated and validated under the rules on decision-making found in Article 99ff. With the exception of the expert-consultation phase, and the Article 81 committee phase under an EC framework program (also involving EFTA), the law-making procedure is not designed to acquiesce to the EFTA. This means that the EU legislation processes found in EC Treaty Articles 251 and 252 are ruling. Here, I am only interested in the subsequent EEA legislation processes.

When an EU act that affects the EEA Agreement is decided, the "go-between-organ" of the EEA, the Joint Committee, is presented

114. EEA Agreement art. 7.

with the new EU legislation. While there are no formal rules giving EU law preemption, the strict obligation to closely follow related EU legislation makes the non-supranational starting point merely a formality.

2. The Factual Influx Of EU Law

Just a few words on the *de facto* influx of EU law into non-EU member EEA countries. While the Roman Empire never conquered the Nordic countries,[115] Roman law nevertheless gained influence over the centuries. So, how does the EU's influence coincide with Norway's Roman legal history?

One mechanism is displayed by the "inverse Chassis de Dijon principle." Contrary to what one may think, a commodity that is recognized as legal in EEA countries outside of the EU is not acknowledged as such in the Common Market. As we saw in the *Chassis de Dijon Case*:

> In the absence of common rules relating to the production and marketing of alcohol…it is for the Member States to regulate all matters relating to the production and marketing…on their own territory….[116]

> There is…no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State….[117]

Adapted to the EEA situation, products that are legally produced under EFTA country legislation should not face any EU import restrictions. No *EU acquis* hinder such a position. For example, the *Hauptzollamt Mainz v. Kupferberg Case,*[118] gave provisions in the EEC – Portuguese Free trade agreement direct effect in the EEC. However, this is not the case under the EEA Agreement. The EU insists that exporters to the EU should follow EU standards as displayed in *acquis commonautaire*. Since production standards can hardly be altered depending on whether the product is intended for

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115. The Roman Empire had its northern borderline by the river Ejdora (Ejdern) at the town of Rendsburg in Sleswig-Holstein (now part of Germany). *See generally* http://www.bbc.co.uk/history/ancient/romans/empire_04.shtml.

116. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung fur Branntwein, 1979 E.C.R. 649, 662 § 8.

117. *Id* at 664 § 14.

118. Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641.

the EU or other markets, the practiced "inverse Chassis de Dijon principle," in reality, leads to an EU law influence that overrides the formal influence of compulsory transition. There is, as stated by professor Jennings in the ICI case, no reciprocity — one of the basic ingredients normally found in intergovernmental agreements.[119]

IV. "SPLIT COMPETENCY" — PERSPECTIVES ON MEMBER STATES' ROLES

EU competencies are divided both "horizontally" and "vertically." Horizontal competencies are specifically defined for each substantially different situation (Section A) — everything from agricultural issues to transportation. Vertical competencies are divided within each field of EU law (Section B); for example, Member States' competencies are decided under the principle of subsidiarity.

A. Exclusive Powers — Common Policies

EU common policies are illustrative of areas where the EU enjoys exclusive legislative competency. See, for instance: common commercial policy (EC Treaty Article 133); common transport policy (EC Treaty Article 76); common customs tariff (EC Treaty Article 26); and common agriculture policy (EC Treaty Article 34). If exclusive autonomy is observed, EU legislation produces preemptive norms. Consequently, Member States may no longer validly act. In this section, I shall investigate applicable criteria for existing common policies that do not produce exclusive EU law-making capacity. The exclusive EU competencies initiate preemptive norms that exclude Member State legislative competency.

The basic principle of exclusive EU competency is ruled out in the *European Agreement on Road Transport* case*:*

> [E]ach 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.[120]

119. Case 48/69, Imperial Chem. Indus. Ltd. v. Commission, 1972 E.C.R. 619, 625.
120. Case 22/70, Commission v. Council, 1971 E.C.R. 263, 274 § 17.

The common policies and preemptive status of EU legislation are only indirectly connected. As stressed by the ECJ, the EU adopts "common rules" according to common policy competencies. The substance of these rules determines whether Member States in their law-making capacity are excluded. The outcome of this analysis is produced by rule orientation and not just logical deductions made under the concept of "common policy" (begriffsjurisprudenz[121]):

> If these two provisions [EC Treaty transportation rule in Article 3E in comparison with Article 5] are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope. [122]

The legislation that implements the common policy is thus decisive. The possible exclusivity of EU legislative competency is premised on the formulations made in the proclaimed community rules. More precisely, what criteria are used to decide which areas are ruled by preemptive norms and which areas fall under the scrutiny of lex superior?

B. Exclusive or Split Powers? From Preemptive Norms to Lex Superior

The superiority of EU legislation presupposes that Member States play a role in law-making. As a consequence, the ever-increasing EU exclusive autonomy precludes Member States from any law making. EU legislation is preemptive. Member States may not validly act unless treaties or secondary provisions say otherwise. Per EC Treaty Article 134(2), the Member States' "urgency clause" found under common commercial policy is illustrative of this issue.

The ruling case specifying the criteria for deciding between exclusive and split powers is *Opinion on the Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work [ILO-opinion]*:

> The exclusive or non-exclusive nature of the Community's competence does not flow solely from

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121. The school of legal reasoning that applies logicical deductions to concepts [author's translation].

122. Case 22/70, Commission v. Council, 1971 E.C.R. 263, 275 § 22.

> the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.[123]

Thus, the groundbreaking question for any EU legislation is whether it deprives Member States of any competencies previously held. Since there are no general characteristics to apply to this question, discretionary justification must be individually sought in each case. To approach a general solution, one question to ask is whether Member States' involvement would bring an area of law out of the EU's exclusive autonomy. Can we then say anything general here? Remaining competency is possible in at least two instances: first, if financial burdens remain with the Member State, this may affect the preemptive status of the EU provisions (section i); second, if the EU promotes a transitional period which is not "of such a kind as to deprive the Member States of an area of competence." (See section ii).

1. Financial Burdens

In accordance with Member States' codified competency, remaining power may occur if involvement causes fiscal burdens, see *Local Cost Standard Clause*[124] and *Rubber Agreement* case.[125] In the first case, the ECJ clarified that common policies do not automatically produce exclusive EU autonomy which exhausts Member States' action. The exclusive nature of EU powers is a product of the objective of the policy and of the:

> [M]anner in which the common commercial policy is conceived in the Treaty.
>
> [The court found] that the subject-matter of the standard [for credits for financing of local costs linked to export operations]…is one of those measures belonging to the common commercial policy

123. Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061, I-1077 § 9.
124. Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355.
125. Opinion 1/78, Int'l Agreement on Natural Rubber, 1979 E.C.R. 2871.

> prescribed by Article 113 [now Article 133] of the Treaty.
>
> Such a policy is conceived in that article in the context of the operation of the Common Market, for the defense of the common interests of the Community, within which the particular interest of the Member States must endeavour to adapt to each other.
>
> Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.[126]

The EU common policies do not automatically produce EU preemptive norms. The discretion of the court seems to rely on the objective of the disputed Member States' regulation; for example, the appearance of a common policy in the treaty and whether a "contra-factual" solution would ruin the efficiency of the common policy. In deciding the case of special Member States' credits for exporters, the court went on to say:

> In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.
>
> It cannot therefore be accepted that…the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of Articles 113 and 114 [now Articles 133 and 134]…show clearly that the exercise of concurrent powers by the Member

126. Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355, 1363-64.

> States and the Community in this matter is impossible.[127]

Interestingly enough, the ECJ did not resort to *begriffsjurisprudenz*, but instead relied on the rule-oriented approach. Common policies, as such, do not automatically lead to norms that exclude Member States' legislation.[128] However, if, by a contra-factual analysis a potential Member State's competency for export policies would distort external markets, no residual legislative power is retained by the Member States. Thus, the question is whether a Member State's involvement would ruin that position. The ECJ questioned whether financial burdens assigned to Member States under the International Local Cost Standard Agreement could possibly defuse the potentially exclusive EU autonomy. The ECJ thought not; "[i]t is of little importance that the obligations and financial burdens inherent in the execution of the agreement [International Agreement of the Understanding on a Local Cost Standard] envisaged are borne directly by the Member States."[129]

According to the Court, a system of Member States, as *recipients* of legal obligations that incurred financial burdens under international agreements, would not alter the conclusion of exclusive EU autonomy. Is this a valid, general conclusion that would then rule all cases of common policies? Apparently not, according to the Court's opinion in the *Rubber Agreement* case.[130] The Court ruled that the stabilization of prices for natural rubber by a buffer stock system ruined EU exclusivity. The change in financing directly from Community budget to Member States deactivated the preemptive effects of the international agreement:

> In the first case no problem would arise as regards the exclusive powers of the Community to conclude the agreement in question. As has been indicated above, the mechanism of the buffer stock has the purpose of regulating trade and from this point of view constitutes an instrument of the common commercial policy. It follows that Community financing of the charges arising would have to be regarded as a solution in conformity with the Treaty.

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127. *Id.* at 1364.
128. *See supra* section 4A.
129. *Id.* at 1364.
130. Opinion 1/78, Int'l Agreement on Natural Rubber, 1979 E.C.R. 2871.

> The facts of the problem would be different if the second alternative were to be preferred. It cannot in fact be denied that the financing of the buffer stock constitutes an essential feature of the scheme for regulating the market which it is proposed to set up. The extent of and the detailed arrangements for the financial undertakings which the Member States will be required to satisfy will directly condition the possibilities and the degree of efficiency of intervention by the buffer mechanism whilst the decisions to be taken as regards the level of the central reference price and the margins of fluctuation to be permitted either upwards or downwards will have immediate repercussions on the use of the financial means put at the disposal of the International Rubber Council which is to be set up and on the extent of the financial means to be put at its disposal. Furthermore sight must not be lost of the fact that the financial structure which it is proposed to set up will make necessary, as is mentioned in the documents submitted to the court and reflecting the most recent stage of negotiations, co-ordination between the use of the specific financial means put at the disposal of the future International Rubber Council and those which it might find in the Common Fund which is to be set up. If the financing of the agreement is a matter for the Community the necessary decisions will be taken according to the appropriate Community procedures. If on the other hand the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. The exclusive competence of the Community could not be envisaged in such a case.[131]

So, if the agreement is only about financing, placing the monetary responsibility in the hands of Member States changes the legal classification. Finance, the primary focus of the agreement, and commercial aspects are downplayed. Therefore, it is classified as a

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131. *Id.* at 2918 §§ 59-60.

split EU — Member States competency task. This interpretation is made clear in the *Natural Rubber Agreement*:

> The court takes the view that the fact that the agreement may cover subjects such as technological assistance, research programmes, labour conditions in the industry concerned or consultations relating to national tax policies which may have an effect on the price of rubber cannot modify the description of the agreement which must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature. This is the more true because the clauses under consideration are in fact closely connected with the objective of the agreement and the duties of the bodies which are to operate in the framework of the International Natural Rubber organization which it is planned to set up. The negotiation and execution of these clauses must therefore follow the system applicable to the agreement considered as a whole. [132]

The financing of rubber buffer stock is the nucleus of the entire agreement; it is not an ancillary element. By changing the financial burden from the Community to the Member States, one opts out of the Community-centered competency. Thus, the exclusive competence of the community ceases to exist, and subsequently a system of split powers is all that remains.

2. Transitional Periods

Interim periods also deviate from exclusive EU legislative power.[133] Under this philosophy, Member States' competency still remains. See, as an illustration, the common fisheries policy, which despite long and hard efforts towards preemptive solutions, still remains under an interim solution. One of the ruling cases is *Cornelis Kramer & Others:*

> [I]t should be stated first that this authority which the Member States have is only of a transitional nature…

132. *Id*. at 2917 § 56.
133. An illustration is the common fisheries policies (CFP). *See* Orebech, *supra* note 6.

> …it follows from the foregoing considerations that this authority will come to an end 'from the sixth year after Accession at the latest', since the Council must by then have adopted…measures for the conservation of the resources of the sea.[134]

The Member States' competency comes to an end as scheduled by the termination date set by the EU act. This was made clear in the *Regina*[135] case:

> It follows from…Articles 100 and 103 of the 1972 Act of Accession that the measures derogating from a fundamental principle of Community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the Community authorities….
>
> It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time-limits.[136]

If a transitional period is overdue, no resurrection of Member States' competency is possible even if the EU has failed to act. Member States enjoy no power to fill-in loopholes. See for instance, *Commission v. UK and Northern Ireland*[137] as referred to in *Officier van Justitie v. J. van Dam & Zonen,*[138] which states that Member States "may henceforth act only as trustees of the common interest" which does not include tacit or implied powers. This is made clear in the EC court analysis of the validity of national fisheries regulation in the 1979 case:

> As this is a field reserved to the powers of the Community,…a Member State cannot therefore, in

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134. Joined Cases 3/76, 4/76 & 6/76, Cornelis Kramer & Others, 1976 E.C.R. 1279, 1310 §§ 40- 41.

135. Case 63/83, Regina v. Kent Kirk, 1984 E.C.R. 2689.

136. *Id.* at 2716-17 §§ 14-15.

137. Case 804/79, Commission v. United Kingdom of Great Britain & Northern Ireland, 1981 E.C.R. 1045.

138. Case 124/80, Officier van Justitie v. J. van Dam & Zonen, 1981 E.C.R. 1447, 1447.

> the absence of appropriate action on the part of the Council, bring into force any interim measures for the conservation of the resources of the sea which may be required by the situation….[139]

Thus, the Member States' action is rebutted here due to the preemptive force of the bare existence of EU legislative power. Clearly, the national action is impermissible.[140] Member States' legislative power is entirely based on explicit delegation. The one and only title for this competency is: delegation of provisional law-making power.

C. Types of "Split Powers"

1. Harmonization

Acquis commonautaire prescribes different types of cooperation between the EU and its Member States. The notion of split power should be qualified. Clearly, only "shared powers" qualify as a basis for the use of the subsidiarity principle.[141] "Shared" and "split" powers, as used here, are dissimilar philosophies. Only when the treaty text explicitly delegates Member States and the Community joint responsibility, does the subsidiarity principle have a place. This shared power is only found outside the areas of common policies.

Several instances of the coordinated actions of the EU and Member States occurred under EU and EC Treaty texts; a brief overview follows. There are a wide variety of cases ranging from those illustrating EU domination to those demonstrating a supportive or complementary role. As an illustration of the latter type, see *India Development Cooperation* case:[142]

> It should first be observed that it is apparent from Title XVII of the Treaty, [now Title XX]…that, on the one hand, the Community has specific competence to conclude agreements with non-member countries in the sphere of development cooperation and that, on

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139. *Id.* For a more complete overview of the lacuna problems, *see* Peter Orebech, *The Fisheries Issues of the Second Accession to European Union, Compared with the 1994 First Accession Treaty,* — with an emphasis on the negotiation positions of Latvia and Norway, *supra* note 6.

140. *See* STEPHEN WEATHERHILL, LAW AND THE INTEGRATION IN THE EUROPEAN UNION 137 (1995).

141. *See* EC treaty Article 5(2).

142. Case C-268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177.

> the other hand, that competence is not exclusive but is complementary to that of the Member States.[143]

"Complementary" power in this case means that the EU, if necessary, supports and supplements Member State action. It is understood, however, that EU "competence clearly [is] subordinate to an objective of coordinating…policies defined by each Member State within the sphere of its own competences."[144] One consequence of the EU subordinate position is that an approximation of laws has no place.

In areas of split competency that give the EU the "first violin," the legal situation is changed, hence the *lex superior* regime and approximation of law rules.[145] Harmonization competence even stretches into property rights, as long as these rights do not belong to the exclusive competency of Member States, as ruled by EC Treaty Article 295. For example, see the *1994 Opinion on the Agreement Establishing the World Trade Organization, General Agreement in Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS):*

> It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights….[146]

Harmonization competency covers all areas of split power with the exception of areas that belong to EU supplementary (complementary) competence. The *lex superior* principle rules govern areas of property that, strictly interpreted, are part of Member States' domain.[147] If EU competency is supplemental, Member States may establish their own individual solutions without having to consider EU prescriptions.

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143. *Id*. at I-6219 § 36.

144. *Id*. at I-6223 § 51. As an example of such complementary EU competence, see EC Treaty Article 151.

145. *See supra* section 1.

146. Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, 1994 E.C.R. I -5276, I-5405 § 59.

147. *See* EC Treaty art. 295.

2. The Obligation of Cooperation

EU law under the regime of split power builds on principles of cooperation. Some casuistic examples exist throughout the EU and EC treaties, but as made clear by the ECJ, the obligation of coordinated action stretches even wider. As stated in the *1994 WTO-Opinion,* cooperation responsibility embraces the entire gamut of split powers:

> [W]here it is apparent that the subject-matter of an agreement or convention falls in part within the competency of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.[148]

As formulated by the court, cooperation in the achievement of common objectives is a non-codified legal obligation. This commitment is implicitly built into the integration purpose of the EU — the endowment of a common platform and understanding. Compare this with the EC Treaty preamble goal of ever-closer cooperation which takes effect outside of common policies. According to the *ILO-Opinion* and later case law,[149] the "obligation to cooperate flows from the requirement of unity in the international representation of the Community."[150]

Clearly, the cooperation requirement may be pursued in different ways. The *FAO* case illustrates that formal "arrangements," or bilateral EU internal agreements, fulfill the cooperation obligation.[151] Cooperation to achieve a unanimous position does not qualify as a kind of shared competency that triggers the principle of subsidiarity.

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148. *Id*. at 5420 § 108 (citations omitted).
149. Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061, I-1083 § 36.
150. *See, e.g.*, Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469, I-1510 § 48.
151. Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469, I-1510 § 48.

D. The Principle of Subsidiarity[152]

EC Treaty Article 5(2) regulates the vertical allotment of power. The more procedural issues are sorted out in Protocol No. 30 of the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality.[153] Two issues are dealt with here: first, the personal competency issue i.e., who is to decide upon the activation of subsidiarity principle; and, second, what is the substantial area covered by that principle?

1. *A Political Principle Only?*

The first issue that has raised concern is whether subsidiarity is justiciable.[154] Basically, this is a political principle policed by the EU entities.[155] Paragraph 1 of the Protocol states that "[i]n exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with."[156] Even acknowledging the justiciability, whether the ECJ may overthrow EU-made discretion in relation to decision-making is an issue. As stated, "it is submitted that the Court is likely to allow the Community legislature a wide discretion in areas which involve policy choices."[157] This restrictive ECJ position is canvassed in the *Biotechnology* case[158] where, after citing the EU position as addressed in the directive, the Court found for the EU with the following rationale: "[a]s the scope of that protection has immediate effects on trade, and, accordingly on intra-community trade, it is

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152. *See generally* Grainne de Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, at 31 (Harvard Jean Monnet Working Paper No. 7/99 1999), *at* http://www.jeanmonnetprogram.org/papers/99/990701.rtf; and Reimer von Borrie & Malte Hauschild, *Implementing The Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369, 371 (1999). On the resurrection of the principle see John McCormick, UNDERSTANDING THE EUROPEAN UNION, A CONCISE INTRODUCTION 123 (1999).

153. Amsterdam Treaty, Nov. 10, 1997, O.J. (C 340) 1, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0105010010.

154. *See* A.G. Toth, *Is Subsidiarity Justiciable?,* 19(3) EUR. L. REV. 268, 285 (1994) (with further references). For an affirmative answer, see Christian Timmerman, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L. J. S106, S114 (1999). *But see* Allison S. Russell, *Subsidiarity in European Union Law: Member State Morphine for the Painful Loss of Sovereignty*, 11 AUT. INT'L PRACTICUM 67, 71 (1998).

155. *Id.*

156. Protocol No. 30 § 1 to the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality, Nov. 10, 1997, O.J. (C 340) 1, *available at* http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0105010010.

157. ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 551 (Oxford University Press 1999).

158. Case C-377/98, Kingdom of the Netherlands v. Parliament & Council, 2001 E.C.R. I-7079.

clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community."[159]

This is identical to the EU position. When it comes to the question of whether the decision was based on sufficient grounds, the ECJ finds no breach of EU administrative law:

> Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point. [160]

Thus, the community position is strictly followed by the ECJ. Despite the acknowledgement that independent justification has its place under the ECJ, a rather convincing argument must be made before the court will overturn the EU's advocated need for unified action.

The ECJ was similarly restrictive in 1996, by holding that when conducting such a review, one must allow the Council "a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments."[161] The Court's judicial review of the issue of whether the exercise of discretion was voided was limited to the manifest error or misuse of powers, which were not found in this case.[162] Failing to give reasons for a decision would be such an error. In a 1997 judgment the Court stated that:

> It is apparent that, *on any view*, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 (now Article 253) of the Treaty. An express reference to that principle cannot be required.[163]

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159. *Id.* § 32.
160. *Id.* § 33.
161. Case C-84/94, United Kingdom v. Council, 1996 E.C.R. I-5793, I-5811 § 58.
162. *Id.*
163. Case C-233/94, Germany v. Parliament & Council, 1997 E.C.R. I-2405 § 28 (emphasis added).

2. The Place of Subsidiarity

The second question as to what substantial areas are covered by the principle of subsidiarity, invokes the greatest doubt. Part one, Article 5 of the Treaty states:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in sofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[164]

This long sentence is not easy to read or understand.[165] Let us take the easiest part first. Surely, the principle of subsidiarity has no place under areas of exclusive EU competence. This includes most areas under the auspices of common policies.[166]

The remaining cases involve split competency. Do all cases in this area qualify for the principle of subsidiarity? The first qualification is that the Member States alone cannot sufficiently attain the objectives of the proposed action. This creates a situation of alternative choices where either the EU or Member States may legislate. Actually, the two alternatives are actually: 1) EU or Member States; or 2) EU and Member States in joint action.

The remaining condition occurs when the EU considers "the scale or effects" and finds it better to make the decision itself. If EU so decides, the decision is placed at the federal level. However, the EU *cannot* make the choice freely. EC & EU Treaties limit the discretionary power.[167] The vital question is whether any provision possibly forces the EU not to deviate from a cooperative EU-Member State solution. Since the EU, when the split power is codified, cannot deviate from a solution, only those cases of involving *shared power* are fully ruled by the subsidiarity principle. This position is supported by the Advocate General in the next case which stated that judicial control over the requirements for adopting measures will "address the concerns regarding unnecessary Community action

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164. EC Treaty, art. 5.

165. *See Subsidiarity: Backing the Right Horse?* 30 COMMON MKT. L. REV. 241, 244 (1993) (stating that "[t]he concept of subsidiarity is not a hard and fast rule in constitutional law, as comparative studies have demonstrated. It is like quicksand and allows only for short respite".).

166. *See supra* sections 4A & B.

167. *See infra* section 5.

in fields where the Member States also enjoy competence which prompted the insertion of the principle of subsidiarity in the Treaty."[168]

This construction is supported by ECJ in its *1993 ILO Opinion* case. "Shared competency" is reserved for the cases of *obligatory* joint action. "Finally, an agreement may be concluded in an area where competence is shared between the Community and the Member States. In such a case, negotiation and implementation of the agreement require *joint action* by the Community *and* the Member States."[169] The EU's obligation is to *consider* use of the subsidiarity principle in instances of treaty-based joint-action provisions. But, compare the notion that competency "cannot be sufficiently achieved by the Member States."[170]Article 5 does not, how-ever, *provide* that competency belongs at the lower Member States' level.

The EU may not make decisions on instances of codified joint action at the federal level. Which EC Treaty provisions demand *joint action*? This treaty contains a few examples such as EC Treaty Articles 151, 155, 157, and 165. These are the only instances of the subsidiarity principle requiring the EU to opt for a Member State level decision. The EU enjoys no exclusive discretion as to whether to keep the decision at federal level. Outside of these few treaty-based cases, the EU has full discretion to delege decision-making authority to Member States. As illustrated by the *Bio-technology* case, it is sufficient to demonstrate that the elements of Article 5(2) have been considered.[171]

V. "INSTITUTIONAL CLASHES" – THE PREROGATIVES OF THE EU INSTITUTIONS

In the early days of the European Economic Community (EEC), "the constitutionalization" of the founding treaties had already become manifest.[172] The ECJ went even further in the *Nold* case, where it stated that secondary Community measures that are

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168. Case C-376/98, Germany v. Parliament & Council, 2000 E.C.R. I-8419 § 144. The ECJ did not delve into the issue of subsidiarity since it annulled the Directive on the grounds that Articles 95 (ex 100a), 47(2) (ex 57(2)), and 55 (ex 66) each were an inappropriate legal basis. *Id.* § 128.

169. Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061, I-1077 § 12 (emphasis added).

170. EC Treatly, art. 5.

171. Case C-377/98, Kingdom of the Netherlands v. Parliament and Council, 2001 E.C.R. I-7079.

172. *See, e.g.*, Case 26/62, NV Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlandsc Administratic der belastingen, 1963 E.C.R. 1; Case 6/64, Costa v. ENEL, 1964 E.C.R. 585.

"incompatible with fundamental rights recognized and protected by the constitutions of those states" should be annulled as unconstitutional.[173] The Court specifically cited "[t]he Grundgesetz of the Federal Republic of Germany and…the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950," as examples.[174] In the *Wachauf* case, the ECJ stated that secondary EC legislation "would amount to an unconstitutional expropriation without compensation" and is contrary to the "fundamental rights in the Community legal order." [175]

Not only have the founding treaties become constitutional EU law, all fundamental rights found either under Member States' human rights conventions or constitutions have become part of the EU constitutional system as well. At the beginning of the 1990s, the ECJ stated "[t]he EEC treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law."[176]

This section emphasizes the balance of power and prerogatives as implemented by case law. In this balance, the ECJ acts as constitutional court and "has fashioned a kind of supranational constitution."[177] The primary focus (Section A) is on the superiority of the EC Treaty over the EU treaty. A secondary issue is whether institutions may pick and chose between provisions authorizing secondary legislation (Section B). If such options exist, the law-initiating Commission may have significant influence on the prerogatives of the Parliament and Council.

A. The Superiority of the EC Treaty Over the EU Treaty

While the EC Treaty has existed for a period of 46 years, the EU Treaty is no more than 10 years old. Thus, while the EU is still a concept,[178] the EC has already established its legal personality (EC Treaty Article 281) and achieved an international capacity.

According to EU Treaty (TEU) Article 47, nothing in the treaty shall affect the EC Treaty or any acts modifying or supplementing

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173. Case 4/73, J. Nold, Kohlen- und Baustoffgroß handlung v Commission, 1974 E.C.R. 491, 507 § 13.

174. *Id*. at 507 § 12.

175. Case 5/88, Wachauf v. Bundesamt fur Ernahrung und Forstwirtschaft, 1989 E.C.R. 2609, 2625 § 11, 2639 § 19.

176. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079 § 1.

177. SWEET, *supra* note 57, at 1.

178. The EU will become a federation of states and consequently enjoy legal personality. *See* Article 6 of the Draft Treaty Establishing a Constitution for Europe, July 18, 2003, *at* http://european-convention.eu.int/docs/Treaty/en00850.en03.pdf.

it. Clearly, the EC Treaty ranks over the EU Treaty. This priority is also made clear by case law. In the *Airport Transit Visa* case, the ECJ states that:

> In accordance with Article L [now TEU Article 46] of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of powers apply to Article M [now TEU Article 47] of the Treaty on European Union.
>
> It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) [now TEU Article 30] of the Treaty of the European Union do not encroach upon the powers conferred by the EC Treaty on the Community.
>
> It follows that the Court has jurisdiction to review the content of the Act in the light of Article 100c of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision and to annul the Act if it appears that it should have been based on Article 100c of the EC Treaty.[179]

Lex superior governs these incidents of colliding entitlements. Where EC competencies exist, no EU Treaty entitlements have priority.

B. The Lex Superior Position of EC Treaty Provisions

The EC Treaty prevails not only over EU Treaty provisions, but also over all subsidiary EU legislation. The UN Food and Agriculture Organization (FAO) case illustrates the lack of derogation capacity. [180] Briefly, the conflict in the FAO case was that the Council and Commission made a binding "arrangement." The Commission exercised voting rights in the FAO on fisheries issues that were under exclusive EU competency. A later 1993 Council decision delegated voting rights to Member States "to promote compliance with international conservation and

179. Case C-170/96, Commission v. Council, 1998 E.C.R. I – 2763 §§ 15-17.
180. Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469.

management measures by fishing vessels on the high seas."[181] Thus, the Council breached the arrangement and the Commission called for an annulment.[182] The Commission claimed that no decision made by agreement or decision to benefit Member States could invalidate the constitutional position clarified by the arrangement.[183]

The ECJ concluded that the arrangement created a duty of cooperation.[184] Consequently, the validity of the arrangement was not nullified. The only question for consideration was whether the 1993 Council decision was in accordance with the Arrangement:

> Consequently, by concluding [in Council's decision of 22 November 1993] that the draft Agreement concerned an issue whose thrust did not lie in an area within the exclusive competence of the Community and accordingly giving the Member States the right to vote for the adoption of that draft, the Council acted in breach of section 2.3 of the Arrangement which it was required to observe.
>
> The Council's decision of 22 November 1993 must therefore be annulled.[185]

Secondary legislation cannot deviate from the balance of competency as installed by an arrangement that was made according to the institutional balance displayed by the treaty. This is true even if the issue was not explicitly stated since it was not challenged at the onset of the arrangement.

C. The Compulsory Legal Title

The EU entitlement system is not entirely optional. EC Treaty Article 7(1) states that "[e]ach institution shall act within the limits of the powers conferred upon it by this treaty."[186] Despite text indicating a somewhat optional system, the ECJ has established a rigid constitutional system to protect "the institutional balance" primarily because decision-making procedures in the EC Treaty Articles 251 and 252 respectively institute both a strong and weak parliamentary position. One simply cannot ruin the fine balance

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181. *Id.* at I-1470 § 2.
182. *See id.* at I-1470 § 1.
183. *Id.* at I-1471 § 4.
184. *Id.* at I-1510 § 49.
185. *Id.* at I-1511 §§ 50-51.
186. EC Treaty art. 7(1).

between institutions by confusing legal authorities and legal appliances. EU institutions may not pick and choose from different valid legal titles because of the consequences this would have on the balance of power. As will be shown later, the *lex superior*, *lex specialis,* and *lex posteriori* doctrines influence this compulsory jurisdiction. Before discussing these principles of colliding norms, we must first look at their interrelation.

1. The Rank of Lex Posteriori — A National State Constitutional Issue

The logic of EU law creates EU supremacy "even over…the [national] constitution itself."[187] For dualistic constitutional orders doctrinal *lex superior* and *lex posteriori* clashes have emerged since, as in Britain, "the only legal limitation to legislative power is that a parliament of today cannot, with legislation, bind a parliament of tomorrow. The doctrine prohibits judicial review of legislation and implies a rigid *lex posteriori* solution."[188] However, in 1991, the British High Court opted out of the *lex posteriori* supremacy doctrine. Subsequently, Member States yielded to EU law and fell under the realm of *lex superior* principle.

Under EU law, the national state democratic right to rethink a former legal position is sacrificed for the benefit of "common policies and markets." The federal solution affects Member States in two ways. First, in cases of EU exclusive autonomy, the federal solution terminates national legislative competency in the name of preemptive competency. Second, in split competency situations the remaining Member States' competency is under the command of EU harmonization policies.[189]

2. ECJ Contra Legem Deviations?

We sometimes hear comments such as the "ECJ is an activist court."[190] However, there is little empirical support for this attitude. Perhaps this feeling more often reflects national politicians' need to blame someone else for not predicting unpopular situations created by new court decisions?[191]

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187. SWEET, *supra* note 57, at 170.

188. *See id.*

189. See, for example, approximation of law under rules of competition in EC Treaty article 94 ff.

190. *See, e.g.,* HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 51-74 (1986); *see also* PATRICK NEILL, THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM 1 (1995).

191. This sentiment can be seen in John Nash's "Monday Morning Players" which is displayed every now and then. *See also* comments made by former Norwegian Prime Minister

My view is that the ECJ leaves very little room for "activism" and that the Court is clearly rule-oriented. This attitude not only relates to codified law, but also to case law. It closely follows the *"stare decisis"* decisions.[192] The Court's position mirrors its role as made manifest by EC Treaty Article 230, which states that the ECJ shall review the legality of acts made by EU institutions. Protection of prerogatives is specifically mentioned in the third paragraph of Article 230. Does the ECJ abide by this requirement, or does it in fact deviate from it?

An activist court could not be depicted without the ECJ breaching EU law as strictly interpreted. I have not found any *contra legem* court adaptations. The closest the Court comes occurs in the cases of *Comitology*[193] and *Chernobyl,*[194] where the Court, at least in these cases, played the lawmaker's role. In the first case, the EU Parliament, lacking *"locus standi,"* found no remedy for a breach of procedural rules so the case was dismissed. Thus, Parliament was forced to accept that a negligent Commission renounced Parliament's legitimate legislative role.[195] This ruling was due to the fact that Parliament had no standing under EC Treaty Article 230.[196] Shortly after, however, the court changed its mind. In the *Chernobyl* case, Parliament was granted *locus standi*.[197] It is possible, then, that the ECJ acted *contra legem* in its second decision. The EU parliament took the position that:

> A new factor distinguished the present case from Case 302/87…. [T]he Court pointed out that it was the responsibility of the Commission under Article 155 [now Article 211]…to ensure that the Parliament's prerogatives were respected and to bring any actions for annulment which might be necessary for that purpose. However, the present case shows that the Commission cannot fulfil that responsibility since it chose a legal basis for its proposal which was different from the legal basis which the Parliament considered appropriate.

Jens Stoltenberg (Labor) who blamed EFTA Surveillance Agency (ESA) — and thereby also EFTA Court, which in all disputes that involved Norway had supported ESA — for activist roles downplaying clear EEA-law. (Oslo Newspaper "VG" March 20th 2003, *at* http://www.vg.no/pub/vgart.hbs?artid=51776.)

192. *See supra* note 80.

193. Case 302/87, Parliament v. Council, 1988 E.C.R. 5615.

194. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041.

195. *See* EC Treaty art. 251 & 252.

196. The 1992 Treaty of Maastricht amended this article.

197. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041.

> Consequently, the Parliament cannot rely on the Commission to defend its prerogatives by bringing an action for annulment.[198]

The Parliament advocated a "legal-vacuum-position." Consequently, it could be said the Court acted not *contra legem,* but rather *praeter legem,* or perhaps even *infra legem*. If the court ruled for Parliament, it would not be playing the role of activist, but more wisely the role of responsible adjudicator. Did the ECJ buy this argument? Having first stated that present legal remedies did not sufficiently guarantee that a measure adopted by the Council or the Commission in disregard of Parliament' s prerogatives would be reviewed, the Court assumed its institutional balance responsibility.

> In carrying out that task the Court cannot, of course, include the Parliament among the institutions which may bring an action under Article 173 [now Article 230] of the EEC Treaty…without being required to demonstrate an interest in bringing an action.
>
> However, it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner.
>
> The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.
>
> Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is

198. *Id*. at I-2070 § 6.

> founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.[199]

The ECJ could not include Parliament among the institutions listed in Article 230. While the lack of *locus standi* is a "procedural gap," it does not mean that procedural rights are denied. It is a *praeter legem*, not *contra legem* issue. Thus, referencing the Court as an activist in this situation is inappropriate.

Some might say that these are but two within a wide range of cases. In reviewing a great variety of cases, one sometimes faces surprising results, such as the results in the EEC groundbreaking cases.[200] However, if these cases portray "bully courts," why then do ECJ judges and national courts acknowledge such results as law? If the ECJ is that far "out of step" with valid EU law, as some say, it would not have gained the prominence it now enjoys. The cognition of the ECJ position not only relies upon case law practices, but also verbatim formulation on "institutional balance" issues. Let us determine whether *contra legem* practice by EU institutions outside the court may form new law.

3. Other Deviations Contra Legem

Among the first cases to focus on the EC institutional balance was the *Roquette* case:

> The consultation provided for in the third subparagraph of article 43 (2) [now Article 37] as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty.[201]

The codified constitutional balance is confirmed by ECJ case law. EU and EC Treaties install institutions for legislation,

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199. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041, I-2073 §§ 24-27.

200. *See, e.g.,* Case 26/62, NV Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlandsc Administratic der belastigan, 1963 E.C.R. 1; Case 6/64, Costa v. ENEL, 1964 E.C.R. 585; Case 22/70, Commission v. Council, 1971 E.C.R. 263; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A, 1978 E.C.R. 629; Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641.

201. Case 138/79, Roquette Freres v. Council, 1980 E.C.R. 3333, 3334 § 4 .

execution, and justification. This system for distributing power specifically assigns prerogatives to each organ:

> Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.
>
> Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. [202]

Clearly, this fixed system of competence will sometimes result in clashes. The question for debate is whether borderlines between functions may be redefined due to longtime practices. One early case that illustrates the importance of administrative practices is the *Hormonal Injection* case*:*

> [I]n the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis.[203]

No institution may establish derogative practices. This position has been steadfastly maintained, although it has become more specific. In the *EU-U.S. Competition Agreement* case*,* the ECJ in an effort to divide competencies between institutions, said that the treaty is the one and only source of law:

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202. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041, 2072 §§ 21-22.

203. Case 68/86, United Kingdom of Great Britain & Northern Ireland v. Council, 1988 E.C.R. 855, 898 § 24.

> [A]ccording to the Commission…it may derive its powers from sources other than the Treaty, such as the practices followed by the institutions. Moreover, reasoning by analogy from the third paragraph of Article 101 of the Euratom Treaty, the Commission considers that it can itself negotiate and conclude agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget without giving rise to any new financial obligations on the part of the Community, provided that it keeps the Council informed.
>
> That argument cannot be accepted.[204]

One of the basic arguments for rejecting a rule-creating administrative practice in contradiction to the treaty-based constitutional balance is that "in any event, a mere practice cannot override the provisions of the Treaty."[205] "Override" means the establishment of a practice totally contradictory to legislation. However, taking later case law into consideration, such conclusions seem inaccurate. In the *Edicom* case, the ECJ states:

> As for the argument based on previous practice, suffice it to say that a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and therefore cannot create a precedent binding on the Community institutions with regard to the correct legal basis.[206]

Deviations from treaty-based balances of competencies are *contra legem* and deemed illegal. As far as I can see, there are no exceptions to this principle.

D. Deviation by Agreement?

May EU institutions agree upon competency rearrangements alternatively to the treaty prerogatives? Is the treaty institutional balance negotiable?

Obviously, the answer is no. Nowhere in the treaties are bargaining positions available. Apparently the provision of EC

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204. Case C-327/91, French Republic v. Commission, 1994 E.C.R. I-3641, I-3676 §§ 31-32.
205. *Id.* at I-3677 § 36.
206. Case C-271/94, Parliament v. Council, 1996 E.C.R. I-1689, I-1714 § 24.

Treaty Article 300(7), which states that concluded agreements should be binding on EU institutions and the Member States, does matter. Internal arrangements are not included, while international agreements are.

I am not aware of any agreements between EU institutions concerning the balance of power that have been tried before the ECJ. One case that relates to such "competency cooperation" is the EU 1993 *FAO Arrangement*.[207] Since the arrangement was considered valid under the EC Treaty ("[n]or has the Council contested its effects at any moment in the proceedings"[208]), the voting arrangement was not challenged, which clearly would have been the case if the Council had considered it illegal. The Court's ultimate position with respect to such agreements is only indirectly known. If the 1993 Arrangement were considered contrary to the EC Treaty, that would have been considered an argument in the dispute. Since it was not, the Commission, the Council, and the United Kingdom clearly acknowledged the arrangement as legally valid. However, somewhat indirectly we may anticipate that under no circumstances will arrangements made between EU institutions that challenge the delicate balance of power, as determined through the treaty prerogatives, be upheld. Whether entities may choose not to use their own power depends upon whether that agency enjoys the freedom to not act. If an omission is a misuse of power, that option is closed.

VI. CONCLUSIONS

The "constitutionalized" EC Treaty does not allow any deviation from the institutional balance. ECJ case law is characterized by strict-rule-orientation. If entitlement fails, the EU must resort to EC Treaty Article 308 ("the rubber paragraph"). However, this competency does not allow for subsidiary legislation that exceeds treaty limits; no amendment is possible. Since the ECJ confirms that Article 308 blocks amendments, this article does not predate Article 5. Therefore, Article 308 should be read within the framework of Article 5.

Member States' private ownership regulation that does not affect trade in "industrial and commercial property" is outside of EU competency (EC treaty Article 295). It appears systems of property are still under the Member States' exclusive autonomy. When rights are tradable, trade in ownership rights are part of EU exclusive competency under common competition policy. Since *l'effet*

207. *See, e.g.*, Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469, I-1510 §§ 48-49.
208. *Id.* at I-1510 § 49.

utile holds even remote consequences as relevant, the outer limits of Member States competency are still undefined.

By the "extension mechanisms" of extraterritorial law and association agreements, the EU increases its geographical scope. The EU includes foreign corporations under the competition *acquis.* The European Economic Area agreement considerably extends parts of the *acquis commonautaire* to non-members of the EU.

EU competency is horizontally and vertically divided. "Horizontal competency" reserves to the EU exclusive competency in areas of law covered by common policies. Under areas of split competency, Member States play a role in the legislative process. Only treaty-based, shared, joint action competencies require the EU to cede to Member States (see, for example, EC Treaty Article 155). In all other instances, the EU may decide that its own institutions are better suited to decide issues than are Member States' institutions. "Institutional clashes" due to administrative practices that deviate from codified solutions are governed by the latter. The ECJ clearly protects treaty prerogatives.

HOW LONG MUST ONE STAY IN THE USVI TO BE CONSIDERED A "RESIDENT" TO QUALIFY FOR THE 90% RESIDENCY TAX CREDIT?

BECKETT G. CANTLEY*

Table of Contents

I. INTRODUCTION

Residents of the United States Virgin Islands (USVI) generally[1] file their tax returns with the USVI tax authorities rather than the Internal Revenue Service (IRS).[2] Such residents also generally[3] make

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1. I.R.C. § 932(a)(1)(A) (2003). A taxpayer:
> is a citizen or resident of the United States (other than a bona fide resident of the Virgin Islands at the close of the taxable year), and [who] has income derived from sources within the Virgin Islands, or effectively connected with the conduct of a trade or business within such possession, for the taxable year….

2. Rev. Rul. 60-291, 1960-2 C.B. 407 (1960). This rule states the following:
> For taxable years for which income tax returns are due on or after July 22, 1954, citizens of the United States who are inhabitants of the Virgin Islands, as defined in section 28(a) of the Revised Organic Act of the

all tax payments to the USVI taxing authorities.[4] The U.S. Naval Services Appropriation Act states that the income tax laws in force in the United States are likewise in force in the USVI.[5] As the law developed under the mirror system, the provisions of the Internal Revenue Code are applicable to the Virgin Islands so long as the specific section to be applied is not "manifestly inapplicable or incompatible with

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> Virgin Islands, are required to satisfy their income tax obligations to the United States under the applicable taxing statutes of the United States by *filing their returns with the taxing authority of the Virgin Islands*….

(emphasis added). *See also* OFFICE OF GOVERNOR, U.S. VIRGIN ISLANDS, *Tax Structure of U.S. Virgin Islands,* 93 TAX NOTES INT'L 171-18, Sept. 3, 1993, *available at* LEXSTAT 93 TNI 171-18 (discussing the USVI tax consequences for individuals, corporations, and charities).

3. The Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1642 (2000) states the following:

> The proceeds of customers duties, the proceeds of the United States income tax, the proceeds of any taxes levied by the Congress on the inhabitants of the Virgin Islands, and the proceeds of all quarantine, passport, immigration, and naturalization fees collected in the Virgin Islands, (less the cost of collecting all such duties, taxes and fees…), shall be covered into the treasury of the Virgin Islands, and shall be available for expenditure as the Legislature of the Virgin Islands may provide: *Provided*, That the term "inhabitants of the Virgin Islands" as used in this section shall include persons whose permanent residence is in the Virgin Islands, and such persons shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands….

See also Rev. Rul. 60-291, s*upra* note 2, *at* 1. This rule provides the following:

> For taxable years for which income tax returns are due on or after July 22, 1954, citizens of the United States who are inhabitants of the Virgin Islands, as defined in section 28(a) of the Revised Organic Act of the Virgin Islands, are required to satisfy their income tax obligations to the United States under the applicable taxing statutes of the United States by…*paying into the treasury of the Virgin Islands their tax on income derived from all sources, both within and without the Virgin Islands.*

(emphasis added.)

4. The contact information for the Bureau of Internal Revenue (BIR) for St. Thomas and St. John is:

> Virgin Islands Bureau of Internal Revenue
> Lockhart Gardens No. 1A
> St. Thomas, Virgin Islands 00802
> (809) 774-5865
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> Virgin Islands Bureau of Internal Revenue
> No. 1DA Estate Diamond
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> St. Croix, Virgin Islands 00820
> (809) 773-1040
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5. 48 U.S.C. § 1397 (2000). *See also* Marjorie Rawls Roberts, *U.S. Virgin Islands Enacts Expanded Tax Incentives for Business Owned by Long-Term Residents,* 2001 WORLDWIDE TAX DAILY 113-13, June 11, 2001, *available at* LEXSTAT 2001 WTD 113-13.

a separate territorial income tax."[6] Moreover, under the "equality principle," discussed in Johnson v. Quinn,[7] "the tax to be paid [to the Virgin Islands] ordinarily is measured by the amount of income tax the taxpayer would be required to pay to the United States of America if the taxpayer were residing in the continental United States."[8]

For example, a USVI corporation would file Form 1120 with the Virgin Islands Bureau of Internal Revenue (BIR) and not with the U.S. Internal Revenue Service. If the corporation was engaged in business only in the USVI, it would not have any additional income tax filing requirements. If a USVI corporation is engaged in business in the United States, it files a Form 1120F, not Form 1120, with the IRS. As for individuals, a U.S. citizen who is a bona fide resident of the USVI files a single Form 1040 with the BIR reporting his or her worldwide income and does not file a Form 1040 with the IRS.[9]

Residents of the USVI can be eligible for as much as a 90% tax credit[10] on their personal income or investment income from ownership in certain business entities[11] by taking advantage of the Economic Development Commission (EDC)[12] program[13] for investment in the

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6. Chicago Bridge and Iron Co. v. Wheatley, 430 F.2d 973, 976 (2d Cir. 1970).
7. 821 F.2d 212, 214 (3d Cir. 1987).
8. *Id.* at 214. *(quoting Chicago Bridge*, 430 F.2d at 975-76).
9. *See* Roberts, *supra* note 5.
10. *Id.* at 4.

> According to the Economic Development Program, a beneficiary receives a 90 percent reduction in its income tax liability on income from the business for which benefits are granted (although the benefits can be reduced upon renewal). The reduction results in an effective tax rate of approximately 4 percent on income from approved operations. If the beneficiary's owners are residents of the U.S. Virgin Islands, the owners also receive the reduction on their dividends or distributions.

11. Marjorie Rawls Roberts, *Legislative Changes Expand, Clarify U.S. Virgin Islands Tax Incentives,* 2000 WORLDWIDE TAX DAILY 204-6, October 16, 2000, *available at* LEXSTAT 2000 WTD 204-6.

> On February 12, 1998, the USVI finally enacted legislation permitting the establishment of limited liability companies, the registration of foreign limited liability companies, and the establishment of limited liability partnerships. The legislation which went into effect June 1, 1998, provided that under the [then] Industrial Development Program, "corporation" shall include a limited liability company and "partnership" shall include a limited liability partnership if the limited liability company or limited liability partnership otherwise meets all of the requirements for industrial development benefits [now economic development commissions].

See also Act No. 6204, § 6(a), Sess. L. 1998; 29 V.I.C. § 703(i).

12. Marjorie Rawls Roberts, *U.S. Virgin Islands Promulgates New Law on Investment Incentives,* 2001 WORLDWIDE TAX DAILY 67-6, April 3, 2001, *available at* LEXSTAT 2001 WTD 67-6 (stating that the Industrial Development Program changed to the Economic Development Commission). Furthermore:

> Act No. 6390 adds a new chapter to the territory's economic development statute, establishing an economic development authority (EDA). It is an umbrella organization that integrates and unifies the

USVI.[14] Under the law of the Virgin Islands, the Governor is given limited review discretion over program participants.[15] The Legislature explicitly states that its intent is that the Governor use this power only to determine whether a business will "promote the public interest by economic development in the Virgin Islands."[16]

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functions of the Government Development Bank, the EDC, the Industrial Park Development Corporation, and the Small Business Development Agency under one executive board.

13. The USVI Exempt Companies Act of 1986 authorized a new provision to I.R.C. §934(b) which became operative on Feb. 24, 1987 with the signing of the Tax Implementation Agreement (TIA) between the United States and the Virgin Islands. Under the initial agreement qualified foreign owned companies could elect for a 20-year local exemption from all taxes except for a $1,000 annual franchise tax. To qualify the company had to pass certain tests:

1. No U.S. person (or USVI person) could own (within the meaning of I.R.C. § 958) 10% or more of the total voting power or value of its stock;
2. The company could not have U.S. source income, nor income effectively connected with the conduct of a trade or business within the U.S.;
3. The company could not carry on a USVI trade or business; and
4. The company must disclose certain information to the IRS about its activities (but paid no taxes).

While the requirements for inclusion of benefits under the economic development program have changed since its initial inception, it has become broader and now includes a broader base of business which can apply for the tax benefits and also initiated new tax incentive programs specifically designed for small business. *See* I.R.C. § 934(b) (2003).

14. 29 V.I. CODE ANN. § 708 (2002).

15. *Id.*

16. *Id. See also* Virgo Corp. v. Paiewonsky, 5 V.I. 417 (D. St. Croix 1966), *rev'd on other grounds* (holding that the Legislature intended the Governor to use his discretion only to determine if the business will promote the public interest by economic development in the Virgin Islands). *See also* Corp. v. Paiewonsky, 6 V.I. 256 (D. St. Croix 1968) (holding that if an industry is of economic benefit to the Virgin Islands, then the individuals or companies which make up that industry must of necessity benefit the Virgin Islands' economy. Grants under the industrial incentive program are closely articulated with the purposes of the program in advancing the economic development of the Virgin Islands and are not intended as mere gratuities or bounties).

These credits have been in existence for almost fifty years[17] and are filled with historical precedent.[18] These credits are also safely guarded by many members of the U.S. Congressional Black Caucus.[19] In response to the Organisation for Economic Cooperation and Development's (OECD) blacklist of tax havens on which the United States Virgin Islands were included, the U.S. Congressional Black Caucus stated that including the U.S. Virgin Islands on the list "will undermine the ability of developing nations and one of our own territories to strengthen and diversify their economies and reduce poverty."[20]

One of the most perplexing questions surrounding the acquisitions of these tax credits is how many days during the tax year must a person "reside" in the USVI in order to complete the "residency" requirement? It is clear that a person must reside in the USVI on the last day of the tax year to be considered a "resident".[21] However, unlike the United

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17. Rev. Rul. 60-291, *supra* note 2 :

> The Revised Organic Act of the Virgin Islands was approved on July 22, 1954, and its provisions became generally operative as of such date. See section 34 of that Act, 48 U.S.C. Supp. V 1541. However, insofar as it is pertinent here, section 7651(5)(B) of the Internal Revenue Code of 1954 provides, "For the purposes of this title [Title 26], section 28(a) of the Revised Organic Act of the Virgin Islands shall be effective as if such section had been enacted subsequent to the enactment of this title." It is clear, therefore, that section 28(a) of the Act was not revoked by the enactment of the 1954 Code.
>
> Accordingly, although section 6151 of the Code requires, in general, that payments of Federal tax be made to the principal internal revenue officer for the internal revenue district in which the return is required to be filed and section 6091 of the Code requires, in general, that returns be filed in the district in which is located the residence or principal place of business of the taxpayer, by reason of section 28(a) of the Act inhabitants of the Virgin Islands are required to file their income tax returns due on or after July 22, 1954, with and pay their tax from all sources to the taxing authorities of the Virgin Islands.

18. The USVI government was organized under the Revised Organic Act of 1954 in which the United States Congress stated the Virgin Islands is an unincorporated U.S. territory. When the USVI was determined to be an unincorporated U.S. territory many of the current deductions available to certain corporations were instigated. Furthermore, the Virgin Islands tax authority is composed of the Internal Revenue Code of 1986 (hereinafter IRC) and the Naval Appropriation Act, which established the principle that the IRC applies in the Virgin Islands under a "mirror system" where "the Virgin Islands" is substituted for "the United States" whenever necessary to give the I.R.C. the proper effect in the Virgin Islands.

19. U.S. CONGRESSIONAL BLACK CAUCUS, *US Congressional Black Caucus letter on the OECD blacklist, available at* http://www.thepanamanews.com/pn/v_07/issue_06/business_02.html, which was a letter in response to the OECD's blacklist of tax havens. The United States Virgin Islands was included in the list and the U.S. Congressional Black Caucus stated that the U.S. Virgin Islands' inclusion in the list, "will undermine the ability of developing nations and one of our own territories to strengthen and diversify their economies and reduce poverty." *Id.*

20. *Id.*

21. I.R.C. § 932(c) (2003). The code, summarized into more readable language, states the

States, there does not appear to be a 183-day residency requirement[22]

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following:

> A citizen or resident of the United States (other than a bona fide Virgin Islands resident) who derives income from the Virgin Islands or an individual who files a joint return with a citizen or resident of the United States who derives income from the Virgin Islands is not liable to the Virgin Islands for any tax determined under the Virgin Islands mirror code. The tax liability of such individuals to the Virgin Islands is a fraction of the individual's U.S. tax liability, based on the ratio of adjusted gross income derived from Virgin Islands sources to worldwide adjusted gross income. Such an individual files identical returns with the United States and the Virgin Islands. The Virgin Islands' portion of the individual's tax liability (if paid) is credited against his total U.S. tax liability. Taxes paid to the Virgin Islands by the individual, other than the Virgin Islands portion of his U.S. tax liability, are treated for U.S. tax purposes in the same manner as state and local taxes.
>
> Individuals who qualify as bona fide Virgin Islands residents *as of the last day of the tax year* (or individuals who file a joint return with such bona fide residents--see the special rule for joint returns, below, however) pay tax to the Virgin Islands under the mirror system on their worldwide income. They have no final tax liability for such year to the United States, as long as they report all income from all sources and identify the source of each item of income on the return filed with the Virgin Islands. Any taxes withheld and deposited in the United States from payments to such individuals, and any estimated tax payments properly made by such individuals to the United States, are covered into the Virgin Islands Treasury and are to be credited against their Virgin Islands tax liability. Residents of the Virgin Islands who derive gross income from sources outside the Virgin Islands report all items of such income on their Virgin Islands return. Information contained on these returns is compiled by the Virgin Islands Bureau of Internal Revenue and transmitted to the IRS in order to facilitate enforcement assistance.

(emphasis added).

22. 1987-2 C.B. 947 (1960) which provides:

> The Tax Reform Act of 1984 added section 7701(b) to the Code to provide a definition of the term "resident alien". Under section 7701(b)(1), an alien individual is considered to be a resident of the United States if he satisfies either of two tests: the green card test or the substantial presence test. As provided in section 7701(b)(1)(A)(i) and (b)(6), an alien individual is considered to be a resident under the green card test if he is a lawful permanent resident of the United States at any time during the calendar year. Under the substantial presence test provided in section 7701(b)(3), an alien individual is treated as a resident if (1) he is physically present in the United States for 183 days or more during the current year, or (2) the sum of the days the alien is physically present in the United States during the current year, plus one-third the number of days the alien is physically present in the United States during the second preceding calendar year, plus one sixth the number of days the alien is physically present in the United States during the second preceding year equals or exceeds 183 days. Section 7701(b)(3) also provides that an individual shall not be considered to meet the substantial presence test if the individual is present in the United States for fewer than 183 days in the current year, has a tax home in a foreign country, and maintains a closer connection to that foreign country than the United States.

Id. For Example, B, an alien individual, is a resident of foreign country X under X's internal

to be considered a resident of the USVI.[23] The purpose of this article is to determine the best answer to the question "How many days must a resident live in the USVI in order to be a 'resident' for purposes of taking advantage of the USVI tax credit"?

II. TAX CONSEQUENCES OF BEING A USVI RESIDENT

A. The 90% Tax Credit

Under the Economic Development Commission's program, a beneficiary company receives a 90% reduction in its income tax liability[24] on income from the business for which benefits are granted.[25]

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law. Country X is a party to an income tax convention with the United States. B is also a resident of the United States under United States law. B is considered to be a resident of country X under the articles of the convention. The convention does not specifically deal with characterization of foreign corporations as controlled foreign corporations or the taxability of United States shareholders on inclusions of subpart F income, but it provides, in an "other Income" article similar to Article 21 of the 1982 draft of the United States Model Income Tax Convention (U.S. Model), that items of income of a resident of country X that are not specifically dealt with in the articles of the convention shall be taxable only in country X. B owns 80% of the one class of stock of foreign corporation R. The remaining 20% is owned by C, a United States citizen who is unrelated to B. In 1985, corporation R's only income is interest that is foreign personal holding company income under §1.954-2. Because the United States-X income tax convention does not deal with characterization of foreign corporations as controlled foreign corporations, United States internal income tax law applies. Therefore, B and C are United States shareholders within the meaning of §1.951-1(g), corporation R is a controlled foreign corporation within the meaning of §1.957-1, and corporation R's income is included in C's income as subpart F income under §1.951-1. B may avoid current taxation on his share of the subpart F inclusion by filing as a nonresident (*i.e.,* by following the procedure in §301.7701(b)-7(b)). If B files as a nonresident, then his share of the subpart F income will not be subject to tax in the United States because the "other Income" article of the convention reserves to the state of residence the exclusive right to tax income other than those items specifically covered in the convention.

23. Marjorie Rawls Roberts, *Legislative Changes Expand, Clarify U.S. Virgin Islands Tax Incentives,* 2000 WORLDWIDE TAX DAILY 204-6, Oct. 16, 2000, *available at* LEXSTAT 2000 WTD 204-6.

> Before amendment by Act No. 6269 "resident of the United States Virgin Islands" was defined to mean any United States citizen currently domiciled in the USVI for one year or more, or the holder of an alien registration receipt card (United States Department of Justice Form No. 1-151) domiciled in the USVI for one year or more. The statute provided that demonstration of the required residency period could be shown by 'using the date of issuance information from a W-2 form, a voter registration card, a permanent resident card, or a United States Virgin Islands driver's license.

24. For example, Coca-Cola opens a bottling subsidiary in the USVI and has $100,000,000 in gross sales in 1999 and before tax profits of $10,000,000. Under the USVI economic development program, the regular U.S. income tax rate of 35% will be applied to the profits, but 90% of the tax payment is exempt, making the actual tax paid to the USVI treasury $350,000. That is an effective tax rate of 3.5%.

25. 29 V.I.C. § 708(a) gives a detailed list of the business that the USVI wishes to attract. The statute provides:

> Invest at least $100,000, exclusive of inventory, in an approved

The reduction results in an effective tax rate of approximately 4% on income.[26] If the owners of a beneficiary business are USVI residents, the owners also receive a reduction on certain dividends[27] or distributions[28] from the beneficiary business.

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industry or business that the Commission has determined to advance the economic well-being of the Virgin Islands and its people. The approved industries or businesses and their established categories shall be: Category I — Rum Production, Milk/Dairy Production, Watch and Jewelry Manufacturing and Assembly; Category II — Product Assembly, Manufacturing (other than Jewelry and Watch Manufacturing and Assembly), Agriculture/Food Processing, Mari culture/Food Processing, Marine Industry, Raw Materials Processing, Hotels/Guesthouses, Transportation and Telecommunications; Category IIA — Service Businesses, not limited to but including, Investment Managers and Advisors, Research and Development, Business and Management Consultants, Software Developers, E-Commerce Businesses, Call Centers, High Tech Businesses, International Public Relations Firms, International Trading and Distribution, and any other businesses serving clients located outside the Virgin Islands. Category III — Utilities, Health Care Facilities, Recreation Facilities, and such other industries or businesses as may be deemed appropriate by the Commission. However, any application that qualifies in two categories, under the provisions of this subsection, shall be considered in the highest payment fee and term category for the purposes of this chapter and an applicant may apply in more than one approved industry or business. Such industry or business shall not, except as provided in section 715 of this chapter, be the same or substantially the same enterprise as one previously granted industrial development benefits under the same or substantially the same ownership, disguised, in whatever manner, for the purpose of qualifying for benefits under this chapter. The fair market value of all equipment leased for a term of at least five years shall be included in determining compliance with the investment requirement. In determining the amount of the investment undertaken by the applicant for purposes of this subsection, the assessed value of land and previously existing buildings (as assessed for tax purposes) used in the industry or business shall be included only to the extent that it does not exceed twenty (20%) percent of the investment undertaken; however, this provision shall not apply to an industry or business of a nature in which investment in land and alteration and/or improvement thereof represents its primary investment factor. The minimum investment required by this section may be reduced, if the Commission finds that the proposed industry or business will provide sufficient employment to justify the lower investment.

26. For further amplification, *see example supra* note 22.
27. 29 V.I.C. 713b(e) (2002). The statute provides that:

> The provisions of this subsection shall apply only to shareholders, members, partners, grantors, beneficiaries, or other owners who are bona fide residents of the Virgin Islands pursuant to section 932(c) of the Internal Revenue Code of 1986, as amended. Such shareholders, members, partners, grantors, beneficiaries, or other owners shall be entitled to a ninety percent (90%) reduction on income taxes payable with respect to income derived from the dividends or distributions paid to them by the beneficiary and which dividends or distributions are attributable to income derived from the business or industry for which the certificate is granted and income from investments described in section 713d(c)(2).

28. *Id.*

In general, residency is determined under section 932(c) of the Internal Revenue Code of 1986,[29] which means that a person must be a bona fide resident as of the end of his or her tax year.[30] Beneficiaries also may receive an exemption from the USVI property tax (.75% of the property's fair market value),[31] an exemption from USVI gross receipts tax (otherwise imposed at 4% on the gross receipts of a business with no deductions),[32] and exemptions from excise taxes on building materials[33] and raw materials.[34]

B. The Real Estate Exemption

Real property taxes[35] are generally comparably lower in the USVI than in the United States.[36] A tax rate of $1.25 per hundred dollars is applied against 60% of "actual value."[37] The real property tax may be reduced by establishing a homestead exemption.[38] If the owner occupies at least a portion of the property full time, the first $15,000 of assessed value is not taxable.[39] For veterans and widow/widowers of veterans, the exemption is $25,000.[40] Persons sixty years old and over having

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29. I.R.C. § 932(c) (2003).

30. *Id.*

31. 29 V.I.C. § 713a (2002).

32. *Id*. at § 713a(a)(2). "All banks as defined by the word 'bank' in Title 19, chapter 1, section 1 of the Virgin Islands Code shall be exempt from the payment of all gross receipts taxes imposed by the Government of the Virgin Islands." 33 V.I.C. § 43(d). *See also* Marjorie Rawls Roberts, *Tax Statute Benefits Knowledge-Based Businesses, Establishes Research and Technology Park*, 28 TAX NOTES INT'L 451, 452, Nov. 4, 2002, *available at* LEXSEE 28 Tax Notes Int' l 451.

33. *Id.* at 713a(a)(3).

34. 33 V.I.C. § 43(d) (2003).

35. OFFICE OF GOVERNOR, *supra* note 2 (stating the Lieutenant Governor's office is responsible for the administration of the real property tax). *See also* 33 V.I.C. § 2301 (2002).

36. 2-34 FLORIDA REAL ESTATE TRANSACTIONS § 34.01:

> All real and personal property in the state, unless immune or expressly exempted, … is subject to taxation [see § 192.011, Fla. Stat.]. Real property, for purposes of taxation, includes land and all buildings, fixtures, and other improvements [§ 192.001(12), Fla. Stat.]. An ad valorem tax is a tax based on the assessed value of property.

Id. Compare 33 V.I.C. § 2301 (2002), which provides that property taxes are assessed, levied and collected a tax of one and one quarter percent (1.25%) of sixty percent (60%) of such assessed value of all real property in the Virgin Islands.

37. OFFICE OF GOVERNOR, *supra* note 2.

38. The Homestead Act, 33 V.I. CODE ANN. § 2305 (2002).

39. *Id.*

40. 33 V.I.C. § 2305(b) (2002):

> Provided, however, that homestead exemptions for veterans and for widows of veterans shall be an exemption from real property taxes in an amount not to exceed the then applicable rate of such taxes multiplied by valuation not to exceed $25,000 on property on which the owner has his homestead exemption constituted. If the property on which the homestead is constituted is assessed up to $25,000, the entire property shall be exempted from the payment of real property taxes. If the property on

maximum income of $10,500 per year are granted an exemption of up to $30,000 assessed value.[41] The maximum exemption in any situation is $20,000 (or $250 in tax).[42]

C. The Economic Development Commission (EDC) System

Under the federal umbrella, the USVI legislature enacted the EDC program.[43] The EDC program establishes the types of businesses that the USVI is seeking to attract with tax benefits and the requirements for obtaining those benefits.[44] There are four categories of industries or business that the EDC seeks to attract to the USVI. The categories are:

> which the homestead is constituted is assessed for more than $25,000 the homestead exemption of $25,000 shall be deducted from the total assessment of property, and shall not be taxable. Provided, further, that the entire homestead property of a veteran who has military service connected disability due to war or peacetime service entitling him to compensation for permanent and total disability due to: (a) the loss or loss of use of both lower extremities such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or (b) disability which includes blindness in both eyes, having only light perception, plus loss or loss of use of one lower extremity, as determined by a Veterans' Administration disability board, shall be exempted from the payment of all real property taxes. For the purposes of this section "veteran" means a person who served in the active military, naval or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.

41. 33 V.I.C. § 2305(b) (2002):

> Provided that homestead exemption for persons 60 years of age or over whose annual gross income from all sources does not exceed $10,500 shall be an exemption from real property taxes in an amount not exceeding the then applicable rate of such taxes multiplied by valuation not to exceed $30,000 on property on which the owner has his homestead constituted. If the property on which the homestead is constituted is assessed up to $30,000 the entire property shall be exempted from the payment of real property taxes. If the property on which the homestead is constituted is assessed for more than $30,000 the homestead exemption of $30,000 shall be deducted from the total assessment of property, and shall not be taxable....

42. *Id*.

43. Roberts, *supra* note 5 (explaining the change from the Industrial Development Program to the Economic Development Commission). *See also* Marjorie Rawls Roberts, *U.S. Virgin Islands Expands Tax Benefits Under Economic Development Program,* 2002 WORLDWIDE TAX DAILY 197-1, Oct. 8, 2002 *available at* LEXSTAT 2002 WTD 197-1 (explaining that the Economic Development Commissioner receives lengthy, detailed tax benefits applications from business, holds public hearings, and approves or denies the applications).

44. 29 V.I.C. § 708(a) (2002). For the pertinent text of the statute refer to note 26. *See also* 29 V.I.C. § 708(f). The statute requires that the beneficiary must employ at least 10 USVI residents full-time (working at least 32 hours a week). 29 V.I.C. 710(a) further requires that regardless of the number of employees, at least 80% of all employees must be residents of the USVI.

> Category I: Rum production, milk/dairy production, and watch and jewelry manufacturing and assembly;[45]
>
> *Category II:* Product assembly, manufacturing (other than jewelry and watch manufacturing and assembly), agriculture/food processing, mari culture/food processing, marine industry, raw material processing, hotels/guesthouses, transporta-tion, and telecommunications;
>
> *Category IIA:* Service business not limited to but including, investment managers and advisers, re-search and development, business and management consultants, software developers, e-commerce busi-ness, call centers, high-tech business, international public relations firms, international trading and distribution, and any other business serving clients outside the Virgin Islands; and
>
> *Category III:* Utilities, health care facilities, recre-ation facilities, and such other industries or businesses as may be deemed appropriate by the commission.[46]

The above provided list differs from the originally enacted list. The USVI recently enacted legislation to make significant changes to the list.[47]

Under the EDC program, a beneficiary business must make a minimum capital contribution of $100,000,[48] exclusive of inventory[49] and provide full-time[50] employment for at least ten USVI resi-dents.[51] A

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45. *See* Marjorie Rawls Roberts, *U.S. Congress and USVI Enact Incentives to Attract Jewelry Manufacturers,* 2000 WORLDWIDE TAX DAILY 59-5, Mar. 27, 2000, for further analysis of the laws pertaining to manufacturers of jewelry and watches.

46. Roberts, *supra* note 5.

47. *See id.*

48. *See id.*

49. 29 V.I.C. § 708(a) (2002).

50. *See* 29 V.I.C. § 708-726 (2002) for the EDC Rules and Regulations. Specifically, 29 V.I.C. § 708(f) states that not only must an EDC beneficiary employ at least 10 USVI residents but they must be employed for at least 32 hours a week. *See also* 29 V.I.C. § 710(a) for the requirement that regardless of the number of employees one has, at least 80% of all employees must be residents of the USVI.

51. 29 V.I.C. § 708(f) (2002). The code does allow for employment of fewer than ten USVI residents if the employer can satisfactorily demonstrate to the Commission that "the employment of this number of persons in his particular enterprise would not be feasible or practical, and upon further finding by the Commission that the desirability of the proposed enterprise outweighs the fact that it is not labor intensive."

beneficiary business must also agree to purchase all goods[52] and services[53] available[54] in the USVI from USVI suppliers[55] that have valid business licenses[56] and are in full payment of their taxes.[57]

Benefits are available for ten years for the islands of St. John, St. Thomas, and the Christiansted District (eastern side of St. Croix), and for fifteen years for the Frederiksted District (western side of St. Croix).[58] Benefits can be extended for ten years[59] if the applicant is in

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52. 11A V.I. CODE ANN. § 2-105 (2002):

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 2-107).
>
> (2 Goods must be both existing and identified before any interest in them ca pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

11(A) V.I. Code Ann. § 2-105 (2002) Uniform Laws Comments:

> The *definition of goods* is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.
>
> Growing crops are included within the *definition of goods* since they are frequently intended for sale. The concept of "industrial" growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article. The young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted. The reason of this definition also leads to the inclusion of a wool crop or the like as "goods" subject to identification under this Article.
>
> The exclusion of "money in which the price is to be paid" from the *definition of goods* does not mean that foreign currency which is included in the definition of money may not be the subject matter of a sales transaction. Goods is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.

(emphasis added).

53. GILBERT'S LAW DICTIONARY 131 (Pocket size ed. 1997) defines "service" as: "To perform a job; to render labor for the benefit of another."

54. Roberts, *supra* note 5.

55. *See* 29 V.I.C. § 708(h) (2002).

56. *Id.* The "valid business license" test is met where a firm or corporation that is a resident of the USVI or incorporated under the laws of the USVI, has been licensed to conduct business in the USVI for at least a year.

57. *Id.*

58. 29 V.I.C. § 714(a) (2002).

59. Under prior law, a beneficiary upon proper application and review could obtain extensions to its benefits from the IDC in five-year increments. Eligible beneficiaries can now receive ten year and subsequent extensions in five -year increments. *See* 29 V.I.C. § 713a (b)

full compliance[60] with all requirements of the EDC and submits a completed[61] extension application.[62] The EDC has the authority[63] to reduce[64] the beneficiary business' benefits[65] under the EDC program upon a filing for an extension.[66]

In order to obtain EDC benefits, a beneficiary business must file a long application[67] and a public hearing[68] must be held to discuss the application.[69] After the hearing, the EDC holds an executive session[70] to discuss the potential granting of EDC benefits. If the application is

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(2002).

60. Full compliance means a firm or company that has met all the requirements needed to become a licensed business under the EDC and that the business continues to meet the requirements throughout the time they are licensed to conduct business in the USVI. *See* 29 V.I.C. § 708 (2002).

61. 29 V.I.C. § 714 (2002). The statute outlines requirements to obtain an extension under the EDC program. The application process generally consists of reviewing the company's business activities while a company was licensed as an EDC. *See also* 29 V.I.C. § 713(a) (2002); 29 V.I.C. § 715 (2002).

62. *See* 29 V.I.C. § 713(a) (2002); 29 V.I.C. § 714 (2002); 29 V.I.C. § 715.

63. The EDC has the authority to reduce the benefits it grants upon an extension, but not upon the initial grant. *See* Roberts, *supra* note 5.

64. *Id.*

65. The benefits would be the same that are granted under the EDC program to a licensed business; beneficiary businesses receive a 90% reduction of their tax liability on income from the business. Furthermore, they would receive a tax exemption from property tax; 29 V.I.C. § 713a(a)(1), an exemption from USVI gross receipts tax; 29 V.I.C. § 713a(a)(2), a reduction in customs duties on certain items; 29 V.I.C. § 713c, an exemptions from excise taxes on building materials; 20 V.I.C. § 713a(a)(3), and raw material; 33 V.I.C. § 43d.

66. 29 V.I.C. § 713a(b) (2002). Benefits can be extended for 10 years if the applicant is in full compliance with all requirements of the EDC and submits a completed extension application.

67. 29 V.I.C. § 717(a) (2002). The application process consists of a long application and a public hearing. After the hearing, the EDC holds an executive session in which benefits are discussed. The approved applications are then reviewed by the Governor who makes the final determination of all tax benefits.

68. 29 V.I.C. § 1007(a) (2002). The statute states that there "may or may not" be a public hearing. The "may or may not" requirement of this statute pertains to renewal of a company's economic benefits. A public hearing must be held whenever a company initially obtains the economic benefits granted by the EDC. 29 V.I.C. § 717(a) (2002).

69. 29 V.I.C. § 717(a) (2002).

70. Roberts, *supra* note 5. The author explains that: "[T]he board is to include three people who head cabinet-level executive departments or are on the governor's executive staff…In addition, the board includes three private citizens appointed by the governor, one each from St. Croix, St. John, and St. Thomas."

approved by the EDC, then the USVI governor[71] must review the approved application and approve any tax benefits.[72]

III. GENERAL RULES APPLICABLE TO USVI RESIDENTS

U.S. citizens who are non-resident to the USVI are generally not liable to the USVI for tax even where such non-residents are party to a joint U.S. federal income tax return with a USVI resident.[73] However, where a U.S. citizen who is a non-resident of the USVI chooses to file a joint income tax return with a USVI resident, the non-resident may elect to file the return in the USVI under certain circumstances.[74]

U.S. citizens who are non-resident to the USVI are only liable to the USVI for tax on income that the USVI non-resident derives from the USVI.[75] In such cases, the USVI non-resident would make a determination as to what fraction of the USVI non-resident's worldwide income represents USVI income and would file identical returns with the United States and the USVI.[76] Any taxes paid to the USVI would be credited against the USVI non-resident's total U.S. tax liability[77] in the same manner as state and local taxes.[78]

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71. 18 V.I.C. § 41 (2002). There are two election districts within the USVI, the district of St. Croix and the district of St. Thomas-St. John. Each district has a separate Board of Elections consisting of seven members who are elected by the electors in each district to terms of four years; provided that the St. Thomas-St. John Board shall include at least two members who are residents of St. John. No more than four members of the same political party shall be members of each board. *See* 3 V.I.C. § 1 (2002). The Governor and Lieutenant Governor are elected on the same ticket by popular vote for four-year terms. The Governor receives a salary of $80,000 per annum, payable in equal bi-weekly installments. The Governor may appoint such personal assistants and provide from the funds appropriated to his office such compensation for the same as he deems appropriate. *See also* http://www.cia.gov/cia/publications/factbook/geos/vq.html#Govt for more information on the USVI and the electoral system.

72. 29 V.I.C. § 717(a) (2002).

73. *See* I.R.C. § 932(c) (2003).

74. I.R.C. § 932(d) (2003). "Special rule for joint returns. In the case of a joint return, this section shall be applied on the basis of the residence of the spouse who has the greater adjusted gross income (determined without regard to community property laws) for the taxable year."

75. OFFICE OF GOVERNOR, s*upra* note 2.

> The V.I. tax liability for all other U.S. citizens or residents with V.I. income is computed as a fraction of the taxpayer's total tax liability, based on the ratio of adjusted gross income derived from V.I. sources to worldwide adjusted gross income. Such individuals must file signed identical returns with the United States and the Virgin Islands…using IRS Form 8689 to figure out what portion of their income tax must be paid to the Virgin Islands.

76. *Id.*

77. I.R.C. § 932(b) (2003).

78. *Id.*

USVI residents[79] pay tax to the USVI on their worldwide income.[80] In general,[81] USVI residents do not have to file federal income tax returns with the IRS.[82] The USVI resident's USVI income tax return must identify the source of each item of income on the return.[83] The USVI Treasury must credit any taxes withheld and deposited in the United States against the USVI resident's USVI tax liability.[84] The USVI Treasury must also credit any estimated taxes paid in the United States against the USVI resident's USVI tax liability.[85] Residents of the Virgin Islands who derive gross income from sources outside the Virgin Islands report all items of such income on their USVI income tax return.[86] The information reported on these USVI income tax returns is compiled by the Virgin Islands Bureau of Internal Revenue and transmitted to the IRS in order to facilitate enforcement assistance.[87]

There are special rules for joint return filers where one filer is a USVI resident and one is a USVI non-resident.[88] Where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income[89] for the tax year in question.[90]

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79. 29 V.I.C. § 703 (2002).

80. I.R.C. § 932(c) (2003). Individuals who qualify as bona fide Virgin Islands residents as of the last day of the tax year (or individuals who file a joint return with such bona fide residents--however, see the special rule for joint returns below) pay tax to the Virgin Islands under the mirror system on their worldwide income.

81. Individuals who qualify as bona fide Virgin Island residents (see explanation, *supra* note 81) have no final tax liability for such year to the United States as long as they report all income from all sources and identify the source of each item of income on the return filed with the USVI. Any taxes withheld and deposited in the United States from payments to such individuals, and any estimated tax payments properly made by such individuals to the United States, are covered into the Virgin Islands Treasury and are to be credited against their USVI tax liability. Residents of the USVI who derive gross income from sources outside the USVI report all items of such income on their USVI return. Information contained on these returns is compiled by the VI BIR and transmitted to the IRS in order to facilitate enforcement assistance. *Special rule for joint returns:* In the case of a joint return where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income (determined without regard to community property laws) for the tax year in question. *Authority to impose nondiscriminatory local income taxes:* In addition to taxes imposed under the mirror system, the USVI has the authority to enact nondiscriminatory local income taxes (which for U.S. purposes would be treated as deductible state or local income taxes). *See* I.R.C. § 932 (2003).

82. OFFICE OF GOVERNOR, *supra* note 2. "A Virgin Island resident files a Form 1040 with the Virgin Islands and pays taxes on their world-wide income to the Virgin Islands."

83. 26 C.F.R. 1.871-2(b) (2002) (emphasis added).

84. I.R.C. § 901 (2003).

85. 33 V.I.C. § 1181(d)(3) (2002).

86. OFFICE OF GOVERNOR, *supra* note 2.

87. *Id.*

88. I.R.C. § 932(d) (2003).

89. *Id.* In the case of a joint return where only one spouse qualifies as a resident of the USVI, the resident status of both spouses is determined by reference to the status of the spouse with the greater amount of adjusted gross income (determined without regard to

IV. WHAT DOES IT TAKE TO BECOME A USVI "RESIDENT"?

The USVI statutorily requires that all persons claiming residency in the USVI be a resident of the USVI on the last day of the tax year (end of year test).[91] By itself, this does not provide enough information to determine who is and who is not a resident of the USVI. Simply being present in the USVI on the last date of the year is not sufficient to acquire residency. In order to acquire residency, a person must be domiciled in the USVI on the last day of the tax year and either; (1) meet the U.S. "facts and circum-stances" test (described below), or (2) meet one of the other USVI statutory prescriptions for residency (also discussed below).

A. How the U.S. "Facts and Circumstances" Test Applies to the USVI

The U.S. Treasury Regulations provide that whether a person is a resident of the U.S. is determined by the "facts and circumstances" test. The facts and circumstances test provides that:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by *his intentions with regard to the length and nature of his stay*. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. *If he lives in the United States and has no definite intention as to his stay, he is a resident***.** One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.[92]

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community property laws) for the tax year in question.

90. *Id.*

91. I.R.C. § 932(c)(1)(A) (2003).

92. 26 C.F.R. 1.871-2 (2002). *See also* Preece v. Commissioner, 95 *T.C.* 594 (Dec. 5, 1990),

The first element of the "facts and circumstances" test is an actual physical presence in the United States for some time period although the time period may be indefinite.[93] Second, the "facts and circumstances" test requires an intention to stay in the United States.[94] Even if the intention is nothing more than a "floating intention"[95] or the person intends to later leave the United States,[96] if the person resides in the U.S., the courts will look at the nature of the person's business in the States[97] and how long they intend to stay[98] in order to determine whether the person should be considered a resident of the United States.

The "facts and circumstances" test sets forth one universal test for the courts to use in order to determine whether the person is a resident. There are no differing time periods for different classes of people or professions.[99] In general, this "facts and circumstances" test will apply equally to the USVI as it does to the United States.[100] As discussed below, the USVI also has carved out exceptions to the "facts and circumstances" test by statute[101] and case law.[102] However, in the absence of such exceptions, the "facts and circumstances" test should apply to determine USVI residency.

There are many facts and circumstances which could assist an individual in proving he or she is a resident of the USVI, such as: (1) registering to vote in the USVI; (2) obtaining a driver's license in the USVI; (3) leasing or purchasing a permanent home in the USVI; (4)

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for a judicial interpretation of the facts and circumstances test.

93. 26 C.F.R. 1.871-2(b) (2002).

> One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.

94. *Id.* "Whether he is a transient is determined by his intentions with regard to the length and nature of his stay."

95. *Id.* "A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident."

96. *Id.*

97. *Id.*

98. *Id.*

99. 26 C.F.R. 1.871-2(b) (2002).

100. *See* OFFICE OF GOVERNOR, *supra* note 2 for a discussion of the V.I. tax consequences for individuals, corporations, and charities. Thus, these "facts and circumstances" rules will also apply to the USVI under the "mirror system."

101. *See* 27 V.I.C. § 94 (2001) dealing with statutory requirements of registered nurses; 27 V.I.C. § 65 (2001) regarding licensing requirements for dentists; and 27 V.I.C. § 283 (2001) regarding general requirements for licensing.

102. *See Gumbs v. Gumbs*, 14 V.I. 550 (1978); Williams v. Williams, 8 V.I. 244 (D. St. Croix 1971).

joining a church, synagogue, or other religious organization in the USVI; (5) joining a social club in the USVI; and (6) obtaining USVI estate planning documentation. This non-exclusive common sense list of facts and circumstances would tend to show whether the person intends to make his or her permanent residency in the USVI. As such, if enough of these type of items have been accomplished prior to the last day of the tax year, then it would appear that both the "facts and circumstances" test and the "year end" statutory requirement have been met for personal residency, regardless of the amount of time the person has actually lived on the island.

B. Exceptions to the "Facts and Circumstances" Test

1. Employees: One-Year Test

The test used to determine residency for employees in the USVI is called the "one-year physical presence test."[103] This test is found under section 703 of the economic development statute[104] and provides that to determine residency for employment purposes, a USVI resident is a person who has resided in the USVI for at least one year.[105] This test was subsequently broadened[106] and currently includes any person who attended school in the USVI for at least six years[107] or who graduated from high school in the USVI and is registered to vote in the USVI.[108] In addition, a graduate of the University of the Virgin Islands is also a resident of the USVI as long as they are registered to vote.[109]

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103. I*d*.
104. 29 V.I.C. §703 (2002).
> According to the laws of the Virgin Islands, a resident of the Virgin Islands is defined as follows:
> (1) any United States citizen currently domiciled in the Virgin Islands for one (1) year or more;
> (2) a person who has attended a school in the Virgin Islands for at least six (6) years or is a high school or University of the Virgin Islands graduate and who is registered to vote in the Virgin Islands; or
> (3) the holder of an alien registration receipt card (United States Department of Justice Form No. 1-151) domiciled in the Virgin Islands for one (1) year or more. A person shall demonstrate that he has been a resident for one (1) year or more for the purposes of this chapter using the date of issuance information from a W-2 form, a voter registration card, a permanent resident card, or a Virgin Islands driver's license

105. *Id.*
106. Roberts, *supra* note 5. *See also* 29 I.R.C. § 703 (2003).
107. 29 V.I.C. § 703(e)(2) (2002).
108. *Id.*
109. *Id.*

2. Professional Licenses

Some of the professional licensure statutes only discuss residency with regard to a particular profession. For example, a residency requirement for a public notary[110] requires a person to:

> [B]e a citizen of the United States, at least 21 years of age and a resident of the Virgin Islands for at *least 5 years* preceding his appointment; provided, however, that notaries ex officio and members of the Virgin Islands Bar commissioned in accordance with the provisions of section 771 of this title shall not be required to comply with the five year residency requirement imposed by this section.[111]

However for certain medical professionals the residency requirement is drastically reduced.[112] For example, for registered nurses[113] the statute has been interpreted to mean:

> Where Legislature provided a *six-months'* residency requirement *for persons seeking entrance to certain medical and related professions*, but not for dentists and nurses, requiring a six-months' resi-dency of dentists

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110. 3 V.I.C. § 771(a) (2002) (covering specific provisions regarding notaries public).

111. 3 V.I.C. § 772 (2002) (emphasis added).

> (1) be a citizen of the United States at least 21 years of age and a resident of the Virgin Islands for at least 5 years preceding his appointment; Provided, however, That notaries ex officio and members of the Virgin Islands Bar commissioned in accordance with the provisions of section 771 of this title shall not be required to comply with the five year residency requirement imposed by this section;
> (2) be a graduate of an accredited high school or have passed the high school equivalency test;
> (3) continue to reside within the Virgin Islands during the term of his office; and
> (4) shall not have been convicted of any crime either within or without the Virgin Islands.

Id. Every applicant for a notary appointment shall be investigated by the Office of the Lieutenant Governor with respect to his character so that prior to the issuance of a commission, the Lieutenant Governor is satisfied with the applicant's good character and integrity for the office. Removal from the Virgin Islands shall vacate his office and be the equivalent of a resignation.

112. *See* 27 V.I.C. § 94 (2001) dealing with statutory requirements of registered nurses; 27 V.I.C. § 65 (2001) regarding licensing requirements for dentists; and 27 V.I.C. § 283 (2001) regarding general requirements for licensing.

113. 27 V.I.C. § 94 (2002) (stating the statutory requirements related to registered nurses).

> and nurses was a matter for legislation and could not be accomplished by administrative regulation.[114]

Thus, the USVI appears to have a more relaxed requirement for certain needed professions (six months in the above example).

3. Divorce

The USVI statutes only require that a person be a resident in the USVI for six weeks in order to either bring a divorce proceeding within the USVI or for a person to be subject to a divorce proceeding in the USVI.[115] This six week standard for divorce cases is strongly supported by USVI case law.[116] These cases generally hold that the person's six-week residency in the USVI should be continuous and uninterrupted[117] and with the intent to stay in the USVI.[118]

C. Facts and Circumstances Applied to EDC Program Participants

While it may be possible for a person to establish personal residency under the "facts and circumstances" test without respect to the time the person has spent in the USVI (as discussed above), it would be much more difficult for that person to benefit from an EDC program unless the person has spent a reasonable amount of time as both (1) a resident in the USVI and (2) a participant in the EDC program. It is likely that the USVI would enforce a more relaxed residency requirement for participation in the EDC program than they would for general workers under the "one year" program. Like the above statutes regarding medical professionals, the EDC program is intended to provide an incentive to potential residents who can benefit the USVI.[119] Medical professionals bring a skill lacking in the USVI. EDC program participants bring investment, jobs, and a boon to the local economy. In

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114. 27 V.I.CODE ANN. § 94 (2002) (emphasis added).

115. 16 V.I.C. § 106 (2002) (internal citations omitted). *See also* Fombrum v. Fombrum, 21 V.I. 300, 302 (1985) (stating that domicile, in and of itself, while sufficient to satisfy constitutional prerequisites, is not sufficient to grant a Virgin Islands court jurisdiction in a divorce action; the statutory requirement of six-weeks residency must still be met, and residency exists independent of domicile, although residency can be submitted in support of a claim of domicile).

116. *See Gumbs & Williams*, *supra* note 102.

117. *Fombrum , supra* note. 115.

118. *Id.*

119. Roberts, *supra* note 5:

> One of the perceived benefits of the Industrial Development Program is to reverse brain drain by creating jobs in the territory, so the definition of resident of the Virgin Islands was expanded, effective October 31, 1998, to include 'a person who has attended a school in the Virgin Islands for at least six (6) years of who is a high school graduate and who is registered to vote in the Virgin Islands'.

addition, like the medical profession, the EDC program (as discussed above) is only offered to businesses who are engaged in one of four [120] categories.[121] The businesses listed above demonstrate that the USVI wants to attract certain types of companies[122] to the USVI and thus, in order to attract those businesses, they generally have less stringent residency requirements in order for EDC program participants to benefit from their investment.

The six-week residency requirements found in the divorce statute[123] are a practical standard not only for a business wanting to move to the USVI, but for the USVI government as well. The shortened time frame would be an added incentive for a business to move to the USVI. Furthermore, the requirements for residency, continuity, and uninterrupted residency coupled with the intent to stay, are not so onerous that they would substantially impede a person or business from claiming residency in the USVI. In addition, the requirements also protect the interest of the USVI because a person or business is required to take assertive actions that prove they intend to stay and be domiciled in the USVI. Moreover, the person or business must also be physically present in the USVI, and while the physical presence of the person may not always be uninterrupted (see discussion below), so long as the intention to stay in the USVI is evidenced by assertive action,[124] the six-week time frame should not be destroyed.

A lack of continuity and uninterrupted residency does not absolutely preclude a person from claiming domicile under the "facts and circumstances" test. In Mitchell v. United States[125] the court stated: "[t]hat domicile once acquired is not lost simply due to absence from the place of domicile (when the *intent to return remains*)."[126] The rule in *Mitchell* would appear to help further define the "facts and circumstances" test. Therefore, so long as a person takes logical steps to demonstrate an intention to stay and claim domicile in the USVI,[127] then he or she should not be required to be physically present the entire

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120. 29 V.I.C. § 708(a) (2002). The categories are listed in Part II. B. of the text and at note 26.

121. Roberts, *supra* note 5.

122. *Id.* The USVI wants to "advance the economic well-being of the United States Virgin Islands."

123. 16 V.I.CODE ANN. § 106 (1988).

124. Berger v. Berger, 3 V.I. 477 (3d Cir. 1954) (holding that although the plaintiff in divorce action left his domicile in New York on the advice of a physician and came to live in Virgin Islands, securing employment there, becoming a member of local library and taking out a permanent driver's license, were evidence sufficient for finding that the plaintiff had established domicile in USVI and such conclusion was not rebutted by absence of plaintiff from the Islands on pleasure or business trips or by payment of Federal income taxes in State of former domicile for the year prior to change of domicile.)

125. 88 U.S. 350 (1875).

126. *Id.* (emphasis added).

127. For a good example, *see* the Berger case, *supra* note 124.

six weeks in an uninterrupted fashion.[128] For example, the resident's business may require her to be out of the USVI to serve customers such that she is not able to be in the USVI uninterrupted for six weeks, even though she will be in the USVI for at least six weeks total during the year. It should be noted though that persons seeking domicile have the burden of proving that they intend to claim domicile in the USVI.[129] Furthermore, persons seeking residency have to be ready to show evidence that indicates that they intend to make the USVI their domicile.[130] The intent to remain domiciled in the USVI requires that they show evidence that they intend to remain in the USVI and establish a home there. However, a person is not required to show an intention to remain in the USVI until death. Rather, a person need only show an intention to make a home in a place until some reason makes it desirable or necessary to leave.[131] By contrast, a person's intent to move to another place outside the USVI can terminate any residency claim that a person has made.[132] Finally, if a person is claiming solely through the divorce statute and not through the "facts and circumstances" test (i.e., the person is involved in a divorce proceeding in the USVI), then the case law would indicate the person would need to be in the USVI for the entire six weeks in an uninterrupted fashion to take advantage of the divorce statute.[133]

D. Summary

Generally, a combination of the "facts and circumstances" test[134] and the "end of year" tests[135] will determine whether an individual can claim

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128. *See* Williams v. Williams, 8 V.I. 244 (D. St. Croix 1971) (holding that a person need not intend to remain in a place until death to acquire domicile there sufficient to vest a court with divorce jurisdiction; it is only necessary to intend to make a home in a place until some reason not incident to the divorce makes it desirable or necessary to leave). *See also* the Berger case, *supra* note 124 (stating that absence of plaintiff from Islands on pleasure or business trips was not enough to rebut presumption of Virgin Islands residency requiremnts).

129. *See* Williams, *supra* note 102.

130. *See* Korn v. Korn, 398 F.2d 689 (3d Cir. 1968).

131. *See* Williams, *supra* note 102 at 328.

132. Sachs v. Sachs, 4 V.I. 102 (3d Cir. 1957) (holding complaint was properly dismissed for lack of jurisdiction where evidence showed that plaintiff, who had resided in the Islands six months before commencing action, intended to return to Massachusetts).

133. The courts have generally upheld the continuous and uninterrupted requirement. *See Fombrum*, *supra* note 115 (granting defendant's motion to dismiss commence-ment of the divorce action because she had not resided continuously and uninterruptedly for six weeks in the USVI and therefore did not fulfill the residency requirement). *See also Gumbs*, *supra* note. 102 (dismissing a petition for divorce on the grounds that the petitioner had not maintained continuous and uninterrupted residency in the USVI for the six-week time requirement).

134. 26 C.F.R. § 1.871-2 (2002). *See also* Preece v. Commissioner, 95 T.C. 594 (1990) discussed in note 92.

135. I.R.C. § 932(c)(1)(A) (2003).

residency in the USVI.[136] However, the USVI has separately carved out by statute a general one-year presence test[137] for employees in the USVI,[138] and the Virgin Islands Code has several professions that do not even require the one-year presence test.[139] With respect to individuals wishing to claim benefits as participants in EDC programs, it is likely that the USVI will require more of a personal time commitment to the USVI. Perhaps a six- week commitment would be the proper time commitment, given it is the time commitment required to take advantage of the USVI divorce laws. As such, the residency requirements of the USVI might be summarized as follows:

> (1) If the person is a W-2 employee, then the person must be domiciled in the USVI for one year before becoming a resident.
>
> (2) If the person's profession is covered by a particular USVI statute, then that person's time commitment for residency would likely be contained in the USVI statute, generally, six months.
>
> (3) If the person is not covered by (1) or (2) and is currently (this tax year) not seeking to receive benefits from an EDC program, then the "facts and circumstances" test applies together with the "year end" test. However, no specific amount of time on the USVI is likely to be required.
>
> (4) If the person is currently seeking (this tax year) benefits from an EDC program, then the time commitment to the USVI must be more substantial than in (3). Perhaps the six-week test contained in the divorce statute is the proper test, although "facts and circumstances" may dictate that the six-weeks period need not be uninterrupted.

V. WHAT IS THE CONGRESSIONAL OUTLOOK ON THE CREDIT?

The most significant legislation to pass affecting the United States Virgin Islands tax credit was the passage of the Foreign Sales Corporation (FSC) Repeal and Extraterritorial Income Exclusion Act of

136. 48 U.S.C. § 1397 (2000).
137. Roberts, *supra* note 5.
138. 16 V.I.C. § 106 (2002).
139. *Id.*

2000. This act effectively repealed the foreign sale corporation program beginning on December 31, 2001.[140] The new legislation approved by Bill Clinton was in response to the World Trade Organization's (WTO) contention that the FSC regime was a prohibited export subsidy.[141]

The FSC Repeal and Extraterritorial Income Exclusion Act of 2000 was detrimental to the USVI because FSCs constituted the largest part of the USVI financial services industry.[142] The USVI Lieutenant Governor, Gerard Luz James II, stated, "[T]he financial impact of such a ruling would be detrimental to the Virgin Islands economy, which is already experiencing an extremely large deficient."[143] In response to the FSC Repeal and Extraterritorial Income Exclusion Act the USVI legislature approved a bill that would replace its foreign sales corporations at year-end and has created a new form of entities called the V.I. foreign sales corporations (VIFSCs).[144]

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140. William L. Blum, *U.S. Virgin Islands Legislature Approves New Tax Exemption Program,* 24 TAX NOTES INT'L 1306, Dec. 10, 2001. "The U.S. Virgin Islands — the first jurisdiction to enact local FSC legislation when the program was created in 1984, and where more than 4,000 FSCs have been created over the years…." See also Marjorie Rawls Roberts, *WTO's FSC Ruling Could Prove Detrimental to the USVI's Economy,* 2000 WORLDWIDE TAX DAILY 66-2, Mar. 31, 2000:

> The Virgin Islands was the first of the major FSC jurisdictions to enact legislation to encourage U.S. exporters to establish their FSCs in the territory, and it has had the most FSCs of any jurisdiction consistently since 1984. The Virgin Islands provides for one-day incorporation of FSCs, and its statute exempts FSCs from all income taxes and all local taxes. FSCs are required to pay an annual franchise tax ranging from US $400 to $25,000, based on foreign trading gross receipts, as well as an annual US $100 license fee.

141. Jose Oyola, *News Analysis: A Fresh Look at FSC Beneficiaries,* 23 TAX NOTES INT'L 71, July 2, 2001. *See also* Marjorie Rawls Roberts, *U.S. Virgin Islands Listed as 'Harmful' Tax Haven by OECD,* 2000 WORLDWIDE TAX DAILY 131-1 June 29, 2000. In the report the OECD states that the USVI was included on the list of harmful tax havens because of U.S. federal legislation on I.R.C. § 934(b)(3) (2003) that allows the establishment of tax-benefited "exempt companies" in the USVI.

142. *Id.* The FSCs in the services sector mainly consisted of exempt insurers, exempt companies, investment advisors, and consulting firms.

143. Roberts, *supra* note 141. The article also stated that the USVI hosted the majority of the FSCs worldwide.

144. 13 V.I.C. § 772 (2002); 13 V.I.C. § 780 (2002). *See also* Blum, *supra* note 140.

The new VIFSCs would offer substantial tax savings[145] to companies that keep their FSC status. Furthermore, VIFSCs would be exempt from all USVI income taxes,[146] gross receipts, taxes on export sales,[147] and excise taxes.[148] Furthermore, VIFSCs would be exempt from certain withholding taxes[149] and they would only be required to pay an annual license fee of $100 and an annual franchise tax of $300, regardless of their sales volume.[150] Prior FSCs may elect to become a VIFSC by amending their articles of incorporation.[151] For new companies that do not already have FSC status in the USVI, they would be permitted under the USVI redomiciliation laws[152] that would permit

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145. *See* Roberts, *supra* note 141. *See also* Albertina M. Fernandez, *Week in Review,* 20 TAX NOTES INT'L 1609, April 10, 2000 (Release Date: April 05, 2000), which provides:

> Marjorie Rawls Roberts reports that the U.S. Virgin Islands hosts the majority of FSCs worldwide, with approximately 3,900 active FSCs. This is no coincidence, since the USVI has consistently wooed FSCs to its shores by enacting legislation to encourage U.S. exporters to establish the entities within its territory. For example, the author reports, "The USVI offers a contract signed by the lieutenant governor that guarantees FSC tax exemptions for a 30-year period from the date the contract is issued." Needless to say, government officials have expressed concern regarding the possible elimination of FSC legislation.

146. 13 V.I.C. § 774 (2002).

147. *Id.*

148. 13 V.I.C. § 775 (2002).

149. 13 V.I.C. § 778 (2002).

150. Roberts, *supra* note 141.

> The Virgin Islands was the first of the major FSC jurisdictions to enact legislation to encourage U.S. exporters to establish their FSCs in the territory, and it has had the most FSCs of any jurisdiction consistently since 1984. The Virgin Islands provides for one-day incorporation of FSCs, and its statute exempts FSCs from all income taxes and all local taxes. FSCs are required to pay an annual franchise tax ranging from US $400 to $25,000, based on foreign trading gross receipts, as well as an annual US $100 license fee.

151. 13 V.I.C. § 772(b) (2002).

> A corporation that is in good standing as of the effective date of this section, and which, as of the day prior to such effective date, was a foreign sales corporation, as defined in section 770 of this chapter as in effect as of that day may elect to be treated as a *VIFSC* if, prior to, or within twelve months of such effective date, it amends it articles of incorporation to conform with section 431(a)(1) of this title, as amended, or otherwise files a document with the Lieutenant Governor evidencing its intent to be treated as a *VIFSC*. Such election, if timely filed after such effective date, will be deemed to be effective as of such effective date."

(emphasis added.)

152. 13 V.I.C. § 471 (2002) (dealing with redomiciliation). *See also* William L. Blum, *Business Opportunities, Corporations, Taxes, Tax Incentives, and Tax Planning in the U.S. Virgin Islands*, *available at http://www.USVI.net/USVI/taxes.html,* stating:

> The USVI permits both the inbound and outbound redomiciliation of companies and it is the only jurisdiction under the U.S. flag to allow for both of these options. An inbound redomiciliation is when a company formed outside the USVI wants to move to the USVI and be treated as if it had been formed there. When the company moves into the USVI it can

a company with a FSC in another jurisdiction to move their subsidiary to the USVI, where they could elect VIFSC status. Companies that did not have FSC status prior to the inception of the VIFSC program could, "also be formed as VIFSCs as soon as the bill becomes law."[153] A company could also obtain VIFSC status by merger.[154]

VI. THE CONGRESSIONAL BLACK CAUCUS: DEFENDERS OF THE CREDIT

The Congressional Black Caucus is one of the biggest supporters of the USVI tax credit and has defended the Virgin Islands recently against attacks by the Organization for Economic Co-Operation and

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> also elect to be treated as an exempt company if it otherwise qualifies. An outbound redomiciliation, by which a USVI corporation moves its domicile to another jurisdiction, is allowed, provided that the laws of the jurisdiction to which the company wishes to move permits it. The company must first prepare and file whatever documents are required by the other jurisdiction; then an affidavit is filed with the USVI as evidence that the company has continued its existence elsewhere. Then the government issues a certificate of discontinuance. A corporation which has removed its domicile from the USVI is not liable for future franchise or other taxes but it does not avoid liabilities incurred prior to its redomiciliation.

See also Marjorie Rawls Roberts, *Tax Havens: Amendments to U.S. Virgin Islands Exempt Company Act Examined*, 7 TAX NOTES INT'L 723, Sept. 20, 1993:

> On August 17, 1993, U.S. Virgin Islands Governor Alexander A. Farrelly signed into law Act No. 5880, the Exempt Company Amendments Act of 1993. The act makes significant changes to the U.S. Virgin Islands' exempt company legislation. It also adds a provision permitting the transfer of domicile on non-United States and non-Virgin Islands corporations into and out of the Virgin Islands…
>
> Section 3 of Act No. 5880 contains provisions that permit foreign corporations to relocate to the Virgin Islands on both a permanent and a standby basis without reincorporating. The corporate *redomiciliation* provisions are almost identical to those existing under Delaware law. Under section 4(b) of Act No. 5880, a permanent relocation costs $500; the annual franchise tax would be $1,000 if exempt company status were elected. If a corporation does not elect or is not eligible for exempt company status, then the relocation fee is a minimum of $175 and the regular annual franchise tax rates apply after relocation. A standby relocation, which is only available to corporations not incorporated in one of the states of the United States or the District of Columbia, costs $1,100 initially and $1,000 per year thereafter, whether or not the company actually relocates.

Id. at 724-725 (emphasis added..

153. *See* William L. Blum, *U.S. Virgin Islands Legislature Approves New Exemption Program*, 24 TAX NOTES INT'L 1306, December 24, 2001 (discussing the new VIFSC program). For companies that did not have FSC status prior to the inception of the VIFSC program they could, "also be formed as VIFSCs as soon as the bill becomes law."

154. 13 V.I.C. § 431 (2002).

Development (OECD)[155] and the WTO.[156] In a letter to then U.S. Treasury Secretary Paul O'Neill,[157] the Congressional Black Caucus stated:

> As you surely know, the Organization for Economic Cooperation and Development (OECD), of which the United States is a member, has initiated a process designed to eliminate so-called "harmful tax competition." Within one year, if these "harmful practices" are not eliminated, sanctions are to be issued. The practices in question are said to be the facilitation of foreign owned entities to do business in these locations, no or nominal tax on relevant income of these entities, lack of information exchange, and lack of transparency.
>
> This initiative threatens to undermine the fragile economies of some of our closest neighbors and allies, as well as the US Virgin Islands. These countries are already grappling with reduced tariffs and declining preferences for their industrial and agricultural products.
>
> Wealthy OECD nations should not have the right to re-write the rules of international commerce on taxation simply because they are upset that investors and entrepreneurs are seeking higher after-tax returns.

The Congressional Black Caucus further stated: "We also fell [sic] that this 'harmful tax competition' project is not in America's national interests. In the case of the Virgin Islands, they were put on the list largely because of federal enabling legislation that was a requirement imposed by the Department of the Treasury."

This sentiment was echoed by USVI legislature when it noted that Federal and not USVI legislation has resulted in the USVI being

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155. Marjorie Rawls Roberts, *U.S. Virgin Islands Listed as 'Harmful' Tax Haven by OECD,* 2000 WORLDWIDE TAX DAILY 131-1, June 29, 2000 (discussing the Virgin Islands placement on the OECD list as a 'harmful' tax haven).

156. Roberts, *supra* note 141.

157. THE CONGRESSIONAL BLACK CONGRESS, *supra* note 19. This letter was signed by Del. Donna Christian-Christensen, Rep. Maxine Waters, Rep. James Clyburn, Rep. Eva Clayton, Rep. John Conyers, Rep. Stephanie Tubbs Jones, Rep. William Clay, Rep. Earl Hilliard, Rep. John Lewis, Rep. William Jefferson, Rep. Alcee Hastings, Rep. Charles Rangel, Rep. Barbara Lee, Rep. Major Owens, Rep. Corrine Brown, Rep. Gregory Meeks, Rep. Sanford Bishop, Rep. Sheila Jackson-Lee, Del. Eleanor Holmes Norton, Rep. Bobby Rush, Rep. Carrie Meek, Rep. Danny K. Davis, Rep. Robert Scott, Rep. Eddie Bernice Johnson, Rep. Melvin Watt, and Rep. Edolphus Towns.

included on the OECD list. Thus, the USVI cannot unilaterally pledge to cooperate with the OECD to remove its name from the list. Furthermore, the United States is one of twenty-nine members of the OECD.[158] Therefore, the U.S. government's pledge to fully cooperate in preparing sanctions for tax havens that fail to reform does not make sense for the USVI because the United States enacted the legislation that effectively put the U.S. Virgin Islands on the list in the first place.

The Congressional Black Caucus openly criticized the OECD report.[159] U.S. House of Representatives Ways and Means Commit-tee Chair William M. Thomas, R-California, introduced the American Competitiveness and Corporate Accountability Act of 2002 that repealed the FSC Repeal and Extraterritorial Income Exclusion Act of 2000. The American Competitiveness and Corporate Accountability Act was not enacted in 2002, but it has been raised again for the new Congressional session in 2003.[160] However, whether the Act will have any more success getting passed is something only time will tell.[161] Therefore this is a continuing issue of importance for the USVI that will need continued watch this Congressional session.

VII. CONCLUSION

Residents of the USVI generally file and make all payments of their taxes to the USVI tax authorities as opposed to the IRS.[162] There are several benefits to having USVI residency. For example, taxpayers of the USVI can be eligible for as much as a 90% tax credit[163] on their

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158. OECD, *OECD Reports on Harmful Tax Jurisdiction,* 2000 WORLDWIDE TAX DAILY 124-11, June 26, 2000. The original members of the OECD are: Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Newer members are: Japan, Finland, Mexico, the Czech Republic, Hungary, Poland, and Korea.

159. THE CONGRESSIONAL BLACK CONGRESS, *supra* note 19 stating:

> What we have been facing is a successful international media campaign, developed by the OECD, aimed at painting a picture of money laundering and unsound regulatory practices. However, the anti-money laundering regulations of many of these countries have been successfully enhanced through the assistance of international funding agencies and the commitment of their own national resources.

160. *Id.* Rose Proskauer, *Impact of the Sarbanes-Oxley Act and Current Legislative and Regulatory Proposals on Employee Benefits and Executive Compensation,* 10 The Metropolitan Corporate Counsel 12 (December 2002).

161. Natalia Radziejewska, *Taxwriters Introduce Bipartisan ETI Act Repeal Bill*, 30 TAX NOTES INT'L 239, Apr. 21, 2003. "U.S. House of Representatives Ways and Means Committee members Philip M. Crane, R-Illinois, and Charles B. Rangel, D-New York, on 11 April introduced a bipartisan bill that would repeal the FSC Repeal and Extraterritorial Income Exclusion Act (ETI Act) and provide U.S. domestic manufacturers a corporate tax rate reduction."

162. I.R.C. § 932(a)(1)(A) (2003).

163. *See* Revised Organic Act Of The Virgin Islands, 48 U.S.C. § 1642 (2002).

personal income or investment income from ownership in certain business entities by taking advantage of the EDC program for investment in the USVI.[164] However, it is clear that a person must reside in the USVI on the last day of the tax year ("end of year" test) to benefit from the USVI's favorable tax system.[165] But unlike the United States, there does not appear to be a one-hundred-eighty-three-day residency requirement to meet the USVI residency requirement.[166] Instead, it appears that in order to determine one's residency in the USVI there is a combination of the "facts and circumstances" test[167] and the "end of year" test.[168] If a person wishes to take advantage of the EDC program, it is likely that the USVI will require more of a personal time commitment to the USVI for the individual to claim the EDC program benefits. Perhaps a six-week commitment would be the proper time commitment, given it is the time commitment required to take advantage of the USVI divorce laws. If this six-week test is the proper test, then the residency requirements of the USVI might be summarized as follows in the next paragraph.

The clearest test is where the person is a W-2 employee. In such cases, the person must be domiciled on the USVI for one year before becoming a resident. Secondly, if the person's profession is covered by a particular USVI statute, then that person's time commitment for residency would likely be contained in the USVI statute, generally, six months. Thirdly, where the person is neither a W-2 employee nor is covered by one of the professional statutes, and is not seeking to receive benefits in the current tax year from an EDC program, the "facts and circumstances" test applies together with the "year end" test. No specific amount of time on the USVI is likely to be required. Lastly, where the person is seeking benefits from an EDC program, the time commitment to the USVI must be more substantial than where the person is not seeking EDC benefits in the current tax year. In this last instance, perhaps the six-week test contained in the divorce statute is the proper test, although "facts and circumstances" may dictate that the six-week period need not be uninterrupted.

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164. *See* Roberts, *supra* note 5.
165. *See* I.R.C. § 932 (2003).
166. *See* 1987-2 C.B. 946 (1960).
167. 26 C.F.R. § 1.871-2. *See also* Preece v. Commissioner, 95 T.C. 594 (1990) discussed in note 92.
168. I.R.C. § 932(c)(1)(A) (2003).

"WALKING INTO THE SEA"[1] OF LEGAL FICTION: AN EXAMINATION OF THE EUROPEAN COURT OF HUMAN RIGHTS, *PRETTY V. UNITED KINGDOM* AND THE UNIVERSAL RIGHT TO DIE

JANNA SATZ NUGENT*

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I. INTRODUCTION

History has proven that certain realities survive legal prohibitions.[2] Regardless of the law, homosexuals participate in the military,[3] women

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1. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 296 (1990) (Scalia, J., concurring) (finding that the line drawn between active and passive euthanasia is as "unreasonable" as ruling that "one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing").

2. Chester Bowles, a member of the 1941 wartime Office of Price Administration, opined that approximately 20% of the regulated population will comply with any regulation, 2 or 3% will be inherently dishonest, and the remaining 75% or so will generally comply as long as they think that they are not being had. CHESTER BOWLES, PROMISES TO KEEP: MY YEARS IN PUBLIC LIFE 1941-1969, 25 (1971).

3. In recent years, the European Court of Human Rights has determined that the United Kingdom's dismissal of homosexuals from the military violated the applicants' privacy rights which are guaranteed under the Convention. *See* Lustig-Prean & Beckett v. United Kingdom, 31 Eur. H.R. Rep. 601 (2001); Smith & Grady v. United Kingdom, 31 Eur. H.R. Rep. 620 (2001). *See also* Rich v. Sec'y of the Army, 735 F.2d 1220, 1227 n.7, 1228-29 (10th Cir. 1994) (recognizing a "significant split of authority as to whether some private consensual homosexual behavior may have constitutional protection" but finding the military's "compelling interest" in regulating homosexual conduct sufficient to uphold discharge) (discussing Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980)).

abort unwanted fetuses,[4] and licensed physicians kill terminally-ill patients.[5] These realities speak to the core of human value[6] and to an individual's right to privacy which is protected explicitly by the Council of Europe's[7] Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),[8] implicitly by the United States Constitution (the Constitution),[9] and expressly by most state constitutions.[10] Where members of the Council of Europe (Member States or States) have interfered with privacy rights under the Convention, the European Court of Human Rights in Strasbourg (sometimes referred to as the Strasbourg Court or the Court) has engaged in a balancing test to determine if the harm of the interference is outweighed by the State's legitimate need to regulate its interests.[11] Federal and state courts in the United States have employed the same method of analysis. In addition to general notions of fairness, public opinion and the common practices of western democratic nations have influenced the international and U.S. courts' weighing of governmental and individual interests: mainstream perspectives on the morality and legality of homosexuals in the military, abortion, and physician-assisted suicide have found their way into the international, national, and state courts' decision-making processes.[12]

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4. CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 245 (1980) (explaining that "a study in the 1920s reported that about one out of four pregnancies ended with a criminal abortion").

5. *See generally* ROGER S. MAGNUSSON, ANGELS OF DEATH: EXPLORING THE EUTHANASIA UNDERGROUND (2002) (documenting numerous first-person accounts of health care workers in Australia and the United States who have participated in assisted suicide and euthanasia despite the illegality of their actions) [hereinafter ANGELS OF DEATH].

6. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

7. For a complete list of the forty-five Member States of the Council of Europe, see http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/CoE_Map_&_Members/ (last visited Sept. 14, 2003).

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

9. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy within the "penumbras" of the First, Third, Fourth, and Fifth Amendments). The scope of the right to privacy has been determined on a case-by-case basis. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage).

10. *See*, e.g., N.J. CONST., art. I.

11. *See*, e.g., In re Quinlan, 355 A.2d 647, 664 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (balancing the right of privacy against asserted state interests); Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, 165 (1981) (explaining that the aims of government must be particularly serious to outweigh interferences with "a most intimate aspect of private life").

12. *See, e.g.,* Thomas J. Ward & Frederick A. Swarts, *The Mainstreaming of Homosexuality*, WORLD & I, Oct. 1993, at 365; MAGNUSSON, *supra* note 5, at 36-38 (explaining that although restrictions on euthanasia have been a common feature of medical ethics since 400 B.C., the debate has only recently surfaced as a result of today's rising costs of health care, the growing

Consequently, as public opinion evolves toward a more liberal view of individual rights, the more conservative stance of jurisprudence on the right to privacy, and particularly on the prohibition of physician-assisted suicide, is threatened.[13]

The European Court of Human Rights recently weighed in on the subject of assisted suicide in *Pretty v. United Kingdom*,[14] in which the international tribunal provided morsels of modern thought regarding an individual's right to self-determination. The Strasbourg Court took great care not to upset the position taken by a majority of western democracies, but its decision treads on shaky ground. Common law courts — including the House of Lords, the United States Supreme Court, and various state supreme courts — depend on linguistic distinctions to deny an individual's right to self-determination. The European Court of Human Rights relied on these common law jurisdictions for guidance in *Pretty*.[15] Its decision, therefore, rests on carefully constructed fallacies rather than logical legal analysis. While opponents of assisted suicide proffer strong arguments against legalization and express valid concerns for vulnerable individuals, tentative definitions of euthanasia cannot support a government's prohibition on physician-assisted suicide as applied to mentally competent, terminally-ill adults. The European Court of Human Rights should abandon these common law arguments and recognize that the Convention's protection of the right to privacy encompasses an individual's right to die. As long as the Strasbourg Court defers to its Member States, people like Diane Pretty will suffer, and the universality of human rights will be called into question.[16]

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importance of individual rights, "an increasingly educated population losing its awe of the medical profession," and the decline of religious institutions) (citations omitted); Ezekiel J. Emanuel, *Why Now?*, *in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 175, 175-202 (Linda L. Emanuel ed., 1998) (addressing the reasons that assisted suicide has become a highly debated issue in the 1990s); Margaret M. Funk, Comment, *A Tale of Two Statutes: Development of Euthanasia Legislation in Australia's Northern Territory and the State of Oregon*, 14 TEMP. INT'L & COMP. L.J. 149, 149 (2000) (arguing that the debate over euthanasia "is not new").

13. *See* WESLEY J. SMITH, FORCED EXIT: THE SLIPPERY SLOPE FROM ASSISTED SUICIDE TO LEGALIZED MURDER 224 (1997) ("Euthanasia is on the cutting edge of 1990s social trends…. Few other issues so perfectly reflect the public gestalt of our times: Euthanasia is justified by claims of compassion, appeals to raw emotionalism, and paeans to 'choice.'").

14. 35 Eur. H.R. Rep. 1 (2002).

15. *Id.*

16. It is important to clarify that this paper does not condone involuntary euthanasia, nor does it argue for the legalization of assisted suicide by someone other than a licensed physician as the likelihood of complications is too great. *See* R. v. Hough, [1984] 6 Cr. App. R. 406, 407-08 (explaining how a sixty-year-old woman, who had promised her suicidal, eighty-four-year-old friend that she would not let anyone resuscitate her after an overdose, resorted to tying plastic bags over the elderly woman's head because the drugs had not stopped her breathing); ANGELS OF DEATH, *supra* note 5, at 122-23 (outlining the dangers of "'amateur' suicide").

A. The Story of Diane Pretty and Amyotrophic Lateral Sclerosis

Diane Pretty's fate was ultimately decided by the six men and one woman who sat as a Chamber for the European Court of Human Rights.[17] To appreciate the legal significance of the *Pretty* decision, one must first become acquainted with Diane Pretty's story.[18] Ms. Pretty and her husband Brian met when Diane was only fifteen years old.[19] Photographs from the couple's wedding reveal a young woman's confidence and sense of humor.[20] But after twenty-five years of marriage and the birth of two children and a grandchild, Ms. Pretty's disposition changed.[21]

In November of 1999, a doctor diagnosed Ms. Pretty with Amyotrophic Lateral Sclerosis (ALS),[22] more commonly known as Lou Gehrig's disease or motor neuron disease.[23] Four months later, Ms. Pretty was confined to a wheelchair.[24] ALS attacks motor neurons, the nerve cells located in the brain and along the spinal cord, degenerating the electrical impulses that send signals to an individual's muscles.[25] As a result, ALS patients suffer "progressive muscle paralysis in the face, the tongue, the throat, the respiratory system, the shoulders, hands, and legs. [Once the disease has taken full effect,] the patient cannot swallow, speak, cough, or breath unassisted."[26] But a person with ALS remains mentally alert and his or her senses of smell, touch, taste, hearing, and sight are in no way diminished.[27] Thus, "[t]he final stages of the disease are exceedingly distressing and undignified" as the patient's inability to

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17. *Pretty*, 35 Eur. H.R. Rep. at 1. *But see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (arguing that it is inappropriate for a court to decide the issues in a right to die case because guidelines "are neither set forth in the Constitution nor known to the nine Justices of [the United States Supreme] Court any better than they are known to nine people picked at random from the Kansas City telephone directory").

18. Pictures of Diane and Brian Pretty can be seen on Ms. Pretty's website *at* http://www.justice4diane.org.uk (last visited Sept. 14, 2003) or on the BBC News Online website at http://www.news.bbc.co.uk (last modified Sept.14, 2003). Justice4diane. org.uk is fully funded by the Voluntary Euthanasia Society. *Id.*

19. *Id.*

20. *The Dignity of Diane Pretty*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/1/low /health/1983781.stm (May 12, 2002).

21. *See id. See also, Diane Pretty: Timeline*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/1/ low/health/1983562.stm (May 12, 2002) [hereinafter *Timeline*].

22. *Timeline*, *supra* note 21.

23. Penney Lewis, *Rights Discourse & Assisted Suicide*, 27 AM. J.L. & MED. 45, 46 n.4 (2001).

24. *Timeline*, *supra* note 21.

25. *See* Information, *at* www.ucsf.edu/brain/als/diagnosis.htm (last visited Sept. 14, 2003); *Motor Neurone Disease*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/1/ low/health/ medical_notes/j-m/1500231.stm (Aug. 20, 2001).

26. RAPHAEL COHEN-ALMAGOR, THE RIGHT TO DIE WITH DIGNITY 92-93 (2001) [hereinafter THE RIGHT TO DIE WITH DIGNITY].

27. JOHN KEOWN, EUTHANASIA, ETHICS AND PUBLIC POLICY: AN ARGUMENT AGAINST LEGISLATION 22 (2002). *See also Motor Neurone Disease*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/1/low /health/ medical_notes/j-m/1500231.stm (Aug. 20, 2001).

control his or her breathing leads to a complete failure of the respiratory system.[28] The average life expectancy of an ALS patient is three to four years.[29]

Photographs revealing Ms. Pretty's clinched fingers and limp wrists document some of the early effects of her disease; her arms are lifeless.[30] By the final months of her life, Ms. Pretty was a quadriplegic who could only communicate through the use of a machine.[31] Despite the loss of her voice, Ms. Pretty's message was clear. In a letter posted on her website, she explained that:

> Motor neurone disease ha[d] left [her] mind as sharp as ever, but it ha[d] gradually destroyed [her] muscles, making it hard for [her] to communicate with [her] family. It…left [her] in a wheelchair, catheterised and fed through a tube. [She] fought against the disease for…two years and had every possible medical treatment.
>
> [She was] fully aware of what the future [held] and ha[d] decided to refuse artificial ventilation. Rather than die by choking or suffocation, [she] want[ed] a doctor to help [her] die when [she was] no longer able to communicate with [her] family and friends…. [She] want[ed] to have a quick death without suffering, at home surrounded by [her] family so that [she could] say good-bye to them.
>
> If [she had been] physically able [she] could [have] take[n] [her] own life. That [was] not illegal. But because of the terrible nature of [her] illness [she could not] take [her] own life — to carry out [her] wish [she would have needed] assistance.[32]

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28. Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 6 (2002).

29. *Motor Neurone Disease*, BBC NEWS ONLINE, *at* http://news.bbc.co. uk/1/low/health/medical_notes/j-m/1500231.stm (Aug. 20, 2001). *But see* KEOWN, *supra* note 27, at 138 (noting that Professor Stephen Hawking has lived with ALS for twenty-five years and that Professor Hawking's life has been both productive and meaningful).

30. *See Timeline*, *supra* note 21 (photograph included on the website). *But see* Wesley J. Smith, *Assisted Suicide Seduction*, 16(2) INT'L TASK FORCE ON EUTHANASIA AND ASSISTED SUICIDE (2002), *available at* www.internationaltaskforce.org/iua25.htm (last visited Sept. 14, 2003) [hereinafter "Assisted Suicide Seduction] ("The good news is that people with motor neuron disease do not die by choking if they receive proper medical care.").

31. *Pretty*, 35 Eur. H.R. Rep. at 6.

32. Posting of Diane Pretty *at* http://www.justice4diane.org.uk/story.asp (last visited Sept. 28, 2002). For the sake of clarity, both "neurone" and "neuron" are appropriate spellings of the word. The spelling ending in "e" is used in the United Kingdom whereas the spelling without a final "e" is more common in the United States. In this article, "neurone" is used

Through the internet, Ms. Pretty appealed to the international community for support. She turned to international law for a determination of her rights because, unlike the common law of England, the Convention, brought into force in the United Kingdom by the Human Rights Act of 1998, includes an explicit right to privacy.[33] Ms. Pretty's words, her face, and her fight became international symbols for both the euthanasia movement and human rights.[34]

B. The Fundamental Provisions of the Convention and the European Court of Human Rights

Ms. Pretty predicated her claims on the broad language of the Convention, an international treaty drafted in 1950.[35] The fundamental provisions of the Convention — Articles 2, 3, and 8 — pronounce specific rights, rights that persons have by virtue of their being persons, and impose corresponding duties on the Member States.[36] But the scope of these rights and duties is "under-determined"[37] and the words of the Convention are susceptible to a variety of meanings. Article 2, for example, establishes the individual's right to life and the government's obligation to safeguard that right. Under this provision, "[e]veryone's right to life shall be protected by law. No one shall be deprived of his [or her] life intentionally save in the execution of a sentence of a court following his [or her] conviction of a crime for which this penalty is provided by law."[38] Case law has moved beyond a literal translation of

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only in quotes where the original source used this spelling.

33. *Pretty*, 35 Eur. H.R. Rep. *at* 7 (2002) (quoting on the application of Pretty, R. v. DPP, 10 H.R.L.R. 241 (HL 2002)).

34. Pretty's legal battle and her website were financially supported by the Voluntary Euthanasia Society and by Liberty, a human rights organization. *See Timeline*, *supra* note 21; *Case, at* http://www.justice4diane.org.uk/case.asp (last visited Sept. 28, 2002).

35. *Pretty*, 35 Eur. H.R. Rep. at 42-43 (unanimously holding that there has been no violation of Articles 2, 3, 8, 9, or 14). *See also* Mark E. Villiger, *Proceedings of the Ninety-Fifth Annual Meeting of the American Society of International Law and Human Rights and Direct Petition: The European Court of Human Rights*, 95 AM. SOC'Y INT'L L. PROC. 79, 79 (2001). The Convention "entered into force in September 1953." The object of its authors was to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights of 1948. HISTORICAL BACKGROUND, ORGANISATIONAL AND PROCEDURE, REGISTRAR OF THE EUROPEAN COURT OF HUMAN RIGHTS, HISTORICAL BACKGROUND, ORGANISATION AND PROCEDURE, *at* http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm (last modified July, 2003).

36. *See* Villiger, *supra* note 35, at 79 ("The Convention…enables the individual to bring an application before the Court in order to complain about a breach of one of these rights by a state authority and, if the application is successful, to obtain a binding judgment and damages."). As of January 1, 2001, the Court's docket had a backlog of sixteen thousand cases, and the Court's registry was receiving between eight hundred and one thousand letters a day. *Id.* at 80.

37. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights*, 73 NOTRE DAME L. REV. 1217, 1219 (1998).

38. Convention, *supra* note 8, at art. 2 § (1).

Article 2 to impose positive obligations on the state; under certain situations, a state has a duty to actively protect an individual whose life is at risk.[39] Similarly, Article 3 establishes that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[40] There are no exceptions to this Article; implicit in its declaration is the government's duty to treat individuals in a humane way, but an exact definition of "inhuman" and "degrading" is left for the Member States and the Strasbourg Court to determine.[41] Finally, Article 8, the provision that speaks most closely to the issues of physician-assisted suicide, states that:

> 1. Everyone has the right to respect for his [or her] private and family life, his [or her] home and his [or her] correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of…public safety…for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[42]

This provision seems to create a universal right to privacy, as well as a universal obligation on public authorities not to interfere with that right, but its application is not so clear. Before the Strasbourg Court can decide whether there has been interference in the exercise of the right to privacy and whether that interference is justified as being "necessary in a democratic society,"[43] it must first explore the scope of activities included in the ever-evolving definitions of private and family life.

The European Court of Human Rights employs a method of comparative law to interpret and apply the written provisions of the Convention.[44] In theory, the Council of Europe has authorized the

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39. *See* X v. Germany, App. No. 10565/83, 7 Eur. H.R. Rep. 152 (1984) (requiring the state to force feed a prisoner who had gone on a hunger strike while in custody); Keenan v. United Kingdom 33 Eur. H.R. Rep. 913 (2001) (holding prison authorities liable for the death of a young prisoner who committed suicide while in state custody).

40. Convention, *supra* note 8, at art. 3.

41. *Id. See also* Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 13-14 (2002) (quoting on the application of Pretty, R. v. DPP, 10 H.R.L.R. 241 (HL 2002)) (reasoning that "while states may be absolutely forbidden to inflict the proscribed treatment on individuals…the steps appropriate or necessary to discharge a positive obligation will be more judgmental, more prone to variation from state to state").

42. Convention, *supra* note 8, at art. 8 § (1), (2).

43. *Id.* § (2).

44. *Id. See also* Carozza, *supra* note 37, at 1225 ("The only characteristics of the Court's

Strasbourg Court to enforce a list of universal human rights.[45] In practice, the Court maintains its legitimacy by sifting through normative values in search of what may be deemed the least common denominator or the minimum standard shared by a majority of the Member States.[46] When the law is "in a transitional stage," making it difficult to find uniformity throughout democratic societies, the Court will apply a wide "margin of appreciation" and defer to the state's application of the law.[47] This margin of appreciation undercuts the notion of universal rights, and the Court's decisions reveal a tension between "universalist…aspirations and the…relativist tendencies of a comparative approach to international human rights."[48] Nevertheless, if the Convention, like the United States Constitution, is to serve as a living document rather than as a historical record of rights and obligations, and if the European Court of Human Rights must rely on the approval of Member States for its legitimacy, there may be no alternative but to continue the comparative approach.

In analyzing the Strasbourg Court's application of Article 8 to assisted suicide, this paper next explores the Court's decision in *Pretty v. United Kingdom*[49] and the developing jurisprudence on patients' rights in the United States. Part III continues with an examination of the definitions supporting euthanasia cases in the United Kingdom, the United States, and, by application, the European Court of Human Rights. Finally, this paper predicts how the European Court of Human Rights will handle future particularized challenges to a prohibition on physician-assisted suicide.

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comparative 'method' on which virtually all commentators have agreed are its lack of depth, rigor, and transparency.") (citation omitted).

45. *See* Carozza, *supra* note 37, at 1219 (asserting that the articles of the Convention "are sometimes too facilely assumed to be 'universal'").

46. *See id.* at 1232 (arguing that "the Court is at one and the same time caught between the need to uphold a set of normative principles that are outside of the will of the Member States and the need to ground its decisions to some degree in the consent of the Member States"). *See also* Villiger, *supra* note 35, at 80-81 (explaining that the court "is the main tool of European states to protect against human rights violations in Europe" and that "full membership will require strict conformity with human rights norms").

47. Carozza, *supra* note 37, at 1222-23 (citations omitted) (defining margin of appreciation as "the latitude of deference or error which the Strasbourg organs will allow to national bodies before it is prepared to declare a violation of one of the Convention's substantive guarantees"). *See, e.g.,* Goodwin v. United Kingdom, 35 Eur. H.R. Rep. 447, 448 (2002) (Article 8 "requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention."); Willis v. United Kingdom, 35 Eur. H.R. Rep. 547, 549 (2002) ("The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.").

48. *See* Carozza, *supra* note 37, at 1219.

49. *See* Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 19-20 (2002); Convention, *supra* note 8, at art. 8.

II. THE RIGHT TO DIE

Ms. Pretty's story continues from her initial diagnosis in 1999 to July 27, 2001 when her attorney wrote a letter to David Calvert Smith, the Director of Public Prosecutions (DPP), asking for assurance that Brian Pretty would not be prosecuted if he was to assist his wife in committing suicide.[50] In a carefully drafted response, the DPP maintained that "[s]uccessive Directors – and Attorneys General – have explained that they will not grant immunities that condone, require, or purport to authorise or permit the future commission of any criminal offense, no matter how exceptional the circumstances."[51] Thus, while Mr. Smith may have felt personal sympathy for Ms. Pretty's case, his hands were tied by precedent.[52]

A. The British Response

In August, Ms. Pretty sought declaratory and injunctive relief from the British courts on several grounds.[53] Apart from her belief that the DPP had the authority to grant her husband immunity from prosecution,[54] Ms. Pretty argued that Section 2 of the 1961 Suicide Act[55] and its criminalizing of assisted suicide "was incompatible with Articles 2 [Right to Life], 3 [Prohibition of Torture], 8 [Right to Privacy], 9 [Freedom of Thought, Conscience and Religion], and 14 [Prohibition of Discrimination] of the Convention."[56] Her case reached the United Kingdom's Supreme Court of Appeal in less than three months.[57] Lord Bingham of Cornhill, writing on behalf of the House of Lords, conceded that "no one of ordinary sensitivity could be unmoved by the frightening

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50. *See* Pretty, 35 Eur. H.R. Rep. at 6. It is unclear why Ms. Pretty petitioned the court to allow her husband, who is not a physician, to assist her in suicide when she had expressed a desire to have a doctor "help [her] die when [she was] no longer able to communicate with [her] family and friends." Posting of Diane Pretty *at* http://www. justice4diane.org.uk /story.asp (last visited Sept. 28, 2002).

51. *Pretty*, 35 Eur. H.R. Rep. at 6.

52. *But see* Suicide Act, 1961, 9 & 10 Eliz., c. 60, § 2 (4) (Eng.) ("[N]o proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.").

53. *Pretty*, 35 Eur. H.R. Rep. at 6-7.

54. *See* Suicide Act, 1961, 9 & 10 Eliz. c. 60, § 2 (4) (Eng.).

55. According to the Suicide Act ,1961, 9 & 10 Eliz. c. 60, § 2 (1)-(2) (Eng.):

> (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.
> (2) If on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence.

Id.

56. *Pretty*, 35 Eur. H.R. Rep. at 7.

57. R.(on the application of Pretty) v. DPP, 10 H.R.L.R. 241 (HL 2002). Ms. Pretty's case had been "fast-tracked" as the courts recognized that her death was imminent.

ordeal which face[d] Mrs. Dianne [sic] Pretty."[58] Then he affirmed the Divisional Court's denial of Ms. Pretty's claims.[59]

B. A Response from the European Court of Human Rights

Having exhausted all available remedies within the United Kingdom, Ms. Pretty turned to the European Court of Human Rights where she reasserted her argument that the United Kingdom's Suicide Act of 1961 violated Articles 2, 3, 8, 9, and 14 of the Convention.[60] Article 8 provides the greatest opportunity for a favorable outcome because it establishes an individual's "right to respect for his [or her] private…life" and restricts public authorities from interfering with that right.[61] But this restriction is not absolute. Recall that the second section of the Article justifies governmental interferences that are both "in accordance with the law and…necessary in a democratic society in the interests of…public safety…the prevention of disorder or crime…the protection of health or morals, or…the protection of the rights and freedoms of others."[62] Thus, to successfully argue her claim, Ms. Pretty had to prove: (1) that her decision to commit suicide with the help of her husband or, more preferably, a physician, fell within the protected scope of her private life; (2) that the United Kingdom's proscription on assisted suicide had interfered with her right to privacy; and (3) that the interference was not "necessary in a democratic society" to achieve a legitimate aim under the Convention.[63]

Accordingly, the Court began its analysis with a discussion on the scope of rights protected under Article 8.[64] The judges recognized that "the concept of 'private life' is a broad term not susceptible to exhaustive definition" and that the boundaries of an individual's privacy are therefore constructed on a case-by-case basis.[65] Although prior case law had not directly addressed the issue of whether the right to self-determination fell within the scope of Article 8,[66] a number of cases stood

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58. *Id.* at 244.

59. *Id.*

60. Pretty applied to the European Court of Human Rights on the basis of Convention Articles 2, 3, 8, 9, and 14. Each claim was eventually dismissed on its merits. *Pretty*, 35 Eur. H.R. Rep. at 27. This Section only focuses on the Court's analysis under Article 8.

61. Convention, *supra* note 8, at art. 8(1)-(2).

62. *Id.* at art. 8(2).

63. *Id.* at art. 8(1)-(2).

64. *Pretty*, 35 Eur. H.R. Rep. at 35-36.

65. *Id.* at *35. See generally* B. v. France, 16 Eur. H.R. Rep. 1 (1992) (discussing the rights of transsexuals); X and Y v. Netherlands, 8 Eur. H.R. Rep. 235 (1985) (addressing the rights of a mentally disabled youth); Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1981) (outlining the privacy rights of homosexuals).

66. The facts of *Sanles v. Spain,* EUR. H.R.L. REV. 348 (2001), were similar to Pretty's, but in *Sanles* the applicant did not base her claims on Article 8. Moreover, the applicant died and the European Court of Human Rights never issued a decision on the merits.

for the proposition that "the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned."[67] By extension, explained the Court, Article 8 "included the right to choose when and how to die."[68] Despite the government's arguments to the contrary, Ms. Pretty's Article 8 rights were engaged.

Next, without a developed body of precedent, the Court conducted a somewhat random search for guidance on whether the United Kingdom had interfered with Ms. Pretty's right to privacy.[69] The Court first looked for persuasive authority in the House of Lords. In his dissenting opinion, Lord Hope had argued that "the closing moments of [Ms. Pretty's] life [were] part of the act of living, and [that] she [had] a right to ask that [these moments] must be respected."[70] The Court agreed with Lord Hope and observed that "notions of the quality of life" have great value under Article 8; the DPP's refusal to grant Mr. Pretty immunity diminished, or interfered with, Ms. Pretty's ability to control her quality of life.[71] The Court also noted that "[i]n an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity."[72]

As a living document, the Convention is designed to ameliorate modern concerns.[73] Finally, the Court referenced *Rodriquez v. Attorney General of Canada*, where the Supreme Court of Canada applied the Canadian Charter to similar facts and concluded that a prohibition on assisted suicide "required justification under principles of fundamental justice."[74] Relying on a hodgepodge of authority — Lord Hope's dissent,

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67. *Pretty*, 35 Eur. H.R. Rep. at 36. *See, e.g.,* Laskey, Jaggard & Brown v. United Kingdom, 24 Eur. H.R. Rep. 39 (1997) (concerning prosecution and conviction for sado-masochistic practices within the home); Valasinas v. Lithuania, App. No. 44558/98(2001) (concerning refusal of medical treatment for a prisoner), *available at* http://hudoc.echr.coe.int (last visited Sept. 14, 2003).

68. *Pretty*, 35 Eur. H.R. Rep. at 35.

69. *Id.* at 37 (Ms. Pretty "is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference….").

70. *Id.* at 22 (quoting R. v. DPP, 10 H.R.L.R. 241 (HL 2002) (Hope, L., dissenting) on the application of Pretty).

71. *Id.* at 37.

72. *Id.*, *at* 37.

73. *See* Marckx v. Belgium, 5 Eur. H.R. Rep. 330, 353 (1979) (recalling that the Convention must be interpreted "in light of present-day conditions").

74. *Pretty*, 35 Eur. H.R. Rep. at 37 (citing Rodriguez v. Attorney Gen. of Canada, [1994] 2 L.R.C. 136). *See generally* Caroline Richmond, *British Case Mimics* Rodriguez *Case*, 166 CANADIAN MED. ASS'N J. 232 (2002), *available at* www.cma.ca/cmaj/cmaj_today/2001/12_03.htm (Dec. 3, 2001).

public opinion, and Canadian law — the Strasbourg Court determined that the United Kingdom's law, and not Ms. Pretty's illness, prevented her from exercising her privacy rights under the Convention.

In concluding its analysis, the Court addressed the final piece of the Article 8 puzzle: whether the United Kingdom's interference with Ms. Pretty's right to privacy was justified; in other words, whether the interference was "in accordance with the law," had legitimate aims, and was "necessary in a democratic society."[75] Ms. Pretty agreed that the prohibition on assisted suicide was imposed by law and that the 1961 Suicide Act legitimately aimed to protect life and the rights of others.[76] Her concessions enabled the Court to focus on the necessity of the interference.[77] As the Court explained, "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."[78] Moreover, "in determining whether an interference is 'necessary in a democratic society', the Court will take into account that a margin of appreciation is left to the national authorities."[79] This margin of appreciation expands and contracts; and here, the court abruptly ruled that unlike interferences with an individual's sex life that require particularly compelling reasons under a narrow margin of appreciation,[80] interferences with an individual's right to self-determination call for a wide margin of appreciation.[81] The Court visualized universal rights on a continuum and recognized one's freedom of sexual identity as more universal than the right to self-determination.[82] In this light, the Court turned to the question of proportionality.

The proportionality test examines the relationship between the interference-— a general ban on all methods of assisted suicide as applied to a "mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision" — and the purpose of the interference — to protect the vulnerable.[83] While the Court recognized a lack of proportionality in this relationship, it also noted that states are free to protect public health and safety through the application of general criminal law and that the states'

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75. *Pretty*, 35 Eur. H.R. Rep. at 37 (quoting Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, 162 (1982)).

76. *Id.*

77. *See id.*

78. *Id.* at 38.

79. *Id.*

80. *See* Smith & Grady v. United Kingdom, 31 Eur. H.R. Rep. 620, (2000) ("A margin of appreciation is left open to Contracting States [and] varies according to the nature of the activities restricted and of the aims pursued by the restrictions.") (citing Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149 (1982)).

81. *Pretty*, 35 Eur. H.R. Rep. at 42.

82. *See id.* at 38.

83. *Id.*

interests had to be balanced against the interference with an individual's personal autonomy or liberty.[84] Personal autonomy sat on one side of the scale and an entire class of vulnerable individuals, plus the United Kingdom's assessment of the risk of abuse, piled onto the other side.[85] "[N]otwithstanding arguments as to the possibility of safeguards and protective procedures," public health and safety interests outweighed personal autonomy.[86] The interference was justified; the United Kingdom's prohibition on assisted suicide did not violate Article 8 of the Convention. Six months after the European Court of Human Rights announced its decision and declined to give Ms. Pretty the right to authorize active euthanasia, Ms. Pretty died in the manner "she had foreseen and was afraid of," at the Pasque Hospice and not at home.[87]

Tension in the Strasbourg Court's universalist aspirations and relativist tendencies clearly shaped its analysis of what is "necessary in a democratic society."[88] The Court's use of the balancing test may have been an attempt to formulate universal standards through objective measures, but its application of a wide margin of appreciation dictated a predetermined outcome. Common law courts have held that state interests — "(1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses [a slippery slope]"[89] — outweigh the right to privacy if the patient wants to die by lethal injection, but the same state interests do not outweigh the right to privacy if the patient wants to die by terminating life-sustaining treatment.[90] Despite this

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84. This was the position held by both the House of Lords and the Supreme Court of Canada in *Rodriguez*, but the Court seems to be applying a hybrid of the United States Supreme Court's First Amendment analysis — neutral law of general application — and its analysis under the Equal Protection clause of the Fourteenth Amendment. *See generally* R. v. DPP (on the application of Pretty), 10 H.R.L.R. 241 (HL 2002); Rodriguez v. Attorney Gen. of Canada [1993] 3 S.C.R. 519, 523.

85. *See Pretty*, 35 Eur. H.R. Rep. at 39.

86. *Id.* The Court harbored a belief that the Suicide Act of 1961 provided flexibility in the law in requiring the consent of the DPP prior to prosecution and in its allowance of minimal sentences. The Court fails to recognize that these elements do not provide flexibility for law-abiding citizens.

87. *Diane Pretty Dies*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/1/low/health/1983457.stm (quoting Brian Pretty)(May 12, 2002).

88. Convention, *supra* note 8, at art. 8(2).

89. Washington v. Glucksberg, 521 U.S. 702, 728 n.20 (1997). *See generally* Linda L. Emanuel, *A Question of Balance, in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 234, 235 (Linda L. Emanuel ed., 1998) (including a chart of the arguments for and against physician-assisted suicide and active euthanasia).

90. *See* Lewis, *supra* note 23, at 57 ("When a competent terminal patient chooses to die, the state interests balanced against that patient's right to privacy are virtually the same regardless of the means chosen." (quoting Steven J. Wolhandler, *Voluntary Active Euthanasia*

inconsistency, the Strasbourg Court deferred to the law of the United Kingdom and the House of Lords.

The House of Lords was influenced by the United States Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*.[91] In *Cruzan*, Nancy Beth Cruzan spent seven years in a persistent vegetative state (PVS)[92] as a result of injuries she sustained in a tragic car accident; her parents petitioned the Missouri courts for permission to terminate all life-sustaining treatment.[93] The Supreme Court of Missouri held that Ms. Cruzan's parents lacked the authority to withdraw their daughter's artificial feeding and hydration tubes because they could not produce the statutorily required "clear and convincing" evidence of Ms. Cruzan's directives for treatment under such circumstances.[94] The Supreme Court granted certiorari and held in a 5-4 decision that the United States Constitution allowed Missouri to require clear and convincing evidence of an incompetent patient's consent to terminate life-sustaining treatment.[95]

The majority opinion in *Cruzan* by Chief Justice Rehnquist was similar to the Strasbourg Court's decision in *Pretty* in that it first surveyed the law of its "member states," in this case Missouri, Massachusetts, New York, New Jersey, California, and Illinois.[96] Although the Supreme Court never had held that a generalized right to privacy included a right to refuse treatment, many state court decisions were grounded on an individual's constitutional right to privacy.[97] Justice

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for the Terminally-ill and the Constitutional Right to Privacy, 69 CORNELL L. REV. 363, 375 (1984)).

91. *See* Airedale N.H.S. Trust v. Bland, [1993] A.C. 789, 803-04, 859 (outlining the Court's analysis in Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

92. According to Dr. Fred Plum, creator of the term "persistent vegetative state," PVS refers to:

> a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

In re Jobes, 108 N.J. 394, 403 (1987).

93. *See Cruzan*, 497 U.S. 261, 265-66.

94. *Id.* at 265.

95. *Id.* at 266. After this case, a lower court heard further evidence and decided that the clear and convincing standard had been met. Nancy Cruzan died 12 days later on December 26, 1990. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 870 (2000).

96. *See Cruzan*, 497 U.S. at 269-78. *See also* Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 22-24 (2002).

97. *Cruzan*, 497 U.S. at 279 n.7. *See, e.g., In re* Quinlan, 355 A.2d 647, 662-64 (N.J. 1976), *cert. denied sub nom;* Garger v. New Jersey, 429 U.S. 922 (1976) (finding that the patient had a right to privacy grounded in the Federal Constitution to terminate treatment); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (relying on the right to privacy to permit the withholding of chemotherapy from a profoundly retarded patient); Conservatorship of Drabick, 245 Cal. Rptr. 840 (App. 6 Dist. 1988), *cert. denied*, 488

O'Connor, however, noted in her concurring opinion that "no national consensus has yet emerged on the best solution for this difficult and sensitive problem."[98] The Supreme Court did not decide the issue in *Cruzan* because it did not face a particularized claim like the one presented by Diane Pretty.

Privacy-based arguments for the right to die still rely on *Cruzan* and on the Supreme Court's sole recognition that competent adults have a constitutional right to direct life-sustaining treatment to be withheld.[99] If patients have the right to *refuse* medical treatment, the argument proceeds, then they have the right to *choose* medical treatment.[100] Moreover, if patients have a right to die naturally, then they have a right to die under the care and supervision of a physician.[101] For now, just as the European Court of Human Rights has instituted a wide margin of appreciation in assisted suicide cases, the U.S. Supreme Court has deferred to the states and to their respective legislatures to make sense of these issues.[102] Recent cases, however, suggest that five out of nine Supreme Court justices stand ready to acknowledge a constitutional right

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U.S. 958 (1988) (authorizing removal of a nasogastric feeding tube based on a constitutional right to privacy). Rehnquist suggested that the individual right involved may best fit within the scope of the Fourteenth Amendment's liberty interest, but the Court did not answer this question; the only issue presented was whether Missouri's law was constitutional. *See Cruzan*, 497 U.S. at 279. *See also* Lewis, *supra* note 23, at 56 ("Arguments in favor of a right to suicide or assisted suicide derived from the right to privacy are closely related to those derived from the rights to autonomy and liberty.").

98. *Cruzan*, 497 U.S. at 292.

99. *See* RONALD DWORKIN, LIFE'S DOMINION 188 (1993) ("Several states revised their laws after the *Cruzan* decision, and every state has now made provision for honoring living wills, health-care proxies, or, in most states, both. In 1990, Congress adopted a law requiring all hospitals supported by federal funds to inform [patients]…about advance directives.").

100. *But see* Nat'l Legal Ctr. for the Medically Dependent & Disabled, Inc., *Whether Physician-Assisted Suicide Serves A "Legitimate Medical Purpose" Under the Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act*, 17 ISSUES LAW & MED. 269, 292 (2002) (concluding that physician-assisted suicide does not serve a legitimate medical purpose); Wesley J. Smith, *Killing Isn't Medicine*, NAT'L REV. ONLINE (May 1, 2002), *at* www.nationalreview.com/comment-smith050102.asp (arguing that if assisted suicide was a medical procedure, the European Court of Human Rights would not have heard Pretty's case because it would have been clear that she was asking the Court to allow her husband to practice medicine without a license).

101. *See* Lewis, *supra* note 23, at 56-57; Compassion in Dying v. Washington, 49 F.3d 586, 595-96 (9th Cir. 1995) (Wright, J., dissenting) (asserting that terminally-ill, mentally competent adults have a fundamental privacy right to physician-assisted suicide), *rev'd* 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd en banc,* 79 F.3d 790 (9th Cir. 1997), *aff'd*, Washington v. Glucksberg, 521 U.S. 702, 743 (1997).

102. Unlike its influence on the European Court of Human Rights, national consensus is not determinative of the Supreme Court's decision; the Supreme Court's legitimacy does not rest in a margin of appreciation and the Court is free to overrule even a unanimous position held by the collective states. *See* Margaret P. Battin, *Is a Physician Ever Obligated to Help a Patient Die?, in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 21, 21 (Linda L. Emanuel ed., 1998) ("Physician-assisted suicide will probably soon become legal on a state-by-state basis, culturally tolerated, and openly practiced.").

to physician-assisted suicide for competent, terminally ill adults.[103] Recognition of a universal right to die therefore looms in the future, tipping national, and perhaps international, balances in the direction of individual rights. But before the courts can recognize a universal right to die, they must first abandon the judicial device that enables them to differentiate between active euthanasia, passive euthanasia, and palliative care.

III. DEFINING DEATH

Beyond the Strasbourg and United States Supreme Courts' analyses of guaranteed, fundamental rights, the international body of right-to-die-jurisprudence rests on carefully crafted language and technical distinctions between active and passive euthanasia and between active euthanasia and palliative care. As a result, language has meant the difference between life and death. For purposes of this paper, the terms "physician-assisted suicide" and "euthanasia," meaning the intended termination of a patient's life, have been used interchangeably; Ms. Pretty would have been satisfied with either one. But the euthanasia movement has a lexicon of its own, and a person contributing to the discourse must be aware of the subtle distinctions assigned to the terms "physician-assisted suicide" and "euthanasia." Physician-assisted suicide occurs when — in response to a request from a mentally competent, terminally-ill[104] adult — "a doctor knowingly and intentionally gives a patient the means [to commit suicide], or otherwise assists a patient who takes his or her own life."[105] In these cases, the physician most often prescribes a lethal dosage of medication for either the patient or someone

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103. In Washington v. Glucksberg, 521 U.S. 702 (1997), the Court applied the Fourteenth Amendment's Due Process Clause to Washington's ban on assisted suicide and found that the statute was rationally related to legitimate governmental interests. On the same day, the Court decided Vacco v. Quill, 521 U.S. 793 (1997) and held that New York's prohibition did not violate the Fourteenth Amendment's Equal Protection Clause. Justices O'Connor, Ginsberg, Breyer, Souter, and Stevens filed concurring opinions which left open the possibility that a ban on assisted suicide could be unconstitutional as applied to a competent, terminally-ill adult. For further discussion on the majority and concurring opinions in these cases, see Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL'Y 599, 613-21 (2000).

104. The characterization of a patient as "terminally-ill" refers to "an incurable or irreversible condition that has a high probability of causing death within a relatively short time with or without treatment." Margaret A. Drickamer et al., *Practical Issues in Physician-Assisted Suicide*, ANNALS OF INTERNAL MED. (Jan. 15, 1997), *at* http://www.acponline.org /shell-cgi/printhappy.pl/ journals/annals/15jan97/pipas.htm. A patient may be considered terminal if he or she has acquired a "terminal disease," meaning "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months." *Id.*

105. Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 PAC. RIM. L. & POL'Y J. 1, 4 (1997).

other than the physician to administer.[106] Euthanasia, on the other hand, literally means "easy death;" in common parlance, the word refers to "an act or practice of painlessly putting to death persons suffering from incurable conditions or diseases."[107] When used in the discourse of the "right to die" movement, however, euthanasia escapes universal definition.[108]

In *Euthanasia, Ethics, and Public Policy*, John Keown identifies three definitions of euthanasia; "all three…concur that 'euthanasia' involves *doctors* making decisions *which have the effect of shortening a patient's life* and that these decisions are *based on the belief that the patient would be better off dead.*"[109] The scope of activities covered by each of the definitions varies greatly, but the end result is the same for the patient. In contrast, the physician must face consequences of a drastically different nature.

A. Active Euthanasia

Keown's first definition of euthanasia, most often referred to as "active euthanasia,"[110] addresses "the *active, intentional* termination of a patient's life by a doctor."[111] Unlike physician-assisted suicide, where the doctor prescribes a lethal dosage of medication for self-administration, active euthanasia depends on the doctor to administer the drug.[112] Most jurisdictions, including the United Kingdom and the United States, define euthanasia under this narrow definition.[113] But instead of distinguishing active euthanasia from physician-assisted suicide, they lump the two together and offer another label, namely murder.[114]

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106. Lara L. Manzione, *Is There a Right to Die?: A Comparative Study of Three Societies (Australia, Netherlands, United States)*, 30 GA. J. INT'L & COMP. L. 443, 446 (2002).

107. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 786 (2002) (noting that the etymology is Greek).

108. *See* KEOWN, *supra* note 27, at 10.

109. *Id.*

110. BLACK'S LAW DICTIONARY, *supra* note 111, at 575.

111. KEOWN, *supra* note 27, at 10.

112. *See* BLACK'S LAW DICTIONARY, *supra* note 111, at 575.

113. KEOWN, *supra* note 27, at 11. The House of Lords Select Committee on Medical Ethics defined euthanasia in 1994 as "a deliberate intervention undertaken with the express intention of ending a life to relieve intractable suffering." *Id.* (quoting *Report of the Select Committee on Medical Ethics* (HL Paper 21-I of 1993-4)). In that same year, the New York State Task Force on Life and the Law defined Euthanasia as "direct measures, such as a lethal injection, by one person to end another person's life for benevolent motives." *Id.* (quoting N.Y. STATE TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994)).

114. *See* Suicide Act, 1961, 9 & 10 Eliz. c. 60, § 2 (1) (Eng.) (criminalizing assisted suicide in the United Kingdom); R. v. United Kingdom 33 D.R. 270 (1983) (finding that the applicant's conviction for aiding and abetting suicide did not violate the Convention). For a comprehensive state survey of laws criminalizing assisted suicide in the United States, see Vacco v. Quill, 521 U.S. 793, 805 n.9 (1997). Oregon is currently the only jurisdiction in the United States that legalizes physician-assisted suicide. *See* The Oregon Death With Dignity Act, OR.

The case of *People v. Kevorkian* is widely recognized for its conviction of Dr. Jack Kevorkian, a seventy-one year old physician sentenced to concurrent prison terms of seven years for delivering a controlled substance and ten to twenty-five years for the second-degree murder of former racecar driver Thomas Youk.[115] Like Ms. Pretty, Mr. Youk suffered from ALS, but similarities between the two cases end there.[116] Most notably, Mr. Youk expressed his desire to die with seemingly less conviction.[117] Notwithstanding the gravity of Mr. Youk's decision, Dr. Kevorkian, "perhaps the most notorious proponent of assisted suicide and euthanasia,"[118] met with Mr. Youk for the first time on September 15, 1998; the meeting lasted twenty minutes.[119] On the following night, Dr. Kevorkian returned to perform, in his words, "a mercy killing."[120] In less than five minutes, Mr. Youk was dead.[121] Although Dr. Kevorkian had assisted in over 130 suicides,[122] Mr. Youk's death was the first to be recorded and aired on national television.[123]

In the course of its decision, the Michigan Court of Appeals remarked that "[b]ut for defendant's self-described zealotry, Thomas

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REV. STAT. ch. 127.800 § 1.01 (1994). Attorney General Ashcroft has challenged Oregon's Death With Dignity Act as a violation of the federal Controlled Substances Act. *See generally* Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (2002); Memorandum from Sheldon Bradshaw, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to the Attorney General (June 27, 2001), *reprinted in Whether Physician-Assisted Suicide Serves a "Legitimate Medical Purpose" Under the Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act*, 17 Issues L. & Med. 269 (2002).

115. 639 N.W.2d 291, 296 (Mich. Ct. App. 2001), *appeal denied*, 642 N.W.2d 681 (Mich. 2002), *and cert. denied*, 2002 WL 1575134 (U.S. Oct. 7, 2002). *See also* ANGELS OF DEATH, *supra* note 5, at 32-34 (describing the exploits of Australia's answer to Kevorkian, Dr. Philip Nitschke, "who presided over all four of the legal euthanasia deaths under the Territory legislation" before it was repealed).

116. *See Kevorkian*, 639 N.W.2d at 298.

117. Dr. Kevorkian allegedly had Mr. Youk sign a consent form and read a prepared statement before being injected with potassium chloride:

> I, Thomas Youk, the undersigned, entirely voluntarily, without any reservation, external persuasion, pressure, or duress, and after prolonged and thorough deliberation, hereby consent to the following medical procedure of my own choosing, and that you have chosen direct injection, or what they call active euthanasia, to be administered by a competent medical professional, in order to end with certainty my intolerable and hopelessly incurable suffering.

Id.

118. Gorsuch, *supra* note 103, at 601.

119. *See Kevorkian,* 639 N.W.2d at 298.

120. *Id.* at 296.

121. *Id.* at 298.

122. Gorsuch, *supra* note 103, at 601. Despite his notoriety, Dr. Kevorkian is "hardly without allies. Derek Humphry, founder of The Hemlock Society, a group devoted to the legalization of euthanasia, has praised Dr. Kevorkian for 'breaking the medical taboo on euthanasia.' The [ACLU] has taken up his legal defense." *Id. But see Kevorkian*, 639 N.W.2d at 312-14 (discussing Kevorkian's decision to represent himself).

123. For a discussion on Dr. Kevorkian's interview with Mike Wallace of *60 Minutes*, see *Kevorkian*, 639 N.W.2d at 299-300.

Youk's death would, in all probability, not have been the subject of national attention, much less a murder trial."[124] In reality, a majority of common law jurisdictions have not prosecuted individuals under assisted suicide statutes since the early 1900s, and this common practice of willful blindness may have left Mr. Youk's death as little more than a number on Dr. Kevorkian's ghoulish résumé.[125] Instead, Dr. Kevorkian repeatedly challenged the courts to judge his actions, which he genuinely believed "could never be a crime in any society which deems itself enlightened," in its purest form.[126] Dr. Kevorkian embodies many of society's rightly-held fears regarding the legalization of physician-assisted suicide; in terms of human rights role models, he is no Diane Pretty. But the strength of Dr. Kevorkian's convictions is seen in his unwavering refusal to characterize his actions under more acceptable definitions of euthanasia, namely passive euthanasia or palliative care.[127]

B. Termination of Life by Act or Omission

Keown's second definition, which he titles "the intentional termination of life by act or by omission," includes the intentional killing of a patient by removal of an artificial breathing device or through the termination of an artificial means of sustenance.[128] Acts such as these are commonly referred to as "passive euthanasia."[129] Under the notion that switching off a patient's ventilator, for example, is an omission rather than an action,[130] the United Kingdom and the United States have exempted physicians and other health care providers from criminal prosecution for the death of a competent patient who either refuses or

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124. *Id.* at 297.

125. *See* Compassion in Dying v. Washington, 79 F.3d 790, 808-10 (9th Cir. 1996) (en banc). Despite laws prohibiting assisted suicide, courts and medical associations in the United Kingdom and the United States have been lenient in dealing with doctors who have admitted prescribing legal dosages of medication to patient with whom they had shared a long, professional relationship. For anecdotal stories of cases in Canada, the United Kingdom, and the United States, see DWORKIN, *supra* note 99, at 185-87.

126. *Kevorkian*, 639 N.W.2d at 299 (quoting Kevorkian's interview on *60 minutes*).

127. *See* Barry A. Bostrom, *In the Michigan Court of Appeals:* People vs. Jack Kevorkian, 18 ISSUES L. & MED. 57, 59 (2002) (noting that Kevorkian did not claim that his actions were covered by the right to refuse life-sustaining treatment or to relieve pain).

128. KEOWN, *supra* note 27, at 12.

129. *See* BARRON'S LAW DICTIONARY 178 (4th ed. 1996). *See also* CAROL KROHM, M.D. & SCOTT SUMMERS, ADVANCE HEALTH CARE DIRECTIVES 140 (2002) [hereinafter ADVANCE HEALTH CARE DIRECTIVES](reporting that "some medical practitioners unilaterally…resort to approaches that come right up to the line of passive euthanasia: 'slow codes' (also known as 'Hollywood Codes' or 'Light Blue,' among other euphemisms), where health care providers go through the motions of heroic interventions").

130. *But see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring) (quoting Blackstone, "[T]he cause of death in both cases is the suicide's conscious decision to pu[t] an end to his own existence.").

wishes to terminate life-sustaining treatment.[131] In fact, even if the patient is incompetent, health care law has evolved in both jurisdictions such that advance directives, particularly living wills and the durable powers of attorney, are recognized as the patient's voice "on how medical choices are to be made in the event of decisional or communicative incapacity."[132] Thus, while competent adults like Ms. Diane Pretty are refused the right to self-determination, passive euthanasia extends the right to die to competent *and* incompetent patients who depend on life-sustaining medical treatment.

The House of Lords relied on this unconvincing logic to distinguish passive euthanasia from active euthanasia in *Airedale NHS Trust v. Bland*.[133] Anthony Bland suffered a crushing blow to his chest as a result of the 1989 Hillsborough disaster,[134] which left him in a persistent vegetative state at the young age of seventeen.[135] A team of doctors agreed "that there was absolutely no hope of any improvement" and sought judicial declarations from the High Court of Justice allowing them to remove Mr. Bland's artificial feeding tube and to cease antibiotic treatment.[136] The High Court acknowledged that within two weeks, "the lack of sustenance would bring an end to the physical functioning of the body of Anthony Bland[,] and he would in terms 'die.' The process would be that of 'starvation.'"[137] All euphemisms aside, the "process" would be that of a mercy killing, a court-sanctioned death by starvation. Had Mr. Bland been able to consent to the withdrawal of the nasogastric tube, or had he prepared advance directives, the doctors would have been able to proceed without the threat of prosecution.[138] Unfortunately, the only

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131. *See* Ms. B v. An NHS Hospital Trust, 2 Eng. Rep. 449 (Fam. 2002) (declaring that Ms. B's right to refuse artificial ventilation is well-established); *In re* Quinlan, 355 A.2d 647, 662-64 *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (holding that Ms. Quinlan had a privacy right to terminate treatment).

132. ADVANCE HEALTH CARE DIRECTIVES, s*upra* note 129, at 9. *See also* Brendan A. Thompson, *Final Exit: Should the Double Effect Rule Regarding the Legality of Euthanasia in the United Kingdom be Laid to Rest?*, 33 VAND. J. TRANSNAT'L L. 1035, 1038 (2000) ("Under English law, doctors may honor a patient's request for passive euthanasia if [the request is] either made to the doctor personally or by an advance directive."). For a discussion on advance directives and other health care alternatives in the United States, see generally ADVANCE HEALTH CARE DIRECTIVES, *supra* note 129.

133. [1993] A.C. 789, 865 ("[T]he law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide…treatment or care which could…prolong his life, and those in which he decides…to bring his patient's life to an end.… [T]he former may be lawful….").

134. For more information on the Hillsborough disaster, see http://www.contrast.org/hillsborough/history/index.shtm (last visited Sept. 14, 2003).

135. *See Airedale N.H.S. Trust*, [1993] A.C. at 795.

136. *Id.* at 796. The trial court noted that the hospital was not financially motivated to seek such a declaration. *See id.*

137. *Id.*

138. *See id.* at 809. The court explained that:

> if, presciently, Mr. Bland had given instructions that he should not be

evidence of Anthony Bland's wishes was his father's feelings that his son "wouldn't want to be left like he is."[139] The judges agreed.

In a unanimous decision, the House of Lords dismissed the official solicitor's appeal and held that the hospital could lawfully terminate Mr. Bland's treatment because he no longer benefited from it.[140] Despite Lord Mustill's admonition that "[e]mollient expressions such as 'letting nature take its course' and 'easing the passing'…[were] out of place,"[141] the Lords glossed over the reality of death and dedicated much of their attention to distinguishing passive euthanasia from active euthanasia. Their arguments are weak. Lord Goff conceded that:

> the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies.[142]

Lord Goff's answer to the charge? The law cannot recognize active euthanasia as lawful because it will become "difficult to see any logical basis for excluding it."[143] The "slippery slope" argument, as discussed in greater detail in Part IV of this Article, does not advance a rational basis for distinguishing starvation from lethal injection. Lord Keith's reasoning is equally unconvincing. He opines that "the principle of the sanctity of life…forbids the taking of active measures to cut short the life of a terminally ill patient," but it does not prohibit the cessation of "medical treatment and care to a [PVS] patient who has been in that state for over three years, considering that to do so involves invasive manipulation of the patient's body to which he has not consented and which confers no benefit upon him."[144] Rather than serving as an exhibition of critical analysis, Lord Keith's words reveal a value judgment based on medical testimony that Mr. Bland's life was not worth living.

> artificially fed or treated with antibiotics if he should become a P.V.S. patient, his doctors would not act unlawfully in complying with those instructions but would act unlawfully if they did not comply, even though the patient's death would inevitably follow.

Id.

139. *Id.* at 797.
140. *See id.* at 856-99.
141. *Airedale N.H.S. Trust*, [1993], A.C.. at 886-87.
142. *Id.* at 865.
143. *Id.*
144. *Id.* at 859.

Interestingly, Lord Keith took "comfort to observe that in other common law jurisdictions, particularly in the United States,…the courts have with near unanimity concluded that it is not unlawful to discontinue medical treatment and care…of [PVS] patients."[145] Common law jurisdictions like the United Kingdom and the United States have differentiated between active and passive euthanasia by crafting legal distinctions out of Anglo-American traditions.[146] Lord Browne-Wilkinson explained in *Airedale N.H.S. Trust* that a patient must consent to medical treatment because touching a patient's body without consent "constitutes the [common law] crime of battery and the tort of trespass to the person."[147] The right to the withdrawal of life support, Lord Browne-Wilkinson explained, is justified by laws against battery.[148] The common law courts have focused on the definition of battery rather than the mercy killing performed when active steps are taken to withdraw life support. The United States Supreme Court is no exception. While it may be true that the United States judiciary is a bastion of rational thought, the bipolar regulation of active and passive euthanasia is not its finest example.[149]

The medical, ethical, and legal issues presented by *In re Quinlan* are remarkably similar to *Bland.*[150] Karen Ann Quinlan, a twenty-two year old New Jersey resident, had inexplicably lapsed into a "chronic and persistent vegetative state."[151] For more than a year, Ms. Quinlan assumed a "fetal-like and grotesque" position in a hospital's intensive care unit.[152] Although she required a ventilator and an artificial means of sustenance, "[u]nder any legal standard recognized by the State of New Jersey and also under standard medical practice, Karen Ann Quinlan [was] alive."[153] Like Mr. Bland, Ms. Quinlan did not have advanced directives and could not consent to the termination of treatment, yet her father sensed from prior conversations that she would not have wanted to continue living in a vegetative state.[154] He therefore sought guardian-

145. *Id.*

146. *But see* Compassion in Dying v. Washington, 79 F.3d 790, 808-10 (9th Cir. 1996) (en banc) (explaining that although assisted suicide was unlawful under English and American common law, a majority of the states had not prosecuted individuals under attempted suicide statutes since the early 1900s).

147. *Airedale N.H.S. Trust*, [1993] A.C. at 882-83 ("The doctor cannot owe to the patient any duty to maintain his life where that life can only be sustained by intrusive medical care to which the patient will not consent".).

148. *See id*.

149. Many American courts have recognized the distinction between passive and active euthanasia. *See* Vacco v. Quill, 521 U.S. 793, 804 n.8 (1997) (compiling cases).

150. *In re* Quinlan, 355 A.2d 647 (N.J.), (1976) *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

151. *See id.* at 655.

152. *Id.*

153. *Id.* at 652.

154. *See id.* at 653.

ship over his daughter and petitioned the court to terminate her treatment.[155]

After an initial finding that hearsay evidence of Ms. Quinlan's aversion to life-sustaining medical treatment lacked significant probative weight, the New Jersey Supreme Court aimed to accord the withdrawal of life support with the state's medical standards and ethics;[156] its conclusions rested "upon definitional and constitutional bases."[157] In defining passive euthanasia, the court made an incredulous leap by likening a physician's withdrawal of life support for PVS patients to the hospital's treatment of terminal patients who die naturally.[158] Doctors testified to an "unwritten and unspoken standard of medical practice implied in the foreboding initials DNR," which prevents health care workers from taking extraordinary measures to resuscitate terminally-ill patients.[159] The generally accepted practice of failing to revive terminally-ill patients, in the court's reasoning, was similar to the informal doctrine of "judicious neglect" where a physician decides that "it does not serve either the patient, the family, or society in any meaningful way to continue treatment with [the] patient" and accordingly suspends or terminates the patient's care.[160] While the court admitted that its "thread of logic…may be elusive," it found that the withdrawal of life support, like DNR orders, comported with New Jersey's medical standards of acting in the best interests of the patient.[161]

The court's "thread of logic," like the threads of the emperor's new clothes, was "make believe."[162] Of course passive euthanasia is *not* a DNR order; the former invites death, the latter prevents defeating it. Unlike a DNR order, passive euthanasia is not passive; it requires action such as the turning off of a ventilator or the removal of a nasogastric tube. Moreover, from the competent patient's perspective, passive euthanasia leads to an array of activities: "[r]emoving a respirator produces suffocation; terminating dialysis produces the symptoms of uremia; refusing feedings produces the symptoms of dehydration or starvation."[163]

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155. *See id.*

156. *In re Quinlan*. 355 A.2d at 657.

157. *Id.* at 670. The court's decision is supported by a right to privacy in the federal and state constitutions. *See id.* at 664 (finding that the termination of treatment is protected by her right to privacy). The Court's analysis under the right to privacy is discussed in greater detail in Part IV of this article.

158. *Id.* at 657.

159. *Id.* DNR stands for "do not resuscitate." *Id.*

160. *Id.*

161. *Id.*

162. *See generally* H.C. ANDERSON, THE EMPEROR'S NEW CLOTHES: AN ALL-STAR RETELLING OF THE CLASSIC FAIRY TALE (1998).

163. Marcia Angell, *Helping Desperately Ill People to Die*, *in* REGULATING HOW WE DIE: THE ETHICAL, MEDICAL, AND LEGAL ISSUES SURROUNDING PHYSICIAN-ASSISTED SUICIDE 3, 13 (Linda L. Emanuel ed., 1998).

In fact, passive euthanasia is more akin to active euthanasia; if passive euthanasia is legal, active euthanasia must be lawful as well.[164] But the New Jersey Supreme Court, like the House of Lords, distinguished passive euthanasia from active euthanasia. The court found that Ms. Quinlan's "ensuing death would not be homicide but rather expiration from existing natural causes [and that] if it were to be regarded as homicide, it would not be unlawful" because Ms. Quinlan had a right to refuse treatment.[165] Here again, semantics played an important role in the court's decision.

Airedale N.H.S. Trust and *Quinlan* clearly influenced the Strasbourg Court's decision in *Pretty* as it adopted the linguistic distinctions proffered by each of these cases.[166] In deciding whether the United Kingdom had interfered with Ms. Pretty's right to privacy, the Court noted that:

> the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment, without the consent of a mentally competent adult patient, would interfere with a person's physical integrity in a manner capable of engaging the rights protected under Article 8(1) of the Convention.[167]

The Court recognized that "in domestic case law, a person may claim to exercise a choice to die by declining to consent to treatment."[168] Then, with a slight of hand, the Court declared that "medical treatment [was] not an issue" in Ms. Pretty's case.[169] This statement enabled the Court to justify the United Kingdom's interference with Ms. Pretty's rights under Article 8(2), whereas the same actions would not have been justified had the court viewed active euthanasia in the same light as passive euthanasia.

In general, these decisions address distinctions between active and passive euthanasia based on causation, act-omission, and intent;[170] but

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164. *See* Robert L. Burgdorf Jr., *Assisted Suicide: A Disability Perspective*, *at* http:// www.ncd.gov/newsroom/publications/suicide. html (Mar. 24, 1997) (Although he opposed the legalization of active euthanasia, Professor Burgdorf, writing on behalf of the National Council on Disability, conceded "that current laws and legal principles regarding treatment, nontreatment, and assisted suicide need refinement" to correct the ironies of the passive-active euthanasia dichotomy).

165. *In re Quinlan*, 355 A.2d at 669-70. *See also* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424-428 (1977) (concluding that the individual patient's interests in refusing treatment outweigh those of the state).

166. *See* Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 36-37 (2002).

167. *Id.* at 36.

168. *Id.*

169. *Id.*

170. Gorsuch, *supra* note 103, at 643.

these distinctions cannot stand. The causation argument is that, unlike active euthanasia, with passive euthanasia the disease or "nature" is responsible for the patient's death when life-sustaining treatment is discontinued.[171] This is simply untrue. If the physician's actions are not the cause of the individual's death, then the causation argument prevents a state from prosecuting anyone who decides to terminate life support or refuse life-sustaining treatment against the patient's wishes. Moreover, "[w]hen patients decide to forgo or withdraw basic care such as food and water, the claim that death is 'caused' as much by that human choice as any death by lethal injection has some undeniable appeal."[172] The act-omission distinction is equally manipulable as "the writing of a prescription to hasten death…involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation and/or dehydration."[173] In fact, passive euthanasia contradicts Anglo-American notions of a physician's duty to his or her patient where "a physician's 'omission' of readily available treatment is the textbook definition of professional malpractice."[174] Yet the courts sanction passive euthanasia and disapprove of active euthanasia.[175] Influenced by bioethicists, the courts also focus on intent. According to the United States Supreme Court, a physician who terminates or forgoes life support "purposefully intends, or may so intend, only to respect his patient's wishes" while a doctor assisting suicide "must, necessarily and indubitably, intend primarily that the patient be made dead."[176] Diane Pretty's struggle is but one example of why this argument is preposterously false; a doctor who prescribes a lethal dosage of medication need not have any more of an intent to kill his or her patient than the doctor who withdraws the patient's life support.[177] The arguments are further weakened by the courts' treatment of palliative care that often includes the foreseeable consequence of death.

C. Foreseeable Consequences

Keown's third and final definition, adopted by many advocates of voluntary active euthanasia (VAE),[178] "embraces not only the intentional termination of life by act or omission, but also acts and omissions which

171. *Id.* at 644.
172. *Id.* at 645.
173. Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996).
174. Gorsuch, *supra* note 103, at 646.
175. *See* Vacco v. Quill, 521 U.S. 793, 802 (1997).
176. *Id.* at 801-02.
177. Washington v. Glucksberg, 521 U.S. 702, 750 (1997) (Stevens, J., concurring).
178. Distinctions have been made between voluntary euthanasia (patient-initiated) and involuntary euthanasia (without the consent of the patient as a result of the patient's incompetency). *See, e.g.,* Thompson, *supra* note 132, at 1038-39; Manzione, *supra* note 106, at 446; Funk, *supra* note 12, at 151.

have the *foreseen* consequence of shortening life."[179] This final definition is the most broad; it includes the administration of large doses of palliative drugs, such as morphine, which have a known side-effect of depressing a patient's respiration.[180] Prescribing large doses of morphine does not fall under the first two definitions of euthanasia if the doctor does not intend to kill his or her patient but palliative care *is* included in the third definition, independent of the physician's motivation, because the patient's death is foreseeable.[181]

The inclusion of foreseen consequences in defining "euthanasia" challenges the well-established "double effect" doctrine which allows for the administration of pain-killers, despite their secondary effects, if the treatment is proportional to the illness and intended to ease suffering.[182] The United Kingdom, the United States, and presumably the European Court of Human Rights subscribe to this doctrine which has served to remove ethical and legal concerns from palliative care:

> Doctors prescribe large doses of medication knowing that, as a result, suffering will be lessened and also that life will be shortened. They feel comfortable with what they are doing: They are not breaking the law; they are acting in accordance with their medical understanding and perceive themselves as providing solace to suffering patients.[183]

Because the legality of palliative care rests on the physician's subjective state of mind, it is difficult to determine whether a decision to prescribe morphine, for example, rests on a genuine intention to ease a patient's pain or the physician's conviction that "enough is enough." Palliative care, in some ways, may be the "don't ask, don't tell" policy[184] of physician-assisted suicide. VAE advocates have attempted to redefine euthanasia to include generally accepted methods of palliative care, thereby winning the support of a broader segment of the population.

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179. KEOWN, *supra* note 27, at 15.

180. *Id.*

181. *See* KEOWN, *supra* note 27, at 15-16.

182. *See* THE RIGHT TO DIE WITH DIGNITY, *supra* note 26, at 27 (noting that the double effect doctrine was "developed by Roman Catholic moral theologians in the Middle Ages as a response to situations requiring actions in which it is impossible to avoid all harmful consequences."); *See generally* Thompson, *supra* note 132 (discussing the United Kingdom's utilization of the double effect doctrine).

183. THE RIGHT TO DIE WITH DIGNITY, supra note 26, at 27.

184. *See* Associated Press, *Bisexual Soldier Discharged* (Oct. 18, 2002), *available at* http://www.gaymilitary.ucsb.edu/PressClips/ 02_1018_AssociatedPress.htm (last visited Sept. 14, 2003) ("The Pentagon's 'don't ask, don't tell' policy allows gay men and lesbians to serve if they keep their sexual orientation private and do not engage in homosexual acts.").

But the global community has not adopted this comprehensive definition and opponents of assisted suicide continue to distinguish palliative care. For example, Wesley J. Smith, an attorney for the International Task Force on Euthanasia and Assisted Suicide, insists that "[a]lthough the use of pain-control drugs such as morphine, like surgery or most other medical treatments, can have serious side effects, including death, pain control, if *properly applied*, rarely hastens death [and]…is in no way akin to intentional killing."[185] Neil Gorsuch, author of *The Right to Assisted Suicide and Euthanasia*, quoting the Attorney General's brief from *Washington v. Glucksberg,* maintains that "[a]nalytically and medically, acceptance of palliative treatment that may result in death is no different from the knowing acceptance of the risk of death that accompanies many medical treatments, such as the risk of death attendant on a quadruple bypass."[186] Smith and Gorsuch too easily dismiss the reality of palliative care as applied to terminally-ill patients; unlike medical treatments that pose a risk of death, the high dosages necessary to relieve the pain of a terminal illness make death a foreseeable consequence rather than a mere possibility.[187] Nevertheless, the American Medical Association has endorsed palliative care even when death is foreseeable.[188] Until a patient's right to active euthanasia is treated in the same respect as his or her right to passive euthanasia or palliative care, courts will continue to tip the scales in favor of state interests.

IV. CONCLUSION

Sincerely held arguments against physician-assisted suicide and active euthanasia exist, and the two strongest points concern the "slippery slope" and the role that finances will play in the decision-making process if assisted suicide is legalized.[189] First, the law of entropy teaches that legal doctrine, like everything else, expands, rather than contracts; and the Dutch experience has given rise to fears of a slippery slope.[190] Statistical studies of the effect of legalization in the Netherlands are most often cited as support for the slippery slope; "[t]he extension of euthanasia to more patients has been associated with the inability to regulate the

185. SMITH, *supra* note 13, at 222.

186. Gorsuch, *supra* note 103, at 707.

187. Council on Ethical and Judicial Affairs, American Medical Association, *Decisions Near the End of Life*, 267 JAMA 2229, 2232 (1992).

188. *Id.*

189. *See Assisted Suicide Seduction*, *supra* note 30.

190. *Id.* ("During the past 30 years, the Dutch have slid quickly down the slippery slope. Doctors have gone from killing terminally ill people who ask to be killed, to chronically ill persons who ask to be killed, to infants born with defects who by definition cannot ask to be killed.").

process within established rules."[191] But it is difficult to draw conclusions from these statistical studies because they cannot be likened to an objective norm and because various factors contribute to a physician's willingness to report cases of euthanasia; thus, a scholar's comparison of the number of cases of physician-assisted suicide post-legalization to the actual number of cases pre-legalization is misleading.[192] Second, opponents of active euthanasia worry that "assisted suicide inevitably will be about money. Once fully established in the bedrock of medical practice, it would be less about 'choice' than about profits in the health care system or cutting the costs of government-funded health care."[193] The financial argument gravely underestimates the ability of physicians and government officials to make medical, ethical, and moral decisions; moreover, it ignores the fact that the real decision makers are the competent adults who are terminally-ill. No matter their strength, the slippery slope and financial contentions do not outweigh an individual's right to self-determination.

The European Court of Human Rights, the House of Lords, the United States Supreme Court, and the many state supreme courts that have issued judgments on physician-assisted suicide share at least one common element in their decisions: each has crafted a legal fiction to deny the existence of a universal right to die. Of all the institutions, the European Court of Human Rights may be the least culpable. The Preamble of the Convention offers a primary defense; the treaty is characterized as an agreement between "the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law."[194] As Professor Paolo G. Carozza explains by quoting Eva Brems, the Convention "is not considered to be a superstructure imposed on the contracting states from above, but a system of rules which are part of the common European heritage."[195] To extract and enforce rules from this common heritage, the Court must engage in a comparative analysis of national legal systems. If the Court departs from the common rule of law, Member States, at least theoretically, may ignore judgments, or the Convention may even be denounced.[196] Thus, the Court's opinions may reflect the Judges' concern for maintaining legitimacy.

Although the vast majority of Member States and other western democracies continue to criminalize active euthanasia and physician-assisted suicide, there is increasing movement toward legalization. Since

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191. *See* Herbert Hendin, *The Dutch Experience*, 17 ISSUES L. & MED. 223, 229 (2002).
192. *See generally* Gorsuch, *supra* note 103, at 679-683.
193. *Assisted Suicide Seduction*, *supra* note 30.
194. Convention, *supra* note 8, preamble at 222-24.
195. Carozza, *supra* note 37, at 1226 (citation omitted).
196. *See id.* at 1229.

the early 1990s, "serious political and legal actions taken by euthanasia advocates and their lawyers have brought assisted suicide to the brink of legal acceptance."[197] Measure 16, Oregon's Death with Dignity Act, was passed on November 10, 1994.[198] Australia's Northern Territory legalized euthanasia in its Rights of the Terminally-ill Act of 1995, effective July 1, 1996; the Federal Parliament, however, invalidated the law less than a year after it became effective.[199] On April 10, 2001, the Netherlands became "the first and at [that] time only country in the world to legalize euthanasia."[200] Belgium passed similar legislation a year later.[201] And, as discussed in Part II of this paper, the United States Supreme Court may be prepared to recognize, under certain circumstances, the right to self-determination.[202] The stage is being set for an international, dare say universal, right to die.

Although the Netherlands, Belgium, and Oregon currently stand in the minority, "[t]he history of the human rights movement makes it lamentably obvious that even large groups of states might share similar internal norms that all violate some basic aspect of human dignity."[203] Indeed, the majority's prohibition of physician-assisted suicide is an egregious violation of human dignity; for proof, look no further than the case of Diane Pretty. In *Pretty*, the Strasbourg Court's deference to Member States weakened the effectiveness of the Convention, forcing Ms. Pretty to face the death that she most feared. But for its application of a wide margin of appreciation, the Court would have held that the ban on assisted suicide violated Article 8.[204] If Article 8 includes "the right to choose when and how to die,"[205] and if the United Kingdom's interference with Ms. Pretty's right lacked proportionality,[206] then a wide margin of appreciation does not rectify the wrong. Moreover, Article 8 mandates, rather than merely permits, recognition of a competent, terminally-ill

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197. SMITH, *supra* note 13, at 115.

198. *See* The Oregon Death With Dignity Act, OR. REV. STAT. 127.800 (2002).

199. *See* Funk, *supra* note 12, at 163-64.

200. Raphael Cohen-Almagor, *Why the Netherlands?*, 30 J.L. MED. & ETHICS 95, 97 (2002). The Dutch treatment of physician-assisted suicide has been the topic of much debate and a prolific source of scholarly writing. *See, e.g.,* Hendin, *supra* note 191, at 229; Manzione, *supra* note 106, at 444; Raphael Cohen-Almagor, "*Culture of Death" in the Netherlands: Dutch Perspectives*, 17 ISSUES L. & MED. 167 (2001).

201. *See International News,* DEATH WITH DIGNITY NATIONAL CENTER, *at* www.deathwithdignity.org/resources/ international.htm (last visited May 12, 2003).

202. Washington v. Glucksberg, 521 U.S. 702 (1997).

203. Carozza, *supra* note 37, at 1228.

204. In the end, the Court found that the right to privacy encompasses the right to die, the prohibition on assisted suicide interfered with Ms. Pretty's right to privacy, and the ban lacked proportionality. *See* Pretty v. United Kingdom, 35 Eur. H.R. Rep. 1, 35-38 (2002).

205. *Id.* at 35.

206. *See id.* at 38 ("[A]lthough the Government argued that [Ms. Pretty]… must be regarded as vulnerable, this assertion is not supported by the evidence before the…House of Lords which, while emphasizing that the law in the United Kingdom was there to protect the vulnerable, did not find that the applicant was in [this] category.").

patient's right to die because a prophylactic rule is not "necessary in a democratic society" that condones passive euthanasia and palliative care.[207]

The next inevitable step in the recognition of fundamental human rights is for the European Court of Human Rights to find that competent, terminally-ill adults have an inviolable right to decide not only what medical treatment they will *not* receive but to choose the medical treatment that they will receive. Given their historical deference to majority rule, this is, for now, unlikely. The Strasbourg Court was given the authority to decide Ms. Diane Pretty's fate; they must not waste the opportunity to build her legacy.

207. Convention, *supra* note 8, at art. 8.

CRIMINAL JURISDICTION UNDER THE U.S.-KOREA STATUS OF FORCES AGREEMENT: PROBLEMS TO PROPOSALS

YOON-HO ALEX LEE*

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I. INTRODUCTION

Ever since the collapse of communism in the early 1990s, the United States has found maintaining global military presence increasingly difficult and its objective less clear. Not surprisingly, nations that once sought U.S. assistance and protection no longer feel the same level of threat from their neighbors. As we begin the twenty-first century, issues concerning terrorism, the world economy, and globalization have taken priority in foreign policy;

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containing communism hardly appears to be the most urgent agenda.[1] The past decade and a half witnessed the demise of the Soviet Union, the fall of the Berlin Wall, and China's liberalization, leaving North Korea as the sole vestige of the Cold War. The primary mission of U.S. troops stationed abroad has mainly become that of peacekeeping, typically under the direction of the United Nations.[2] The overall size of the United States force permanently stationed abroad is currently being reduced accordingly.[3]

Meanwhile, this reduction of Cold War angst has partly given rise to, or has simply unveiled, more pronounced tensions between U.S. soldiers stationed abroad and the locals of host nations. These disputes often take the form of challenging the fairness of the bilateral agreements between the United States and the host nations that make explicit the legal rights and responsibilities of military forces (and often of the accompanying civilians as well) stationed on foreign soil. These agreements are commonly known as the Status of Forces Agreements (SOFAs). By and large, the contents of the SOFAs exhibit only slight variations from one host nation to another.[4]

Today 37,000 U.S. troops are stationed in South Korea alone.[5] While their presence has prevented North Korea from launching any significant attack on its counterpart, the relationship between South Koreans and the U.S. troops has not been one of complete

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1. *See* PAUL K. DAVIS & LOU FINCH, DEFENSE PLANNING FOR THE POST-COLD WAR ERA 13 (1993) (discussing United States defense planning in a report prepared for the Pentagon by the National Defense Research Institute). *Cf.* GENRIKH TROFIMENKO, THE U.S. MILITARY DOCTRINE 33 (1986) (providing an official Soviet discussion of United States military policy from the Cold War era).

2. *See* Sam C. Sarkesian & Robert E. Conner, Jr., *Conclusion: The Twenty-First Century Military*, *in* AMERICA'S ARMED FORCES: A HANDBOOK OF CURRENT AND FUTURE CAPABILITIES 420 (Sam C. Sarkesian & Robert E. Conner, Jr. eds., 1996) [hereinafter HANDBOOK OF CAPABILITIES]. For more information on peace-keeping mission, see also Steven G. Hemmert, Note, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. Int'l L.J. 215, 227-239 (1999).

3. *See* Daniel J. Kaufman, *The Army*, *in* HANDBOOK OF CAPABILITIES, *supra* note 2, at 39.

4. Some of the topics covered are ordinary but nonetheless necessary to insure a smooth working relationship between the United States and the host nation. These include stipulations for the passport and visa requirements, personal income tax exemptions, etc. Other portions of the SOFA cut to the essence of sovereign power. Currently, the United States has negotiated SOFAs with ninety-two countries worldwide. For the complete list of SOFAs, see Status of Forces Agreements, *at* http://www.defenselink.mil/policy/isa/inra/da/list_of_sofas.html (last visited Oct. 3, 2003). For examples of recent disputes among locals in host countries and U.S. troops, see, e.g., Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67 (1992); and Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605 (2000).

5. *See* S. Korea, US to Forge New Troop Pact, UPI, Dec. 28, 2000, LEXIS, Asiapc Library, UPI File.

harmony. Several recent, unrelated events have contributed to propagating anti-American sentiments among Koreans,[6] but perhaps no single event prompted a greater scale of protests and more conspicuous public displays of hostility from the Korean public than one particular tragic event last summer.

On June 13, 2002, a U.S. armored vehicle ran over two young Korean girls who were walking to a friend's birthday party.[7] The girls were crushed to death instantly. The incident happened in a village near Uijongbu, just 18 miles south of the border between North Korea and South Korea. The vehicle was part of a convoy traveling to a training exercise. Initially, the United States Forces in Korea (USFK) had no plan to prosecute the soldiers, calling it a mere accident. But thousands of Koreans organized mass protests and demanded that the U.S. military hand over Sergeant Mark Walker and Sergeant Fernando Nino, the two soldiers responsible for this incident, to face criminal charges in a South Korean court. The U.S. reluctantly charged the soldiers with "negligent homicide" in the deaths of the teenagers, and agreed to try them at a military tribunal. The Status of Forces Agreement[8] (the Korea SOFA) between the United States and South Korea granted primary jurisdiction to the United States over crimes committed by soldiers while on duty.[9] The Korean Ministry of Justice, for the very first time in the 36-year history of the Korea SOFA, requested that the United States waive its primary jurisdiction. The United States declined to surrender jurisdiction, insisting that "there was no such precedent."[10] Furthermore, Korean police were given very limited authority to investigate the case even though the Korea SOFA

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6. Over the past six years, a number of Koreans have been upset with the United States for: 1) the stringent economic policy imposed by the IMF and the U.S. Treasury during the 1997 East Asian Economic Crisis; 2) President George W. Bush's State of the Union speech in 2002 in which he labeled North Korea as a member of the "axis of evil"; and 3) the stripping of short-track speed skater Kim Dong Sung's gold medal at the Salt Lake City Olympic Games.

7. For more facts of this case, see Na Jeong-ju, *Activists Watch Talks on SOFA Revision in Anticipation*, KOREA TIMES, Dec. 11, 2002, *available at* http://times.hankooki.com (last visited Mar. 15, 2003); *Armitage Conveys Bush's Apologies*, KOREA TIMES, Dec. 11, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003); Sgt. Russell C. Bassett, *Tracked vehicle driver found not guilty in Korea*, ARMYLINK NEWS, Nov. 22, 2002 *at* http://www4.army.mil/ocpa/news/index.php (last visited Mar. 15, 2003); and Jeremy Kirk, *U.S. Soldier Pleads Innocent in Deaths of Two South Korean Girls*, STARS & STRIPES, Sept. 28, 2002, *available at* http://www.estripes.com (last visited Oct. 3, 2003).

8. Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, U.S.-S.Korea, 17 U.S.T. 1677, 674 U.N.T.S. 16. [hereinafter The Korea SOFA].

9. *Id.* art. XXII, para. 3(a)(ii).

10. Kim Ji-ho, *U.S. Military Refuses to Relinquish Jurisdiction over American Soldiers*, KOREA HERALD, Aug. 8, 2002, *at* http://www.geocities.com/leavekorea/middleschool/8_8.htm (last visited Oct. 3, 2003).

explicitly grants this right to Korea.[11] Subsequently, the two soldiers were tried at separate military tribunals. Both were acquitted in a jury trial where the jury members were all U.S. citizens.[12]

Upon their acquittal, South Koreans wasted no time in organizing daily protests of unprecedented magnitude.[13] These included demonstrations by over 17,000 people, hunger strikes by Catholic priests camping right outside the U.S. embassy in Seoul, attacks on the Korean police who were guarding the U.S. army bases, and numerous candlelight vigils in memory of the two dead girls. In addition, countless civic groups are attempting to convince the Korean government to oust all U.S. troops immediately and prohibit permanent stationing of U.S. troops in the future. Even in America, Korean-Americans organized protests in front of the White House and attempted to deliver petitions signed by 1.3 million Koreans. These petitions — brought over to America by a delegation from South Korea — demanded that President George W. Bush publicly apologize for the girls' deaths, turn over jurisdiction in the case to Korean courts, and revise the Korea SOFA.[14] Then-President Kim Dae Jung, in his meeting with Deputy U.S. Secretary of State Richard Armitage, said, "I believe the SOFA can be applied so as to enable not only U.S. but also Korean officials to get involved in such accidents from the initial stage."[15] In the end, even the public apologies by President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld were not enough to console the Korean public.

It is a curious fact that this incident, though tragic by any measure, should have resulted in such a large nationwide, coalition-building movement. This is especially alarming considering the relative mildness with which Koreans and the Korean media have reacted towards past offenses involving U.S. soldiers.[16] Some skeptics have hypothesized that the recent surge of strong anti-

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11. *Id.*; *see also* Korea SOFA, *supra* note 8, at art. XXII, para. 5.

12. Sgt. Russell C. Bassett, *Tracked Vehicle Driver Found Not Guilty in Korea*, ARMYLINK NEWS, Nov. 22, 2002 *at* http://www4.army.mil/ocpa/news/index.php (last visited Mar. 15, 2003).

13. *See, e.g.*, Na Jeong-ju, *Firebombs Hurled at Another U.S. Base*, KOREA TIMES, Nov. 28, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003).

14. *See* Yoo Chang-yup, *Prospects for SOFA Revision 'Not Bright,'* YONHAP NEWS, Mar. 14, 2003, *at* http://www.yonhapnews.co.kr/Engservices/3000000000.html (last visited Oct. 3, 2003).

15. *Armitage Conveys Bush's Apologies*, *supra* note 7.

16. *See GIs Murder of Girls Fuels Korean Anger*, THE PEOPLE'S KOREA, June 30, 2002, *available at* http://www.korea-np.co.jp (pk archives June 2002) (last visited Oct. 3, 2003) (describing how South Korea's media traditionally gives passive coverage of incidents with U.S. soldiers).

American protests may have been organized by political entrepreneurs with an eye towards strengthening the platform of then–presidential candidate, Roh Moo Hyun, who subsequently won the election in December of 2002.[17] Notwithstanding possible alternative political motivations behind the protests, calls for reforms of the Korea SOFA and in the U.S.-Korea relationship must not fall on deaf ears. Put simply, these situations have already significantly altered the relational dynamics between the two countries and continue to carry tremendous potential to shape the future of the geopolitics in the Korean peninsula.

South Korea has long been an important economic and political partner to the United States. Permanent stationing of U.S. troops in South Korea benefits not only South Korea but also the United States since it provides the necessary mobility, ease, and swiftness with which the United States can operate its troops in case of possible conflicts with North Korea, which is not a scenario we can completely discount. Especially with the current nuclear threat from North Korea, the United States cannot afford to jeopardize its relationship with South Korea. It would behoove the United States to moderate anti-American sentiments among South Koreans and maintain its strong bond with the Republic of Korea. The United States should seek to restore a healthy relationship between its soldiers and Korean citizens without substantially compromising the legal rights of its soldiers or its capacity to protect them.

The author is of the opinion that the outcomes of the trials of Sergeant Walker and Sergeant Nino are consistent with U.S. domestic law. However, discussing the jurisprudence behind the trials and justifying the outcomes are not the aims of this Article. Instead, it is an analysis of the Korea SOFA motivated by these recent events. While numerous articles have already been devoted to international bilateral agreements in general and specifically to the NATO SOFA, surprisingly few authors have examined the Korea SOFA and the problems arising from its peculiar

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17. *See, e.g.*, Chang Choon Lee, *With Whining Comes Little Respect*, JOONGANG DAILY NEWS, Jan. 17, 2003, *available at* http://joongangdaily.joins.com (last visited Oct. 3, 2003) (implying the effect of the protests on President Roh Moo Hyun's recent electoral victory); Anthony Spaeth, *Roh Moo Hyun Takes Center Stage*, TIMEASIA, Feb. 24, 2003. *available at* http://www.time.com/time/asia (last visited Oct. 3, 2003) ("South Korean President-elect Roh Moo Hyun won office in December by tapping into a rising tide of anti-Americanism."); Jeffrey Miller, *Reinventing Korea-US Alliance: What Lies Under the SOFA?,* KOREA HERALD, May 6, 2003, *available at* http://times.hankooki.com/lpage/nation/200305/kt2003050617401910590.htm ("continued demands for another SOFA revision from NGOs and other groups heat up…when groups seek to use any incident that is available in order to stir up public outcry to accomplish some political objective").

arrangement. A careful inspection of the agreement, a comparison of the document with other international treaties, and an assessment of the current interests of the United States and South Korea make clear why reform is in order. Therefore, this Article provides an in-depth analysis of the Korea SOFA and proposes some measures both the Korean and U.S. governments can take in order to improve their souring relationship. When appropriate, I will draw parallels from this case to clarify some of these issues, but the overall scope is intended to be more general.

The Korea SOFA covers a broad range of topics including tax liability, environmental regulations, and criminal and civil jurisdictions of the military. This paper primarily addresses the criminal jurisdiction element as described in Article XXII.[18] Part II presents the historical background and evolution of customs, agreements, and treaties in international law concerning jurisdiction of foreign nationals prior to the inception of the NATO SOFA[19] in 1951. Because a number of articles have already examined this subject extensively, this section is only a cursory summary. In Part III, I analyze both the NATO SOFA and the Korea SOFA, specifically focusing on the issues pertaining to foreign criminal jurisdiction and its waiver. An analysis of the NATO SOFA is appropriate since the Korea SOFA borrows heavily from its NATO counterpart, yet exhibits a stark contrast to it nonetheless. Several key additional clauses and phrases inserted in the Korea SOFA substantially compromise Korea's jurisdictional authority and differentiate it from that of the parties to the NATO SOFA. I particularly argue that the Korea SOFA is currently designed in a way such that the United States' jurisdiction over the crimes committed by its soldiers stationed in Korea encompasses almost all instances, leaving Korea uncharacteristically little power to prosecute U.S. soldiers except in dire situations. Part IV identifies several critical problems with the current version of the Korea SOFA. In addition to possible biases and preferential treatment resulting from the skewed allocation of criminal jurisdiction, equally problematic is the difference in the ways Koreans and Americans view and understand the rhetoric of the law. In Part V, I examine the perspectives of the United States and South Korea and suggest some positive modifications to the Korea SOFA that are not only consistent with the international standard but can also easily be implemented given the current framework. Although no realistic

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18. In the NATO SOFA, *infra* note 19, criminal jurisdiction is included in Article VII instead.

19. North Atlantic Treaty; Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67. [hereinafter NATO SOFA].

measure can completely satisfy both sides, these modifications, I believe, will be a small step towards minimizing misunderstanding between the two parties and enhancing their relationship. Ultimately, the burden rests with both the Korean and U.S. governments. It is imperative that both nations recognize this as a serious problem, promote more communication, and approach it with more open-minded attitudes.

II. HISTORICAL BACKGROUND OF FOREIGN CRIMINAL JURISDICTION, THE NATO SOFA, AND THE KOREA SOFA

A. Traditional Laws Governing Foreign Criminal Jurisdiction and the Military[20]

The evolution of international law in this area owes much to the two major conflicts of the last century: World War I and World War II. Prior to the inception of the NATO SOFA, two competing paradigms had governed criminal jurisdiction of military troops stationed on foreign soil in the absence of any bilateral agreement between the parties involved.[21] The first principle, known as "the law of the flag," stipulated that a country allowing foreign troops to pass through its boundaries or to be stationed in it implicitly waived the exercise of its jurisdiction.[22] In contrast, the principle of "territorial sovereignty" gave the receiving State exclusive jurisdiction over members of foreign troops.[23] The latter doctrine was based on the idea that the sovereignty of the receiving State should be respected so as to allow for supreme jurisdictional interest over anything that happens on its territory. Although the prevailing practice of the United States during the first half of the twentieth century was "the law of the flag," it is widely accepted today that absent an explicit agreement, such as a SOFA, the doctrine of "territorial sovereignty" would apply.[24] In particular, the

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20. For a more detailed history of criminal jurisdiction of foreign troops, see Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189 (1992); Major Steven J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994); *see also* Priest-Hamilton, *supra* note 4.

21. Pagano, *supra* note 20, at 190.

22. *Id.*

23. *See* Wilson v. Girard, 354 U.S. 524, 529 (1957) (per curiam) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.") In time of armed conflict, however, it is recognized that military forces in enemy territory, including occupied territory, are immune from jurisdiction of local law. *See* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 13 (1971).

24. This is the case for instance with Mexico, because there is no SOFA between the United States and Mexico. *See* Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, and the Rules of Deadly*

Treaty of Brussels, signed on March 17, 1948, recognized the principle of territorial sovereignty for offenses that violated the laws of the receiving State.[25]

B. History of the NATO SOFA[26]

After World War II, countries began to see the need to station their troops abroad on a more permanent basis in order to promote collective security among nations that shared the same interests. As the Warsaw Pact and Cold War tensions led NATO states to permanently station troops in other NATO states, it became necessary to draft explicit agreements addressing many potential problems associated with long term stationing of foreign soldiers. This led to the drafting of the NATO SOFA, which was signed on June 19, 1951. This agreement asserted the rights as well as the obligations of a visiting force stationed in a foreign state. The main distinguishing feature of the NATO SOFA was the assignment and sharing of criminal jurisdiction over foreign soldiers. Article VII apportioned the right to exercise jurisdiction on a reciprocal basis depending on the paramount interests of each state. Part III will examine more closely the details of this arrangement.[27]

The signing of the NATO SOFA marked the first time the United States even partly relinquished criminal jurisdiction of U.S. troops to foreign states.[28] Although subject to modification between individual states, the provisions contained in the NATO SOFA are generally applicable to all NATO troops stationed in other NATO states and provide the basic framework for the relationship between sending and receiving states. Because the NATO SOFA was intended to apply within the territory of all of the NATO states (including the United States), this agreement is completely reciprocal. Although the NATO SOFA has since become a model for similar agreements the United States has negotiated with other host nations, it remains to this day the only completely reciprocal SOFA to which the United States is a party.[29]

Force, 2000-NOV ARMY LAW. 1, 10 (2000) ("Despite the regular United States military presence in Thailand, the United States does not have a SOFA with Thailand that retains criminal jurisdiction for official acts of Department of Defense personnel.").

25. Pagano, *supra* note 20, at 198.

26. For a detailed discussion of the NATO SOFA see generally Pagano, *supra* note 20; Priest-Hamilton, *supra* note 4.

27. *See id.*

28. Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140 (1994); Major Steven J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994).

29. *Id.*

C. History of the Korea SOFA[30]

The Korea SOFA is an unintended byproduct of the Korean War of 1950. Prior to the war, South Korea sought technical military assistance from the U.S. Army and Coast Guard, and entered into an advisory agreement with the United States on January 26, 1950.[31] Under this agreement, the advisory team consisted of fewer than five hundred officers, "all members of the advisory team were [considered] members of the embassy staff, and hence [were] granted a [certain] degree of immunity."[32]

After the end of the Korean War (though many consider it still on-going), South Korea negotiated an agreement that governed the use of facilities by U.S. military members and their status (including jurisdictional) while in Korea. This treaty authorized the United States to station troops on Korean soil to prevent a repeat invasion by North Korea. "When this SOFA was first signed in 1966, South Korea was still rebuilding from the remnants of the war. Because U.S. forces were still securing the thirty-eighth parallel Seoul [might] not have been in a position to fully assert its interests."[33] Scholars have surmised that South Korea's dire post-war situation led to the country's willingness to agree to arrangements that were less than ideal and more stringent than the prevailing international norms, such as the NATO SOFA.[34] The Korea SOFA has only undergone a couple of revisions since then, but criminal jurisdiction did not play a key role in the most recent revision in 2001.[35]

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30. For a detailed history of the U.S.-R.O.K. SOFA see generally CSIS, PATH TO AN AGREEMENT: THE U.S.-REPUBLIC OF KOREA STATUS OF FORCES AGREEMENT REVISION PROCESS 2-5 (CSIS 2001) *available at* http://www.csis.org/isp/PathToAnAgreement.pdf; *see also* Jennifer Gannon, *Renegotiation of the Status of Forces Agreement Between the United States and the Republic of Korea*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 263 (2000).

31. *See* J. Holmes Armstead, Jr., *Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future*, 12 S.U. L. REV. 1, 7 (1985).

32. *Id.*

33. Gannon, *supra* note 30.

34. *See, e.g.*, Armstead, *supra* note 31, at 7 ("Certainly the granting of immunity here to military families was an extraordinary occurrence. The external threat to Korean security was great when this agreement was negotiated and of course open conflict broke out shortly confirming the seriousness of the threat.").

35. *See* Gannon, *supra* note 30, at 268. "Article 30 of the Korea SOFA provides that '[e]ither Government may at any time request the revision of any Article of this Agreement, in which case the two Governments shall enter into negotiations through appropriate channels.'" *Id.* (quoting The Korea SOFA, art. XXX). The SOFA has been revised only twice since its creation in 1966: in 1991 and in 2000. *Id.* The most recent negotiation mainly addressed remedying environmental damages caused by U.S. troops in South Korea. *Id.* Former Korean president Kim Dae Jung urged Washington to "revise the treaty as quickly as possible to prevent a small minority of anti-American activists in Seoul from using the issue to…demand that all U.S. forces leave South Korea." *at* http://www.fed-soc.org (archived news 2000) (last visited October 6, 2003).

III. CRIMINAL JURISDICTION AND WAIVER UNDER THE NATO SOFA AND THE KOREA SOFA

A. General Jurisdiction

This section presents textual analyses and case law of criminal jurisdiction under the NATO SOFA and the Korea SOFA in conjunction with the Uniform Code of Military Justice (UCMJ). Ever since President Harry Truman signed the UCMJ into law in 1950, the United States has always maintained a separate justice system specially designed for the military.[36] The UCMJ is also the body of law that governs U.S. troops abroad. When the United States concludes a SOFA as a sending State with another nation, there are several relevant bodies of law that are applicable to a U.S. soldier committing an offense within the territory of the receiving State. These include the laws of the sending State, the UCMJ, and the SOFA. However, U.S. domestic law is still relevant for cases involving civilians accompanying these forces abroad. Article VII, Paragraph 1, stipulates the general assignment of criminal jurisdiction as follows:

> 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.[37]

According to this provision, the sending State has no jurisdiction over the civilian component since accompanying civilians are not subject to the military law of the United States. More importantly, there clearly will be overlaps in jurisdiction under this set-up. In

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36. *See generally* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002) (explaining why we have a separate justice system); Major George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21 (2000).

37. NATO SOFA, *supra* note 19, at art. VII, para.1.

paragraphs 2 and 3, the NATO SOFA defines instances of exclusive and concurrent jurisdictions.

B. Exclusive Jurisdiction

Paragraph 2 delineates the instances of exclusive jurisdiction for each State as follows:

> (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
>
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.[38]

Three things are important here. First, the literal meaning of this paragraph is that when a soldier from the sending State commits a crime within the territory of the receiving State, the State whose law is not violated will have no jurisdiction over the person. This is sensible since an act permitted or pardoned by one State within its territory is expected to be permitted or pardoned by the same State *a fortiori* if it is carried out outside its territory. This paragraph, however, is rather narrow in its scope and turns out to have little practical bite. An oft-cited example of an exclusive criminal jurisdiction case is possessing chewing gum in Singapore. It is illegal to possess or trade chewing gum in Singapore,[39] but no such law exists in the United States. Since the United States has concluded an agreement nearly identical to the NATO SOFA with Singapore, the Singapore government has the sole authority to punish any U.S. soldiers possessing chewing gum in Singapore.

Likewise, U.S. military authorities have exclusive jurisdiction over any U.S. soldier who sleeps while posted as a sentry since this act is a strictly military offense under the UCMJ and not punishable under Singapore law. The extreme nature of these examples

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38. *Id*. at art. VII, para.2.
39. Lepper, *supra* note 28, at 173.

demonstrates just how unusual these situations are. Indeed, most crimes — and certainly, as one would expect, most serious crimes — are punishable by both the sending and receiving States' laws, and would not be governed by this paragraph. Thus, in reality, situations subject to exclusive jurisdiction are quite rare.

Second, when instances of exclusive jurisdiction do arise, this paragraph provides no possibility of waiver requests from one State to the other. Consequently, however rare those situations may be, there will be instances where the sending State not only lacks jurisdiction but also authority to request waivers. The United States has traditionally been a sending State, and has sought, therefore, to further reduce the sphere of the receiving State's exclusive criminal jurisdiction by application of Article 134 of the UCMJ. This provision reads as follows:

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[40]

The practical use of this provision is unclear, but it is certainly designed to make many violations of local law a military violation of the UCMJ as well. An expansive reading of this article "can eliminate the receiving state's exclusive jurisdiction over…the armed forces of the sending state."[41] In short, the United States can, by means of Article 134, greatly curtail jurisdiction of the receiving State.

Finally, the paragraph clearly provides that exclusive criminal jurisdiction rests with the sending State only in cases of violations by the members of the military force and not in cases of offenses committed by the civilian components or dependents because civilian employees and dependents are not amenable to military courts under the UCMJ.[42] It means that, in general, criminal

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40. UCMJ, art. 134.

41. Pagano, *supra* note 20, at 207; *see also* Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958) (discussing the effect of Article 134 of UCMJ).

42. The Supreme Court has held that civilian dependents accompanying service members

jurisdiction over the civilian component or dependents belongs to the receiving State by means of Paragraph 1. As we will see in the next section, this arrangement carries a further implication in the context of concurrent jurisdiction.

C. Concurrent Jurisdiction

Article VII, Paragraph 3 stipulates concurrent jurisdiction and a systematic allocation of primary jurisdiction to one of the two States:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relationship to
>
> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offences arising out of any act or omission done in the performance of official duty.
>
> (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
>
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.[43]

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overseas are not subject to trial by military tribunal. Reid v. Covert, 354 U.S. 1, 19 (1957) ("[Nothing] within the Constitution…authorizes the military trial of dependents accompanying the armed forces overseas.").

43. NATO SOFA, *supra* note 19, at art. VII, para. 3.

The general philosophy here is that the State with a greater stake in the offense should retain primary jurisdiction over the case. When offenses are directed solely against the property or security of the sending State, indeed, the receiving State has little interest in its prosecution. Furthermore, Clause 3(a)(ii) is consistent with U.S. domestic tort law involving offenses falling "within the scope of employment." In theory, this clause is necessary to ensure that the troops function efficiently and that the soldiers obey and carry out given commands without reservation. Meanwhile, any other offense can be characterized as an offense which 1) is directed against the property or security of the receiving State, or 2) does not arise in the performance of official duty. Obviously, the receiving State has an interest in controlling these acts in order to maintain an orderly society.

As mentioned above, Paragraphs 1 and 2 have already granted exclusive criminal jurisdiction over the civilian component of the military force. But Paragraph 3 explicitly takes away this exclusive criminal jurisdiction over the military force if the offenses are type (i) or (ii) offenses. This provides a specific gap in criminal jurisdiction over civilians and dependents of the members of the military who commit offenses solely against the property or security of the United States because neither U.S. domestic law nor the UCMJ applies to civilians in a foreign territory. Only recently was this gap closed when President Bill Clinton signed into law the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) on November 22, 2000.[44] Under this Act, conduct by military personnel and accompanying civilians abroad that would have been a felony under federal law — had the conduct occurred within the United States — becomes a federal crime. As a result, the receiving State's once exclusive criminal jurisdiction over the civilian component has now become only primary jurisdiction under MEJA. Accordingly, the civilian component of the military force is currently subject to a similar jurisdictional arrangement as the military force.[45]

Although the rest of the terms in this paragraph are reasonably clear, the NATO SOFA specifically left open the

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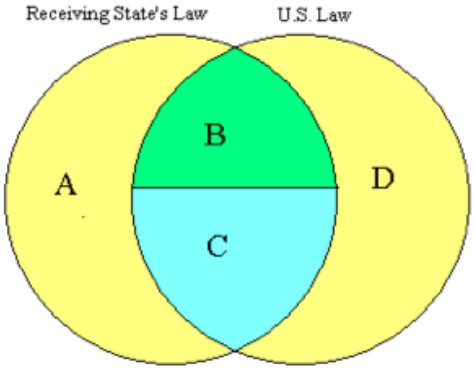
44. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, § 3261(a), 114 Stat. 2488 (to be codified at 18 U.S.C. § 3261). For the historical background of this statute, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad — A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001). The Act purports to apply the same punishment to crimes as if they were committed in the United States. Although the Act prohibits prosecution under the new statute in cases where jurisdiction lies with the receiving State, it also allows the Attorney General to waive this provision in some cases.

45. *See id.*

following questions: 1) what constitutes an offense arising in the performance of official duty, and 2) who has the final authority to decide this question? Naturally, the sending State will try to define the scope of official duty in its broadest sense to include as many acts as possible, whereas the receiving State would try to interpret this clause rather narrowly and expand its jurisdiction.[46] These questions have proved to be critical problems, and presently no definitive answers exist. Different host nations have adopted different agreements with the United States.[47]

Figure 1 is a diagrammatic representation of the allocation of criminal jurisdiction according to NATO SOFA Article VII, Paragraphs 2 and 3, assuming that there is a bright line test to determine the on-and-off-duty question. As shown above, when the United States acts as a sending State under the NATO SOFA, the bilateral agreement in practice does not equally apportion jurisdiction between the sending and the receiving States. Nevertheless, in comparison to other SOFA agreements, such as the Korea SOFA, the NATO SOFA still remains the fairest arrangement of sharing the sovereign prerogative. The agreement continues to

Figure 1. Diagrammatic Representation of Offenses Committed by U.S. Soldiers on Foreign Soil (The NATO SOFA Version)



A = Crimes that are punishable only under the receiving State's law
B = Crimes arising "while off duty" that are punishable under both the receiving State's law and the UCMJ
C = Crimes arising "while on duty" that are punishable under both the receiving State's law and the UCMJ
D = Crimes that are punishable only under the UCMJ (U.S. law)

1. *Intended Division of Jurisdiction:*
   Receiving State retains A+B, U.S. retains C+D
2. *Current Division of Jurisdiction Enforceable in Theory:*
   U.S. retains C+D+A (by incorporation of the UCMJ Article 134) + B (of particular importance to U.S.)
3. *Exercise of Jurisdiction in Practice:*
   U.S. retains C+D+ most of A + most of B; NATO countries can, however, choose to retain most of B.
4. Dependents are subject to the receiving State's exclusive criminal jurisdiction until 2000.

46. *See generally* Priest-Hamilton, *supra* note 4 (describing an instance of dispute over the interpretation of this phrase).
47. *Id.*

allow — on a formal level, at least — many of the NATO countries to retain the authority to enforce their primary jurisdiction if they wish to do so. As we shall see, this is more than can be said of the Korea SOFA.

D. Criminal Jurisdiction under the Korea SOFA

Article XXII of the Korea SOFA is the equivalent of Article VII of the NATO SOFA, but its substance differs from that of the NATO SOFA in three significant ways. First, Paragraphs 1(a), 2, and 3 have always applied to not only the "armed forces or civilian component" but also "their dependents."[48] Thus, Korea has never enjoyed exclusive criminal jurisdiction over the dependents of the military forces who commit offenses that are punishable under its law. Even before the enactment of the MEJA in 2000, the civilian component and their dependents, like the military forces, always enjoyed immunity from the criminal jurisdiction of Korea.[49] Surely, this difference is no longer of paramount importance since 2000, but it does signify an unusually generous arrangement for U.S. citizens in South Korea.[50]

Second, the Korea SOFA comes equipped with an addendum called the "Agreed Minutes" that compromises South Korea's position in several ways.[51] First of all, a modification to Article XXII, Paragraph 3(a) states that "a certificate issued by competent military authorities of the United States stating that the alleged offense…arose out of an act or omission done in the performance of official duty shall be sufficient evidence of the fact for the purpose of determining primary jurisdiction."[52] While putting an end to the problem of uncertainty in determining the scope of official duty, this amendment unilaterally assigns this authority to the United States and provides South Korea with no means to challenge the allegations of U.S. military authorities. Put simply, the United States reserves the right to delineate its primary jurisdiction as it sees fit.

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48. Korea SOFA, *supra* note 8, at art. XXII, para. 2(a).

49. *Id*.

50. *See* Armstead, *supra* note 31.

51. Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 17 U.S.T. 1768, 674 U.N.T.S. 163 (hereinafter Agreed Minutes).

52. *Id.* art. XXII, para. 3(a).

Third, and most critically, another modification states that Korea "will, upon the request of the military authorities of the United States pursuant to paragraph 3(c), waive their primary right to exercise jurisdiction under paragraph 3(b) except when they determine that it is of particular importance that jurisdiction be exercised by the authorities of…Korea."[53] This amendment effectively nullifies 3(b) because, in general, far more cases are found to be of *no particular importance* than are found to be of particular importance. Not surprisingly, U.S. authorities, as a rule, have always requested that Korea waive its primary jurisdiction,[54] and Korea has been bound by this addendum to hand over primary jurisdiction in almost all instances.[55] Figure 2 is a diagrammatic representation of the allocation of criminal jurisdiction according to the Korea SOFA and its "Agreed Minutes." To summarize, the most notable difference between the Korea SOFA and the NATO SOFA is that the former expressly restricts South Korea's primary jurisdiction to a distinct minority of cases while the latter gives due respect to the legal regimes of the receiving states. The U.S. policy reasons for maintaining such disparate agreements are not entirely clear, but the most probable answer is that the United States views the reciprocal arrangement of the NATO SOFA as an exception rather than a norm.

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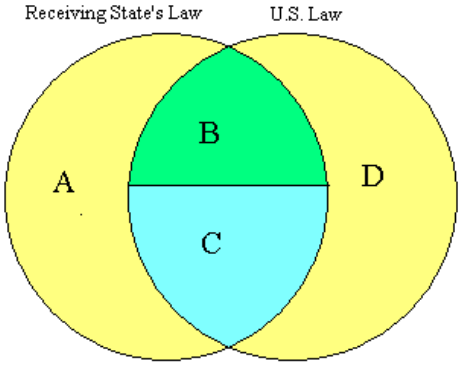
53. *Id*. art. XXII, para. 3(b).

54. *See* Pagano, *supra* note 20, at 207 ("The United States, in order to obtain the broadest possible jurisdiction, always requests waivers in cases involving individuals covered by NATO-SOFA.").

55. Although most countries within the NATO SOFA do not have this additional paragraph inserted, it has been suggested that the U.S. policy of requesting waivers of foreign criminal jurisdiction in cases regarding its military force "has led to the result that American forces are in fact 'extraterritorial' (and *de facto* following law of the flag principles), rather than subject to foreign criminal jurisdiction (with certain exceptions)." Maj. Mark R. Ruppert, Criminal Jurisdiction over Environmental Offenses Committed Overseas: How To Maximize and When To Say "No,", 40 A.F. L. REV. 1, 7 (1996).

Figure 2. Diagrammatic Representation of Offenses Committed by U.S. Soldiers on Foreign Soil (The Korea SOFA Version)



A = Crimes that are punishable only under the receiving State's law
B = Crimes arising "while off duty" that are punishable under both the receiving State's law and the UCMJ
C = Crimes arising "while on duty" that are punishable under both the receiving State's law and the UCMJ
D = Crimes that are punishable only under the UCMJ (U.S. law)

1. *Intended Division of Jurisdiction:*
   Receiving State retains A+B, U.S. retains C+D
2. *Current Division of Jurisdiction Enforceable in Theory:*
   U.S. retains C+D+A (by incorporation of the UCMJ Article 134) + B (unless of particular importance to Korea)
3. *Exercise of Jurisdiction in Practice:*
   U.S. retains C+D+ most of A plus most of B; unlike NATO countries, Korea *cannot* retain most of B.
4. Dependents have always been subject to identical jurisdiction.

IV. PROBLEMS WITH THE CURRENT ARRANGEMENT OF CRIMINAL JURISDICTION

The current form of the Korea SOFA poses numerous problems, and this section examines just a few of them. Admittedly, deconstructing the elements of a legal agreement and critiquing its arrangement are not terribly difficult matters. What is more challenging, and more meaningful, is suggesting workable solutions to mend these foibles. Therefore, it is necessary to distinguish the different levels of concern and decide which concerns can be addressed with realistic solutions. As a general matter, there are two categories of concern that are mutually independent: theoretical concerns and practical concerns. Theoretical concerns are moral, philosophical, or doctrinal problems that are associated with the current arrangement of the Korea SOFA, including problems such as how different people perceive justice and the law and whether the agreement violates any existing international legal norms. Some of these are problematic at an abstract level because they are at odds with political-philosophical ideas or with some established legal tradition. There may not be any workable solutions to some of these theoretical concerns, but it is nonetheless

necessary to point them out and recognize the fundamental issues at play.

On the other hand, practical concerns mainly arise in implementing or continuing to enforce this agreement. One immediate source for these concerns is document imperfections within the Korea SOFA that make it difficult for both countries to consistently adhere to the agreement. Another is the ambiance and current circumstances that govern the social dynamics between the Korean locals and the U.S. soldiers. Finding solutions to these practical concerns is often easier, and the suggestions in Part IV are just a few examples.

A. Theoretical Concerns

1. *Concern for Bias and Preferential Treatment*

The first question a person might ask regarding the SOFA criminal jurisdiction is, why does it have to be one country or the other? Indeed, the most obvious and inherent problem of any SOFA occurs in cases of concurrent jurisdiction, where, ultimately, only one of the two States gets to exercise its jurisdiction even though the offense may be of interest to both. There inevitably will be a concern for potential bias in the outcome.[56] Where jurisdiction is exclusive, the matter concerns only one State. But when an actor commits a crime that is punishable under both the sending and receiving States' laws, there is a conflict of interest: the sending State would naturally want to protect its soldier, whereas the receiving State would want to fully remedy any harm inflicted upon the involved party. In theory, having a universal arbiter or otherwise giving both parties a say, would yield the most equitable outcome.

The basis for this problem becomes clearer if we view nation-states as actors in the international political setting. Just as we expect individuals in a society to adhere to certain moral principles that are common to all men, so too, do we hope that nation-states obey analogous rules and respect other parties. One fundamental tenet of a civil society is that no man may judge his own case. The seventeenth century English philosopher, Thomas Hobbes, in *Leviathan* wrote, "there may arise a controversie between the party Judged, and the Judge; which…ought in Equity to be Judged by men agreed on by consent of both; *for no man can be Judge in his*

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56. *See, e.g.*, Major William K. Lietzau, *Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan*, ARMY LAW., Dec. 1996, 3 (1996) (discussing a case in Japan where the Japanese public felt the accused members of the U.S. military received preferential treatment under the SOFA).

own cause."[57] John Locke, too, extensively discusses this matter in his *Second Treatise on Civil Government*:

> Wherever any persons are who have not such an authority to appeal to, and decide any difference between them there, those persons are still in the state of nature…
>
> …For the absolute prince is presumed to have both legislative and executive power in himself alone. For him there is no judge, no appeal lies open to anyone who may fairly and impartially decide from whose decision relief and redress may be expected of any injury of inconvenience that may be suffered from the prince or by his order…. For wherever any two men are who have no standing rule and common judge to appeal to on earth for the determination of controversies of right between them, there they are still in the state of nature….[58]

More than three centuries have passed since Locke and Hobbes, but this world has yet to construct a civil society of nations. No competent international institutions exist to address these problems. This shortcoming owes much to the current state of international law and international relations. Political scientists and philosophers have long argued that international relations are governed by anarchy. Subscribing to Locke's philosophy, Bertrand Russell stated that "[a] new international Social Contract is necessary before we can enjoy the promised benefits of government."[59] Another scholar commented that "international institutions are unable to mitigate anarchy's constraining effects on inter-state cooperation."[60]

The current state of foreign criminal jurisdiction is just the same. In an ideal world, a neutral party with an agreed-upon body of law would govern whenever serious crimes that concern both States occur. The closest solution we have today to such an institution is the International Criminal Court (ICC). At the time

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57. THOMAS HOBBES, LEVIATHAN 128 (Dutton 1976) (1651) (emphasis added).

58. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 45, paras. 90-91 (Lester DeKoster ed., William B. Eerdman's 1978) (1690).

59. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 640 (Simon & Schuster 1972).

60. Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the New Liberal Institutionalism*, *in* THEORY AND STRUCTURE IN INTERNATIONAL POLITICAL ECONOMY 9 (Charles Lipson & Benjamin J. Cohen eds., 1999).

of this writing, however, the ICC has not yet fully blossomed. This is due in large part to the fact that the Bush administration "unsigned" the treaty that subjected the United States to the jurisdiction of the ICC.[61] Even if the United States were to ratify the Rome Statute and join the members of the ICC, it is highly improbable that the United States would nullify the existing SOFA arrangements with the countries that currently station U.S. troops. More importantly, the ICC was specifically designed to limit its jurisdiction "to the most serious crimes of concern to the international community as a whole."[62] Since a good majority of the offenses arising from U.S. soldiers fall somewhere between civil and criminal offenses, it is unlikely that they will fall under the jurisdiction of the ICC. Therefore, whether the United States should ratify the Rome Statute is an irrelevant question; regardless of the U.S. posture, the ICC in its current form would provide no satisfactory solution.

This concern for preferential treatment is indeed what prompted the enraged Koreans to demand a retrial of Sergeants Walker and Nino in a South Korean court. South Korea had absolutely no say in the outcomes of their trials. Naturally, however, this argument goes both ways: transferring jurisdiction to South Korea will merely beget another concern for bias, this time on the part of the United States. The United States has no more reason to trust the application of the Korean law to U.S. citizens than Korea has regarding the application of U.S. law to its cases. Unless the matter is approached with an eye towards equity, a renegotiation of the Korea SOFA that simply grants South Korea broader jurisdiction will be an equally dangerous resolution, and could provoke many Americans. In any case, as we saw in Part III, Congress passed Article 134 of the UCMJ to avoid precisely this problem; it has little intention to relinquish much of its jurisdiction. What is significant here is not whether any one State actually exercises jurisdiction with a specific bias *per se*; rather, the concern that the other party might be biased in the outcome of the case effectively undermines the trust between the States.

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61. The ICC was created on the basis of the Rome Statute, a treaty adopted in Rome on July 17, 1998. The Rome Statute now has 75 ratifications and 139 signatories. Ratification of the Treaty makes it part of a nation's body of law. Although the U.S. initially signed the Treaty on December 31, 2000, the Bush Administration declared that it would no longer consider the U.S. legally bound by that signature. The countries that have not ratified the Rome Treaty are not to be involved in decisions. *See* USA for the International Criminal Court, *at* http://www.usaforicc.org/index.html (last visited Mar. 20, 2003).

62. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court*, Rome Statute for the International Criminal Court, art. V, § 1, U.N. Doc. A/Conf.183/9 (1998).

Unfortunately, jury trials further enhance this possibility of bias since jury members are all selected from the USFK and hence are all U.S. citizens.[63] The UCMJ "allows the accused in…court-martial to choose whether to be tried by a military judge or a panel of military members."[64] Panel members "must be active-duty U.S. military members who also are subject to the jurisdiction of the [UCMJ]."[65] In general, a jury trial is *a priori* "considered to provide a more sympathetic finder of fact than a judge."[66] Moreover, in cases involving nationals of both countries, nationalistic sentiments will also play a huge role. For civil or criminal cases arising within the territory of the United States, jury trials make sense because members of the jury are determining the verdict on someone who is accused of threatening the security of the very society to which they belong. Jury trials might be equally appropriate for cases that deal with U.S. soldiers stationed abroad who commit offenses that are directed solely against the property or security of the United States. But when U.S. men and women are given the responsibility of determining the verdict of U.S. soldiers who commit an offense against locals of a host nation, the host nation has reason to be concerned about the validity and fairness of the trial.

In the absence of any competent, impartial international institution to handle these matters, there can be no perfect solution. Nonetheless, there are obviously measures that the sending State and the receiving State can take in order to minimize this concern for bias as much as possible, and eliminating jury trials is one such measure.

2. *Gap in the Cultural Understanding of Justice and the Law*

Suppose we could completely eliminate all biases and implement a fault-proof system where all cases are judged fairly and objectively according to a relevant body of law. Another problem still arises from there being different notions of justice and legal righteousness among the citizens of different nations. Expressive

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63. Bae Keun-min, *Jury Clears GI of Killing Korean Girls*, KOREA TIMES, Nov. 20, 2002 (quoting a Korean activist who described the court martial as "the trial of an accomplice by accomplices"), *available at* http://www.hankooki.com/times/200211/t20021120172424401l0.htm (last visited Mar. 20, 2003).

64. United States Embassy Seoul, Republic of Korea, The June 13 Accident Q's and A's, *at* http://usembassy.state.gov/seoul/wwwh0501.html (last visited Mar. 18, 2003).

65. *Id.*

66. William C. Martucci et al., *Class Action Litigation in the Employment Arena: The Corporate Employer's Perspective*, 58 J. MO. B. 332, 333 (2002). *See generally* Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J. L. ECON. & ORG. 306 (2000) (examining the effect of jury trials versus bench trials).

theory of law tells us that law is an expression of social values.[67] Conversely, individual values can be conditioned by a society's law. While justice and fairness are universally accepted concepts, how people in a particular society grow to perceive justice and fairness is inevitably intertwined with that society's law. For example, most Americans would not see much justice in prosecuting an individual for chewing gum, especially if their own soldier, who is stationed in Singapore specifically to protect that country, is being prosecuted. Likewise, most Koreans found it puzzling that nobody had to serve any jail time when an accident took away the lives of two of their own. But that is simply how the American criminal justice system works. For criminal liability, there needs to be evidence "beyond a reasonable doubt" of *mens rea*, even at the level of simple negligence. This is different from imposing civil liability, for which the American law requires only a "preponderance of evidence." This protection "reflects the goal of decreasing the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape conviction."[68] American courts have repeatedly held that "it is a fundamental value determination of the American criminal justice system that it is far worse to convict an innocent person than to let a guilty person go free."[69] Other authorities have held similar views:

> What most significantly distinguishes the [criminal justice] system of one country from that of another is the extent and the form of the protections it offers individuals in the process of determining guilt and imposing punishment. [O]ur system of justice deliberately sacrifices much in efficiency and even in effectiveness in order to…protect the individual. Sometimes it may seem to sacrifice too much.[70]

As a result, any host nation that does not fully appreciate this system or adhere to such philosophy will have problems if the United States acquits its soldiers despite their apparent "crimes."

Without merging the two legal systems, there will always be some culture-induced discrepancy in people's understanding of

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67. *See generally*, Elizabeth S. Anderson, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

68. People v. Bull, 705 N.E.2d 824, 842 (Ill. 1998).

69. *See, e.g.*, *id.*; *see also* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6(c), at 45 (1984).

70. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 7 (1967).

justice. For the time being, the best course of action for the United States and South Korea is to promote more dialogue and educate the other party about how its legal system operates. Soon after the incident involving the sergeants, the U.S. Embassy in Seoul, Korea felt the need to fill out a Q&A form to defend the U.S. criminal justice system. In it, the U.S. Embassy clearly stated that in the U.S. judiciary system, "there is a distinction between holding someone 'criminally responsible' and being 'responsible.'"[71] This response probably did not win over many hearts, but it did serve as a starter in disseminating some information about the American criminal justice system to the Korean public.

3. *Discriminatory Treatment*

In concluding different versions of SOFAs with different countries, the United States is in fact treating countries with outright discrimination. The first two concerns discussed in this section pertain to all SOFA or bilateral agreements, but this one concerns the Korea SOFA in particular. The United States has explicitly granted more primary jurisdiction to the NATO countries than to South Korea.[72] Also as we noted, the NATO SOFA is currently the only fully reciprocal SOFA to which the United States is a party. Among the "lesser," non-NATO countries, such practice is probably perceived to be even more unjust than the typical American unilateralism. Viewed against the tradition of international law, this is a violation of the "laws of nature and of nations." Emer de Vattel, an 18th century international legal scholar, wrote the following:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[73]

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71. The June 13 Accident Q's and A's, *supra* note 64.

72. As it turns out, the Netherlands is another country with which the United States has a similar SOFA arrangement (with the Agreed Minutes) as it has with South Korea. *See* Stationing of United States Armed Forced in the Netherlands, North Atlantic Treaty, Nov. 16, 1954, 6 U.S.T. 103 (1954).

73. EMER DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED

The United States has not been explicit about its reasons for exercising different forms and standards of bilateral agreements with different countries; it merely alleges that the same arrangements will not always work because situations are inherently different for each host country.[74] If the differential treatment is predicated upon the understanding that South Korea's legal system is not as developed as those of NATO countries or otherwise not prepared to handle transnational legal problems, then the burden lies with the United States to prove that South Korea's legal system is indeed substandard because it is the United States that is discriminating. If this turns out to be the case, indeed, the burden will then rest with South Korea to improve the robustness of its legal system and bring it up to par with other NATO nations before demanding equal treatment.

Nonetheless, the justification the United States has given thus far for assigning broader criminal jurisdiction to itself is only because "it is the primary responsibility of the military authorities of the United States to maintain good order and discipline where persons subject to United States military laws are concerned."[75] This justification is clearly not specific to South Korea, and therefore, does not justify the U.S. discriminatory behavior. Unless the United States demonstrates an urgent need to exercise discrimination towards Korea, the current Korea SOFA violates the longstanding and well-grounded natural law doctrine of international law.

Certainly, countless unfair and discriminatory arrangements always exist among countries because politics always plays a role in these settings. For example, trade agreements (or sanctions) and visa requirements are never the same among different countries. On one hand, these issues may be equally problematic and must be addressed separately. On the other hand, the SOFA arrangements are in some ways more sensitive issues. Policy reasons are often much less clear with the SOFA arrangements, compared to international economic law or immigration law. Also, the SOFA arrangements directly concern crimes, prosecution, and damage measures occurring within the host country's territory, not just between the two countries. These issues impact the host country

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TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lxiii (1797), *cited in* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 59 (Little, Brown & Company 1993).

74. *See* Song Hye-Min, *No More Empty Negotiations on SOFA,* THE ARGUS, ENGLISH NEWSPAPER OF HANKUK UNIVERSITY OF FOREIGN STUDIES, Sept. 1, 2000, *available at* http://maincc.hufs.ac.kr/~theargus/352/feature-2-3.htm (last visited Mar. 15, 2003) (explaining instances of unfair arrangements of the Korea SOFA compared to the agreements the United States has concluded with Japan or Germany).

75. Agreed Minutes, *supra* note 51, at art. XXII, para. 3(b)

much more visibly than economic competitive disadvantages or opportunities to immigrate. The main effect of SOFA arrangements is to strip the host country of its jurisdiction over those who cause disorder within its territory. In this state-of-nature world of nation-states, if "a small republic is no less a sovereign state," then its sovereignty must be given due respect.

B. Practical Concerns

1. *The Language, the Semantics, and the Ambiguities*

In implementing the Korea SOFA, several serious problems arise from the ambiguous language of the SOFA and the consequences governed by its semantics. This is a general problem for all SOFAs, including the NATO SOFA. It seems that whenever the legal consequences of a situation are reduced to interpreting phrases, the United States frequently takes the role of deciding and interpreting.

Like the "plain meaning" rule for domestic legislation, Vienna Convention Article 31(1) lays down a rule for interpreting the language of treaties: "A treaty shall be interpreted in good faith in accordance with *the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose."[76] The crux of Article 31 is to use the text as agreed by the negotiators. The "ordinary meaning" rule is the current posture of the World Court and corresponds with the practice of interpreting state statutes in the United States.

Consider, for example, the phrase "sympathetic consideration" in Paragraph 3(c) of the Korea SOFA. The provision states that "the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver."[77] But there is no agreed-upon definition of sympathetic consideration. The party who has primary jurisdiction can always claim that it has given "sympathetic consideration" but has nevertheless decided to decline the waiver request and exercise its jurisdiction. Not only is the notion of sympathy vague, but there is also no way for the other party to check whether any serious consideration has been given or not. In other words, giving sympathetic consideration is not a procedure that can be monitored. Understandably, giving a rigid procedural guideline for giving "sympathetic consideration" is

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76. Vienna Convention, art. 31(1), *reprinted in* 63 AM. J. INT'L L. 875, 885 (emphasis added); *accord*, Restatement (Third), *infra* note 105, § 325(1) (discussing the Law of Treaties May 23, 1969).

77. The Korea SOFA, *supra* note 8, art. XXII, para. 3(c).

difficult; however, unless the parties agree on a set of criteria, this clause will be a mere gratuity that serves no ends.

In the absence of any definite and common understanding, Article 31(1) of the Vienna Convention offers little help. One can never be certain exactly what the framers of the Korea SOFA or the NATO SOFA intended, but whatever it is, the United States has yet to demonstrate its commitment to this provision. As noted above, the cases involving Sergeants Walker and Nino marked the first instances South Korea requested a waiver of jurisdiction, and the United States simply declined it by saying "there was no such precedent."[78] If the United States meant by that phrase that there has not been a precedent of the United States ever relinquishing its primary jurisdiction in any SOFA-like arrangement, then that is simply not true. Even in Japan, the United States has had to relinquish its jurisdiction at least twice. In 1957, a U.S. soldier was accused of murdering a Japanese woman.[79] The United States initially claimed that this arose out of an act or omission "done in the performance of official duty," but Japan disagreed.[80] Ultimately, the Department of Defense waived jurisdiction to the Japanese.[81] As recently as 1995, three American service members were accused of "premeditated kidnapping and rap[ing] of a twelve-year-old Japanese girl," and the United States elected to hand over its jurisdiction to Japan.[82]

If, on the other hand, the United States meant that in the history of the Korea SOFA there has never been any such precedent, then, of course, there is no precedent since South Korea has long respected the United States' right to primary jurisdiction and has discreetly chosen not to request any waiver in the past. But as long as the United States continues to decline to relinquish its jurisdiction, there will never be any precedent. Korea's passive behavior in the past should be an indication of the gravity of the matter when it does request a waiver; instead, the United States has chosen to cite the history of jurisdiction (or lack thereof) against Korea's case for waiver. Lacking a common understanding of the phrase "sympathetic consideration," Korea has opted to waive its jurisdiction in almost all instances, and the United States has opted never to waive its jurisdiction. It is probably safe to conclude that this is not what the framers had intended, thus the current practice violates the law of treaties.

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78. Kim Ji-ho, *supra* note 10.
79. *See* Wilson v. Girard, 354 U.S. 524 (1957).
80. *Id*.
81. Lepper, *supra* note 28, at 179.
82. Lietzau, *supra* note 56, at 3.

Second, deciding whether or not a soldier was "on duty" is also a problem. Under the Korea SOFA, the United States has reserved the right to determine the scope of employment of its soldiers.[83] Likewise, in a recent SOFA negotiation between the United States and the Philippines, the Philippine government wanted to have "Philippine courts make the final determination on whether or not an offender was acting within the scope of military duty when the offense was committed."[84] The United States refused to hand over this authority.[85] Regarding Korea SOFA cases, Choe Hun-Sik, a former SOFA advisor at the U.S. Army, remarked that while:

> American military authorities seem to have applied a concept analogous to, but somewhat broader than, what is called the common-law concept of 'scope of employment.' There appears to be a definite tendency, to extend the coverage of this provision as far as possible. Thus Korean authorities normally accept a determination on this issue as binding, when that determination is made in official duty certificate being issued by a general grade officer only upon the advice of a staff judge advocate or other legal officer unless the contrary is proved."[86]

Some angry Koreans have argued that Sergeants Walker and Nino were not on duty because "killing two girls" could not possibly have been their duty. This is an extremely narrow reading of the situation. By contrast, the United States could equally claim that "driving an armored vehicle" is part of their duty.

The United States has had problems of this kind with other host countries as well. For example, a recent tragedy in Italy echoes this dispute: in 1998, when a U.S. military jet that was participating in a low-level training mission violated the minimum altitude restriction, it consequently flew into and severed the cables supporting an Italian ski gondola, killing twenty passengers.[87] The United States claimed primary jurisdiction by asserting that "the jet was flying under the auspices of the alliance when the incident occurred," but the Italians argued that the flight was not a U.S. mission since "flying 3300 feet below the designated altitude floor"

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83. *See, e.g.*, Agreed Minutes, *supra* note 51.
84. Porrata-Doria, Jr., *supra* note 4, at 99.
85. *Id*.
86. Choe Hun Sik, *In SOFA Case: Offenses Arising in Performance of Official Duty*, KOREA TIMES, Jul. 29, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003).
87. Priest-Hamilton, *supra* note 4, at 605.

is not authorized by the United States.[88] The case rested with the United States.

2. *Discomforts in the Daily Life of the U.S. Soldiers Stationed in Korea*

There is at least one more significant problem if the United States were to refuse any further substantial revisions of the Korea SOFA and to insist that South Korea continue to respect the current arrangement. The recent events have not only upset many Koreans but also educated them about the skewed jurisdictional allocation of the Korea SOFA. Angry South Koreans are expressing their hostility towards U.S. soldiers in several different ways. Some shopkeepers are refusing to admit any Americans; some have explicitly put up signs that read "AMERICANS ARE NOT WELCOME HERE."[89] Others have chosen more direct ap-proaches, such as throwing fire-bombs at a U.S. military base.[90] If the United States were to refuse to allow any sincere revision, the daily lives of U.S. soldiers in South Korea will become increasingly difficult, and their safety might be put in danger. Meanwhile, any Korean citizen attacking U.S. soldiers would have to answer only to Korean courts since the United States has no jurisdiction over them. The more intransigent the United States remains in relinquishing primary jurisdiction in instances of concurrent jurisdiction, the more lenient and sympathetic the Korean court may be towards anti-American offenses. From this perspective, the United States would do well to respond genuinely to the calls for reform.

V. TOWARDS COMMON SOLUTIONS FOR REFORMING THE KOREA SOFA

A. The Law of Treaties and Other Considerations

The problems discussed in Part IV and the current ongoing public outcry in Korea provide compelling reasons to revise the agreement. But what issues must the United States and Korea consider before renegotiation? First and foremost, one must remember that a SOFA is negotiated between two *friendly* parties, not *hostile* parties. The focus is not, and should never have been, who has broader jurisdiction and who gets limited power. Instead, the two countries must remind themselves of the many different

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88. *Id*. at 605-07.

89. Michael Taylor, *Anti-Americanism All the Rage in South Korea*, ASIA TIMES, Dec. 20, 2002, *available at* http://www.atimes.com (last visited Oct. 3, 2003).

90. *See* Na Jeong-ju, *supra* note 13.

reasons they have in keeping a SOFA arrangement, in the first place, and then decide what the best arrangement must be in light of these issues.

Second, South Korea must understand that the United States will only be interested in revisions that somehow benefit the United States, either directly or indirectly Likewise, the United States must see that Korea wants revisions that will provide the Korean government more authority in these matters. Because neither party will agree to a revision that will seriously compromise its position, any proposed solution must consider both perspectives and their consequences; in the end, any renegotiation must achieve a *Pareto improvement*.[91]

Third, in formulating new agreements, it would be judicious for the two countries to obey the Law of Treaties of the 1969 Vienna Convention. Admittedly, taking into consideration the existing legal regimes of both countries is important, but the two countries can better avoid arbitrariness and future contentions by appealing to an international legal norm.

Finally, proposed solutions must not be purely theoretical in nature; they must be able to be implemented. For instance, one might plainly think that the best way to eliminate concerns for bias and preferential treatment is to have either no party or both parties exercise jurisdiction. But as we saw, if neither party should exercise jurisdiction, no institution in this world can fairly judge the matter. On the other hand, trying to devise a scheme that combines the laws of both States and has judges from both States presiding is quite impracticable. Thus, these are not really solutions that can be implemented given the current state of the world.

B. The U.S. Perspectives

The United States has at least four distinct interests to consider in these types of bilateral agreements: first, it must promote the efficiency of its military operations so as to conduct successful peace-keeping missions all over the world; second, it must seek to protect the rights and safety of its soldiers stationed abroad; third, it must maintain a sound relationship with the host nation; and fourth, it must consider the broader consequences of one SOFA revision to other SOFAs it has signed. Although these are all important interests the United States must balance and prioritize these interests somehow. Presently, the United States appears to rank these concerns in the order listed above. For example, in

91. A Pareto improvement is a bargaining solution which improves at least one party's position without harming any other party's position.

regard to the fourth concern, the United States can always claim that a particular arrangement with one country was contingent on that country's special circumstance or legal system.[92]

How would the United States look at the other three concerns? For over a decade, foreign policy outside terrorism management has not been a main agenda for the United States. Henry Kissinger notes this trend in his *Does America Need a Foreign Policy?*:

> Judging from media coverage and congressional sentiments…Americans' interest in foreign policy is at an all-time low…. The last presidential election was the third in a row in which foreign policy was not seriously discussed by the candidates. Especially in the 1990s, American preeminence evolved less from a strategic design than a series of ad hoc decisions designed to satisfy domestic constituencies while, in the economic field, it was driven by technology and the resulting unprecedented gains in American productivity. All this has given rise to the temptation of acting as if the United States needed no long-range foreign policy at all and could confine itself to a case-by-case response to challenges as they arise.[93]

Therefore, maintaining a harmonious relationship will probably take a backseat in light of the other objectives. Between the first two interests, efficient military operation will likely prevail since the United States has always had the option of declaring national security an "important government interest"[94] and applying the doctrine of military deference[95] to place the military operation before the protection of the rights of its soldiers.

But even in this ordering, circumstances can change to such an extent that it may be wise for the United States to give more care to its subordinate objectives. For instance, if the U.S.-Korea relationship should deteriorate to a degree where South Korea demands that the U.S. troops withdraw at once, then so long as the threat is credible, the United States should give more care to restoring a healthy relationship with South Korea than to the other goals.

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92. *See, e.g.,* NATO SOFA, *supra* note 19; UCMJ, *supra* note 40.

93. HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY?: TOWARD A DIPLOMACY FOR THE 21ST CENTURY 18-19 (Touchstone 2002).

94. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("No one could deny that under the test of Craig v. Boren…the Government's interest in raising and supporting armies is an 'important governmental interest.'") (citing Craig v. Boren, 429 U.S. 190 (1976)).

95. *See, e.g.*, U.S. v. O'Brien, 391 U.S. 367, 377 (1968) (concluding that Congress's power to regulate armies and navies is "broad and sweeping").

C. The Korean Perspectives

The host nation faces a different set of concerns. Most likely, Korea's objectives include the following in the order of significance: first, Korea must avoid any major military conflict with North Korea; second, Korea must maintain a strong bond with the United States; third, the Korean government must protect its citizens from crimes of U.S. troops, and when crimes do occur, the government must push for a fair judicial process; and fourth, the Korean government must realize that it is unfair to seek a bilateral agreement arrangement that does not mirror the arrangements it has with others.

Korea has traditionally placed its relationship with the United States above the protection of its citizens.[96] Several reasons explain this stance: South Korea is facing an imminent communist threat from North Korea, South Korea has never enjoyed hegemony, and it is not used to asserting its position. Nevertheless, the end of the Cold War and its economic boom over the past four decades has given more bargaining power to South Korea. For one thing, its military strength has grown significantly over the late twentieth century. The government has been requiring every able male to serve in the military for twenty-six months. For another, South Korea is a member of the Organization for Economic Cooperation and Development (OECD) and is a huge trade partner with the United States.

But for Koreans, there has also been a critical paradigm shift: if three decades ago a typical Korean young adult might have viewed the United States as South Korea's savior from North Korea's attacks, today a typical Korean young adult views the United States as a hurdle in reunifying with North Korea. Many believe that former President Kim Dae- Jung's "sunshine policy" has brought the two Koreas closer together.[97] The North-South summit in Pyongyang in June of 2001 was the first meeting ever to take place between the two governments.[98] At the 2002 Asian Games, held in Pusan, South Korea, the two Korean teams walked together with one flag. In June of 2003, North and South Korea connected railways across their heavily armed border, and linked the two countries for the first time in over fifty years.[99] Although the

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96. *See generally GIs Murder of Girls Fuels Korean Anger*, *supra* note 16.

97. *See generally Kim Dae-jung Stresses Importance of 'Sunshine Policy'*, PEOPLE'S DAILY, Dec. 30, 2002, *at* http://english.peopledaily.com.cn (last visited Oct. 3, 2003).

98. Stephen W. Bosworth, *U.S.-Korean Relations After the Summit*, 25 FLETCHER F. WORLD AFF. 25 (2001).

99. *Koreas Connect After 50 Years*, CNN.COM, Jun. 13, 2003, *at* http://www.cnn.com /2003/WORLD/asiapcf/east/06/14/koreas.railway.ap/index.html (last visited June 18, 2003).

current nuclear crisis with North Korea does present a credible threat to South Korea, on the whole, North Korea is slowly beginning to show its willingness to converse with South Korea. Accordingly, the South Korean government is placing less emphasis on its relationship with the United States and increasing emphasis on claiming the rights and protection of its own citizens.[100]

D. Proposed Solutions

1. *Model the Korea SOFA more like the NATO SOFA by repealing the modifications in the "Agreed Minutes" to Paragraph 3(a), (b) and the immunity granted to the civilian component and dependents.*

The NATO SOFA is by no means a perfect arrangement,[101] but revising the Korea SOFA to resemble the NATO SOFA will mean that, at least, this bilateral agreement would now conform to an international norm accepted by most advanced nations. In doing so, the agreement should not limit primary jurisdiction of South Korea to only those cases that are of *particular* importance to South Korea, but rather to those cases that are *not of particular* importance to the United States. Make no mistake, it will still be in the interest of the United States to request a waiver in every instance. But by repealing this addendum, at a minimum, the two countries will be devising a seemingly more equitable agreement, and South Korea will no longer view the SOFA as just an old contract — completed under duress — to which it is helplessly bound under the doctrine of *pacta sunt servanda*.[102] From the United States' point of view, even with this modification, it may still succeed in waiver requests as it has frequently done with NATO countries.

The United States was quick to point out that South Korea, too, has concluded a SOFA-like arrangement with Kyrgyzstan in which South Korea retains primary jurisdiction over its soldiers regardless of whether crimes are committed *on or off* duty.[103] South Korea's arrangement with Kyrgyzstan is even more stringent to the receiving State than the Korea SOFA is to Korea. Thus if South Korea wants to present a strong case in reforming the Korea SOFA

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100. *See generally id.* (concluding that after the North-South summit, it is in the interest of the United States to work hard to maintain a sound relationship with South Korea).

101. *See generally* Pagano, *supra* note 20; Priest-Hamilton, *supra* note 4.

102. This principle, roughly translated to say that an "international agreement in force is binding upon the parties to it and must be performed in good faith," is restated in the U.N. Charter, art. 2, para.2 and in art. 26 of the Vienna Convention.

103. In March of 2002, South Korea struck a SOFA with Kyrgyzstan in order to support the anti-terror campaign in Afghanistan. *See* Yoo Chang-yup, *supra* note 14 ("South Korea has no clause in its SOFA to give jurisdiction to Kyrgyzstan whether incidents occur on or off duty."); *see also* The June 13 Accident Q's and A's, *supra* note 64.

it should first seek to revise its arrangement with Kyrgyzstan; otherwise, South Korea has the semblance of saying "do as we ask, not as we do."

This would also be consistent with the general principles of equity in international law. The World Court generally decrees that "he who seeks equity must do equity," and he who seeks fair or equitable treatment must come into court with clean hands.[104] For instance, "if a nation has been wronged, and its military commanders have violated the same law their nation seeks to enforce, the 'clean hands doctrine' may keep the complaining nation from getting relief for which it might otherwise be entitled."[105] Technically, the ICJ's unilateral compulsory jurisdiction is non-binding for most nations. Nonetheless, the clean-hands problem has had a long tradition in international law, and may still come up in the international setting.[106]

2. *Eliminate jury trials for crimes that concern both States or both nationals.*

As discussed above, the possibility of jury trials enhances the concern for bias and preferential treatment. Therefore, the United States should amend the UCMJ to curtail the soldiers' right to jury trial when matters concern both nations. Of course, this raises a concern that such policy would violate U.S. citizens' right to jury trial granted by the Seventh Amendment of the U.S. Constitution; nevertheless, people's fundamental rights have been compromised in the military. For example, in *Orloff v. Willoughby*, the U.S. Supreme Court concluded that "the military constitutes a specialized community governed by a separate discipline from that of the civilian."[107] Subsequently, in *Frey v. State of California*, the Ninth Circuit upheld the California National Guard's mandatory retirement policy despite its facial violation of the Age Discrimination in Employment Act.[108] In *Thomasson v. Perry*, the Fourth Circuit upheld the infamous "Don't Ask, Don't Tell" policy partly abridging a homosexual individual's right to freedom of

104. Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (Separate opinion of Hudson, J.); *See also* SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 78 Recueil des Cours 9, 82 (1982); RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987);Janis, *Equity and International Law: The Comment in the Tentative Draft*, 57 TUL. L. REV. 80 (1982).

105. George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 30 (1988).

106. *Id.*

107. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)

108. *Frey v. State of California*, 982 F.2d 399 (9th Cir. 1993)

speech.[109] Robert Sherill went as far as to publish a book titled *Military Justice is to Justice as Military Music is to Music*.[110] If anything, the United States, with its history of military justice, is not in a position to claim that this right to jury trial cannot be withheld on the basis of its Constitution. Although it is always dangerous to suggest a proposal that further limits U.S. soldiers' fundamental rights by citing other instances of curtailed rights, in this particular instance, there are good reasons for banning jury trials when both nations have a stake in the offense.

3. *The United States should demonstrate its willingness to honor Paragraph 3(c) by waiving primary jurisdiction from time to time.*

The United States was not necessarily at fault in refusing to waive its primary jurisdiction and to hand over Sergeants Walker and Nino to be tried in a Korean court. With the entire Korean public sentiment and media against them, the two defendants would almost certainly have been convicted, whereas the United States probably had reason to believe that there was not enough evidence to convict them with criminal charges. Be that as it may, the U.S. military authorities certainly could have provided a better justification for denying Korea's waiver request than just saying that there has been no such precedent. It is precisely this lack of waiver history that has angered Korean authorities and public. The United States should begin making small concessions and waiving primary jurisdiction from time to time.

4. *Establish a standard for determining whether an offense occurred while on duty or off duty, instead of an ad hoc certificate method.*

As we saw, the inherent conflict of the two opposing interests of the sending and the receiving States frequently leads to different interpretations of official duty. The agreement needs to include a bright-line mechanism by which to make the official duty determination. The parties should be cautious about relying on ad hoc agreements, since those agreements will endure only as long as South Korea and the United States maintain a good relationship. A uniform approach will ensure that all parties are treated equally.

Although Korea is not a common law country, keeping a database of scenarios or precedents will provide a more robust

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109. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996)

110. *See generally* ROBERT SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (Harper & Row 1970).

approach to determining the scope of employment. This seemingly innocuous determination can be quite pivotal in the outcome of a case since it effectively decides which party is to have primary jurisdiction. Therefore, the United States and South Korea would do well to agree upon a clear guideline approved by the legal authorities of both States. At a minimum, such a system would serve to educate the Korean public about why certain decisions come out the way they do, and they will perhaps be less suspicious of arbitrary favoritism on the part of the United States.

5. *When cases concern both states, regardless of who has primary jurisdiction, the two states should have equal investigatory power.*

The State who does not have primary jurisdiction should, at least, be given the chance to present the strongest case it can prepare. This is particularly appropriate since Paragraph 5 specifically prescribes this. Allowing equal investigatory power will be one way to minimize the concern for bias and preferential treatment. Meanwhile, it serves an additional purpose: the more transparency is allowed, the more the authorities of one State can learn about how the other State's justice system functions. In the case at bar, had the Korean authorities been granted more investigatory power, the trial might or might not have reached different outcomes. But more importantly, the Korean authorities would have learned the level of evidence required to establish criminal negligence is "beyond a reasonable doubt."

VI. CONCLUSION

Just as the conclusions of World War I and II brought about the virtual erosion of "the law of the flag" and led to a paradigm shift in how we view international law, the end of the Cold War has changed the geopolitical environment of the modern era. Law must evolve through time in order to reflect the varying social circumstances and expectations. The purpose of a SOFA is to share the sovereign prerogative between the receiving and the sending states. SOFA agreements should embody the participating parties' intentions to find a balance between the rights and obligations of the U.S. troops on foreign soil, the United States, and the Korean government.

More than a year has passed since the tragic incident of Uijongbu, and a lot has occurred in the meantime. In October 2002, North Korea confessed that it had been developing nuclear weapons. It came as a devastating blow to both the United States and South Korea. With the Bush administration refusing to sign a non-

aggression treaty with North Korea, there is a real possibility of a war between the United States and North Korea. Tensions remain high in the Korean peninsula. Newly-elected President Roh Moo-Hyun, who originally rode to electoral victory with anti-American slogans, paid a visit to the United States in May of 2003. In his summit meeting with President George W. Bush, he stressed the importance of having the United States as a close ally. In a public message, President Roh stated that "the next fifty years of the Korea-U.S. alliance would be even more precious and meaningful than before."[111] The past twelve months gave both countries a chance to think about their priorities, and at the moment, both the United States and South Korea undoubtedly recognize the importance of keeping the U.S. troops in the peninsula all the more. Still, the Korean public continues to insist on SOFA reforms.

It would be rather unfortunate if these recent developments mask the necessity for meaningful SOFA reforms. At the same time, the lesson from the Uijongbu incident is that no SOFA — no matter how carefully drafted and revided — will serve its purpose unless all parties honor their commitment to sharing and believe their interests have been properly balanced. Dialogue between the parties is essential to this end. South Korea and the United States should begin their renegotiation process by making small concessions and having more frequent communication. Neither country benefits from the spread of anti-American sentiments; likewise, neither country will benefit from unilateral behavior. The upcoming renegotiation process may define a new standard of bilateral treaties and may very well mark a new chapter in the history of international law.

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111. Choi Won-gyu, *Roh Pays Homage to U.S. War Dead*, CHOSUN ILBO, May 22, 2003, *available at* http://english.chosun.com (last visited Oct. 3, 2003).

CONSTITUTIONAL CONSTRAINTS ON THE INTERNATIONAL LAW-MAKING POWER OF THE FEDERAL COURTS

JASON JARVIS*

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I. INTRODUCTION

The sole clause in the Constitution expressly giving Congress power to define law is the Offenses Clause.[1] That clause states, in part, "The Congress shall have power…to define and punish… offences against the Law of Nations."[2] This unique clause constrains courts' law-making power further than previously expressed by courts or commentators. While the federal courts' common law power to make law is only to be used sparingly,[3] if at

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1. U.S. CONST. art. I, § 8, cl. 10. Also sometimes referred to as the "Power to Define," "Define and Punish," or "Law of Nations" clause. Obviously, this is not pertaining directly to legislative power.

2. *Id.*

3. *See, e.g.,* Louise Weinberg, *Federal Common Law,* 83 NW. U. L. REV. 805, 832-33 (1989) (suggesting federal common law creation is rare in and of itself, and in its pure form, virtually unique).

all,[4] in this article I argue that the federal courts are without power to define the law of nations due to the Offenses Clause. Other scholars have argued that the clause constrains certain doctrines,[5] but, in fact, compliance with the Constitution mandates the federal courts' complete withdrawal from the determination or enforcement of non-statutory customary international law.[6] Thus, the long-held doctrine for determining international law is flawed from its foundation and must be discarded for a constitutionally permissible alternative. In Part II, I review the background of the Offenses Clause and consider (1) the text of the Clause; (2) the structure and theory behind the Clause; and (3) the history of both the Clause and its American jurisprudence. Next, in Part III, I examine other scholars' attempts to quantify the Clause and limits arising from it. Finally, in Part IV, I analyze what the proper role of the courts in determining the law of nations should be. I conclude by pointing out that these limitations only apply to freestanding determinations of customary international law, not to the interpretive, express role of the courts in applying and interpreting treaties, domestic legislation with international implications, or any subject matter over which jurisdiction is expressly granted by Article III.

II. BACKGROUND TO THE OFFENSES CLAUSE

A. The Text of the Offenses Clause

"Congress shall have the power…[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[7] There are two things of note about the plain language of this clause.

First, that Congress has the power "to define and punish" is unique within the Constitution. No place else is the word "define"

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4. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective,* 83 NW. U. L. REV. 761, 765 (1989) (questioning the legitimacy of judicial creation of federal common law in the "political context of a carefully structured system of separation of powers").

5. *See, e.g.,* Curtis A. Bradley*, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 481-84 (1998) (reexamining the modern international application of the Charming Betsy doctrine in light of separation of powers concernes); Donald J. Kochan, Note*, Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153, 155 (1998) (hereinafter "Constitutional Structure") (arguing that separation of powers concerns limit application of the ATCA under the Offenses Clause).

6. "Customary international law" is the modern term for the "law of nations." Although arguably, they do not mean the exact same thing, I endeavor to use each term in its popular context; i.e., when talking about the Offenses Clause I use the term "law of nations," and when discussing modern international law doctrines such as the Act of State doctrine I use the term "customary international law."

7. U.S. CONST. art. 1 § 8, cl. 10.

used in the context of Congressional law-making power.[8] It is a foundational principle of the Constitution that the power to make and modify law is granted in the legislature; this principle needs no further discussion.[9]

The second unique aspect to the language of this clause is the almost wholly international flavor. International law is referred to in the Constitution very few times: the President's power to make treaties with the advice and consent of the Senate, the prohibition of several states' rights to make treaties, the judicial power over treaties, and the Supremacy clause's incorporation of treaties.[10] No other Constitutional provision expressly refers to international law. When a textual commitment of an issue is made to one branch of the government in a wholly unique manner (the power to define exists only in the Offenses Clause), regarding a matter only referred to in that clause (the phrase "law of nations" only appears in the Offenses Clause), it should be treated uniquely. Clearly, something special was intended for the Offenses Clause. To determine what this is, an examination of the structure and theory behind the Constitution is in order.

B. Structure and Theory

It may be said that the United States of America must speak with one voice to the world community; one voice capable of providing a strong and complete response to foreign complaints. Accordingly, it should be recognized that the structure and location of the Offenses Clause dictates the manner in which the Founders saw such a desire operating. Sources contemporaneous to the drafting and eventual adoption of the Constitution express two principles of relevance: first, that the power to define and punish was specifically vested in the Congress as a legislative power; and second, that this grant of power was unique and intended as separate from traditional federal jurisdiction.

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8. *See generally* U.S. CONST.

9. However, it has never been as clear the extent to which the federal courts have law making power irrespective of the discussion herein regarding international law. *See generally* Weinberg, *supra* note 3; Redish, *supra* note 4.

10. *See* U.S. CONST. art. I, § 10; art. 2, § 2, cl. 2; art III, § 2, cl. 1; art. VI. References to treaties and ambassadors are made in these sections, but no place other than the Offenses Clause contains a reference to the law of nations.

1. A Government of Enumerated Powers

The structure of the Constitution itself suggests a restrained reading of the Offenses Clause.[11] The common sense, widely held rule of Constitutional construction is that where a power is committed to one branch of the government it was meant exclusively. A written Constitution that limits the federal government to exercising only enumerated powers means that power for one branch to act must be given separately or by necessary implication. A corollary is that express delegation of power to one branch implies no delegation to another branch.[12] Thus, for example, to the extent that Article I gives Congress express powers to regulate commerce and tax and spend for the general welfare, it, by negative implication, excludes the President and the federal courts from exercising these powers. When the Court contemplates shared powers (such as the power of making judicial appointments or treaties), it frequently declines to define with precision the roles each must take.[13]

Thus, because Article I gives Congress the power to "define and punish…. Offenses against the Law of Nations," by implication the federal courts lack that power.[14]

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11. Simply put, the Offenses Clause of Article I gives the power to define to Congress. Article III says nothing to contradict the general rule of Constitutional construction that powers enumerated in one article are intended to be exclusive.

12. This is not to say, as discussed elsewhere, that Congress cannot delegate power to another branch. *See, e.g.,* United States v. Smith, 18 U.S. (5 Wheat.) 153, 157-58 (1820).

13. A recent case involving treaty adoption that illustrates this principle is Made in the USA Foundation v. United States, 242 F.3d 1300, 1318 (11th Cir. 2001) ("a review by this court of the process by which the President and Congress enter into international agreements would run the risk of intruding upon the respect due coordinate branches of government").

14. U.S. CONST. art. I. § 8, cl.10. But it must be noted that Joseph Story, commenting on the Offenses Clause 13 years after the *Smith* decision considered the question of exclusivity:

> Whether this power [to define offenses against the law of nations], so far as it concerns the law of nations, is an exclusive one, has been doubted by a learned commentator. As, up to the present time, that question may be deemed for most purposes to be a mere speculative question, it is not proposed to discuss it, since it may be better reasoned out, when it shall require judicial decision.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, 58 (1833).

2. The Judicial Power

The obvious counter-argument to this point is that "judicial power" includes some common law-making power in the area of international law.[15] Why this argument does not apply to the Offenses Clause is in part the subject of this article. But as a structural matter, the unique aspect of the Offenses Clause, its subject matter and its unique grant of "defining" power, should be read, likewise, as a unique grant of power. Whatever the judicial power extends to in a domestic context, in the international context it is limited to interpreting and applying *statutes passed by Congress* regarding the law of nations.[16]

This structural reading is supported by the seminal case of *United States v. Hudson & Goodwin*.[17] The pertinent holding of *Hudson* was that no federal common law jurisdiction in criminal cases exists in the absence of a legislative pronouncement to the affirmative.[18] In *Hudson,* the common law crime of libel was implicated; and the Court refused to impart itself common-law making power.[19] By comparison, for the Offenses Clause, there is an affirmative grant of the power to define the law of nations to

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15. *See generally* U.S. CONST. art III.

16. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 IOWA L. REV. 735, 744-47 (2001). Professor Pushaw illustrates the difference between law making by the courts and Congress, stating that a:

> constitutional precept is the distinction between legislative and judicial lawmaking processes. Article I grants Congress alone the "legislative power" to create — or to decline to create — federal law whenever and however it sees fit according to its policy preferences…. By contrast, a federal court cannot formulate law until a person…appropriately presents a claim that must be decided by interpreting and applying the law in a principled manner…. [T]he Court has confined "federal common law" to situations of genuine necessity…and protecting uniquely federal interests …

Id. at 746-47. *But see* Stewart Jay, *Origins of Federal Common Law: Part One,* 133 U. PA. L. REV. 1003, 1012-13 (1985) (suggesting that the history and development of federal common law "has a great deal to do with the balance of political forces in the society, the degree of attention that courts wish to devote to certain areas, and a range of other elements that form the judicial personalities of an era").

17. 11 U.S. (7 Cranch) 32 (1812).

18. *See id.* at 32. Professor Pushaw nicely sums up *Hudson's* holding:

> According to the Court, [three] "simple" constitutional principles [resulted in the holding]: (1) the national government had only those powers "expressly given" it by the Constitution; (2) the Constitution authorized Congress to create inferior federal courts — and, by implication, to specify their jurisdiction; and (3) therefore, Congress alone could define federal crimes and grant courts cognizance over them.

Pushaw, *supra* note 16, at 767-68.

19. *See Hudson,* 11 U.S. at 32.

Congress.[20] By way of analogy, this is as though Article I included a provision such as, "Congress shall have the power to define and punish crimes of libel." Clearly, the *Hudson* court needed no such affirmative grant to recognize the structural limits in the federal courts to make common law.[21] Thus, the Offenses Clause should cause far greater reason for concern at any federal court's use of common law-making power or principles to usurp the constitutionally granted power of Congress. Furthermore, other structural concerns support the restrictive reading of the Offenses Clause.

3. "International" Power in Articles I and II

Article III indeed provides broad power for the third branch.[22] It gives jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made…."[23] However, except with certain narrow exceptions,[24] "jurisdiction" over issues of international character are committed by enumeration in Articles I and II.[25]

It is a well-established rule of law that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[26] Courts are ill equipped to deal with the intricacies and policy issues inherent in deciding matters of great international import — this principle likely led the Founders to delineate the separation of powers in the Constitution.[27] It is why the treaty-making power exists in Article II. Treaties are formal statements of law between two or more countries. Treaties, being definite, are, pursuant to Article III, specifically within the court's jurisdiction.[28] Likewise, Articles I and II commit the making of laws

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20. U.S. CONST. art. I, § 8, cl. 10.

21. *See generally id.*

22. U.S. CONST. art. III. It is clear that the Framers thought that the federal courts power was the narrowest of the three branches. *See, e.g.,* THE FEDERALIST NO. 78 (Alexander Hamilton) ("the judiciary is beyond comparison the weakest of the three departments of power").

23. U.S. CONST. art. III, § 1.

24. The power over ambassadors and the inclusion in the federal jurisdiction over treaties being examples thereof.

25. *See* U.S. CONST. arts. I, II.

26. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

27. *See, e.g.,* Coleman v. Miller, 307 U.S. 433, 455 (1939) (noting that the conduct of foreign relations often involves "considerations of policy… [that render a court] entirely incompetent to [their] examination and decision" (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796))).

28. *See* U.S. CONST. art. III, § 2.

concerning the relationship of the United States of America to other nations, i.e., foreign affairs, to Congress and the President.[29] Article III gives power to the courts to protect individual legal rights arising out of foreign affairs decisions that result in treaties or domestic statutes.[30]

A more subtle argument may also be made: it was common at the time of the Founders to consider the law of nations strictly in a nationalistic function; that is to say, the law of nations applied only to nation-states.[31] This view appears to have been shared by both European and American commentators of the time.[32] However, this view may be countered by the prevailing incidents present during the time of the adoption of the Constitution, however, and the disagreement between contemporaries of Vattel and Wilson illustrates the tenuous nature of this assertion.[33] To the extent the law of nations was only to apply to states, however, it may be said

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29. *See* U.S. CONST. arts. I, II.

30. *See* U.S. CONST. art. III.

31. In fact, later commentaries seem to agree with the less-exclusive reading of the Offenses Clause specifically for federalism concerns. *See, e.g.,* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 106-09 (Leonard W. Levy ed., Da Capo Press 1970) (1829) (commenting that, while Congress is appropriately given power to define the law of nations, "if cases arise for which no…statutory provision has been made, both these descriptions of courts are thrown upon those general principles [of commonly-held international law norms]"). Rawle acknowledged the sole grant of power to Congress, but appears to have read it only in the federalism context as a federal power as opposed to state grant. *See id.* at 107-09.

32. James Wilson said this, explicitly: "The law of nature, when applied to states or political societies, receives a new name, that of the law of nations." JAMES WILSON, *Of the Law of Nations, in* 1 THE WORKS OF JAMES WILSON 148, 148 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804). Wilson explained that the law of nature was an inherent natural foundation of immutable law derived from divine sources, and that the law of nations more properly was derived of consent by man-made institutions. *See id.* at 146-67. Vattel differed slightly in his understanding of these concepts, asserting instead that the law of nations was derived from the law of nature. *See* EMER DE Vattel, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lvi (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson 1863) (1758). However, Vattel clearly intended his rules regarding the law of nations to apply primarily to the sovereign states of the world, not to individuals. *See generally id. See also* Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 676-78 (describing conflicts regarding ambassadors prior to adoption of the U.S. Constitution). Wilson attempted to note the general disagreement between Grotius and Puffendorf as to the origin of the law of nations — mutual national consent and complete devotion to the law of nature, respectively. WILSON, *supra,* at 151. However, it is unclear if Wilson correctly interpreted Grotius' thoughts on the law of nations, as Grotius is not only one of the legal scholars most responsible for the concept of the law of nature, but also a devoted and serious adherent to a law for all nations bereft of vicissitude. *See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 102-07 (1947). Regardless, Grotius' thoughts on the law of nations are not as important to this discussion as are Wilson's.

33. For an in-depth discussion of the these scholars see Nussbaum, *supra*, note 32.

that such devotion of this power to Congress was due to separation of powers concerns.

Congress and the President are clearly granted the foreign affairs power. The grant of the Offenses Clause falls within this overall scheme. Read in light of the notion that the law of nations was primarily focused at states, it provides even more compelling evidence for why the courts were intentionally left out of this international power-sharing occurring between the political branches.[34]

4. Federal Common Law and the Three Forms of Law-Defining Power

Swift v. Tyson[35] and *Erie Railroad Co. v. Tompkins*[36] reviewed and settled a nagging question of federal jurisprudence: whether a state or federal law governs various aspects of a dispute. Such history is important to the issue at hand because it illustrates the struggles the federal courts have undertaken to establish (as in the case of *Swift*) and then restrict (as in the case of *Erie*) the broad authority of federal common law. After *Erie*, it is clear that the surviving federal common law exists only in narrow circumstances.[37] *Erie* corrected the ambiguity and forum shopping resulting from federal common law, but also illustrated why some areas of law are best left to Congress to determine.[38]

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34. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936) (illustrating that foreign relations powers are devoted almost exclusively to the political branches).

35. 41 U.S. (16 Pet.) 1 (1842).

36. 304 U.S. 64 (1938).

37. Such as certain Federal Rules of Evidence — like expert testimony or inadvertent disclosure.

38. That is to say, that state substantive law is wholly appropriate for use in federal court in situations like that in *Erie* (tort actions); but it may be inappropriate for issues concerning the nation as a whole--such as international law. *See Erie*, 304 U.S. at 78-79. An ancillary point may be made at this juncture. *Swift v. Tyson* began nearly 100 years of federal common law creation. *See id.* at 71. Such decisions determined that in the absence of state statutory schemes the federal court should fashion and obey federal common law. This raises important parallels apparent to the astute reader as *The Paquete Habana* caused federal courts to create (or at least "determine") what is essentially international common law in the absence of federal statutes. The Paquete Habana, 175 U.S. 677, 700. Thus, *The Paquete Habana* court was justifiably consistent with then-contemporary federal courts' reading of their expansive power to create law in the absence of statutory instruction. If this parallel is true, then likewise, with the advent of *Erie*, it would be thought that the modern courts would realize the greater constitutional restrictions on legislating from the bench, especially in areas of foreign affairs. The Court's concern with uniformity can find no better illustration of its importance than in the international context. *See Erie*, 304 U.S. at 74. Thus, just as *Erie* ended *Swift's* common law power, *Erie* should have curtailed common law making power in the international law context (perhaps even specifically overruling *The Paquete Habana*). Of course, *Erie* relied on the Rules of Decision Act, and therefore concerned an already made domestic statute of delegation. *See id.* at 71. Whether the Judiciary Act of 1789's international law ramifications can serve as a corollary is a question best left to another day.

Looking at the issue of the Offenses Clause through the prism of *Erie* and its progeny, three distinct forms of law-definition power within the federal court system are revealed.[39] First are wholly domestic, substantive issues traditionally of state concern, such as property law, family law, and criminal law. Second is federal court power over substantive areas such as the Freedom of Information Act,[40] the Federal Tort Claims Act,[41] or bankruptcy, where controlling federal statutes and federal common law exist. Third is power over cases in federal court where there is no established domestic federal law or established domestic state law — namely, international law.[42] International law may be governed by domestic statute, such as the Foreign Corrupt Practices Act,[43] treaty, such as the Vienna Convention for the International Sale of Goods,[44] or the law of nations.[45] This last category of law-defining power is the only category specifically granted to Congress in Article I.[46] Even substantive law subjects, such as bankruptcy and tax, also enumerated in Article I, are not referred to as a power to "define and punish."[47]

Thus, considering the plain language of the clause and the structural commitment of coordinate power to other branches, it seems indicated that the Constitution provides for no ability on the part of federal courts to determine the law of nations. This becomes even more manifest when an examination of the history of the clause is undertaken.

C. The History Behind the Offenses Clause

A survey of the understanding of law-making power, especially in the international law context, illuminates further support for the strict reading of the Offenses Clause.[48]

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39. The discussion herein concerns international litigation occurring in federal courts, and does not discuss state court powers or jurisdiction except insofar as necessary to distinguish it.

40. 5 U.S.C. § 552 (1976).

41. 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (2003).

42. The determination of which, of course, is the subject of this article.

43. 15 U.S.C. § 78dd-1 (2003).

44. *See* United Nations Conference on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (entered into force Jan. 1, 1988).

45. *See generally Smith*, 18 U.S. (5 Wheat.) at 153-60. .

46. *See* U.S. CONST. art. I, § 8, cl. 10.

47. *See id*. Of course, the "legislative power" is the power to make (define) law. But for other reasons noted herein, it seems plain that the use of the specific "define and punish" phrase meant something more than the traditional legislative power.

48. A sense of irony may be born in the reader's mind: after all, this article advocates a departure from federal courts' current process for determination of international legal precedent, namely, consultation of international legal scholars; yet does exactly that in seeking to establish the proposition which it sets forth. However, to establish the proper

1. Impetus for Incorporation of the Clause into the Constitution

The circumstances for the Offenses Clause manifest the clause's unique history.[49] Constitutional impetus for the Offenses Clause was found in two important needs of the fledgling country. The greatest need at the time of the constitutional convention arose out of the several states' failure to adequately remedy and address two notable incidents with international implications: the *De Longchamps* affair[50] and the *Dutch Ambassador* incident.[51] These notable instances where state law failed to provide adequate remedies for ambassadors injured on U.S. soil, raised considerable ire in the international community[52] and cemented the need for a strong, central international voice in the minds of the Founders.[53]

The two examples cited above where the several states failed to address concerns of international figures provided what may be termed a "sensationalist" need for a federal international law.[54] But it was the general view of those most eloquent of Founders, the Federalist authors, who most compellingly expressed the operative perspective.[55] This perspective can best be summed up as the abhorrence for leaving issues of international significance to the

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understanding of Offenses Clause limits on the federal courts is *not* to determine the law of nations.

49. I discuss the overall constitutional structure and early court decisions at *infra,* Parts III and IV, respectively. This is to establish the unique background to the Offenses Clause before placing it into the context of the entire Constitution and early jurisprudential use.

50. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Terminer 1784).

51. Curtis Bradley, *Alien Tort Statute and Ariticle III*, 42 Va. J. Int'l L 587, 641 (2002).

52. *Id.*

53. *See, e.g.,* Edmund Randolph et al., Report to Congress Nov. 1781, *reprinted in* 3 THE FOUNDERS CONSTITUTION 66 (Phillip B. Kurland and Ralph Lerner, eds. 1987).

54. Pennsylvania and New York were those in which the incidents occurred. *But see,* Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, n. 39 (2003) (arguing that the states did in fact adequately address the penal issue regarding international offenders and a more political impetus drove the convention's interest in a federal constitutional provision speaking to international offenses).

55. John Jay, James Madison and Alexander Hamilton, authors of The Federalist Papers.

several states.[56] Professor Charles D. Siegal sums up the mindset well:

> The Framers understood that certain acts violated the law of nations; they were aware that the states had failed to deal adequately with those acts as crimes under their common law and that the law of nations was imprecise — the new nation needed both a way to treat such offenses and uniformity.[57]

2. The Constitutional Debates and Discussion Over the Language of the Clause

One of the early suggestions for federal court jurisdiction included "authority to hear and determine…all Cases…*on the Law of Nations.*"[58] Yet the language of Article III allows for no such

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56. These ideals are espoused best in the following sources: "The power to define and punish…offenses against the law of nations [does not yet rest in the federal government and therefore it is] in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42 (James Madison). "It is of high importance to the peace of America that she observe the laws of nations…and…it appears evident that this will be more perfectly and punctually done by one national Government than it could be…by the thirteen separate States." THE FEDERALIST NO. 3, (John Jay). "[T]he peace of the WHOLE ought not to be left at the disposal of a PART." The Federalist No. 80 (Alexander Hamilton). Hamilton noted the complexity of international conflicts rendered their determination by federal courts imperative: "So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Id*. And Madison once stated that it was the greatest single deficit on the Articles of Confederation that they did not empower one national government to speak in matters of international import. *See* JAMES MADISON, JOURNAL OF CONSTITUTIONAL CONVENTION 60 (E. H. Scott ed., 1970) (1840).

57. Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define…Offenses Against the Law of Nations*," 21 VAND. J. TRANSNAT'L L. 865, 879 (1988). Professor Siegal's article composes the most thorough background specifically to the Offenses Clause, but does not analyze it under the exclusivity principle I advocate. Still, for a more in-depth treatment of the Founders and the Offenses Clause, see *id*. at 874-886.

58. Committee of Detail VII, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 157 (Max Farrand ed., Yale Univ. Press 1966) (1911) [hereinafter 2 Farrand]. *But see* Bradley, *supra* note 5, at 494. Professor Bradley notes that

> [I]nternational law during this period was widely considered to be objective and discoverable…due in part to international law's association with natural law. As the nineteenth century progressed, the objectivity and discoverability of international law were derived more from its association with state practice. Regardless of the basis, international law was accepted as "knowable doctrine." Judges who applied international law were seen as involved in a process of discovery rather than creation.

Id. Professor Bradley does not seem to suggest that courts were not capable of creating law, but he does suggest that such was not in the contemplation of the jurists of the time. *Id*. Read in light of the principles already discussed in this article regarding the Founder's specific grant of defining power to Congress, Professor Bradley's assertion supports the notion that Judges were not thought to be in the business of making new law. *Id*.

authority; the Framers retained the judicial power over cases of admiralty jurisdiction and those affecting ambassadors, but deleted power to determine the law of nations.[59] This reading is further supported by the affirmative grant of power to the Senate "to provide tribunals and punishment for mere offenses against the Law of Nations;"[60] and the grant of power "to declare the Law and Punishment of Piracies and…of offenses against the Law of Nations."[61]

However, it is in the notes of Madison on the debates that provide perhaps the most compelling support for the intended denial of power to the judiciary.[62] In debating the Offenses Clause, Wilson posited that purporting to "define" the law of nations "would have a look of arrogance" and hoped such language would not be used.[63] However, the will of the majority appeared to be that the law of nations was "too vague and deficient to be a rule."[64] If the Framers had intended for the judiciary to define the law of nations, they certainly would have manifested this intent with a specific provision in Article III, and would not have inserted the Offenses Clause into Article I.

3. American Commentators

One of the early writings expressing the need for courts capable of cognizing issues of international law was the letter by Edmund Randolph to the Congress, stating "that it be farther [sic] recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offenses against the law of nations… "[65] This language suggests Randolph's

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59. *See* U.S. CONST. art. III, § 2, cl. 2.

60. Committee of Detail IV, 2 Farrand, *supra* note 58, at 143.

61. Committee of Detail VII, 2 Farrand, *supra* note 58, at 168. An affirmative grant of definitional power both for piracy and offenses against the law of nations is distinct in theory, but conflated in reality. One of the primary offenses against the law of nations, both as understood at the time of the founding, and as cited by courts today, is piracy. *See, e.g.,* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66-73 (Garland Publishing 1978) (1766).

62. *Id.* at 614-15.

63. *Id.* at 615.

64. *Id.* There are then two possible meanings for the Offenses Clause as illustrated by this portion of the Records: first, that inserting the word "punish" in front of "offenses against the law of nations" would be too great of an implication of arrogance for the fledgling United States; that is to say, that the United States of America did not have the power to *punish anything* in the international arena. The second meaning is that by using such a term, the Constitution might *limit* the ability of Congress *to define* the offenses, exactly what the delegates did *not* want to imply. Thus, it is clear that in either case, the intent was to expressly grant Congress the power to define the law of nations, not merely to punish it (as would have been the case without the stricken term).

65. Randolph, *supra* note 53, at 66.

desire to see power vested in the judiciary, but it is clear from the records of the debates of the Committee on Style that this was not the majority view of the delegates and that the power to define and punish ought to be vested in the Congress.[66]

Commentators relatively contemporary with the founding of the Constitution further support the "exclusive grant" reading of the Offenses Clause:

> And here we may remark by the way, the very guarded manner in which congress are [sic] vested with authority to legislate upon the subject of crimes, and misdemeanors. They are not entrusted with a general power over these subjects, but a few offences are selected from the great mass of crimes with which society may be infested, upon which, only, congress are authorized to prescribe the punishment, or define the offence. All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively. From whence this corollary seems to follow. *That all crimes cognizable by the federal courts (except such as are committed in places, the exclusive jurisdiction of which has been ceded to the federal government) must be previously defined, (except treason,) and the punishment thereof previously declared, by the federal legislature.*[67]

Thus, the historical framework for the adoption of the Offenses Clause suggests specific intent on the part of the Framers to vest power for law-making in Congress.

4. International Commentators

Much of the historical commentary on the making of international law can trace its roots to Grotius.[68] Best known for his work, *De jure belli ac pacis* (On the Law of War and Peace), Grotius is considered by some to be seminal in the history of international law.[69] This tradition was continued by the famous Swiss writer,

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66. *See 2* Farrand, *supra* note 58 at 615.

67. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 269-70 (Augustus M. Kelly 1969) (1803) (emphasis added). Although Tucker's anti-federalist views must be taken in context, his Commentaries are worthwhile in their general appraisal of the historical context to the Offenses Clause.

68. www.icrc.org/web/eng/siteengo.nsf (last visited October 10, 2003).

69. *See id. See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 102 (1947).

Emer de Vattel. Vattel was so influential that he was still being quoted in 1887 for support of an issue of the law of nations.[70] No discussion of the influences on American jurisprudence is complete without Sir William Blackstone.

The vast importance of Blackstone to early American legal theory cannot be underestimated, yet his importance to precepts on international law was less broad.[71] Blackstone's best-known commentary on the law of nations described the three common violations against it.[72] These violations are referred to repeatedly by the Founders and considered accurate, if limited, descriptions of common violations of the law of nations as they were thought to be in England during the time of the Founding.[73] Blackstone characterized these laws thusly, "[t]he principal offences against the law of nations…are of three kinds: (1) [v]iolation of safe-conducts; (2) [I]nfringement of the rights of ambassadors; and, (3) [p]iracy."[74]

5. English Courts

The English courts' international law-making powers are, much like their American progeny, complicated and involved multiple layers of jurisprudence and political controversy.[75] The clearest reference to the power of a court to interpret the law of nations may be found in Sir William Holdsworth's seminal work on English law, *A History of English Law*:[76]

> Lord Stowell said in the case of *The Recovery*, "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the king of Great Britain. It belongs to other nations as well as to our own; and, what foreigners have a right to demand from it, is the administration of the *Law of Nations* simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence."

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70. *E.g.,* United States v. Arjona, 120 U.S. 479, 484 (1887) (citing with approval Vattel for his understanding of the law of nations).

71. *See* 4 BLACKSTONE, *supra* note 61, at 68. Blackstone's writings on the law of nations are sparse in the commentaries.

72. *Id.*

73. *Supra* note 57.

74. *Id.* at 68. It should provoke the curiosity of the thoughtful reader, however, why such sparce attention is given to international law when volumes of other domestic thought existed at the time. International law was not as it is today.

75. One such layer included the admiralty prize courts that "determined whether a captured vessel was a legitimate prize." *at* http://www.maritime-scotland.com/introduc.html.

76. 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 565-66 (A.L. Goodhart & H.G. Hanbury eds., 1966) (1903).

> It is clear that an English statute can compel a judge to depart from these principles; but it has been held by the Privy Council in the case of *The Zamora* that nothing short of a statute can have this effect.[77]

Holdsworth reviewed two "modern" cases for his discussion of the law of nations: *The Recovery* and *The Zamora.*[78] These two cases demonstrated the divergence of the nineteenth century courts of England as to their duty to the law of nations versus that of the crown, and while not exhaustive by any stretch, illustrate how some English courts interpreted the law of nations with great deference to applicable domestic statutes.[79]

The essential point to be gleaned from Holdsworth's review of the history of English law, however, is that it was "clear that in the sixteenth and seventeenth centuries the judges of the court of Admiralty, exercising…[prize] jurisdiction, were very much under the thumb of the crown."[80] It is this tradition, contemporaneous with and prior to the establishment of the American colonies, that would have informed the Founding Fathers. Disagreement abounded in English courts in the eighteenth and nineteenth centuries about the reach and power of international law in domestic courts,[81] but by that time American courts had begun to develop independent of their English counterparts and the parallel then begins to lose its impact.

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77. *Id.* Holdsworth further illuminates the power of domestic decisions, "I doubt very much whether [a domestic statute issued by the crown] can be disregarded [by the courts] if it contravenes a rule of international law." *Id.* at 567.

78. *Id.* at 566-67. Holdsworth illuminated the power of domestic decisions. "[I]t was probably the better opinion in the eighteenth century that, even if [a domestic statute issued by the crown] could not be…justified [by a treaty], the court must obey it, even though obedience might… expose the country to reprisals." *Id.* Thus, we are left with two cases from the Prize Courts of England, one which determined that the law of nations ought to reign supreme over English Common Law, and one which determined that decisions of the Crown are effectively acts of state and definitionally, then, international law for domestic purposes. Holdsworth recognized the complexity of the situation in England when he stated that "the contents of those rules of international law which have not been incorporated with the common law is intimately bound up with the prerogative of the crown in relation to foreign affairs…." *Id.*

79. *See id.* The point is that the Crown and some judges of the Prize courts were in conflict over whether the common law ought to incorporate the law of nations. *Id.* Whether such conflict can be removed from the conflicts between the English courts of common pleas and chancery is a question best left to another day, but for our purposes the conflicts in England were not so important as the agreement which preceded them.

80. *Id.* at 566. That is, the domestic sovereign's determination of international law reigned supreme.

81. *See id* at 566-67.

6. American Jurisprudence and the Offenses Clause

a. Early Court Decisions

The seminal case of *United States v. Smith,*[82] provided an early framework to the Offenses Clause. *Smith* concerned an indictment for piracy; the statute upon which imposition of criminal rested, stated, "if any person or persons…commit the crime of piracy, as defined by the law of nations…such offender or offenders shall… upon conviction…be punished with death."[83] Justice Story, writing for the court, addressed the validity of such a pronouncement (it is clearly constitutional, as supported by the Offenses Clause) and then addressed the prisoner's argument.[84] The gravamen of this argument was: "that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation."[85] The Court rejected this argument as "too narrow a view of the language of the constitution."[86] Instead, Justice Story set forth two justifications for this conclusion: first, that since the law of nations cannot simply be ascertained by review of "any public code recognised by the common consent of nations," the power to define bore "peculiar fitness" for review by the Court.[87] Why this meant Congress is not bound to define the offenses is not readily apparent. What Justice Story may have meant is that the power of Congress to *delegate* the power to define offenses against the law of nations is logical.

The second justification was that Congress need not have explicitly defined the offence of piracy.[88] As Justice Story writes, "there is nothing which restricts [Congress] to a mere logical enumeration in detail of all the facts constituting the offence."[89] A requirement for express definitions of all offenses of all sorts, felonious or otherwise, would result in "no end to our difficulties…for each [definition] would involve some terms which might still require some new explanation."[90]

Such a reading of the Offenses Clause is valid. It is in fact quite logical. It would make no sense for Congress to have to define every single term that could need defining in the law of nations. Yet, that is not why Justice Story is essentially correct in his application of

82. U.S. v. Smith, 18 U.S. (5 Wheat.) 153 (1820).
83. *Id.* at 157.
84. *Id.* at 158.
85. *Id.*
86. *Id.*
87. *Id.* at 159.
88. *Smith*, 14 U.S. at 159-60.
89. *Id.* at 159.
90. *Id.* at 160.

the felony of *piracy* to the defendant in *Smith*. It was the Court's description of how to determine the law of nations which leads future courts astray.[91] The Court determined to examine the law of nations and apply it, not because the power had been delegated to the Courts by Congress, but because it presumed the Court's power extended to cover such determinations.

Justice Livingston took a different tack in his dissent.[92] He made clear that the power to define piracy, to which *Smith* referred, had been enumerated to Congress.[93] Note the following:

> If it had been intended to adopt the definition…[of piracy]…it might as well at once have been adopted as a standard by the constitution itself. The object, therefore, of referring its definition to Congress was, and could have been no other than, to enable that body, to select from sources it might think proper, and then to declare, and with reasonable precision to define, what act or acts should constitute this crime …. Can this be the case, or can a crime be said to be defined, even to a common intent, when those who are desirous of information on the subject are referred to a code, without knowing with any certainty, where it is to be found…. Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain, that they do not all agree; and if they did, it would seem unreasonable to impose upon that class of men, who are the most liable to commit offences of this description, the task of looking beyond the written law of their own country for a definition of them. If in criminal cases every thing is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to

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91. The conundrum faced by Justice Story is cyclical upon first blush. If (i) the power to define piracy and the law of nations is given to Congress; and (ii) Congress gives the courts power to define piracy; but (iii) does so by reference to the law of nations; and (iv) gives no further direction; arguably Justice Story had to determine the law of nations before he could determine what piracy was or was not. This excuses Justice Story of some culpability in the Constitutional error discussion in this article. Indeed, the error is not so much contained in *Smith*as it is in later cases. Cases that extend the quandary of Justice Story beyond where courts are required by statute to determine the law of nations to a general self-grant of power authorizing courts to do so without an express delegation from Congress. *See, e.g.,* The Paquete Habana, 175 U.S. 667, 700 (1899).

92. *Smith*, 14 U.S. at 164-83.

93. *See id.*

> any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; *that it is the duty of Congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country….*[94]

Several things distinguish Justice Livingston's dissent from the thesis of this article. First, the issue in *Smith* concerned whether the definition of piracy was sufficiently compelling to warrant a conviction thereon.[95] It appears from Justice Livingston that the fact a criminal conviction was at issue factored heavily into his desire for greater specificity.[96] Second, Justice Livingston correctly noted that the Offenses Clause required Congress to define an offense against the law of nations [97] (without specifically referring to the Offenses Clause), but did not follow through on the separation of powers ramifications: namely, that such enumeration of power in Article I deprived Article III courts of that jurisdiction.[98] Finally, Justice Livingston did not agree that the delegation of the power to define piracy via the law of nations gave the courts the power to do so. He would have required Congress to define piracy, not by another indistinct term such as the law of nations, but by express specificity.[99] Arguably, the degrees of separation between Story's opinion and Livingston's dissent are few: the majority held that a definition of piracy by the law of nations using two degrees of definition is sufficient; the dissent framed the issue as requiring merely one degree of definition (piracy itself).[100]

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94. *Id.* at 176-83 (emphasis added).
95. *See generally id.* at 164-81.
96. *See id.*
97. *Id.*
98. *See supra* Part II(B).
99. *See id.*
100. *See generally id.* at 153-83. Although the most important, *Smith* was not the first case to confront important issues of international law. Two prior cases worth note dealt with issues of interpretation. The first was *Ware v. Hylton*, 3 U.S. 199, 240-41 (1796). *Hylton* is most often cited for the proposition that "general rules of construction apply to international agreements." *E.g.,* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Justice Stevens, dissenting). *Hylton* is important, distinct from the Offenses Clause discussion herein, because it concerned the interpretation of a treaty — clearly a place where Congress has made the initial "definition" required by the Offenses Clause. The second case dealing with interpretation was *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116

b. The Paquete Habana

The case that culminated this expanse of the federal courts' power into unconstitutional waters was *The Paquete Habana.*[101] *The Paquete Habana* was a ship captured by the United States while flying a Spanish flag.[102] To determine the legality of this capture, the Supreme Court looked to common law norms of historical international law.[103] "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt…from capture as prize of war."[104] The court traced the history of fishing vessel exemptions to wartime capture rules and found, by and large, agreement among the international community that fishing vessels were exempt.[105] *The Paquete Habana* court then made this oft-quoted statement: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[106]

(1812). *The Schooner Exchange* concerned issues of territoriality. *Id.* at 136. Chief Justice Marshall stated regarding territoriality that "All exceptions…to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.… This consent may be either express or implied." *Id.* at 136. Chief Justice Marshall set the stage for *Smith* and *The Paquete Habana* by, without expressly stating so, looking to the international works of jurists and commentators. *See The Schooner Exchange,* 11 U.S. (7 Cranch) at 144. "In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this." *Id.* at 136. Chief Justice Marshall's concern to expand, not restrict, the power of the federal judiciary and the Supreme Court may explain the Court's arguable need to stretch the power of the Court to determine indeterminate issues of international law in contravention of the Offenses Clause. In fact, he displayed a fundamental appreciation for the law of nations: "A nation would justly be considered as violating its faith…which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world." *Id.* at 137. However, to be properly deferential to the commitment of the power to define these "obligations" Chief Justice Marshall would have been more accurate to include a parenthetical, "as defined by Congress," for example, at the end of such a statement. It was not until *The Paquete Habana*, however, that the Court deviated expressly from the Constitutional mandate of the Offenses Clause.

101. The Paquete Habana, 175 U.S. 677.

102. *Id.* at 678.

103. *See id.* at 686.

104. *Id.*

105. *See id.* at 686-700 The court did not find unanimous agreement however as to this rule.

106. *Id.* at 700. The court then, arguably, drew on *Smith* when completing the statement:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators.… Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The "methods" became an outgrowth of what Justice Story referred to in *Smith*, "[consultation of] the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[107] Professor Louis Henkin illustrates *The Paquete Habana* method with characteristic aplomb:

> In a real sense federal courts *find* international law rather than make it, as was not true when courts were applying the "common law," and as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation. The courts determine international law for their purposes, but the determinants are not their own judgments or the precedents of U.S. courts.[108]

The Paquete Habana was wrongly decided; not because of its result but because of its reasoning. In reaching the result (that fishing vessel protection was valid under the law of nations) the Court reached beyond the specific delegation of authority by the *Smith* court in determining piracy.[109] Instead, *The Paquete Habana* court declared that in the absence of other instructions they should simply consult the so-called "customs and usages of civilized nations."[110] The court erred fundamentally because it relied on *Smith* and *Hylton* to *determine how to determine the law of nations*. Unfortunately, it did not ask the question *whether it should determine the law of nations.* The court thereby mistakenly usurped this Congressional power.

The ramifications of this over-extension of federal jurisdiction can be seen in the following modern uses of *The Paquete Habana.*

7. Modern Uses of "Customary International Law" in the United States

The term "customary international law," came in to use in the twentieth century.[111] But, in all respects it mirrors and duplicates

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107. *Smith*, 14 U.S. at 160. The Court restated this list in *The Paquete Habana*, 175 U.S. at 700.

108. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-1562 (1984).

109. Note again that the Court in *Smith* had the benefit of a statute charging courts with defining piracy by using the law of nations. *Smith,* 18 U.S. at 162.

110. The Paquete Habana, 175 U.S. at 700.

111. It appears that one of the first instances the term "customary international law" was used in American jurisprudence was in 1951, in *Aboitiz & Co v. Price*, 99 F. Supp. 602, 609 (D. Utah 1951), where the court stated:

the term "law of nations."[112] The first time the Supreme Court interpreted the law of nations in the twentieth century was in the case of *In re Yamashita*.[113] But the most important Supreme Court case of the twentieth century concerning international law, and the first time the Court used the term "customary international law," was *Banco Nacional de Cuba v. Sabbatino*.[114] *Sabbatino* examined customary international law to determine the international practices regarding "a state's power to expropriate the property of aliens."[115]

Sabbatino illustrates how the Court struggles with its self-imposed need to define customary international law, and why it should refrain from doing so.[116] The Court admitted the great

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> Although it is correct to say that international law governs only the relations between States, and that it has nothing to do directly with disputes between private individuals, the principle has been clearly adopted in the United States that it is part of the law of the land, because either we have signed international agreements, or have otherwise written it into our municipal law. Oppenheim says: "Such customary International Law as is universally recognized or has at any rate received the assent of the United States, and further all international conventions ratified by the United States are binding upon American courts, even if in conflict with previous American statutory law; for according to the practice of the United States customary as well as conventional International Law overrule previous Municipal Law, provided, apparently, that they do not conflict with the Constitution of the United States."

Id. at 609 (citation omitted).

112. The Supreme Court did not use the term until 1964 in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). This is a term of recent use and development if not in legal academia, then at least in the common parlance of the Court, but there is no indication that a court seeking to establish the law of nations is seeking anything different whatsoever from establishing customary international law.

113. 327 U.S. 1 (1946). *Yamashita* concerned the habeas application of a Japanese general convicted of war crimes by a military tribunal in the Philippines to the Supreme Court. *Id.* at 4.

114. 376 U.S. 398 (1964).

115. *Id.* at 428.

116. *See id* at 428. Note this paragraph in the Court's opinion:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances

division among international authorities,[117] yet still the Court managed to settle on a single interpretation, ruling that "the act of state doctrine is applicable [to expropriation] even if international law has been violated."[118] *Sabbatino* provides an early example of *The Paquete Habana* method in action, but the Courts' usurpation of the power to define international law continued.

8. Emerging Trends Among the Circuit Courts and Expansion of the Federal Courts' International Law Making Power

Filartiga v. Pena-Irala[119] concerned the suit by a resident alien against another alien based on allegations of the torture and murder of a political dissident's son in Paraguay.[120] The Second Circuit began its analysis to find liability under the Alien Tort Statute (ATS)[121] by requiring a clear violation of the "law of nations."[122] Defining the law of nations became the first order of business for the panel, which began its analysis by reviewing Supreme Court jurisprudence on this issue.[123] Relying upon the expression contained in *The Paquete Habana*,[124] the *Filartiga* panel reviewed the authorities for determination of the law of nations, and then noted the unequivocal condemnation of the use of torture by

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of emergent states.

Id. at 428-29 (citations omitted).

117. *See id* at *430*. "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430. Professor Henkin poses an interesting question in reviewing *Sabbatino*: "Was the Court merely seizing an occasion to aggrandize judicial power?" Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 57 (2d ed., Claredon Press 1996) (1990). Although Henkin is referring to the Courts insistence that the Act of State doctrine was judicially empowered, arguably his comment may encompass far more. *See id.* at 57-58.

118. *Sabbatino,* 376 U.S. at 431.

119. 630 F.2d 876 (2d Cir. 1980).

120. *Id*. at 878.

121. 28 U.S.C. § 1350 (2003).

122. *Id* at 880.

123. *Id.* "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recogni[s]ing and enforcing that law.'" *Id.* (quoting *Smith,* 18 U.S. at 160-161) (alteration in original). It is noteworthy that not only the order in which these sources are listed might be considered counterintuitive, but they furthermore recognize the importance of reviewing international law in a *manner similar to the modus of the courts in other countries*The Second Circuit made a base(if harmless) error, however, in not consulting what is clearly the most important domestic source of the law of nations, Congress and the Constitution. *See* U.S. CONST. art. I, § 8, cl. 10. For a discussion of the use of the Offenses clause with respect to extraterritoriality, see Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1316 (1999).

124. *See supra* note 101.

"civilized nations."[125] The court found that the conduct alleged in *Filartiga* clearly violated the law of nations.[126] *Filartiga* is notable for two reasons: (1) it revitalized (if not resurrected) use of the ATS; and (2) by doing so, reminded the international legal community that the law of nations was alive and meaningful. The opinion is otherwise unremarkable for the purposes of this article.

Another important case (also utilizing the ATS), *Tel-Oren v. Libyan Arab Republic* [127] arose just a few years after *Filartiga*. *Tel-Oren* involved a lawsuit filed by the claims of survivors and relatives of persons murdered and injured by a terrorist attack in Israel.[128] In the course of the attack the terrorist tortured, shot and killed numerous adults and children.[129] Most victims were Israeli, but some Americans and Dutch were also affected.[130] These plaintiffs brought their claim in the District of Columbia against a number of defendants, including the Palestinian Liberation Organization.[131]

Although all three judges on the *Tel-Oren* panel agreed to dismiss the action for lack of subject matter jurisdiction, their reasoning greatly diverged.[132] Briefly, Judge Edwards reasoned that while *Filartiga* had been properly decided and torture is prohibited

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125. *Id* at 881. The court also wisely noted that a particular rule need not be adhered to by every single nation. "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." *Id*.

126. *Id*. This is another important point because in many later cases, the greatest issue facing litigants is whether or not something violated the law of nations. Proof of a tort, and proof of alien status are both patent. Proof of violation of the law of nations is extremely fact-sensitive, and thus, torture's implication as a clear violation was important insofar as the reach *Filartiga* has had, and should have. *See, e.g.,* Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774, 775 (D.C. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'").

127. 726 F.2d 774 (D.C. Cir. 1984).

128. *Id*. at 775.

129. *Id*. at 776.

130. *Id*.

131. *Id*. at 775. Judge Edwards, in his concurring opinion, pointed out that he was self-limiting his analysis "to the allegations against the Palestine Liberation Organization… [because] the complainants' allegations against the Palestine Information Office and the National Association of Arab Americans are too insubstantial to satisfy the… [the ATS and] [j]urisdiction over Libya is barred by the Foreign Sovereign Immunities Act." *Id*.(citations omitted). Commentators have disagreed whether this analysis is correct in light of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *Compare* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 480-497 (1997) ("According to *Sabbatino's* reasoning…judicial incorporation of CIL for such claims would survive the act of state doctrine."), *with* Gary B. Born, *International Civil Litigation in United States Courts* 743 (3d ed. 1996) ("The act of state doctrine articulated in Sabbatino would presumptively forbid U.S. courts from sitting in judgment on the foreign state's misconduct.").

132. *See generally* Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774 (D.C. 1984)The three D.C. Circuit Judges were Judge Edwards, Judge Bork, and Senior Judge Robb. Each filed a separate concurring opinion joining no part of any of the others. *Id.*

by the law of nations, such referred to "official" torture as perpetrated by a state actor.[133] Judge Bork took a new, and then-to-date unique tack: he also held to affirm the dismissal of action, but on the theory that the ATS provides jurisdiction but no cause of action for violations of the law of nations.[134] Judge Bork suggested that implying a cause of action would, in effect, make the ATS self-executing and go beyond that which Congress intended or undertook.[135]

After compiling quite an extensive and exhaustive list of rationales for doing so, Judge Robb concurred on the basis that the issue presented to the panel was non-justiciable under the political question doctrine.[136] But Judge Robb noted something in his concurrence dispositive of the issue in this article that:

> I agree with the sentiment expressed by Chief Justice Fuller in his dissent to *The Paquete Habana*, where he wrote that it was "needless to review the speculations and repetitions of writers on international law…. Their lucubrations may be persuasive, but are not authoritative." Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations…. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law."[137]

Other cases discussing the law of nations utilized a similar approach to that of the *Filartiga* panel.[138]

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133. *Id.* at 777.

134. *Id.* at 809. For just one drop of water in a sea of criticism for this point of view, see Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985).

135. *Tel-Oren*, 726 F.2d. at 808-12.

136. *Id.* at 823. Judge Robb arguably based this assertion on one fundamental but unspoken difference from the other Judges: that the act of terrorism committed by the defendants was a political or war-time act and not that of a private tortfeasor in the classic sense. *See id.* at 825.

137. *Id.* at 827 (internal citations omitted).

138. The best example of this is *Kadic v. Karadzic*, 70 F. 3d 232, 241 (2d Cir. 1995) (reviewing the law of nations in order to determine violations thereof with respect to genocide).

III. SCHOLARLY REVIEW OF OFFENSES CLAUSE LIMITATIONS

Having examined the text of the Offenses Clause, the history and structure of its passage, and the American jurisprudence interpreting the clause, I turn to the present, first by considering other scholars' work on the Offenses Clause.

A. "Deference and Its Dangers"[139]

In what may be the seminal work on the Offenses Clause, Charles Siegal argues that the courts have given Congress free rein in defining the law of nations.[140] While an accurate rendition of the state of the law, this analysis misses the mark. The courts have never had the power to "give Congress free rein" because the power to define has always been vested in Congress. It was Congress' right to give courts a free rein (by delegating its authority) rather than the other way around. Such a commonly held improper reading of the courts' law making power is precisely why a new and more thorough appreciation for the unique qualities of the Offenses Clause requires thought.

B. The Charming Betsy Doctrine

Curtis Bradley suggests that in light of certain constitutional understandings of the law of nations, combined with the modern evolution of customary international law, the *Charming Betsy* canon ought to be revised.[141]

The *Charming Betsy* doctrine is simple and well-settled,[142] and may be best stated by quoting its source: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[143] The Restatement (Third) of Foreign Relations adjusts this standard somewhat in adopting the language "where fairly possible."[144] Scholars and courts debate regarding the appropriate level of vagueness required for a court to

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139. Siegal, *supra* note 57.

140. *Id.* at 880. In pertinent part:

> Indeed, no court has ever invalidated a statute enacted pursuant to the offenses clause on the ground that no offense against the law of nations existed. The cases, albeit equivocally, seem to give Congress a somewhat freer hand in defining crimes under the offenses clause than they generally give courts in integrating customary international law into United States law, in the sense that in some cases less evidence of custom is needed to establish an offense than is needed to establish custom generally.

141. *See* Bradley, *supra* note 5, AT 484.

142. *See id.* at 482-84.

143. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

144. RESTATEMENT (THIRD) FOREIGN RELATIONS § 114 (1987).

look to international law for possible violations,[145] but as an essential doctrine the canon has survived nearly 200 years. Professor Bradley's argument is complicated. A vastly simplified summary is as follows:

> to the extent that the [*Charming Betsy*] canon is to be retained, it is best thought of today as a device to preserve the proper separation of powers between the three branches of the federal government….
>
> …[T]he canon was adopted during a time when the international status of the United States, prevailing views…of international law, and the role of federal courts were all very different than they are today.[146]

The *Charming Betsy* canon cannot survive the principles suggested by a careful reading of the Offenses Clause.[147] Specific suggestions for how to alter the doctrine such that it complies with the principles espoused here must be left for another day, although arguably Professor Bradley's description of the "separation of powers conception" fits nicely within the Offenses Clause limitations.[148] This is because, like *Charming Betsy, The Paquete Habana* relied on an overbroad understanding of the power of federal courts to make determinations of international law. Furthermore, in both cases, less deference is paid to domestic law than ought to be in light of the Offenses Clause. If the Offenses Clause is to be properly respected, it must be noted that the affirmative grant of power to Congress to make international law was not only to keep it out of the hands of the courts (as discussed herein), or the several states,[149] but also out of the hands of foreign nations. Thus, rather than paying deference to the law of nations by reading domestic law in accordance therewith, the law of nations should be read in accordance with domestic law and under proper

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145. *See* Bradley, *supra* note 5, at 490-91.

146. *See id.* at 484. These arguments are similar to this article's in that I also advocate a separation of powers framework for understanding why courts do not have power to define the law of nations; yet Professor Bradley does not seem to rest his qualified acceptance of *Charming Betsy* upon such constitutional bases. *See generally id.*

147. Professor Bradley concluded his article by illustrating that the *Charming Betsy* canon is similar to other presumptive interpretive canons "such as the canon that federal statutes should be construed to avoid serious constitutional questions." *Id.* at 536. However, while Professor Bradley recognizes the fundamental problems with permitting the courts to interpret statutes in light of the law of nations, he does not recognize that the source of this fundamental problem is the Offenses Clause. *See generally id.*

148. *See id.* at 524-29.

149. *See supra* Section II(C) regarding the impetus for the Offenses Clause.

Constitutional principles.[150] Another article addressed a specific use of the Offenses Clause that has seen ever-increasing use since the *Filartiga* case referenced above.

C. The Alien Tort Statute

Congress passed the Alien Tort Statute (commonly called the Alien Tort Claims Act) as part of the Judiciary Act of 1789.[151] The statute provides that "[t]he district courts shall have original jurisdiction of any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States."[152] Although the number of successful litigants utilizing the ATS has been limited, the ATS has engendered substantial commentary.[153] One such commentator, Donald J. Kochan, argues that the ATS should be restricted to violations against the law of nations as understood by the Founders and thereby only to those cognizable in American law.[154]

This argument is facially similar to that in this article but foundationally different. Kochan argues (compellingly) that the structure and context of the ATS should be read restrictively as to the courts' power.[155] He does not make the argument that, foundationally, federal courts lack the judicial power to determine even what the law of nations is. Thus, while this argument may be sound in principle it neither supports nor opposes the principles espoused herein.

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150. It is realized that this American-centric view of international law may not be popular with other countries or many scholars. However plain the interest of the Founders in respecting international law and proving the United States would, as a fledgling country, respect the law of nations, it is likely that they also intended Congress to be the final arbiter on what the law of nations would be. This turns the *Charming Betsy* canon on its head, and arguably parallels Professor Bradley's point.

151. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000).

152. 28 U.S.C. § 1350 (2003). Originally, the ATS provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the Law of Nations or a treaty of the United States." *See* Judiciary Act of 1789 § 9(b).

153. *See, e.g.,* Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquires into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Jarvis, Comment, *A New Paradigm for the ATS*, 30 PEPP. L. REV 671 (2003). A number of factors likely enter into the popularity of commentary: it is an old, unused statute revitalized in the 1980s; it can be used in everything from egregious and heinous human rights violations to complicated environmental torts; and it allows litigants without a United States nexus to litigate in United States courts.

154. *See generally* Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L. J. 153 (1998).

155. *See id*. at 156.

IV. THE PROPER ROLE OF COURTS IN INTERPRETING THE LAW OF NATIONS

Having examined the background of the Offenses Clause, it appears, in sum, that there are two instances where the federal courts may determine the law of nations.

A. Where There is Domestic Law on Point

There are numerous statutes passed by Congress that concern issues of international law; in fact, far too many to list here. Notable ones used frequently by litigants include the Alien Tort Statute,[156] the Foreign Sovereign Immunities Act,[157] and the Torture Victims Protection Act.[158] This does not include the hundreds (if not thousands) of laws that do not appear intentionally directed in an international context, but which include powerful ramifications therefore.[159] For courts to either directly apply, or interpret these or any other pertinent statute, is clearly within the power contemplated by Article III. Yet it is the presumption by the federal courts that the law of nations is like treaties or domestic statutes in that the judicial power extends to it, which is erroneous. Courts must, in the future, look to whether a treaty or domestic statute is on point, and analyze the issues in that, and only that, framework.

B. Where Delegated by Congress

Nothing prohibits Congress from delegating its constitutional authority.[160] Perhaps the most notable instance of this is the case discussed at length above, *United States v. Smith*.[161] In *Smith*, Justice Story made an ultimately correct decision, not because the Court had constitutionally granted jurisdiction over the law of nations, but because Congress had expressly delegated the power to define piracy by passing the act upon which the indictment was returned![162] By passing such an act and directing courts to determine the law of nations definition of piracy, Congress gave the courts power to determine piracy. This did not mean the courts then had the power to define the law of nations. Unfortunately,

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156. 28 U.S.C. § 1350 (2003).
157. Pub. L. No. 94-583, 90 Stat. 2891-97 (1976) (codified at 28 U.S.C. § 1330 (2003)).
158. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2003).
159. *See, e.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 6-7 (1992) (examining application of the Sherman Anti-Trust Act in an international context).
160. For example, Congress delegated the power to promulgate the Federal Rules of Evidence to the courts.
161. 18 U.S. (5 Wheat.) 153 (1820).
162. *See supra* Section IIC(6)(a).

Justice Story took a step further when forced to define piracy as under the law of nations. As he stated early in the opinion, "the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes."[163] Thus, it appears Story considered the delegation of power to define piracy as given to the courts to determine in a manner *distinct from their definition by reference to the law of nations.* This is confusing in light of the language of the statute conferring specifically upon piracy its definition in the law of nations.[164]

C. A Suggested Approach for Federal Courts.

I suggest therefore, a two-pronged approach for federal courts confronted with issues pertaining to the law of nations.[165] First, a court should ask: is the issue one covered directly by any domestic statute or applicable treaty? If so, the inquiry should stop there. The statute or treaty would control. This is not really different from the current regime. The second prong is: has the power to determine the law of nations for this issue been delegated to the courts by Congress? It may be a situation such as *Smith*, where the domestic statute requests that the court determine the law of nations. This suggested approach is nothing revolutionary, but framed in these two simple questions is the essence of this article's thesis: that the federal courts must have been given by Congress an affirmative grant of authority, either expressly by statute or treaty, or impliedly by delegation, before the courts can determine the law of nations. In the absence of such a grant, the federal courts lack jurisdiction.

V. CONCLUSION

The textual commitment of the power "[t]o define and punish… offenses against the law of nations," indicate a clear intent on the part of the Framers to limit the federal courts' jurisdiction to matters already defined by Congress or those so delegated.[166] Considered also in light of the strong public policy concerns favoring the courts' refraining from determining sensitive, undeclared issues of customary international law, it is clear what must be a new rule

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163. *Smith,* 18 U.S. at 158.
164. *See id*. at 153.
165. Should this proper understanding of the Offenses Clause come to light, litigants will no longer be able to look to courts to make the law and will instead seek appropriate redress with the political process.
166. *See* U.S. CONST. art. II, § 8.

of federal jurisprudence for international law: *unless Congress has either expressly delegated the defining power authority to the courts, or already legislated on a subject of customary international law, courts must dismiss actions calling for any determination of the law of nations for want of jurisdiction.*[167] In many respects this is essentially the view taken by Judge Robb in his *Tel Oren* concurrence.[168]

It is important to note what the principle stated in this article does not advance. It does not advance the proposition that courts lack jurisdiction to review matters of international law where Congress has defined the law of nations. Any time Congress makes a treaty, domestic statute, suggests findings on the state of international law, or passes a law intended to have international consequences (such as the Torture Victims Protection Act), courts may interpret and apply these rules. Courts may also act in cases such as *Smith* where Congress has delegated the power to determine the law of nations to the courts.

Absent such a grant of legislation or delegation, however, the Constitution demands courts bow out of any litigant request for a determination of the law of nations. It is not likely that the courts will seek to limit their own power, thus it lies with Congress to duly exercise their power and duty, to set forth new laws either delegating the power to, or defining itself, the law of nations.

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167. A corollary to this argument may be made: That the political question doctrine would also abrogate jurisdiction by the federal courts to make determinations of the law of nations

168. "I agree with the sentiment expressed by Chief Justice Fuller in his dissent to the *Paquete Habana*, where he wrote that it was 'needless to review the speculations and repetitions of writers on international law…. Their lucubrations may be persuasive, but are not authoritative.'" *Tel Oren*, 726 F.2d at 827 (quoting *Paquete Habana*, 175 U.S. 677, 720 (1900) (Fuller, J. dissenting).

THE REALPOLITIK OF EMPIRE

TIKKUN A. S. GOTTSCHALK*

Table of Contents

I. INTRODUCTION

The United States approaches the formulation and use of international law from a unilateralist perspective, encouraging foreign compliance, yet stymieing domestic incorporation. Decisions involving customary international law (CIL) are an important part of the business of the U.S. court system. However, the gap between the potential value of CIL to domestic issues and the actual application of CIL to these issues remains wide. Further widening this gap, both the President and Congress continue their opposition to almost all forms of domestic incorporation and international enforcement of CIL. The unique status of the United States on the world stages of power and influence perpetuates a lack of mutual obligation, a vacuum of corresponding incentives to adopt at home what is law abroad. The battery of rights protected through the U.S. Constitution reflects many of the precepts of international humanitarian law, but the United States is still behind the international curve in the protection of human rights. The U.S. judicial system is often a strong advocate of humanitarian law, yet U.S. courts, as well as Congress and the President, fall short of the

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international standard set by other countries. Contrary to the contemporary practice of its allies, the United States has shown limited interest in looking beyond the boundaries of American notions of law, policy, and politics when considering human rights issues.

Despite this imbalance, there are emerging avenues of indirect pressure on the United States from foreign and international bodies. Even if many U.S. politicians remain opposed to broad-based codification of international law, litigation in foreign and international contexts may create a back door to increased compliance with normative humanitarian law. The ever-shrinking impunity of world leaders for crimes against humanity and the growing legitimacy of international courts suggest that the U.S. unilateralist abstention from customary human rights law may begin to erode. With the prospect of individual leaders and political figures facing criminal or civil liability for their actions, the United States may, at the very least, be forced into minimal compliance with CIL.

Similarly, the active participation of foreign and international judicial bodies in the development and enforcement of CIL, as compared with only marginal domestic acceptance of international law, will strengthen efforts to incorporate normative human rights law in an effort to combat a decline in U.S. judicial legitimacy. Even if the United States remains opposed to international judicial institutions, pressure to support the enforcement of international human rights standards will rise out of the War on Terrorism, among other foreign policy agendas, because of the U.S. desire for foreign and international cooperation in the capture and prosecution of terrorist suspects. While it is unlikely that the increased pressure from abroad will trigger the wholesale adoption of CIL into domestic law, it could lead to increased conformity with international human rights standards.

As the point of departure for this essay, Part II discusses the development of CIL in the U.S. court system and the debate over the status of CIL. Part III places CIL human rights claims in modern context, outlining Alien Tort Claims Act[1] (ATCA) litigation and sorting alleged jus cogens[2] violations into a three-tiered analytical framework. Notwithstanding the incorporation of human rights law

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1. 28 U.S.C. § 1350 (2000): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

2. "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACKS LAW DICTIONARY 864 (7th ed. 1999).

in the ATCA and the Torture Victims Protection Act[3] (TVPA) noted in Part III, Part IV describes political antagonism to ATCA jurisdiction and discusses the related hostility to international law reflected in U.S. foreign policy and Supreme Court jurisprudence. In addition, Part IV argues that this political and judicial opposition to international law threatens to erode the legitimacy of the U.S. court system. Highlighting this erosion, Part V describes international efforts to prosecute leaders for human rights violations, arguing that these efforts put increasing pressure on all countries, including the United States, to conform to international human rights standards. Describing similar external influences on the United States, Part VI discusses international pressure on the United States to conform to international humanitarian standards, arguing that this pressure will force the United States to further conform to international norms. Finally, Part VII concludes that this pressure, compounded by the U.S. desire for international cooperation in the War on Terrorism, will force the United States to back away from the unilateralist approach to foreign policy and force greater judicial and political acceptance of CIL.

II. HISTORICAL BACKGROUND: CIL IN THE U.S. COURT SYSTEM

Ever since *Filartiga v. Peña-Irala*,[4] the role of CIL in the domestic legal framework has been a subject of intense debate, in both the federal courts[5] and in academic circles.[6] In *Filartiga*, the plaintiffs, Dolly M.E. Filartiga and her father Joel Filartiga, sought a civil judgment against Americo Norberto Peña-Irala, the former Inspector General of Police in Asuncion, Paraguay, for the torture and murder of Mrs. Filartiga's brother, Joelito Filartiga.[7] Although the events at issue occurred outside U.S. jurisdiction and all the

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3. 28 U.S.C. § 1350 (2000).

4. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).

5. *See, e.g.,* Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (J. Randolph, concurring): "Congress — not the Judiciary — is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *See also* Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995): "We find the norms of contemporary international law by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." (internal quotations omitted) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820)).

6. *See, e.g.*, Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law,* 86 GEO. L. J. 479 (1998); Harold H. Koh, *Commentary: Is International Law Really State Law?,* 111 HARV. L. REV. 1824 (1998). For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S., see Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192-93 (2001).

7. *Filartiga,* 630 F.2d at 878.

parties were aliens, the Second Circuit resurrected the long-dormant ATCA to secure jurisdiction over the suit and a cause of action.[8] Embracing an interpretive approach to international law, the court used the ATCA to provide a basis for the enforcement of human rights norms.[9] Expanding the scope of the ATCA to include emerging notions of CIL and humanitarian law, *Filartiga* rejected the static conception of international law.[10] Despite limiting claims to violations of universal norms of international law,[11] *Filartiga* opened the door to domestic punishment for jus cogens violations committed abroad.

Although criticized little for its policy rationale that human rights violations should be punished, *Filartiga* sparked a disagreement over whether CIL is federal common law.[12] *Erie Railroad Co. v. Tompkins,*[13] the foundational case behind this debate, abolished generally applicable federal common law, but the effect that *Erie* had on the status of international law was arguably uncertain at the time.[14] The *Erie* court, in ruling that federal courts must apply state law in cases where there is no constitutional provision or federal statute on point, said little about where its ruling left concepts of CIL not explicitly reflected in congressional enactments or the Constitution.[15]

The uncertainty over the status of CIL was in part allayed through *Banco Nacional de Cuba v. Sabbatino*,[16] where the Supreme Court formally carved out a place for international law within the context of federal "foreign relations law."[17] In considering the plaintiff's claim that the Cuban government's expropriation of property violated international law, *Sabbatino* held that the act of state doctrine[18] prohibited U.S. courts from inquiring into the

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8. *Id.* at 880.

9. *See id.*

10. *See* Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 143 (1986).

11. *See* part II., *infra*.

12. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), *with* Koh, *supra* note 6. For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S. court system, *see* Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192 (2001).

13. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

14. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558-59 (1984).

15. *Erie*, 304 U.S. at 78.

16. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

17. Henkin, *supra* note 14, at 1559; *see also* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472-73 (1997).

18. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[E]very sovereign State is bound

legality of a foreign government's actions within its own territory.[19] Noting that *Erie* limitations on federal common law should not be extended to rules of international law,[20] including the act of state doctrine, *Sabbatino* gave rise to the "modern position,"[21] the notion that international law is federal law.[22] Yet, while *Sabbatino* appeared to settle uncertainty over the status of international law — and while U.S. courts generally accept the "modern position" — the issue is by no means settled.[23]

In their acceptance of the "modern position," federal courts require, under a variety of ATCA precedents,[24] that claims allege a jus cogens violation — a violation of a universal, definable, and obligatory precept of international law.[25] The Supreme Court articulated the principals governing the interpretation and identification of such violations in *The Paquete Habana*,[26] where the Court held that the capture of fishing vessels as prizes of war was a violation of international law.[27] In addition to the probative value of judicial precedent and state practice, *The Paquete Habana* standard, in providing that international law may be ascertained by "consulting the works of jurists and commentators"[28] opens the door

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to respect the independence of every other sovereign State."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 443 (1987):

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

19. *Sabbatino*, 376 U.S. at 415.

20. *Id*. at 424. See Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939), for the theoretical bases behind the Supreme Court's discussion of *Erie's* applicability to international law.

21. Bradley & Goldsmith, *supra* note 12, at 816; Harold H. Koh terms the other side the "revisionist position." *Supra* note 6, at 1824.

22. Henkin, *supra* note 14, at 1560.

23. *See* Bradley & Goldsmith, *supra* note 12, at 816 (challenging the notion that *Sabbatino* supports CIL as federal common law).

24. *See, e.g.,* Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995):

> [ATCA jurisdiction] require[s] that: 1) no state condone the act in question and there is a recognizable "universal" consensus of prohibition against it; 2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; 3) the prohibition against it is non-derogable and therefore binding at all times upon all actors.

Id; see also Kadic, 70 F.3d at 232; In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994) [hereinafter *Marcos*]; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); *Filartiga*, 630 F.2d at 876.

25. Goodman & Jinks, *supra* note 17, at 495.

26. The Paquete Habana, 175 U.S. 677, 700 (1903).

27. *Id.* at 686.

28. *Id.* at 700:

to criticism that CIL is "made up" by federal courts. Despite the squishiness of this standard, there is little evidence that U.S. courts acknowledge anything but the most obvious and discernable CIL violations.[29] The standard, theoretically, could be construed to include certain acts that, while often condemned by international commentators and jurists, are not, realistically, outside the realm of legitimate state practice.[30] Yet U.S. courts continually demonstrate a willingness to recognize the uncertainty of a stipulated jus cogens rule, disallowing the invocation of asserted "norms" of international law where those "norms" do not reflect universal and obligatory practice.[31]

Criticism of *The Paquete Habana* framework for analyzing CIL claims may be more justified outside the realm of the ATCA, in areas where there are no statutes on point. Article I of the Constitution expressly delegates to Congress the authority to define and punish offenses against the law of nations,[32] suggesting that judicial definitions of international law usurp Congress' constitutional authority. Yet this power does not mandate judicial blindness to the guiding principals of international law. Congress has implemented the Article I mandate in diverse contexts, affirmatively delegating its constitutional authority to the courts, as in the ATCA,[33] yet CIL remains important even in areas where Congress has not expressly "defined" international law.[34]

Whether the oft-quoted phrase from *The Paquete Habana,* "international law is part of our law,"[35] should be interpreted to mean that CIL is federal common law is unimportant to the discussion of influences on U.S. policy and practice. Under ATCA precedents and the continued endorsement of the "modern

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> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

See also U.S. v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820).

29. *See infra* Part III, notes 46 through 50.

30. State-sponsored assassination, for example.

31. *See* Goodman & Jinks, *supra* note 17, at 495; *Filartiga*, 630 F.2d at 881. *See infra* Part III discussion of cruel, unusual, and degrading treatment for an example of an uncertain norm.

32. U.S. CONST. art. I, § 8 ("Congress shall have power to…define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.").

33. *See Smith*, 18 U.S. (5 Wheat.) at 157-158.

34. *See* Martha F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Court Watcher*, 64 ALB. L. REV. 417, 418-419, 432-433 (2000).

35. *The Paquete Habana,* 175 U.S. at 700.

position,"[36] CIL *is* part of our law, at least for the time being. Despite the debate over the application of international law, federal courts continue to make active use of CIL on the human rights stage, under both the ATCA and the TVPA.[37] Further confirming the basic approach of *Filartiga,* Congress, in the passage of the TVPA, noted that the ATCA creates a right of action under "norms that already exist or may ripen in the future into rules of customary international law."[38]

> [The TVPA extended to] U.S. citizens the same right to sue in U.S. court that the ATCA gives aliens to sue for torture or extra-judicial killing. The passage of this act is seen by many legal commentators as bolstering the legitimacy of the ATCA by codifying the right to sue, which courts had previously read into the ATCA.[39]

Some courts are certainly less willing than others to delve into human rights issues through the ATCA,[40] but most accept the *Filartiga* framework for determining whether an act is a violation of CIL.[41] Even with the many barriers to claims brought under the ATCA, including forum non conveniens[42] and the act of state doctrine,[43] the use of the statute is an essential element of U.S. involvement in the enforcement of human rights standards.

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36. *See, e.g, Xuncax*, 886 F. Supp. at 162; *Kadic*, 70 F.3d at 232; *Marcos*, 25 F.3d at 1475; *Forti*, 672 F. Supp. at 1531; *Filartiga*, 630 F.2d at 876.

37. 28 U.S.C. § 1350 (2000). Congress enacted the TVPA in part as a response to Judge Robert Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, where he stated that the ATCA does not imply a cause of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984).

38. H.R. REP. NO. 367, 103d Cong., 1st Sess. 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84; *see also* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 53 (1996).

39. Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401,415 (2002).

40. *See, e.g. Tel-Oren,* 726 F.2d at 774-801.

41. *See, e.g., Kadic*, 70 F.3d at 232.

42. Forum non conveniens provides that a court, although otherwise an appropriate forum, may dismiss the litigation if "it appears that the action should proceed in another forum in which the action might originally have been brought." BLACK'S LAW DICTIONARY 665 (7th ed. 1999). For a thorough discussion of forum non conveniens issues in relation to human rights litigation see Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 507-510 (2002).

43. For further discussion of the act of state doctrine's effects on ATCA litigation, *see* Aaron Xavier Fellmeth, Note From the Field, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 YALE H.R. & DEV. L.J. 241 (2002); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

III. LITIGATION UNDER THE ATCA

As Ryan Goodman and Derek P. Jinks outline in their article defending *Filartiga* and the modern position, there are three general categories of claims under the ATCA.[44] Ranging from least successful to most they are as follows: (1) claims that, while commonly prohibited by domestic law, are not within the scope of international law; (2) claims that, while based on general principles of CIL, lack consistent definition and application in the international community; and (3) claims alleging established, well recognized jus cogens violations.[45] Discussed below, these three categories define the bounds of ATCA litigation, separating human rights claims into a tripartite framework.

The first category, where rights are codified in domestic law but not universally protected in CIL, includes many of the rights that are enshrined in the U.S. Constitution. Although generally protected by many nations, these rights are not reflected in international law. For example, certain nations actively protect private property from uncompensated governmental seizure, but others (such as communist nations) do not, resulting in divergent views and a lack of consensus in international law.[46] Similarly unenforceable within the scope of the ATCA and international law are claims based on fraud,[47] free speech rights,[48] and libel,[49] among others.[50] Although many of these claims are often adjudicated in federal court using other jurisdictional bases besides the ATCA, the ATCA remains constrained to the more insidious, violent offenses. Beyond the realm of rights that have no expression in international law or no demonstrable consensus supporting their enforcement, the second category is where the principle of CIL is universal, but the definition is not. International agreements and state practice might demonstrate a consensus, an agreement that a certain type of conduct is universally condemned, but the degree of protection

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44. Goodman & Jinks, *supra* note 17, at 498-513.

45. *Id.*

46. *Sabbatino*, 376 U.S. at 428 ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").

47. *See* ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (concluding that, while fraud may be of individual concern for all nations, it is not a "mutual" concern of the community of nations); Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565, 566 (C.D. Cal. 1980) (noting that the universal condemnation of fraud does not mean that it is within the scope of the international law).

48. Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that first amendment rights to free speech are not universal and therefore are not part of international law).

49. Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (libel not within the scope of judicial interpretations of international law).

50. *See* Goodman & Jinks, *supra* note 17, at 509.

afforded to the right associated with that condemnation varies from nation to nation. The most notable of such rights is the prohibition against cruel, inhuman, or degrading treatment.[51] "The norm, broadly speaking, satisfies the requirements of universal condemnation and obligatory prohibition,"[52] but the range of behavior and practice that the norm prohibits is uncertain and subject to intense debate.[53] This "twilight zone" is arguably where CIL prohibitions spend their time before they either become universal norms or return to the arena of legitimate practice through active use or lack of international support.[54]

While encompassing more venerable prohibitions, such as slavery, the third category includes the more modern prohibitions against official torture, extrajudicial killing, prolonged arbitrary detention, genocide, disappearances, and war crimes.[55] The typical case in the *Filartiga* line, raising one or more of these "incontrovertible"[56] jus cogens violations, involves an individual defendant found and served in the United States, who allegedly perpetrated various human rights abuses "under color of law." The defendant is usually a former government official who exceeded the authority of the office in committing the human rights violations.[57] Although the *Filartiga* line is not limited to jus cogens violations

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51. *See id.* at 506; *Forti*, 672 F. Supp. at 1543 (although evidence sufficient to prove "disappearance" is a jus cogens violation, there is no similar consensus on a "right to be free from 'cruel, inhuman and degrading treatment'") (citing plaintiffs', Forti and Benchoam, complaint paras. 47-48.); *but see* Xuncax, 886 F. Supp. at 162 (certain claims within the "cruel, inhuman, or degrading" classification are in fact universally condemned, and therefore actionable as jus cogens violations).

52. Goodman & Jinks, *supra* note 17, at 506-7 ("While nations may agree that certain grotesque practices fall within the category, they are unable to agree, with the requisite precision, on the definitional parameters of the norm involved").

53. *See infra* Part VI (discussion of death penalty and extradition).

54. By way of analogy, see Michael J. Kelly, *Time Warp to 1945, Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law,* 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, discussing the preemption doctrine — a doctrine that, while denounced by many nations, may be moving out of the "gray area" and into a realm of greater legitimacy.

55. Goodman & Jinks, *supra* note 17, at 498-506.

56. *Id.*

57. *E.g., Forti*, 672 F. Supp. at 1531 (involving a suit against former Argentine general for the disappearance of plaintiff's mother during the "dirty war"). Conceptually, the defendant is deemed to be a state actor acting outside his legal authority (as defined by the law of the country), thus the term "under color of law," yet this terminology can be deceptive. The average defendant in a *Filartiga*-like case is simply one of many individuals who have taken part in widespread, systematic human rights violations in their home country — they just had the bad luck of being caught in the U.S. Ostensibly, viewed from a purely legal standpoint, the acts exceed the constitutional or statutory authority of the country where they took place, but the cultural or political climate in the country was such that a de facto authority existed.

involving state action, the majority of such claims deal with official or semi-official conduct.[58]

Litigation in the "incontrovertible" category began with a line of suits against individuals, as in *Filartiga,*[59] but has recently been more common in suits against corporations.[60] Often based on clear violations of CIL, suits against corporations, usually multinationals with significant assets in the United States,[61] fall into a unique subcategory, distinct from the *Filartiga* line in their particularity. These cases, such as *Doe v. Unocal*,[62] where Myanmar residents alleged corporate involvement in forced relocation, enslavement, rape, and torture in connection with the building of a pipeline,[63] generally deal with corporations that contract with governments in resource exploitation and infrastructure projects in developing countries.

Hinging more on whether there is a sufficient connection between the corporation's activities and the violations carried out by the state than on whether the acts violate jus cogens norms, such suits strike to the heart of the primary beneficiaries of human rights violations. Because multinational corporations (MNCs) are increasingly more powerful in economic activity between and within states, especially developing countries acutely vulnerable to human rights violations, MNCs are a prime target for human rights groups seeking to remove the economic incentives to human rights abuses. Thus, if the cost of doing business with the Myanmar government, for example, includes defending multiple suits under the ATCA, then avoiding similar countries with poor human rights records becomes more cost-effective, which in turn encourages all countries to pay more attention to how they treat their citizens.

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58. *See* Hall, *supra* note 39, at 413.

59. See description of *Filartiga*, *supra* Part II. *See also Kadic*, 70 F.3d at 232 (suit by two groups of plaintiffs alleging president of "Srpska" directed the genocide, forced prostitution and impregnation, torture, and summary execution carried out by Bosnian-Serb military forces).

60. *E.g.,* Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997); *see generally* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level,* 1999 B.Y.U.L. REV. 1139 (This is arguably at least one area where the U.S. has successfully promoted human rights: the dearth of recent cases against individuals for state-sponsored jus cogens violations may indicate that similarly culpable individuals are no longer "retiring" in the U.S. For corporations, on the other hand, it is likely much more difficult to avoid being found (for jurisdiction purposes) in the increasingly interconnected global economy.)

61. In contrast to the majority of suits against individuals under the ATCA, where judgments generally go uncollected, successful suits against corporations provide victims of human rights abuses with something more than abstract justice. *See* Boyd, *supra* note 60, at 1144-1145.

62. *Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) *vacated, rehearing granted en banc by* John Doe I v. Unocal Corp., 2003 Cal. Daily Op. Service 1388 (9th Cir. 2003).

63. *Unocal*, 963 F. Supp. at 883.

IV. RESISTING INTERNATIONAL LAW: U.S. PRACTICE AND POLICY

As civil suits against corporate and individual human rights violators continue in U.S. courts, all three branches of the government are laying the groundwork for a coming crisis of legitimacy, undermining the professed status of the United States as the world's preeminent crusader for liberty and justice. U.S courts sometimes recognize the importance of international law, yet these courts often show only marginal acceptance of international trends and foreign precedents.[64] U.S. courts acknowledge the importance of non-domestic case law in some circumstances, but the gap between the probative value and actual usage of international law is, at times, embarrassingly obvious.

The disparity between international precedent and Supreme Court jurisprudence can be extreme. For example, in *Miller v. Albright*,[65] the Supreme Court rejected an equal protection challenge to 8 U.S.C.S 1409, a law establishing differential criteria based on gender for obtaining citizenship. If a person born abroad and out of wedlock seeks to gain U.S. citizenship through their mother, 8 U.S.C.S 1409 imposes certain residency, nationality, and maternity requirements.[66] If, on the other hand, citizenship is sought through the father, the same statute not only requires residency, nationality, and paternity, but also mandates that the claimant "produce a written statement of support prior to the child's eighteenth birthday and … formally legitimate or acknowledge paternity prior to the child's eighteenth birthday."[67] The Court's decision in *Miller*, which allowed the law to stand on the basis that it reflected real differences between "mothers' and fathers' opportunities to transmit the value of citizenship,"[68] may merit criticism for its reasoning. However, it is more noteworthy for what it fails to cite, distinguish, or even acknowledge: that a then-recent Canadian case, directly on point, came to the opposite conclusion.

In *Benner v. Canada*,[69] the Canadian Supreme Court held that a law that distinguished between fathers and mothers in a child's citizenship claim reflected unwarranted stereotypes, not real differences meriting gender discrimination.[70] In contrast to U.S.

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64. *See e.g.* Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

65. Miller v. Albright, 523 U.S. 420 (1998).

66. 8 U.S.C.S 1409 (2003); Davis, *supra* note 34, at 434.

67. Davis, *supra* note 34, at 434. *See also* 8 U.S.C.S 1409 (2003).

68. *Miller*, 523 U.S. at 438.

69. [1997] 1 S.C.R. 358.

70. *See id.* at 365.

law,[71] the Canadian law at issue made it easier to establish citizenship through paternity rather than maternity, a difference that only emphasizes the absurdity of the Supreme Court's ignorance of *Benner*.[72] While the Supreme Court may think "a comparative analysis [is] inappropriate to the task of interpreting a constitution,"[73] such blatant disregard for informative international case law offers a glimpse of the latent isolationism that lurks beneath the surface of Supreme Court jurisprudence.[74] Cases like *Lawrence v. Texas,*[75] where Justice Kennedy used international precedents to support the expansion of the right of privacy to cover consensual sexual conduct, offer hope that the Supreme Court will look to international law for guidance in uncertain domestic issues. *Benner,* on the contrary, shows the degree to which domestic myopia and judicial disinterest in international precedents can infect the U.S. court system.

Notwithstanding judicial disinterest in international law, the Bush Administration is attempting to widen the gap between international law and domestic practice through recent efforts to undermine the ATCA. Even though the ATCA has been a powerful tool in the enforcement and solidification of human rights law in the United States, the Executive branch, in a recent brief submitted by the Department of Justice (DOJ) in *Unocal*,[76] states that the courts should "reconsider" their approach to the statute.[77] In an attempt to "undo 20 years of legal precedent,"[78] the DOJ suggests that

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71. 8 U.S.C.S 1409 (2003).

72. *See* Davis, *supra* note 34, at 435.

73. Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

74. Davis, *supra* note 34 at 435-36, makes a similar argument:

> Placed side by side, the Canadian law and United States law demonstrate that both laws rest on culture-bound stereotypes rather than biological truths. No country is closer to the United States in temperament or social practices, yet Canada assumed that fathers as patriarchs were best able to transmit the values of citizenship while the United States assumed that mothers, as caretakers, were best able to. Taking this into account, the members of the Supreme Court would be hard-pressed to find that the United States law did not reflect gender-based stereotypes, a finding that would in all likelihood change the result of the case.

75. Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003).

76. The same brief was filed by the defendants in Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

77. Brief of Amici Curiae Department of Justice at 4, *Unocal*, 248 F.3d 915 (2001) (Nos. 00-56603, 00-56628) [hereinafter DOJ Brief], *available at* http://www.lchr.org/Issues/ATCA/atca_02.pdf.

78. *Justice Department Seeks to Reverse Two Decades of Progress Under Important U.S. Human Rights Law,* LAWYERS COMMITTEE FOR HUMAN RIGHTS (May 23, 2003), *at* http://www.lchr.org/media/2003_alerts/0523.htm.

foreign policy concerns and the War on Terrorism,[79] among other issues, merit changing the course of human rights litigation in the United States. This stance has emerged despite the DOJ's active support of the ATCA in *Filartiga* and many other human rights cases.[80]

Even as the Bush Administration pursues a war in Iraq to bring relief from tyranny and oppression abroad, it simultaneously seeks to undermine the limited avenues of domestic enforcement of international humanitarian norms at home. In the face of executive opposition to the International Criminal Court (ICC) and other international judicial bodies, ATCA litigation is one of the few high-profile forums in which the United States demonstrates its underlying belief in humanitarian law. By attempting to remove the cause of action implied in the ATCA since *Filartiga*,[81] the Bush administration shows the chameleon nature of U.S. human rights policy. Eliminating the efficacy of the ATCA will only further erode judicial acceptance of CIL and the perceived legitimacy of U.S. courts.

In addition to attacks on ATCA jurisprudence, the White House is also undermining efforts to bring the accused to justice in foreign courts. Shoring up the waning impunity of world leaders for human rights abuses, the United States recently pressured Belgium into revising its universal jurisdiction law, thus altering the provision that allowed Belgian courts to prosecute war crimes committed in other countries.[82] Protesting complaints filed against western leaders, including former President George Bush Sr., Tony Blair, and Ariel Sharon, the United States succeeded in convincing Belgium to further restrict the application of the war crimes law, even though Belgian courts had already dismissed many suits brought against foreign leaders.[83] The Belgian law "has brought little but headlines and political embarrassment,"[84] but the U.S.

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79. DOJ Brief at 3.

80. *See* Brief Amici Curiae of International Law Scholars and Human Rights Organizations in Support of Plaintiffs at 1, Presbyterian Church of Sudan, 244 F. Supp. 2d 289 (2003) (No. 01 Civ. 9882), *available at* http://www.lchr.org/workers_rights/wr_other/ATCA%20Talisman%20Amici%20Brief.pdf.

81. *Id*. at 4.

82. *Belgian Lower House Approves Revision of War Crimes Law*, HAARETZ, July 30, 2003 (on file with the Florida State University Journal of Transnational Law & Policy).

83. *See id*.; Ian Black, *Judges Decide Belgian War Crimes Law Cannot Be Used to Try Sharon*, THE GUARDIAN, June 27, 2002, *available at* http://www.guardian.co.uk /international/story /0,3604,744644,00.html. In the ten years since its inception, the Belgian war crimes law has only tried and sentenced four individuals (all of whom were involved in the Rwandan genocide). *Id.*

84. Black, *supra* note 83.

pressure dealt the fatal blow, eliminating universal jurisdiction from one of the few countries willing to exercise it.[85]

Opposition by the United States to human rights prosecutions continues on other fronts as well. As part of a program designed to limit the reach of human rights law and protect American interests and military personnel abroad,[86] Congress passed the American Servicemembers' Protection Act (ASPA).[87] Popularly known as "The Hague Invasion Act,"[88] the ASPA authorizes the use of force to secure the release of any American held by the ICC.[89] Championed by Senator Helms,[90] the ASPA passed as a response to the growing support for the ICC within the international community.[91] Going beyond a measured response to fear of politically motivated prosecutions, the ASPA prohibits all U.S. involvement in the ICC, even minimal cooperation with investigations and extraditions.[92] In public, the White House says that concern over American soldiers being subject to prosecution under a politicized process is the impetus behind its opposition to the ICC, but privately the government suggests that it is more concerned about claims against public officials.[93]

In another move aimed at undermining international adjudication of human rights abuses, the United States announced

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85. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82-86 (2001). Universal jurisdiction is the only legal theory that allows a domestic court to prosecute CIL crimes that have no "nexus" or connection with the forum state. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001). The *Nuremburg*, *Pinochet,* and *Argentina* cases all involved elements of universal jurisdiction. *Id*. at 324.

86. *See* Roseann M. Latore, Note, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court,* 25 B.C. INT'L & COMP. L. REV. 159, 160 (2002).

87. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, §2001-2012, 116 Stat. 899 (2002).

88. Jonathan D. Tepperman, *American Opposition to the International Criminal Court*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-Tepperman.html.

89. Latore, *supra* note 86, at 169-170; Remigius Chibueze, *United States Opposition to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 48-49 (2003).

90. *See* Press Release, American Servicemembers' Protection Act Receives Approval, Coalition for the International Criminal Court (Dec. 11, 2001), *at* http://www.iccnow.org/html/pressrelease20011211.pdf.

91. *See* Chibueze, *supra* note 89, at 48.

92. § 2004, 116 Stat. 899.

93. Elizabeth Becker, *Kissinger Watch #10-02: On World Court, U.S. Focus Shifts to Shielding Officials,* INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (Sept. 7, 2002), at http://www.icai-online.org/68735,KW_Detail.html. In most of their public utterances, administration officials have argued that they feared American soldiers might be subject to politically motivated charges. But in private discussions with allies, officials say, they are now stressing deep concerns about the vulnerability of top civilian leaders to international legal action. *Id*.

in 2002 that it no longer supports the U.N. system of international war crimes tribunals.[94] Citing a desire to have the accused tried in the country where the abuses occurred,[95] the United States wants the tribunals phased out because "they foster 'a dependency on international institutions.'"[96] Although the United States continues to profess its support for humanitarian law, in its opposition to the ICC, it now stands firmly with such other champions of human rights as China, Iran, Iraq, Israel, and Libya.[97]

V. JUSTICE FOR HUMAN RIGHTS VIOLATORS: IT'S NO LONGER JUST FOR LOSERS

Ever since the Nuremberg trials, international justice is most often meted out by the winners and suffered by the losers, delivered by the righteous, the powerful, and received by the wicked, the weak. These "losers" have always faced universal condemnation, their punishment and public prosecution well deserved; yet, the winners have never faced similar castigation for their abuses. Similarly, leaders and regimes are often not punished until they *become* losers in one sense or another, as in Iraq with Saddam Hussein and Liberia with Charles Taylor. The international community did little to castigate Saddam Hussein when he murdered thousands of Kurds in Northern Iraq at the end of the Iran-Iraq War.[98] Rather, only after he had outlived his usefulness, through the invasion of Kuwait, did the United States and world leaders highlight his human rights record.[99] Similarly, an international judicial body did not indict Charles Taylor[100] until he was on the verge of political and military defeat, even though he began his reign of violence more than ten years ago.[101] Regardless

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94. Stacy Sullivan, *United States Calls for Dissolution of U.N. War Crimes Tribunals*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-dissolution.html.

95. *Id.*

96. *Id*. (quoting Pierre-Richard Prosper, U.S. Ambassador for War Crimes).

97. *See* Chibueze, *supra* note 89, at 21; Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001).

98. *See* Aryeh Neier, *Putting Saddam Hussein on Trial*, NEW YORK REVIEW OF BOOKS, Vol. 40, No. 15, (Sept. 23, 1993) *at* http://www.nybooks.com/articles/2466; *Iraq: Crimes Against Humanity, Leaders as Executioners*, U.S. DEPARTMENT OF STATE, *at* http://usinfo.state.gov /regional/nea/iraq/crimes/.

99. *See Michael Wines, Confrontation in the Gulf; U.S. Aid Helped Hussein's Climb; Now, Critics Say, the Bill is Due,* N.Y. TIMES, Aug. 12, 1990, at A1; A. M. Rosenthal, *On My Mind; The Iraqi Nightmare,* N.Y. TIMES, Nov. 6, 1990, at A23.

100. Taylor was indicted by the Special Court for Sierra Leone, "an independent treaty based institution, established by an Agreement between the United Nations and Sierra Leone." Official Web Site of the Special Court for Sierra Leone, *at* http://www.sc-sl.org/.

101. Press Release, Testimony of Janet Fleischman, Washington Director for Africa, on the Human Rights Situation in Liberia Before the Congressional Human Rights Caucus (July 9,

of the body count on either side, the individual acts of cruelty and disregard for human life evoke the same abhorrence whether the perpetrator is a winner or a loser when the conflict, political or military, ceases.

This is not to argue that any modern international criminal tribunal is unjust or that the punishment of individuals responsible for human rights abuses is illegitimate. Simply put, human rights abuses perpetrated by one side are no less evil because worse abuses were committed on the other. The Japanese deprived of their liberty by the U.S. during WWII were not comforted by the knowledge that the Jews in Europe were deprived of their liberty *and* their life — both acts were based on racism. Punishing the bank robber does not make the pickpocket less guilty of being a thief.

Despite inconsistent enforcement and continued U.S. opposition, the cost to governments directly responsible for jus cogens violations is increasing through efforts by foreign and international courts. Although justice for regimes defeated in armed conflicts is often swift, the impunity of former and current leaders not so defeated is ever more uncertain, even for those who have significant political insulation within their own country.[102] Beginning with Spain's extradition request for Augusto Pinochet,[103] the former dictator and "senator for life" of Chile, a few foreign courts have shown an increasing willingness to indict former and current leaders accused of human rights abuses using universal jurisdiction.[104] Spain failed to secure Pinochet's extradition,[105] but the international attention the case garnered was arguably the impetus behind legal proceedings against him in his own country.[106] The court presiding over Pinochet's prosecution in Chile suspended the case due to his health,[107] but the case arguably fueled other prosecutions of former leaders.

2003), *available at* http://hrw.org/press/2003/07/liberia-test070903.htm.

102. *See, e.g.,* Bill Cormier, *Argentina OKs "Dirty War" Extraditions*, ASSOCIATED PRESS (July 25, 2003), *available at* http://www.herald-sun.com/nationworld/14-374977.html. Following in Argentina's footsteps, Peru also appears to be laying the groundwork for prosecution of past human rights abuses. *See* Monte Hayes, Peru *Truth Panel Report Upsets Military*, ASSOCIATED PRESS (Aug. 28, 2003), *available at* http://news.findlaw.com/wires /apwires.html.

103. *See* R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97 (H.L.) [hereinafter "*Ex Parte Pinochet*"]; Amnon Reichman, *"When We Sit to Judge We Are Being Judged:" The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41, 71-74 (2001).

104. *See supra* note 85.

105. *Ex Parte Pinochet*, 2 All E.R. at 85.

106. *See Pinochet Decision Lamented, But Rights Group Says Case a Landmark*, HUMAN RIGHTS WATCH (July 9, 2001), *at* http://www.hrw.org/press/2001/07/pino0709.htm.

107. *Id*.

Following the *Pinochet* trend, Argentine President Nestor Kirchner eliminated the immunity of military leaders involved in Argentina's "dirty war" and allowed their extradition to Spain,[108] providing another sign of the growing legitimacy of human rights prosecutions. Although Kirchner's decision did not display the same degree of domestic accountability seen in the *Pinochet* case, the trend toward prosecution of jus cogens violations in foreign jurisdictions may provide more of a deterrent to future regimes. Even though some commentators warn that universal jurisdiction has the potential to be used illegitimately,[109] foreign venues are in some ways more legitimate than domestic ones. A foreign court is uniquely capable of providing legitimacy because of its physical and political distance from the country where the alleged abuses occurred. While the exercise of universal jurisdiction in Belgium may be near political failure, the movement is by no means dead.

In contrast to Pinochet and Argentina's military junta leaders, who were not indicted until they left office and suffered a fair degree of political isolation, perhaps placing them in the "loser" category, efforts to prosecute and highlight the abuses of leaders while they are in office are growing. Such efforts began with the indictment of Slobodan Milosevic during his tenure as head of state,[110] and continued through the recent indictment of Charles Taylor by the Special Court for Sierra Leone.[111] Both Milosevic and Taylor were near the losing point of their international and internal conflicts. However, the timing of the charges against them demonstrates increased international support for leader accountability and appears to bring prosecutions of jus cogens violations closer to the abuses and the abuser. It is unlikely that an abusive leader who enjoys broad international support will be similarly indicted while in office, but the willingness to indict sitting presidents begins the divorce of such prosecutions from the political or military defeats that often accompany them. This divorce in turn makes the

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108. Cormier, *supra* note 102. Although the Spanish government aborted the extradition proceedings against Argentina's former military leaders at the end of August 2003, Argentina appears to be seeking similar accountability efforts in its domestic courts. *See* Oscar Serrat, *Top Former General Detained in Argentina*, ASSOCIATED PRESS (Sept. 23, 2003), *available at* http://news.findlaw.com/ap_stories/i/1102/9-23-2003/20030923133008_15.html. This is arguably another instance of foreign pressure leading to domestic prosecution of human rights abuses.

109. *See, e.g.,* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (Jul.-Aug. 2001); Curtis A. Bradley, *The "Pinochet Method" and Political Accountability*, 3 THE GREEN BAG 2d 5 (1999).

110. *See* Bassiouni, *supra* note 85, at 84.

111. Press Release, Human Rights News, West Africa: Taylor Indictment Advances Justice, Liberian President Must Be Arrested (June 4, 2003), *at* http://hrw.org/press/2003/06/westafrica060403.htm.

prosecutions themselves more legitimate by removing the precondition of defeat from the enforcement paradigm, thereby ratcheting up the pressure on all world leaders to conform to international human rights norms. Whether this pressure will begin to function as a significant deterrent remains unclear, but international movement to bring abusive leaders to justice is a growing force in world politics.[112]

VI. TOWARDS GREATER LEGITIMACY: EXTERNAL INFLUENCES ON THE INCORPORATION OF CIL INTO U.S. LAW

In the move towards greater U.S. legitimacy through the incorporation and recognition of CIL and international human rights norms, the United States need only yield to existing domestic and international influences. Even as the Supreme Court turns a blind eye to many international precedents, certain members of the Court are beginning to recognize the need to look beyond national boundaries.[113] As Ruth Bader Ginsburg recently noted in a lecture on affirmative action, "[e]xperience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives."[114]

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112. *See id.*

113. *See* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281-82 (1999); Davis, *supra* note 34, at 419. *See also Lawrence*, 123 S. Ct. at 2481 (discussed *supra* Part IV); *Printz*, 521 U.S. at 977 (J. Breyer dissenting) (described *supra* note 73).

114. Ginsburg & Merritt, *supra* note 113, at 281-2. Ginsburg & Merritt describe the use of international law in foreign jurisdiction, as compared to Supreme Court disinterest in CIL:

> India's Supreme Court, for example, has considered United States precedents when judging the constitutionality of affirmative action measures. Defenders of Germany's tie-breaker preferences invoked several international covenants before the European Court of Justice. Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that "affirmative action seems to be [in] a state of crisis in its country of origin." (Quoting Case C-450/93, Kalanke v. Freie Hansestadt Breman, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesauro).
>
> The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision. The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall. Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution." (Quoting Printz v. United States, 521 U.S. 898, 921 n.11 (majority opinion).

Even if American politicians remain opposed to all forms of international accountability for human rights abuses, the rest of the world may force the United States to begin to conform to international expectations. As the prosecution of jus cogens violations gathers momentum in foreign courts and the ICC, U.S. leaders are beginning to feel the same legal heat felt by leaders like Pinochet and Taylor. Although the United States continues to pressure governments like Belgium to remove legal methods for indicting U.S. officials, activities in a number of courts are opening the door to increased U.S. compliance with CIL. These pressures from abroad, compounded with the U.S. desire for international cooperation in the War on Terrorism, may force the United States to reconsider its unilateralism and trigger a shift in the realpolitik winds.

A. Nicaragua and Yugoslavia

Compliance with and participation in international courts is not entirely foreign to U.S. experience. For example, even though the United States was no less enamored of international judicial bodies in the 1980's than it is now, it was forced to comply with a ruling by the International Court of Justice, which held that the mining of a Nicaraguan harbor in support of the Contras was illegal under international law.[115] The ruling itself did not result in immediate U.S. compliance, but it indirectly caused the end of mining, thereby bringing the United States into compliance with international law.[116] More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) opened an investigation in response to a complaint filed against General Wesley Clark and NATO.[117] The central claim in the complaint was that "NATO's policy of targeting power generation and water systems was illegal under the Geneva Conventions."[118] The United States attempted to pressure the ICTY to end the investigation, but, when that effort failed, it was forced to respond with a legal, rather than a political, defense to the

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> In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.

115. Harold H. Koh, *Address: The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 644 (1998).

116. *Id*. Although the U.S. had veto power over all rulings issued by the International Court of Justice, the decision supporting the Nicaraguan claim galvanized efforts in Congress to stop the clandestine support of the Contras.

117. Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 472-3 (2001).

118. *See id*.

charges.[119] The ICTY investigation threatened little more than political embarrassment, since it was unlikely that such a suit would succeed. Yet similar complaints filed against the United States in the future, such as allegations of war crimes in Iraq, may result in increased compliance with international law through fear of prosecution. Compliance is not certain, but rulings similar to the Nicaragua case may lead to further internalization[120] of international law.

B. Soering

The incorporation of international human rights into domestic practice may come through more subtle influences than the prosecution of leaders and presidents. In *Soering v. United Kingdom*,[121] for example, the European Court of Human Rights (ECHR) conditioned the extradition of the defendant to the United States on an agreement that he would not face the death penalty.[122] In the years after it was decided, *Soering* received significant attention for its potential to influence the use of the death penalty in the United States,[123] but "predictions that the case would spur change in U.S. policy or possible crisis have not become reality."[124] Though its ruling did not identify the death penalty itself as prohibited by CIL, the ECHR noted that the "very long period of time spent on death row" might violate the European Convention for the Protection of Human Rights and Fundamental Freedoms,[125] which prohibits inhuman or degrading treatment or punishment.

Although the United States can sidestep extradition conflicts by agreeing to not pursue the death penalty, as one commentator argues, *Soering* may signal a more fundamental challenge to the U.S. penal system.[126] "Read as a case about prison conditions… *Soering* becomes a much more intrusive basis for forcing the U.S. government to consider its criminal justice policies in light of international human rights norms."[127] While U.S. courts may still treat allegations of cruel and inhuman treatment as uncertain international law claims[128] and proscribe little beyond outright

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119. *See id.*
120. Koh, *supra* note 115, at 642-644.
121. 161 Eur. Ct. H.R. (1989).
122. Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions,* 67 BROOKLYN L. REV. 719, 732 (2002).
123. *See id.* at 721.
124. *Id.* at 738.
125. *Soering,* 161 Eur. Ct. H.R. at para. 44.
126. Sharfstein, *supra* note 122, at 723.
127. *Id.*
128. *See id.*

torture under the 8th Amendment,[129] extradition challenges based on prison conditions posit a significant challenge to U.S. practice. For the time being, the United States may successfully resist the pressure to conform to international standards in some areas. Yet a broader willingness to criticize U.S. prisons[130] and block extraditions because of prison conditions will force increased acceptance and incorporation of international definitions of cruel and unusual treatment, moving the prohibition closer to universal international support.

C. Henry Kissinger

Outside the realm of domestic incorporation of international standards, the prosecution of individual U.S. leaders for jus cogens violations may be on the horizon. Although the Belgian indictments of former President Bush and the ICTY investigation of General Clark were arguably aimed at promoting general compliance with CIL and the Geneva Conventions[131] and not the specific punishment of Bush and Clark, the movement to prosecute Henry Kissinger[132] for crimes against humanity offers evidence that impunity for dominant world leaders may soon end. Accused of a long list of jus cogens violations,[133] Kissinger is unlikely to be prosecuted any time soon, yet he is beginning to feel the heat of domestic and international vilification. Whether Kissinger feared being held for prosecution or being forced to reveal incriminating information, he fled Paris abruptly rather than respond to a warrant for his testimony in a French case.[134] He similarly eluded questioning from French and Chilean judges while he was in England.[135] "It is known that there are many countries to which he cannot travel at all, and it is also known that he takes legal advice before traveling anywhere."[136] He has yet to be formally charged by any foreign or

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129. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

130. *See* Sharfstein, *supra* note 122, at 762.

131. *See* Barrett, *supra* note 117, at 473.

132. *See* Christopher Hitchens, *The Case Against Henry Kissinger*, HARPER'S MAGAZINE (Feb. 2001) *available at* http://www.icai-online.org/files/hitchens_harpers_kissinger.pdf.

133. *See id*. Christopher Hitchens, one of the leading critics of Kissinger, accuses him of directing and supporting a variety of war crimes and human rights violations in Vietnam, Cambodia, Laos, Bangladesh, Chile, and East Timor. *See also* CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2001).

134. Christopher Hitchens, *The Latest Kissinger Outrage*, SLATE (Nov. 27, 2002), *at* http://slate.msn.com/?id=2074678.

135. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, THE GUARDIAN (June 12, 2002), *available at* http://www.guardian.co.uk/international/story/0,3604,735723,00.html.

136. Hitchens, *supra* note 132.

international court[137] — he is dodging investigations, not indictments — and he is not on the run at home,[138] but he is at least finding no safe haven abroad.

Instead of seeking to alter U.S. foreign policy, present or future, the move to prosecute Kissinger seeks to extend punishment for human rights abuses to all world leaders who are complicit, not just those who are politically or militarily defeated.[139] The prosecution of Kissinger may only succeed in the court of public opinion, yet it provides support for international efforts to prosecute all human rights violations and violators, bringing punishment for jus cogens violations ever closer to the most politically immune. Just as the prosecution of Pinochet gathered steam in a foreign arena before moving to his home country, the move to hold U.S. officials accountable for war crimes and other human rights violations may begin in other countries, but it will eventually find greater support at home.

VII. CONCLUSION

While some victims and activists may seek a certain amount of retribution through human rights prosecutions, the goal of such prosecutions is not limited to punishment. Rather, it is aimed at achieving a long-term commitment to human rights through broader incorporation of normative international law into domestic practice. Greater acceptance of jus cogens norms would not necessitate a fundamental change in U.S. ideology because CIL and human rights law reflect many of the values and ideals already present in the cultural and political identities of American society. The gap between domestic acceptance and international practice does not exist because of an ideological disconnect between domestic and

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137. Kissinger might soon face at least one civil suit in connection with his (alleged) past involvement in human rights abuses. *See* CBS News, 60 Minutes, *Family To Sue Kissinger For Death* (Sept. 9, 2001), *available at* http://www.cbsnews.com/stories/2001/09/06/60minutes/main309983.html; *Kissinger Watch #9 - Chile: Complaint Against Kissinger,* INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (July 22, 2002), *at* http://www.icai-online.org/60238,KW_Detail.html.

138. The most recent, high profile vilification of Kissinger came when he agreed to head the 9/11 independent investigation commission, then refused to comply with congressional financial-disclosure rules. These rules would have required him to disclose the names of international clients his firm, Kissinger & Associates, advises. Kissinger resigned the post rather than comply. *See* Romesh Ratnesar, Matthew Cooper, & Michael Weisskopf, *Kissinger's Fast Exit,* CNN.com (Dec. 16, 2002), *available at* http://www.cnn.com/2002/ALLPOLITICS/12/16/timep.kissinger.tm/. More a public-relations misstep than an admission of a guilty conscience, the refusal to identify his clients casts shadows of suspicion over Kissinger's current involvement with foreign governments.

139. *See generally Kissinger Watch #1, International Campaign Against Impunity*, *at* http://www.icai-online.org/54175,55541.html.

foreign cultures — it exists because of the preeminence of U.S. economic and military power. "The United States declines to embrace international human rights law because it can."[140]

Whether or not the United States maintains its dominance of world affairs may be irrelevant to future incorporation of CIL and U.S. acceptance of international judicial processes. To counteract the danger of international irrelevancy, U.S. courts may be forced to seek greater legitimacy through the recognition of foreign precedents that inform, distinguish, and support the American conception of justice. Further incorporation of CIL may come through enforcing the same CIL standards litigated in the ATCA and the TVPA against domestic actors as well as international actors. Short-term solutions that avoid addressing the underlying conflicts between domestic and international practice, such as individual extradition agreements, offer little hope of continued success when the challenges to U.S. policy become more fundamental.

Apart from domestic internalization of international law, other influences may emerge in the realm of U.S. foreign policy, leading to further compliance with international norms. While the United States undermines efforts to bring former leaders to justice for their human rights violations, the War on Terrorism may force U.S. leaders to reconsider their objections to international courts (such as the ICC), given their desire for future cooperation in the apprehension and prosecution of terrorist suspects. American power may insulate Congress and the court system from criticism for promoting the human rights "double standard,"[141] but it will not protect the United States from reciprocated recalcitrance in the War on Terrorism and the pursuit of other foreign policy goals. In the past, a realpolitik approach to foreign policy may have justified U.S. unilateralism. The future, however, will require the United States to trade more than monetary and military aid for foreign support. In efforts to protect and sustain American society, U.S. politicians could be forced to reinvest in international legal processes, backing off their blanket opposition to international cooperation.

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140. Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 THE GREEN BAG 2d 365, 371 (1998).

141. *Id*. at 369; "[T]he U.S. government uses the international human rights system to measure the legitimacy of foreign governmental acts, but it systematically declines to hold domestic acts to the same legal scrutiny."