

HOW FAR DO THE LAWLESS AREAS OF EUROPE EXTEND? EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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In February of 2004, former Chechen President Zelimkhan Yandarbiyev was killed in Doha, Qatar, when his car was detonated by an explosive device.¹ Local authorities later arrested three alleged Russian intelligence agents for his death, one of them holding a diplomatic passport.² Two of the men admitted to being members of Russian intelligence services, and reported that the explosive used to kill Yandarbiyev was smuggled into Qatar through a diplomatic pouch.³ A U.S. official later stated that the arrests of the Russian agents were made with assistance to Qatar by the United States.⁴ After a diplomatic row between Russia and Qatar, the two suspects were tried and found guilty by a Qatari court, marking “the first time in recent history that a court has found that Russia, a key U.S. ally in the war on terrorism, itself employed terrorist tactics on foreign soil to eliminate one of its enemies.”⁵

Zelimkhan Yandarbiyev’s assassination should not be treated as an isolated event. In an era characterized by increased military intervention abroad, international courts should be prepared to

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1. Steven Lee Myers, *Russia Hits Qatar over Arrests of 2; Agents Held in Death of ex-Chechen Leader*, N.Y. TIMES, Feb. 27, 2004 (discussing the assassination of Yandarbiyev by a car bomb and arrest of suspects), available at LEXIS, European News Sources File.

2. Nick Paton Walsh, *Russian Fury as Agents Held in Doha*, THE GUARDIAN (London), Feb. 27, 2004 (describing Russia’s reaction to the arrests of three alleged agents responsible for the assassination), available at LEXIS, European News Sources File.

3. Michael Binyon & Jeremy Page, *Qatar Bombers “were Russian special forces.”* TIMES (London), Mar. 12, 2004 (reporting an alleged statement made during questioning of the Russian suspects, and noting that “Moscow would be hugely embarrassed by any trial if it revealed that its agents were instructed to assassinate Mr. Yandarbiyev, and even more so if it were shown that the bomb had been brought in through the diplomatic bag”), available at LEXIS, European News Sources File.

4. *US Helped Qatar Arrest Russian Agents: Top US Official*, AGENCFR.-PRESS, Mar. 22, 2004 (quoting a statement by U.S. Deputy Assistant Secretary for European and Eurasian Affairs Steven Pifer), available at LEXIS, European News Sources File.

5. Peter Baker, *Russians Convicted of Murder in Qatar; Court Says Intelligence Agents Killed Former Chechen President on Moscow’s Orders*, WASH. POST, June 30, 2004, available at LEXIS, European News Sources File.

address claims of human rights violations committed by state actors in foreign territories. The principle question in such inquiries, however, is to what extent human rights treaty obligations extend beyond the territorial jurisdiction of states acting on foreign soil. This article examines the role of the European Convention on Human Rights, arguably one of the most important international human rights agreements, in addressing claims of human rights violations by member-states to the Convention committed on the soil of nations not party to the Convention. The Convention's judiciary body — the European Court of Human Rights — has developed important precedents regarding alleged human rights violations committed in non-Convention nations and continues to grapple with the issue of the extraterritorial application of the Convention abroad. Most notably, the Court issued rulings in *Banković and Others v. Belgium and 16 Other Contracting States*, involving the NATO bombing of Yugoslavia, and *Öcalan v. Turkey*, concerning the Turkish abduction of a Kurdish leader in Kenya, which speak to the Convention's applicability to state actions in foreign nations.

This article proceeds as follows: Part I-A provides an overview of the European Convention on Human Rights — Europe's regional treaty protecting fundamental human rights and freedoms since its inception following the Second World War. Parts I-B and I-C, respectively, outline characteristics of the Convention's judicial body, the European Court of Human Rights, and its executive body, the Committee of Ministers, which is charged with enforcing rulings of the Court on member-states to the Convention. Part II provides a general outline of considerations of extraterritorial jurisdiction for state actors abroad.

Part III analyzes the European Court of Human Rights' ruling in *Banković*, in which citizens of Yugoslavia sued NATO for deaths caused by the bombing of a television station during Operation Allied Force. It provides, in Part III-A, a background to NATO intervention in Kosovo and, in Part III-B, a review of the plaintiff's argument that the European Convention applied to NATO actions in Yugoslavia — which at the time was not a member-state to the Convention. Those arguments relied on the Court's case law in: 1) *Loizidou v. Cyprus* and *Cyprus v. Turkey* — in which Turkey was found to have an obligation to uphold the Convention in areas of Cyprus under military occupation because of its exertion of effective control in those areas; 2) recent admissibility decisions in *Ilaşcu and Others v. Moldova and Russia*; and 3) *Issa and Others v. Turkey*, concerning military operations by member-states to the Convention in foreign nations. Parts III-C and III-D outline the respondent governments' arguments, and the Court's ruling in

Banković, respectively, in which it found that NATO countries did not have an obligation to adhere to the Convention. Part IV-A reviews the 2003 case of *Öcalan v. Turkey*—involving the abduction of Abdullah Öcalan by Turkish security forces at Nairobi International Airport, and Part IV-B reviews the Court's ruling—in contrast to *Banković*—that Turkey's actions in Kenya triggered the Convention's jurisdiction because of its effective control over Öcalan vis-à-vis his arrest and detention.

Parts V-X provide the bulk of this article's analyses, by indicating how European Court of Human Rights case law may apply to human rights violations committed abroad. Part V examines the state of the European Court of Human Rights' doctrine on extraterritorial application in the wake of *Banković*, *Öcalan*, and related cases. It argues that the Convention does apply to member-states acting abroad if its operations are characterized by effective control. Part VI reviews the recent adoption of the European Convention on Human Rights into the United Kingdom's jurisprudence through its passage of the Human Rights Act 1998. This development is significant, as suits have recently been filed against the United Kingdom for human rights violations committed by British military forces in Iraq alleging violations of the European Convention. Part VII specifically outlines the case of Baha Mousa, who was allegedly tortured with other Iraqis and killed by British military personnel while in their custody. Mousa's case, along with other complaints, has been filed before the High Court of England and Wales in the aforementioned suits against the United Kingdom.

Part VIII proceeds to examine the European Court's treatment of mistreatment and torture claims of persons in state custody in the cases of *Ireland v. The United Kingdom*, *Tomasi v. France*, *Ribitsch v. Austria*, and *Selmouni v. France*, in which the Court has found member-states to the Convention in violation of its prohibition against torture and inhuman treatment. Part IX begins with an analysis of *McCann and Others v. The United Kingdom*, in which the British government was found to have violated the Convention's protection of the fundamental right to life in the killings of Irish Republican Army suspects in Gibraltar. It also reviews the Court's case law on the "disappearance" cases of *Çakici v. Turkey* and *Timurta^o v. Turkey*, in which the Court held that the unacknowledged detentions and deaths of Kurdish separatists by Turkish security forces also amounted to violations of the Convention's right to life, and *Velikova v. Bulgaria*, in which the Court found a violation of the right to life of an individual detained by Bulgarian police.

Part X concludes this Article with an argument that the United Kingdom should be liable for the death of Baha Mousa and other

alleged human rights violations committed in Iraq based on previous European Court of Human Rights case law. However, Mousa's case should not be considered the endpoint of an examination of the European Convention on Human Rights' extraterritorial application. The Court is now placed to review numerous claims of human rights violations originating from recent and ongoing conflicts, as it has and is continuing to do with cases regarding Turkey's 1990s operations against Kurdish separatists and Russia's continuing conflict in Chechnya.⁶ In an era in which international military intervention may continue to occur for an unforeseeable amount of time, an examination of extraterritorial obligations to protect fundamental human rights in "lawless areas" of conflict is warranted.

I-A. THE COUNCIL OF EUROPE AND EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe was created in May of 1949.⁷ The principal motivation for developing the Council was to create a Pan-European association in the wake of the Second World War.⁸ The Council's overriding mission was to protect democratic values and human rights.⁹ At its inception, the Council restricted membership

6. See STEFAN KIRCHNER, THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN TIMES OF CONFLICT, at http://www.sarigiannidis.gr/articles/Kirchner_articleECtHR.PDF (last visited Feb. 25, 2005) ("[N]ow that the first cases relating to the conflicts in Kurdistan and Chechnya are being dealt with by the E.C.H.R., it has been estimated that up to 100,000 new cases could reach [the European Court of Human Rights] every year."). See also Press Release, Registrar of the European Court of Human Rights, Six Complaints Against Russia Concerning Events in Chechnya Declared Admissible (Jan. 16, 2003), at <http://www.echr.coe.int> (last visited Feb. 25, 2005) (announcing in 2003 the admissibility of the first six claims brought by Chechens for alleged human rights violations committed in Chechnya by the Russian military in 1999 and 2000).

7. COUNCIL OF EUROPE, MANUAL OF THE COUNCIL OF EUROPE: STRUCTURE, FUNCTIONS AND ACHIEVEMENTS 3 (1970) [hereinafter MANUAL] (discussing the creation of the Council of Europe by statute). See also PETER M. R. STIRK, A HISTORY OF EUROPEAN INTEGRATION SINCE 1914 103 (1996) [hereinafter HISTORY OF EUROPEAN INTEGRATION] (noting that the specific proposal behind the Council of Europe's formation came from French Foreign Minister Georges Bidault, who advocated for the creation of a European Assembly in 1948).

8. See A.H. ROBERTSON, EUROPEAN INSTITUTIONS: CO-OPERATION, INTEGRATION, UNIFICATION 4-5 (2d ed. 1966) (outlining the formative history of the Council of Europe and importance of a "need for European unity"). See also Statute of the Council of Europe, May 5, 1949, art. 1(a), Europ. T.S. No. 1 [hereinafter Statute] (stating that "[t]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress").

9. See Diana Pinto, *The Council of Europe: Its Missions and Its Structures*, in THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY 29, 29 (1996) (denoting the "basic functions" of the Council of Europe). See also Walter Schwimmer, *Statements Made at the Opening Session* (Nov. 3, 2000), in EUROPEAN MINISTERIAL CONFERENCE ON HUMAN RIGHTS AND COMMEMORATIVE CEREMONY OF THE 50TH

to ten West European nations: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.¹⁰ In the Statute of the Council of Europe, it was these nations that deemed themselves devoted “to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”¹¹ Because of the fundamental requirement of democratic governance for membership, the Soviet Union and Soviet-bloc nations were not originally included in the Council.¹²

Shortly after the creation of the Council, it adopted the European Convention on Human Rights in 1950.¹³ The Convention enshrines “fundamental freedoms which are the foundation of justice and peace.”¹⁴ It was the first convention passed by the Council, and regarded by some as its most important.¹⁵ Since it has been in force, all member-states of the Council of Europe must ratify the Convention to be a Council member.¹⁶ Many of the rights and protections in the Convention are similar to those found in the Universal Declaration of Human Rights, passed two years prior to the Convention.¹⁷ Major rights and protections in the European

ANNIVERSARY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 13, 15 (2000) (“The Council of Europe has changed into a more political and operational organisation. One thing has not changed: the protection of human rights is and remains at the heart of its mission.”).

10. MANUAL, *supra* note 7, at 3 (listing the original ten members of the Council of Europe).

11. Statute, *supra* note 8, at pmb. See also MANUAL, *supra* note 7, at 8 (discussing the meaning of the “values” shared by the original member states and proposing that these values emanate from the “cumulative influence of Greek philosophy, Roman law, the Western Christian Church, [and] the humanism of the Renaissance and the French Revolution”).

12. See Pinto, *supra* note 9, at 29 (listing original members of the Council).

13. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 17-19 (1996) (outlining the general history and framework of the European Convention on Human Rights).

14. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, pmb., Europ. T.S. No. 5 [hereinafter Convention for Human Rights], available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Feb. 28, 2005).

15. See Pinto, *supra* note 9, at 34 (asserting that the Council “derives its strength from the more than 155 conventions it has concluded over the years, the oldest and most important of which is the European Convention on Human Rights”).

16. See Convention for Human Rights, *supra* note 14, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention.”). See also GOMIEN, *supra* note 13, at 18 (discussing the Convention and noting the “compulsory jurisdiction” of the Convention and Court of Human Rights); Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69, 76 (1999) (noting that a new Council of Europe member must sign the Convention at the same time they formally sign the treaty joining the Council).

17. Colloquium, *In our hands: The effectiveness of human rights protection 50 years after the Universal Declaration*, EUROPEAN REGIONAL COLLOQUY ORGANISED BY THE COUNCIL OF

Convention include the right to life,¹⁸ right to liberty and security,¹⁹ right to fair trial,²⁰ right to freedom of thought, conscience and religion,²¹ right to freedom of expression,²² prohibition of torture,²³ prohibition of slavery,²⁴ and prohibition of discrimination.²⁵ Since its inception, a number of changes and protocols have been made to the Convention, although its fundamental nature has remained unchanged.²⁶ The major operational organs of the Convention include the European Court of Human Rights and Committee of Ministers.

I-B. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights is the judicial body which interprets the European Convention on Human Rights for the Council of Europe.²⁷ The European Court of Human Rights was created in tandem with the Convention as its judicial decision-making body.²⁸ The potency of the Court is primarily due to two aspects. First, the Court retains compulsory jurisdiction over all Council of Europe members.²⁹ Secondly, the Court allows individuals, as well as states, to petition the Court directly for relief

EUROPE 17 (1998) (statement of Daniel Tarschys, Secretary General of the Council of Europe) ("As you know, much of our European human rights protection system was inspired by and is deeply indebted to the Universal Declaration."). Many of the protections found in the Convention are also found in the Universal Declaration of Human Rights. See Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/RES/810 (1948) (right to life, liberty and security); *id.* art. 4 (prohibition of slavery); *id.* art. 7 (prohibition of discrimination).

18. Convention for Human Rights, *supra* note 14, art. 2.

19. *Id.* art. 5.

20. *Id.* art. 6.

21. *Id.* art. 9.

22. *Id.* art. 10.

23. *Id.* art. 3.

24. *Id.* art. 4.

25. *Id.* art. 14.

26. See GOMIEN, *supra* note 13, at 18 (outlining several of the additional protocols that have been made to the Convention).

27. Convention for Human Rights, *supra* note 14, art. 19 ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis.").

28. *Id.*

29. *Id.* art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."); *id.* art. 32(1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto . . ."); *id.* art. 32(2) ("In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."); *id.* art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.").

from alleged violations.³⁰ These principles of the Convention were enshrined by Protocol Number 11 to the Convention, signed in 1994 and in force since 1998.³¹ Together, these principles make the Convention, through the Court, an “essential Bill of Rights” for Europe.³²

The number of judges in the Court is equal to the number of Council of Europe member-states, which, as of 2004, was forty-five.³³ Judges are elected into office for six-year terms by the Parliamentary Assembly of the Council of Europe.³⁴ Ordinarily, to decide a case, the Court meets in a Committee of three judges, a Chamber of seven judges, or in the case of an extraordinarily important issue, a Grand Chamber of seventeen judges.³⁵

However, for a case to be admissible, it is first reviewed by a judge-rapporteur and committee of three judges.³⁶ If deemed inadmissible, the Court may dispose of the case at any time.³⁷ Criteria for admissibility include several major requirements. First, the Court may only review cases “after all domestic remedies have been exhausted.”³⁸ This requirement is based on the well-accepted principle of international law that states must first have an

30. *Id.* art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties . . .”).

31. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, May 11, 1994, p.mbl., Europ. T.S. No. 155, available at <http://conventions.coe.int> (last visited Feb. 28, 2005).

32. EUROPAWORLD, HUMAN RIGHTS AND EUROPE’S WRONGS (Oct. 11, 2000), at <http://www.europaworld.org> (last visited Feb. 28, 2005).

33. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE’S MEMBER STATES (2004), at <http://www.coe.int> (last visited Feb. 28, 2005). Current members include Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Spain, Sweden, Switzerland, “The former Yugoslav Republic of Macedonia,” Turkey, Ukraine, and the United Kingdom. *Id.* See also GOMIEN, *supra* note 13, at 33.

34. Convention for Human Rights, *supra* note 14, art. 23 (“The judges shall be elected for a period of nine years.”); GOMIEN, *supra* note 13, at 34 (noting that the first actual election occurred several years after the Court was created in 1959).

35. Convention for Human Rights, *supra* note 14, art. 27 (stating size of review bodies); *id.* art. 30 (stating that the Grand Chamber meets when there is a “serious question affecting the interpretation of the Convention”).

36. See *A New Court of Human Rights in Strasbourg*, in THE CHALLENGES OF A GREATER EUROPE: THE COUNCIL OF EUROPE AND DEMOCRATIC SECURITY 81, 81 (1996) (outlining procedures by which applications to the Court are first reviewed for admissibility).

37. See Convention for Human Rights, *supra* note 14, art. 35(4) (“The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.”).

38. *Id.* art. 35(1).

opportunity to provide relief to the claim domestically.³⁹ However, there are of course exceptions to this requirement, most notably involving situations in which pursuing a claim domestically would be difficult or impossible given wartime situations.⁴⁰ Second, an applicant must file a claim with the Court within six months of the date in which a domestic decision was finalized.⁴¹ The six-month period begins not only when the decision is issued, but when the applicant becomes aware of that decision.⁴²

A third requirement, particular to individual applicants, is that a case will be deemed inadmissible if found to be “incompatible with the provisions of the Convention or the protocols thereto, [or] manifestly ill-founded.”⁴³ The difference between the first and second item is slight. A case will be deemed incompatible with the Convention if the act or omission raised by the applicant does not speak to a protected right enumerated in it.⁴⁴ On the other hand, a case which does speak to a protected right under the Convention will be deemed ill-founded if not found to be a *prima facie*

39. GOMIEN, *supra* note 13, at 55 (noting that the requirement to exhaust domestic remedies is based on a “general principle of international law”); A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 265 (1993) [hereinafter ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE] (noting that the requirement to exhaust domestic remedies is based on “[a] well-established part of international law . . . [I]t would be unjust to engage the international responsibility of a State for an act or omission when a national means of redress is available but has not been used.”).

40. Jurisprudence has developed in this area in regards to Turkey’s war against Worker’s Party of Kurdistan (PKK) separatists. In *Akdivar v. Turkey*, applicants sued the government for destroying property in an anti-PKK operation. *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192, 1199. Although the government alleged that they had not yet exhausted domestic remedies, the Court noted that there were “special circumstances” that waived this requirement. *Id.* at 1211. In particular, the Court noted difficulty in gathering evidence and pursuing a claim because that region of Southeast Turkey was basically in a state of war. *Id.* at 1211-12. The Court also noted that facts of the case indicated a “clear reluctance” of the government to investigate acts of its own soldiers against the Kurdish population. *Id.* at 1209. In *Kiliç v. Turkey*, the applicant sued the government for the assassination of a Kurdish human rights worker. *Kiliç v. Turkey*, 2000-II Eur. Ct. H.R. 75, 83-84. The Court found that Turkey had not fulfilled its obligation to investigate the act and provide a remedy to the applicant because it had “permitted or fostered a lack of accountability of members of the security forces for their actions.” *Id.* at 99. The government’s inability to provide a domestic remedy, even in a wartime situation, was in itself found to be a violation of the Convention. *Id.* at 103.

41. Convention for Human Rights, *supra* note 14, art. 35 (1) (“The Court may only deal with the matter after all domestic remedies have been exhausted . . . and within a period of six months from the date on which the decision was taken.”).

42. GOMIEN, *supra* note 13, at 59 (discussing different circumstances in which the six-month period begins).

43. Convention for Human Rights, *supra* note 14, art. 35 (3).

44. ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 272 (asserting that an application is “doomed to fail” if it alleges non-covered rights, such as a “right to asylum” or a “right not to be extradited”).

violation.⁴⁵ The “clearest situation [of an ill-founded application] is when the applicant fails to adduce any evidence in support of his claim.”⁴⁶ The final major requirement of admissibility is that an application has not “already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”⁴⁷ This requirement has become more relevant given the development of other international mechanisms to address alleged human rights violations, such as the European Court of Justice⁴⁸ and the Human Rights Committee of the International Covenant on Civil and Political Rights.⁴⁹ “No relevant new information” is considered to be facts that were not known when the original application was submitted.⁵⁰

Upon a finding that an application is admissible, review on the merits begins. The Court must first attempt to find a “friendly settlement” between parties.⁵¹ If a settlement can be achieved, the

45. See *id.* at 272-73 (quoting Felix Ermacora, *Rights of Minorities and Self-Determination in the Framework of the CSCE*, in *THE HUMAN DIMENSION OF THE HELSINKI PROCESS: THE VIENNA FOLLOW-UP MEETING AND ITS AFTERMATH* 197 (Arie Bloed and Pieter van Dijk eds., 1991)).

46. *Id.* at 273.

47. Convention for Human Rights, *supra* note 14, art. 35(2)(b).

48. See Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301, 302-317 (2001) (discussing the gradual integration of human rights into community law of the European Union); *id.* at 329 (concluding that “[w]ithout question, the European Union will play an increasingly important role in the area of human rights, both in its external and internal policies”). See also SALVATORE ZAPPALA, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 10-14 (Ian Brownlie & Vaughan Lowe eds., 2003) (discussing systemic intricacies between the European Court of Human Rights, European Court of Justice, and International Criminal Tribunal for the former Yugoslavia); Jonathan Miller, *A European Bill of Rights?*, in *THE HARMONIZATION OF EUROPEAN PUBLIC POLICY: REGIONAL RESPONSES TO TRANSNATIONAL CHALLENGES* 219, 221-33 (Leon Hurwitz ed., 1983) (discussing the increasing willingness of the European Court of Justice to broaden its human rights framework in tandem with the European Court of Human Rights); Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, 46 MCGILL L.J. 849, 851-54 (2001) (outlining general issues pertinent to the European Union’s increasing human rights agenda).

49. See GOMIEN, *supra* note 13, at 61-62 (discussing implications of raising claims in either or both the European Court of Human Rights and the International Covenant on Civil and Political Rights); ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 274 (discussing both forums, and noting the possibility of “appealing” a decision from the Court of Human Rights to the Covenant’s Human Rights Committee). For a general comparison of application procedures of the European Court of Human Rights and the Human Rights Committee, see Rein Müllerson, *The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR*, in *MONITORING HUMAN RIGHTS IN EUROPE: COMPARING INTERNATIONAL PROCEDURES AND MECHANISMS* 25 (Arie Bloed et al. eds., 1993).

50. GOMIEN, *supra* note 13, at 61 (noting that “no new relevant information’ . . . encompasses only facts that were not known at the time of the previous application or have occurred since the [Court] disposed of the matter”).

51. Convention for Human Rights, *supra* note 14, art. 38(1)(b) (“If the Court declares the application admissible, it shall . . . place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human

case is then removed from the Court.⁵² The finding of friendly settlements has become increasingly common, with one estimation being that one of seven cases are resolved through friendly settlement.⁵³ If such a settlement cannot be achieved, review continues, with proceedings scheduled by the Court.⁵⁴ Arguments and testimony are conducted in one of the Court's official languages: English or French.⁵⁵ Interpreters are provided for those not proficient in either language.⁵⁶ Hearings are generally public, with certain exceptions depending on circumstances.⁵⁷ After all arguments and evidence are offered, the judges deliberate in private.⁵⁸ A majority vote amongst the judges is required for final determination.⁵⁹ If a violation is found to have occurred, the Court may then "afford just satisfaction" to the plaintiff.⁶⁰ Just satisfaction is monetary and may include payment of legal and court fees, as well as "damages" that may either be compensatory in nature or "moral" — awarding a plaintiff for loss and punishing the actor in breach for violating the Convention.⁶¹

I-C. THE COMMITTEE OF MINISTERS

The Council of Europe's Committee of Ministers serves as the executive body for the Council.⁶² It is composed of the Foreign Affairs Ministers of each Council member-state.⁶³ The Committee

rights.”).

52. *Id.* art. 39 (“If a friendly settlement is effected, the Court shall strike the case out of its list.”).

53. ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 282 (discussing the increasing incidence of friendly settlements and estimating that one in seven cases are resolved in this manner).

54. GOMIEN, *supra* note 13, at 70-71 (discussing the Court's procedures).

55. D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 658 (1995) (discussing procedures for review of cases).

56. EUR. CT. H.R., RULE 34(6), *available at* <http://www.echr.coe.int> (last visited Feb. 28, 2005).

57. *Id.* RULE 63(1-3) (outlining the “public character of hearings”).

58. *Id.* RULE 22(1) (“The Court shall deliberate in private. Its deliberations shall remain secret.”).

59. *Id.* RULE 23(1) (“The decisions of the Court shall be taken by a majority of the judges present. In the event of a tie, a fresh vote shall be taken and, if there is still a tie, the President shall have a casting vote.”).

60. Convention for Human Rights, *supra* note 14, art. 41.

61. HARRIS, *supra* note 55, at 686-87 (discussing pecuniary damages upon finding of a Convention violation).

62. Statute, *supra* note 8, art. 13 (“The Committee of Ministers is the organ which acts on behalf of the Council of Europe.”).

63. *Id.* art. 14 (“Representatives on the Committee shall be the Ministers for Foreign Affairs.”). In actuality, representatives of Foreign Affairs Ministers are the individuals who do much of the Committee's work. *See* ROBERTSON & MERRILLS, *HUMAN RIGHTS IN EUROPE*, *supra* note 39, at 324.

considers steps necessary to “further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.”⁶⁴ Among other things, the Committee may make recommendations to member-states about policy issues,⁶⁵ invite states to become new members of the Council,⁶⁶ terminate states from Council membership,⁶⁷ and ratify the Council’s annual budget.⁶⁸

In regards to the Convention on Human Rights, the Committee plays the crucial role of enforcing the decisions of the Court.⁶⁹ The Committee might oversee the payment of monetary damages to a plaintiff upon finding of a Convention violation.⁷⁰ It might also monitor a violating member-state’s compliance with the Convention by amending or reversing a law, administrative act, or judicial decision.⁷¹ However, it should be noted that the Committee cannot compel a non-complying member to remedy a violation.⁷² Perhaps the one power that the Committee does retain to address violations

64. Statute, *supra* note 8, art. 15(a).

65. *Id.* art. 15(b) (“In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members.”).

66. *Id.* art. 4 (“Any European state which is deemed to be able and willing to fulfill the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers.”).

67. *Id.* art. 8 (“Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation [and] the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”).

68. *Id.* art. 38(c) (“In accordance with the financial regulations, the budget of the Council shall be submitted annually by the Secretary General for adoption by the Committee.”).

69. Convention for Human Rights, *supra* note 14, art. 46(2) (“The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”).

70. *Id.* art. 41 (“If the Court finds that there has been a violation of the Convention or the protocols thereto . . . the Court shall, if necessary, afford just satisfaction to the injured party.”).

71. GOMIEN, *supra* note 13, at 90 (“This supervision may take the form of monitoring legislative or administrative reforms instituted by states in response to a finding of a violation, or, in the case of judgments for ‘just satisfaction’ under Article [41], ensuring that the state has made its payment to the individual.”).

72. *Id.*

It is important to remember that the Committee of Ministers has no power to intervene directly in the supervision and execution of judgments by the offending state in a given case Should a state choose to ignore, or not give full force to a judgment of the Court or a decision of the Committee of Ministers, there may often be little that either body can do to persuade the state to respect the holding of the Strasbourg body.

Id. See also ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 338 (“The limitations of the Committee are all reflections of its political character and it was, of course, the desire of the Contracting States to have a political rather than a judicial organ as the ultimate decision-maker . . .”).

by a member-state is its most extreme — Article 8 of the Convention allows the Committee to remove a nation from the Council of Europe.⁷³ The Committee came close to considering this option following the 1967 military coup in Greece, but the Greek government subsequently chose to leave the Council on its own accord before the Committee could take such action.⁷⁴

Still, enforcement of judgments against member-states has been extremely successful.⁷⁵ Failure to comply with judgments is virtually non-existent.⁷⁶ This includes the numerous times the

73. Statute, *supra* note 8, art. 8 (“Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation [and] the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”).

74. GOMIEN, *supra* note 13, at 89 (“In the Greek case the Committee of Ministers considered that a great many Articles of the Convention had been violated. However, before the Committee adopted its resolution in this case, Greece withdrew from the Council of Europe and denounced the Convention.”). See also ROBERTSON & MERRILLS, HUMAN RIGHTS IN EUROPE, *supra* note 39, at 337-38 (outlining the Greek case and discussing other instances in which the Committee addressed cases of member-states continually violating the Convention); Pinto, *supra* note 9, at 30 (outlining the Council’s strained relationships with Greece and Turkey following government overthrows, and the severance of ties with Yugoslavia).

Although Turkey was often cited for its relatively poor human rights record and strained relationship with the Council of Europe for its war against Kurdish separatists, the Council’s relationship with Russia has become increasingly difficult in regards to its war in Chechnya. See RUDOLF BINDIG, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, Doc. 9732: *The Human Rights Situation in the Chechen Republic*, § II, ¶ 3 (Mar. 13, 2003) (suggesting that an international war crimes tribunal be created for human rights violations in Chechnya), available at <http://www.europarl.eu.int/meetdocs/delegations/russ/20030409-Tchechenie/05.pdf> (last visited Feb. 28, 2005); Press Release, Council of Europe, Assembly Gravelly Concerned About Human Rights in Chechnya, Puts the Situation Under Its Constant Review (Jan. 25, 2001) (“[The Council of Europe’s Parliamentary Assembly] stressed once again that Russia did not act in line with the Council of Europe’s principles and values in the conduct of its military campaign and that many of the Assembly’s requirements in this regard are yet to be implemented.”), available at <http://press.coe.int> (last visited Feb. 28, 2005).

The European Court of Human Rights has declared admissible, for the first time, claims against Russia by Chechens allegedly committed during its 1999-2000 war in Chechnya in January of 2003. Press Release, European Court of Human Rights, Six Complaints Against Russia Concerning Events in Chechnya Declared Admissible (Jan. 16, 2003), available at <http://www.echr.coe.int> (last visited Feb. 28, 2005). Those claims are: *Khashiyev v. Russia*, App. No. 57942/00 at 12 (2002) (charging Russia with torture, disappearances, and extrajudicial killings in Grozny), at <http://www.echr.coe.int> (last visited Mar. 1, 2005); *Isayeva v. Russia*, App. No. 57947/00 at 10-11 (2002) (charging Russia with deaths of civilians following a bombardment of Grozny), at <http://www.echr.coe.int> (last visited Mar. 1, 2005); and *Isayeva v. Russia*, App. No. 57950/00 at 2, 8 (2003) (charging Russia with deaths of civilians following a bombardment of Katyr-Yurt), at <http://www.echr.coe.int> (last visited Mar. 1, 2005). See Press Release, *supra*.

75. HARRIS, *supra* note 55, at 702 (observing that the record of compliance with judgments by member-states “is generally recognised to be exemplary”).

76. Klebes, *supra* note 16, at 78 (noting that in the forty year history of the Convention, the Court has adjudicated approximately 800 judgments, and “[a]ll its decisions have been respected, though sometimes grudgingly, by the States concerned”).

Court has ordered member-states to pay monetary compensation to plaintiffs for Convention violations.⁷⁷ In 2001, the Court ordered Turkey to pay a record high of £2.5 million for a military operation against Kurds that killed fifteen civilians, a payment the Turkish government agreed to make.⁷⁸ In other instances, member-states have gone so far as to change constitutions to comply with Court rulings, as Germany has done.⁷⁹ This level of compliance with the Convention — through a body formed of the Foreign Ministers of all Council of Europe members — and its compulsory jurisdiction and ability for individuals to bring suits directly against member-states, make the Convention an extremely powerful mechanism for enforcement of human rights.⁸⁰

77. *Austria Violated Rights of Anti-Haider Paper: EU Rights Court*, AGENCE FR. PRESSE, Feb. 26, 2002 (noting a \$14,700 fine imposed on Austria for violating free speech rights), available at LEXIS, European News Sources File; *European Human Rights Court Condemns Turkey in Kurd's Death*, AGENCE FR. PRESSE, Feb. 14, 2002 (noting a \$63,100 fine imposed on Turkey after police tortured a Kurd to death), available at LEXIS, European News Sources File; *Council of Europe Says London Must Allow Elections in Gibraltar*, AGENCE FR. PRESSE, June 26, 2001 (noting a \$64,000 fine imposed on the United Kingdom for failing to secure voting rights for Gibraltar residents), available at LEXIS, European News Sources File; *France Fined by European Court Over Murder Trial of German*, AGENCE FR. PRESSE, Feb. 13, 2001 (noting a \$14,000 fine imposed on France for failing to secure trial rights to a German physician), available at LEXIS, European News Sources File; *Cyprus Says It Will Pay EU Human Rights Fine to Turkish Cypriot*, AGENCE FR. PRESSE, Dec. 22, 2000 (noting a \$15,370 fine imposed on Cyprus for maltreatment of a suspected criminal), available at LEXIS, European News Sources File.

78. Gareth Jenkins, *Cloudy Forecast for Turkey*, AL-AHRAM WEEKLY ON-LINE (Cairo), June 21–27, 2001 (noting strained relationships between Turkey and the European Union about its human rights record and an announcement by Turkey's interior minister that it would pay the £2.5 million sterling fine), available at <http://weekly.ahram.org.eg> (last visited Mar. 3, 2005).

79. Georg Ress, *The European Convention on Human Rights and States Parties: The Legal Effect of the Judgments of the European Court of Human Rights on the Internal Law and Before Domestic Courts of the Contracting States*, in PROTECTION OF HUMAN RIGHTS IN EUROPE: LIMITS AND EFFECTS 209, 256 (Irene Maier ed., 1982) (describing the Federal Republic of Germany's pre-emptive amendment to its Code of Criminal Procedure and Code of the Constitution of Courts to comply with the Court). See also HUMAN RIGHTS: A CONTINUING CHALLENGE FOR THE COUNCIL OF EUROPE 14 (1995) (noting alteration of laws or regulations in France, Ireland, Italy, Sweden, Switzerland, and the Netherlands to comply with the Convention); MANUAL, *supra* note 7, at 282 (describing instances when Norway changed its constitution, Belgium changed legislation, and Austria changed its Code of Criminal Procedure to comply with the Convention).

80. There is, of course, frequent criticism of the effectiveness of the Court and the Convention. For example, Doris Marie Provine argues that the Convention has not effectively addressed or conceptualized the problems encountered by half the population of Council of Europe member-states: women. Doris Marie Provine, *Women's Concerns in the European Commission and Court on Human Rights*, in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS 76 (Mary L. Volcansek ed., 1997).

II. JURISDICTION AND EXTRATERRITORIALITY

At a very general level, the framework in which extraterritorial actions committed by nation-states occur can be examined through well-accepted principles of jurisdiction.⁸¹ Jurisdiction, it should be noted, differs from the concept of sovereignty.⁸² On the international stage, a nation-state exercises jurisdiction over criminal acts based on principles of territoriality (the act was committed within the nation-state's territorial boundaries), nationality (the act occurred outside the nation-state's territory but was committed by a national), or passive nationality (the act occurred outside the nation-state's territory but the victim was a national).⁸³ The territorial principle is the most often cited grounds for the exercise of jurisdiction — and well-accepted in customary international law — whereas nationality, and passive nationality, respectively, are less relied on.⁸⁴

In its model classification of international legal documents, the Council of Europe itself recognizes specific types of extraterritorial jurisdiction, such as traditionally accepted principles of jurisdiction over consulates, embassies, and military personnel stationed abroad.⁸⁵ It also recognizes “other” forms of extraterritorial intervention, such as “artificial islands, *terrae nullius*, etc.”⁸⁶ The

81. For a general definition on jurisdiction, see WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 214 (4th ed. 2003) (“The term jurisdiction has several meanings. It includes the legal capacity or power of a State to (a) establish, (b) enforce, and (c) adjudicate rules of law within its boundaries.”). See also Vaughan Lowe, *Jurisdiction*, in *INTERNATIONAL LAW* 329, 329 (Malcolm D. Evans ed., 1st ed. 2003) (“Jurisdiction’ is the term that describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons.”).

82. SLOMANSON, *supra* note 81, at 214 (noting the conceptual differences between “jurisdiction” and “sovereignty” and defining sovereignty as “the exclusive right of a State to govern the affairs of its inhabitants”).

83. ANTONIO CASSESE, *INTERNATIONAL LAW* 260-62 (2001) (outlining general principles by which nation-states exert jurisdiction in criminal matters).

84. SLOMANSON, *supra* note 81, at 216-22 (discussing the degree of acceptance in customary international law of jurisdictional principles).

85. Lowe, *supra* note 81, at 331-33 (discussing a model plan formulated by the Council of Europe for the categorization of international law documents). The plan is entitled *Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law*, Council of Europe Resolution (68) 17 (June 28, 1968). Its latest iteration is Council of Europe Recommendation No. R (97) 11 (June 12, 1997) [hereinafter Council of Europe Recommendation], available at <http://cm.coe.int/ta/rec/1997/97r11.html> (last visited Mar. 3, 2005).

86. Council of Europe Recommendation, *supra* note 85. *Terrae nullius* or “empty land” refers to a legal fiction devised during the British colonial era. It justified colonization of already inhabited areas on the basis that such land was either not inhabited or inhabited by barbarians. This fiction has since been formally terminated by an Australian decision in 1992. Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 *AKRON L. REV.* 245, 253-65 (2003); Rick Sarre, *The Imprisonment of Indigenous Australians: Dilemmas and*

Council has also examined and recognized specific forms of extraterritorial jurisdiction for criminal acts.⁸⁷

Practices based on the doctrine of universal jurisdiction have become increasingly more relevant. The exertion of universal jurisdiction is justified on the rationale that the act in question is of such a grave and far-sweeping nature that any state is morally bound to apprehend and/or stop the actor, regardless of nationality or location.⁸⁸ On the other hand, commentators have also pointed out that the customary application of universal jurisdiction over piracy — a crime not generally considered to be “heinous” relative to other crimes such as genocide — may have been rationalized on the premise that pirates on the high seas easily eluded capture.⁸⁹ A number of nations have enacted legislation that enables some form

Challenges for Policymakers, 4 GEO. PUB. POL'Y REV. 165, 165-69 (1999).

87. COUNCIL OF EUROPE, EXTRATERRITORIAL CRIMINAL JURISDICTION 9-16 (1990).

88. SLOMANSON, *supra* note 81, at 222 (“Certain crimes spawn ‘universal interest’ because they are sufficiently heinous to be crimes against the entire community of nations.”); Lowe, *supra* note 81, at 343 (“Some crimes are regarded as so heinous that every State has a legitimate interest in their repression.”). See also M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 96-105 (2001) (providing an overview of the basis for universal jurisdiction); Jonathan H. Marks, *Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council*, 42 COLUM. J. TRANSNAT’L L. 445, 463-72 (2004). Marks further distinguishes the rationale for exercising universal jurisdiction into five sub-categories: 1) The “Manichean Rationale” — the act in question is of such a nature that its perpetrator is considered an enemy of all humanity; 2) the “Common Interest Rationale” — the act in question poses a threat to not only one state but all states, which thus have an interest in suppressing it; 3) the “Agency Rationale” — the act in question has violated common norms of *ius gentium* — the law of all nations — thus, a nation-state acts as an agent of all nations in repressing the act; 4) the “*Ius Cogens* Rationale” — the act in question violates a norm of international law so serious that it cannot be permitted and must be repressed; 5) the “Harm Rationale” — the act in question is so harmful and widespread (e.g. genocide) that it demands repression; and 6) the “Pragmatic Rationale” — in addition to any of the above reasons, the act in question must be repressed because if not, the perpetrator(s) might not be brought to justice unless a nation-state takes action. *Id.*

The concept of *Ius Gentium*, the law of all nations, or alternatively, the law of all peoples, is most famously spoken of in Justinian’s Institutes. See J. INST. 1.1.3 (Peter Birks & Grant McLeod trans., Cornell University Press 1987). The *Ius Gentium* is “the law which natural reason makes for all mankind It is called ‘the law of all peoples’ because it is common to every nation.” *Id.* at 1.1.2. The law of all nations should not be confused with what is referred to as the modern “international law.” See WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 73 (J.M. Kelly trans., Oxford University Press 1966). The law of all nations was law the Romans perceived to be shared by them with other peoples from surrounding nations. *Id.* They were shared social institutions, not laws. See HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 47 (10th ed. 1963) (defining the law of all nations as “the sum of the common ingredients in the customs of the old Italian tribes, for they were *all the nations* whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil”).

89. Lowe, *supra* note 81, at 343 (discussing traditional universal jurisdiction over high seas piracy, and noting how it generally cannot be considered as “heinous” as other acts such as genocide, war crimes, and even criminal acts against persons).

of prosecution based on universal jurisdiction.⁹⁰ Perhaps most well-known was the filing of complaints against various world leaders under a Belgian universality law — complaints later dismissed at the risk of straining diplomatic relations.⁹¹

Treaty jurisdiction offers a limited version of universal jurisdiction.⁹² It essentially provides for jurisdiction over treaty-defined criminal acts or violations committed within member-states of that particular treaty.⁹³ The European Convention on Human Rights is a prototypical example of a treaty which provides for, in the absence of national redress, judicial jurisdiction and authority in the Court of Human Rights for violations of the Convention.⁹⁴ The principal problem at issue is the extension of the Convention's jurisdiction over acts committed by member-states in areas not covered by the Convention.

A major form of extraterritorial action that has received support by the Council of Europe, at least in principal, is humanitarian intervention.⁹⁵ Although armed intervention by one state in the affairs of another is generally unaccepted in contemporary international law and by the United Nations,⁹⁶ an exception exists

90. CASSESE, *supra* note 83, at 261-62 (noting adoption in some form of the universal jurisdiction principle by Belgium, Germany, Italy, and Spain).

91. Raf Casert, *Belgium's Highest Court Dismisses War Crimes Cases Against Former President Bush and Others*, ASSOCIATED PRESS, Sept. 24, 2003 (reporting the dismissal of claims against George Bush, Dick Cheney, Colin Powell, and Ariel Sharon by a Belgian court), available at LEXIS, European News Sources File.

92. Lowe, *supra* note 81, at 344 (describing treaty based jurisdiction as basically a form of universal jurisdiction limited to the member-states of the treaty in question).

93. *Id.* at 343-45 (providing an overview of treaty-based jurisdiction and discussing examples).

94. Convention for Human Rights, *supra* note 14, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"); *id.* art. 32 (1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto").

95. The United Nations at the turn of the New Century, Eur. Parl. Doc. (8822) § I ¶ 6 (2000), available at <http://assembly.coe.int> (last visited Mar. 3, 2005).

The Assembly fully supports the Secretary General of the United Nations in his efforts to reconsider how the United Nations should respond to crisis and which means should be employed in cases of massive and systematic violations of human rights with grave humanitarian consequences. The Assembly understands the difficult balance between legal, political and moral factors and the collision between national sovereignty and the rights of individuals. Humanitarian intervention should be based on legitimate and universal principles set by the United Nations.

Id.

96. U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

for particular circumstances.⁹⁷ Chapter Seven of the United Nations' Charter authorizes action in response to "threat[s] to the peace, breach of the peace, or act[s] of aggression."⁹⁸ Collective intervention, as recognized by the United Nations Charter,⁹⁹ is generally more acceptable than a unilateral approach.¹⁰⁰ Although traditionally a "threat to the peace" was deemed to be a threat to peace between nations, therefore requiring the existence of an actual armed conflict between nations,¹⁰¹ the United Nations has more recently been inclined to justify intervention in internal civil wars on the basis that their humanitarian consequences threaten international peace and security.¹⁰² These characterizations surrounded events authorizing military intervention in Haiti in 1993 and Rwanda in 1994.¹⁰³ The North Atlantic Treaty Organization's (NATO) 1999 aerial bombardments in the former Yugoslavia were a major case in point, elevating focus on the United Nations Chapter VII articles which NATO had relied

97. See U.N. CHARTER art. 2, para. 7.

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

Id.

98. U.N. CHARTER art. 39. For an overview of principles and examples of U.N. interventions, see L. C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 318-26 (1993); David J. Scheffer, *U.N. Engagement in Ethnic Conflicts*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 147 (David Wippman ed. 1998); Rüdiger Wolfrum, *The UN Experience in Modern Intervention*, in *INTERNATIONAL INTERVENTION: SOVEREIGNTY VERSUS RESPONSIBILITY* 95 (Michael Keren & Donald A. Sylvan eds., 2002).

99. The principal article in the United Nations' Charter authorizing use of force by the Security Council is Article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

U.N. CHARTER art. 42.

100. SLOMANSON, *supra* note 81, at 492 (noting that "[collective intervention] is readily more justifiable than unilateral intervention").

101. BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION* 151-52 (2002) (discussing definitions of the "threat to the peace" language in the United Nations Charter).

102. *Id.* at 153-59 (outlining examples in which United Nations Security Council resolutions have characterized internal matters as threatening international peace, security, and stability).

103. *Id.* at 154 (discussing the characterization of internal matters as having international effects, thus justifying intervention in Haiti and Rwanda).

upon.¹⁰⁴ NATO's involvement in that conflict served as the basis for the case of *Banković and Others v. Belgium and Others*.¹⁰⁵

III-A. BANKOVIĆ: THE BACKGROUND

The backdrop to the *Banković* decision originated from events directly related to the dissolution of Yugoslavia and ethnic tensions that had developed among rival communities. The communist government of Yugoslavia had divided the nation into six republics and two autonomous entities, one of which was Kosovo.¹⁰⁶ The government-imposed consensus and stability created out of Yugoslavia's multi-ethnic state set the stage for conflict upon Marshall Tito's death in 1980.¹⁰⁷ Within the next ten years, ethnic politics had escalated, and multiparty elections resulted in significant gains for a variety of ethnic nationalist parties in various republics.¹⁰⁸ From there, the conventional view is that Serb nationalists, led by Slobodan Milošević,¹⁰⁹ manipulated ethnic tensions and fear to spur the beginning of actual fighting.¹¹⁰

104. Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 589, 595-97 (Malcolm D. Evans ed., 1st ed. 2003) (discussing how NATO's actions resulted in "an extended debate on the issue as to whether [U.N. Charter] Article 2(4) allowed the use of force for humanitarian intervention").

105. *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 333, 333. The nations sued were NATO members also party to the Convention on Human Rights. *Id.* at 339.

106. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 24 (1997) (noting Marshall Tito's creation of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and the autonomous areas of Kosovo and Vojvodina).

107. JOHN ALLCOCK ET AL., CONFLICT IN THE FORMER YUGOSLAVIA: AN ENCYCLOPEDIA 290-91 (1998) (discussing the impact of Tito's recreation of Yugoslavia and asserting that he be seen "in part, as the architect of Yugoslavia's problems in the 1990s"). See also SCHARF, *supra* note 106, at 24 (noting that Tito's creation of the individual republics of Yugoslavia was an attempt to dilute Serbian dominance); Radek Sikorski, *War In Europe Again*, NAT'L REV., Dec. 16, 1991, at 40, 42 (asserting another explanation for the subsequent break-up of Yugoslavia involving British support for the anti-Nazi communist partisans).

108. DIANA JOHNSTONE, FOOLS' CRUSADE: YUGOSLAVIA, NATO AND WESTERN DELUSIONS 18-19 (2002) (noting the development of nationalist parties in a number of elections in 1990). See also PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 153-54 (2002) (discussing the period between Tito's death and the outbreak of military conflict and noting the development of nationalist parties).

109. SCHARF, *supra* note 106, at 25 (asserting that Milošević was the "chief engineer" arousing ethnic tensions that led to conflict in 1990 and 1991). See also *Focus on Kosovo: Wily Milošević makes the most of the worst*, CNN.COM (assessing blame for the break-up of Yugoslavia upon Milošević), at <http://www.cnn.com> (last visited Mar. 3, 2005). But see JOHNSTONE, *supra* note 108, at 16-19, 26-27 (arguing that some of the blame targeting Milošević as the principal culprit behind the ensuing war was undue and that Croatian President Franjo Tuđman was mainly responsible).

110. SCHARF, *supra* note 106, at 25. It should be noted that fears of ethnic cleansing were very real, as only decades earlier during World War II, Croatian fascists — ustaša — exterminated or expelled Serbs en masse. See Vincent M. Creta, *The Search for Justice in*

Some of the earliest unrest began in the Serbian Krajina area of Croatia in 1990.¹¹¹ As repeated attempts at negotiations failed, acquiescence on the international arena set the stage for major conflict.¹¹² On June 25, 1991, Croatia and Slovenia declared independence, prompting Milošević to send the Yugoslavian army, the majority of whom were Serbs, into those republics.¹¹³ Massacres were committed by all sides.¹¹⁴ In July of 1990, predominantly-Muslim Kosovo declared its separation from Serbia.¹¹⁵ Bosnia-Herzegovina's declaration of independence on March 3 of 1992 sparked a subsequent declaration of a Serbian Republic within Bosnia, and fighting on a wider scale.¹¹⁶

Despite various attempts by the United Nations and the European Community to broker peace talks, fighting continued with no outside military intervention.¹¹⁷ The infamous "siege of

the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 20 HOUS. J. INT'L L. 381, 388-89 (1998). In response, Serbian militia — *četnici* — also killed Croats and Muslims. See Lisa L. Schmandt, *Peace with Justice: Is It Possible for the Former Yugoslavia?* 30 TEX. INT'L L.J. 335, 337-38 (1995). Croatian President Franjo Tudjman had resurrected the use of ustaša imagery, quite predictably causing fear among Serbian minorities in Croatia. JOHNSTONE, *supra* note 108, at 27; Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 11 (2001). In the infamous Serbian "rape camps" of the 1990s, Serb forces also justified atrocities based upon ustaša imagery; one Croat woman reported that she was told she was ustaša and had to be impregnated to give birth to a Serb instead. Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights — Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 636 n.124 (1995-1996).

111. ALLCOCK, *supra* note 107, at 148-49 (discussing developments in Krajina in 1990-91).

112. See RADAN, *supra* note 108, at 156, in reference to U.S. Secretary of State James Baker's visit to Yugoslavia on June 21, 1991.

Although Baker called for restraint on all sides and reiterated continued support for Yugoslavia's territorial integrity, it was also clear to all of Yugoslavia's republic leaders that the USA, and thus the rest of the international community, would not actively intervene in the crisis. This amounted to giving the green light for the use of force against secessionist republics. . . . Within days Slovenia and Croatia declared their independence.

Id.

113. SCHARF, *supra* note 106, at 26 (discussing the subsequent aftermath of Secretary of State James Baker's visit to Yugoslavia, and the beginning of all-out fighting).

114. JOHNSTONE, *supra* note 108, at 29-30 (discussing massacres committed by the "Croatian Knights" against Serbs in the Croatian town of Gospiæ); SCHARF, *supra* note 106, at 26 (discussing a massacre of hospital patients in the Croatian town of Vukovar by Serbs).

115. RADAN, *supra* note 108, at 198-99 (discussing developments leading to Kosovo's declaration of independence from Serbia). See also Miranda Vickers, *What Cost Kosovo?*, HIST. TODAY, Dec. 1991, at 6 (asserting that much of the ethnic strife surrounding Yugoslavia's break-up was due to the significance of Kosovo).

116. SCHARF, *supra* note 106, at 27 (discussing the spread of conflict into Bosnia-Herzegovina).

117. *Id.* at 30-36 (asserting that the UN "could have acted to stop the atrocities" that occurred in the early 1990s and noting failed diplomatic initiatives to either stop the conflict or intervene militarily).

Sarajevo” continued for several years, eventually prompting NATO¹¹⁸ military action in August of 1995.¹¹⁹ The destruction of substantial Serbian forces led to the conclusion of the U.S. sponsored Dayton Accords,¹²⁰ introduction of NATO peace-keeping forces into the former Yugoslavia, and creation of the Yugoslavia War Crimes Tribunal.¹²¹

However, tensions continued to build in Kosovo, a region politically affiliated with Serbia but populated by a majority of Muslim Albanians.¹²² In the late 1990s, members of the Kosovo Liberation Army began targeting Serb government officials.¹²³ Serbian forces responded by committing a series of atrocities against civilians.¹²⁴ On March 24, 1999, NATO commenced Operation Allied Force to destroy Serbian military entities that

118. The Yugoslavian crisis came at a time when many felt NATO had to revise its strategy following Soviet disintegration. S. NELSON DREW ET AL., *THE FUTURE OF NATO: FACING AN UNRELIABLE ENEMY IN AN UNCERTAIN ENVIRONMENT* 9-10 (1991) (discussing changing European realities and a need to revise NATO strategy); *NATO's New Strategy*, NAT'L REV., June 24, 1991, at 15 (noting revisions in NATO strategy).

119. Ian Traynor, *The Slow But Sure Sacking of Sarajevo*, THE GUARDIAN (London), May 11, 1992, at 22 (discussing shelling and sniper fire that paralyzed Sarajevo and its residents), available at LEXIS, European News Sources File; Ian Traynor, *Vulnerable Convoys of Refugees Flee "Dying" Sarajevo*, THE GUARDIAN (London), May 19, 1992, at 8 (discussing the refugee crisis in Sarajevo), available at LEXIS, European News Sources File; John Palmer et al., *U.S. Ready to Relieve Sarajevo*, THE GUARDIAN (London), June 26, 1992, at 1 (discussing President Bush's initiative to press for stronger actions against the Serbs with allies), available at LEXIS, European News Sources File; Ruth Marcus & Rick Atkinson, *NATO Envoys Agree to Back U.S. Air Strike Plan in Bosnia*, THE WASH. POST, Aug. 3, 1993 (discussing a U.S. air strike plan by NATO in conjunction with UN Security Council resolutions), available at LEXIS, European News Sources File; Dusan Stojanovic, *U.S. Fighters Down Four Serb Warplanes Over Bosnia*, THE ASSOC. PRESS, Feb. 28, 1994 (discussing the "first time NATO had struck militarily in its 44-year history" when U.S. planes shot down Serbian jets violating the no-fly zone), available at LEXIS, European News Sources File; Robert Burns, *Allies May Sustain Air Attacks for Several Days*, THE ASSOC. PRESS, Aug. 30, 1995 (discussing the beginning of major NATO attacks against Serbian positions), available at LEXIS, European News Sources File. For a description of post-siege Sarajevo from the perspective of a foreign journalist, see GREG CAMPBELL, *THE ROAD TO KOSOVO* 89-93 (1999).

120. ALLCOCK, *supra* note 107, at 70-71 (describing the Dayton Accords).

121. SCHARF, *supra* note 106, at 51-73 (describing the creation of the Yugoslavia War Crimes Tribunal).

122. ALLCOCK, *supra* note 107, at 145-47 (describing the history of Kosovo and ethnic tensions that led to conflict in 1998-99).

123. Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 336 (2000) (discussing the background to NATO air strikes in Kosovo); Klinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 431-34 (2000) (same).

124. BRUCE R. NARDULLI ET AL., *DISJOINTED WAR: MILITARY OPERATIONS IN KOSOVO, 1999* at 15 (2002) (noting the massacre of civilians in September of 1998 and continued tension in October); John J. Merriam, *Kosovo and The Law of Humanitarian Intervention*, 33 CASE W. RES. J. INT'L L. 111, 136-43 (2001) (describing accounts of human rights violations committed in Kosovo).

threatened Kosovo.¹²⁵ The first stage of the strikes involved the use of missiles against select military targets,¹²⁶ but progressed to heavy bombardments of non-military infrastructure.¹²⁷ At the conclusion of Operation Allied Force, an estimated 500-1,800 civilians were killed by NATO strikes.¹²⁸

III-B. *BANKOVIĆ*: THE PLAINTIFFS' ARGUMENT

In *Banković* the plaintiffs were relatives of individuals killed during Operation Allied Force¹²⁹ after a NATO missile hit a media station in Belgrade.¹³⁰ The plaintiffs asserted¹³¹ that the NATO governments, who were all member-states to the European Convention on Human Rights, had violated Article 2 of the Convention — the right to life.¹³² In determining whether or not the case was admissible to the Court of Human Rights, the principal issue was determining if Article 1 jurisdiction¹³³ was implicated by the air strikes, because at that time, Yugoslavia was not a contracting party to the Convention.

Noting that Article 1 of the Convention on Human Rights obligates member-states to “secure to everyone within their jurisdiction the rights and freedoms”¹³⁴ of the Convention, the key issue was determining what extraterritorial acts committed by member-states constituted an extension of jurisdiction. The plaintiffs asserted that the NATO air strikes brought them within the jurisdiction of those governments.¹³⁵ They relied on a series of

125. BENJAMIN S. LAMBETH, NATO'S AIR WAR FOR KOSOVO: A STRATEGIC AND OPERATIONAL ASSESSMENT 19 (2001) (discussing the beginning of Operation Allied Force).

126. WESLEY K. CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT 193-94 (2001) (discussing the beginning of the military operation).

127. LAMBETH, *supra* note 125, at 39 (discussing the widening of NATO strikes to civilian targets such as media broadcast stations).

128. Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 121, 121 (Aleksandar Jokic ed., 2003) (discussing the civilian impact of the NATO campaign).

129. *Banković*, 2001-XII Eur. Ct. H.R. at 339 (noting relationships between the plaintiffs and deceased).

130. *Id.* at 340-41 (describing events on the morning of April 23, 1999).

131. *Id.* at 345 (noting the complaints filed against the NATO states).

132. Convention for Human Rights, *supra* note 14, art. 2. As noted by Lambeth, although the respondent governments were all European members of NATO, the United States also had a clear role in contributing forces to Operation Allied Force. See LAMBETH, *supra* note 125, at 20-21 (noting that the initial strikes involved a large contingent of U.S. aircraft and sea-launched missiles).

133. See Convention for Human Rights, *supra* note 14, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [the Convention].”).

134. *Id.*

135. *Banković*, 2001-XII Eur. Ct. H.R. at 345 (describing the plaintiff's main claim).

previous Court judgments and admissibility decisions to support their argument.

1. *The Cyprus Cases*

The principal case used by the plaintiffs was the Court's landmark 1995 decision in *Loizidou v. Turkey*.¹³⁶ Loizidou was a Cypriot who lived near the border of Turkish-occupied Cyprus, and owned land within that part of the island.¹³⁷ In March of 1989, Loizidou and other members of a Cypriot women's organization marched across the border to demonstrate against the occupation, and were subsequently stopped and detained by Turkish forces.¹³⁸ Although she was released shortly thereafter, she sued the Turkish government, alleging that her Article 3 Prohibition of Torture,¹³⁹ Article 5 Right to Liberty,¹⁴⁰ and Article 8 Right to Respect for Private and Family Life¹⁴¹ protections had been violated.

At the time of the event, both Turkey and Cyprus had been member-states of the Council of Europe and parties to the Convention.¹⁴² However, Turkey argued that the Court of Human Rights did not have jurisdiction over the issue because at that time the events did not occur within Turkey or Cyprus, but in the "Turkish Republic of Northern Cyprus,"¹⁴³ and that Turkey had not accepted the Court's jurisdiction outside of its territorial boundaries.¹⁴⁴

In its analysis, the Court noted that the reference to jurisdiction in Article 1 of the Convention was not limited to territorial boundaries of member-states.¹⁴⁵ Actions such as personal extraditions and forced expulsions involving non-member-states did

136. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (preliminary objections) [hereinafter *Loizidou I*].

137. *Id.* at 10 (describing the plaintiff and noting her claims to property in Turkish-occupied Cyprus).

138. *Id.* (describing the march by the "Women Walk Home" movement and subsequent events resulting in Loizidou's detention).

139. Convention for Human Rights, *supra* note 14, art. 3.

140. *Id.* art. 5.

141. *Id.* art. 8.

142. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES (stating that Cyprus joined the Council in 1961 and Turkey joined in 1949), at <http://www.coe.int> (last visited Mar. 1, 2005).

143. YASEMIN ÇELİK, CONTEMPORARY TURKISH FOREIGN POLICY 62 (1999) (noting that Turkish Cypriots declared the existence of the Turkish Republic of Northern Cyprus in 1983). Only Turkey recognized the Turkish Republic of Northern Cyprus. F. STEPHEN LARRABEE & IAN O. LESSER, TURKISH FOREIGN POLICY IN AN AGE OF UNCERTAINTY 78 (2003).

144. *Loizidou I*, 310 Eur. Ct. H.R. (ser. A) at 17, 21 (describing the positions of Turkey).

145. *Id.* at 23 ("In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties.")

trigger Convention jurisdiction,¹⁴⁶ as did acts committed by member-states that “produce effects outside their own territory.”¹⁴⁷ In the instant case, the Court noted that military action or occupation — when a member-state “exercises effective control of an area outside its national territory”¹⁴⁸ — also produces an “obligation to secure, in such an area, the rights and freedoms set out in the Convention,”¹⁴⁹ and it was clear that Turkish occupation of northern Cyprus was related to Loizidou’s claims.¹⁵⁰ As the Court later stated in its judgment on the merits of the case:

[I]n conformity with the relevant principles of international law governing State responsibility, ... responsibility of a Contracting Party could arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control

. . . It is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that [Turkey’s] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention.¹⁵¹

The “effective control” Turkey had over northern Cyprus thus brought those within its occupation under its jurisdiction, extending the protections of the Convention to those within the scope of that control.

146. *Id.* (noting case law in which “extradition or expulsion of a person by a Contracting State may give rise to an issue . . . and hence engage the responsibility of that State under the Convention”).

147. *Id.* at 24.

148. *Id.*

149. *Id.*

150. *Id.* (“[T]he respondent Government have [sic] acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops.”).

151. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2234-35 [hereinafter *Loizidou II*].

The effective control test enshrined in the *Loizidou* holding was later reaffirmed in *Cyprus v. Turkey*.¹⁵² In that case, Cyprus sued Turkey for a wide array of alleged violations stemming from Turkish occupation, including “disappearances” of Greek-Cypriots and violations of Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 17, and 18.¹⁵³ Relying on *Loizidou*, the Court concluded that Turkish military occupation of northern Cyprus expanded all rights and protections of the Convention to those within that territory.¹⁵⁴ The Court also expanded on the effective control principle. Noting that Cyprus — as a Council of Europe member and signatory to the Convention — was denied the ability to secure the Convention rights in the occupied part of that country, the Court stated that such a situation amounted to a “vacuum in the system of human-rights protection.”¹⁵⁵ Because the Convention was an “instrument of European public order,”¹⁵⁶ it had to apply to the inhabitants of a nation party to the Convention, otherwise they would have no other recourse to secure their rights.¹⁵⁷

2. Admissibility in *Ilaşcu v. Moldova and Russia*

In a case similar to *Loizidou* implicating jurisdictional issues, the *Banković* claimants cited the Court’s admissibility decision in *Ilaşcu and Others v. Moldova and the Russian Federation*.¹⁵⁸ Once a former republic of the Soviet Union, Moldova is ethnically divided between a majority of Moldovans and a minority of Slavic peoples.¹⁵⁹ After Moldova’s declaration of independence in 1991, a pro-Russian and separatist “Transnistrian Moldovan Republic” was declared on the east side of the Dniester River, sparking a minor civil war.¹⁶⁰ Russia’s Fourteenth Army remained in the

152. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

153. *Id.* at 11 (outlining complaints filed against Turkey by Cyprus).

154. *Id.* at 21 (“[I]n terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention.”).

155. *Id.*

156. *Id.*

157. *Id.* at 25 (noting the consequences of a “vacuum” in human rights protections to the individuals living under occupation).

158. *Banković*, 2001-XII Eur. Ct. H.R. at 349 (decision as to admissibility) (citing *Ilaşcu and Others v. Moldova and Russia*, Eur. Ct. H.R. App. No. 48787/99 (2004)), at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

159. William Crowther, *The Politics of Ethno-National Mobilization: Nationalism and Reform in Soviet Moldavia*, 50 THE RUSSIAN REV. 183, 184-86 (1991) (outlining demographic characteristics of Moldova). For an outline of historic ethnic/religious tensions in Moldova, see Nicholas Dima, *Politics and Religion in Moldova: A Case Study*, 34 THE MANKIND QUARTERLY 175, 175-94 (1994).

160. Charles King, *Eurasia Letter: Moldova With A Russian Face*, 97 FOREIGN POL’Y 106, 106-07 (1994) (outlining events subsequent to Moldova’s independence).

separatist portion and aided Slavic paramilitaries against Moldovans.¹⁶¹

In *Ilaşcu*, the plaintiffs were arrested in 1992 by Transnistrian security forces, tried and found guilty by a Transnistrian court for terrorism-related charges, and imprisoned.¹⁶² While in prison, they were allegedly beaten, drugged, shot, and psychologically tortured by Transnistrian and Russian military forces.¹⁶³

The Government of Moldova, which had ratified the Convention on Human Rights in 1997 — argued that it did not have *de facto* control of the east bank of the Dniester — the breakaway Transnistrian Republic — and hence did not have responsibility or jurisdiction for an area they did not control.¹⁶⁴ The Russian Federation also argued that it had no jurisdiction in Transnistria as well, and that its military forces stationed there were for “peacemaking duties.”¹⁶⁵ Citing *Loizidou*, the Court found the case admissible for further review on its merits, because Russian jurisdiction may have been implicated either through the actions of its own forces or a proxy entity.¹⁶⁶

3. Admissibility in *Issa v. Turkey*

The *Banković* plaintiffs also relied on the Court’s admissibility decision in *Issa and Others v. Turkey*,¹⁶⁷ involving extraterritorial action taken by Turkey against Kurds in Iraq — obviously a non-Council of Europe nation. In *Issa*, the plaintiffs were Iraqi women living on the Iraqi side of the border with Turkey.¹⁶⁸ They alleged that an encounter had occurred between Turkish military forces deployed in Northern Iraq and the applicants in April of 1995 while they were sheep-herding.¹⁶⁹ In the encounter, the soldiers allegedly began beating and abusing the shepherds, and then ordered the women to return to their village while keeping the men in their

161. *Id.* (discussing Russia’s involvement in Moldova).

162. *Ilaşcu*, Eur. Ct. H.R. App. No. 48787/99 at 5-7 (2004), (describing the plaintiffs’ arrests and trials) at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

163. *Id.* at 8-10 (describing instances of alleged beatings, shootings, and mock executions suffered by the applicants).

164. *Id.* at 14-15 (describing the position of the Moldovan government).

165. *Id.* at 16.

166. *Id.* at 21 (referencing the *Loizidou* control test and finding the issue admissible for further determination on its merits).

167. *Banković*, 2001-XII Eur. Ct. H.R. at 349 (citing *Issa and Others v. Turkey*, Eur. Ct. H.R. App. No. 31821/96 (2000)) (decision as to admissibility), at <http://www.echr.coe.int> (last visited Mar. 1, 2005).

168. *Issa and Others v. Turkey*, Eur. Ct. H.R. App. No. 31821/96 2 (2000) (describing the applicants and their livelihoods and relationships to the deceased).

169. *Id.* (describing the applicant’s alleged encounter).

custody.¹⁷⁰ Within the next two-three days the detained shepherds were found shot dead and mutilated.¹⁷¹ The Turkish government claimed that although a military incursion into Iraq had occurred at that time, there was no record of the alleged event.¹⁷² Charging Turkey with multiple violations of the European Convention on Human Rights, the Court admitted the case for review on its merits.¹⁷³

In sum, the *Banković* plaintiffs asserted that the *Ilaşcu* and *Issa* admissibility decisions and ruling in *Loizidou* and *Cyprus* together suggested that a signatory to the Convention on Human Rights could be sued in the Court for actions taken either in non-Council of Europe nations, or areas within the Council marked by ambiguous authority (i.e., the “Turkish Republic of Northern Cyprus” or “Transnistrian Republic”), if jurisdiction was established through effective control by a Council member-state. In the case of Yugoslavia — then a non-Council of Europe nation — the plaintiffs acknowledged that NATO may not have had complete control over that nation, as Turkey did in Northern Cyprus through its occupation.¹⁷⁴ However, by virtue of the deliberately planned and precision-guided military air strikes, they had enough control to be responsible for the consequences of the strikes, and should thus be held accountable for the resulting damage and deaths under the Convention that NATO knew would occur, amounting to an obligation to uphold not all Convention protections — but just those actions in which control was maintained.¹⁷⁵ Finally, the plaintiffs argued that if NATO did not fall under Convention jurisdiction for its actions in Yugoslavia, the governments would be “free to act with impunity”¹⁷⁶ abroad, and the basic mission of the Convention — to secure the fundamental human right to life in Europe — would be entirely circumvented.¹⁷⁷

170. *Id.* (“The [Turkish soldiers] started shouting abuse at the eleven shepherds, beating them with their rifle butts, kicking them and slapping them on the face. Then they separated the women from the men. They told the women to return to the village and took the men away.”).

171. *Id.* at 3 (“The bodies had been shot at several times and were badly mutilated — ears, tongues and genitals missing.”).

172. *Id.* at 4 (describing Turkey’s position in the complaint).

173. *Id.* at 8 (declaring the case admissible to the European Court of Human Rights).

174. *Banković*, 2001-XII Eur. Ct. H.R. at 348-49 (describing the plaintiffs’ arguments applying the effective control test of *Loizidou* to the instant case).

175. *Id.* at 349 (describing the plaintiffs’ stance that when a Convention member-state conducts air strikes, they should be “held accountable for those Convention rights within their control in the situation in question”).

176. *Id.* at 349-50.

177. *Id.* (describing the plaintiffs’ emphasis on the purpose of the Convention).

III-C. *BANKOVIĆ*: NATO'S ARGUMENT

The respondents' (governments of NATO nations) argument rested on a number of points. Its major contention was that the plaintiffs' type of claim was not originally intended to be scrutinized by the Convention.¹⁷⁸ If the Convention drafters intended to allow broad and loose "cause-and-effect" claims before the Court, in which the consequences of any member-states' extraterritorial actions would be reviewed, then the text of the Convention would be similar to that of the Geneva Conventions,¹⁷⁹ which state that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."¹⁸⁰ Instead, the European Convention does not cover acts occurring in *all circumstances*, but only those falling under the Article 1 obligation to "secure to everyone within their jurisdiction the rights and freedoms"¹⁸¹ of the Convention. The exercise of jurisdiction, as defined by the respondent governments, only referred to traditionally-accepted notions of exercises cloaked with the emblem of legal authority, such as an arrest or detention.¹⁸²

Similarly, the NATO governments argued that the military actions taken in Yugoslavia could not be equated with such traditional notions of legal authority purportedly covered by the Convention.¹⁸³ If such activities fell under the jurisdiction of the Convention, then all extraterritorial military missions would be reviewed by the European Court of Human Rights, an expansion of the Court to uncharted territory already covered by other international legal entities.¹⁸⁴ The NATO governments also argued that their alleged control over Yugoslavia's airspace did not equate with the control exercised by Turkey in Northern Cyprus in *Loizidou*,¹⁸⁵ and that while Cyprus and all its citizens had

178. *Id.* at 347.

179. *Id.* at 347 (describing the respondents' defense regarding the textual differences between the Geneva Convention and the European Convention on Human Rights); *id.* at 344 (citing language from the Geneva Conventions).

180. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 1.

181. Convention for Human Rights, *supra* note 14, art. 1.

182. *Banković*, 2001-XII Eur. Ct. H.R. at 346 (describing the respondent governments' assertion that "jurisdiction" only referred to the exercise of legal authority, such as the arrests and detentions of individuals).

183. *Id.* at 347 ("The Governments conclude that it is clear that the conduct of which the applicants complain could not be described as the exercise of such legal authority or competence.")

184. *Id.* at 347-48 (describing the respondents' arguments related to alleged "serious consequences for collective international military action").

185. *Id.* at 348 (describing the respondents' assertion distinguishing the *Loizidou* case with the instant one).

previously enjoyed the protections of the Convention prior to Turkish occupation, Yugoslavia and the Banković plaintiffs were not previously, nor at the time of the incident, covered under the Convention.¹⁸⁶

III-D. THE COURT'S DECISION IN *BANKOVIĆ*

The Court began its analysis by outlining the issue as a question of whether or not the Banković plaintiffs were covered under NATO's jurisdiction through its military actions.¹⁸⁷ Examining the meaning of "jurisdiction" by defining its ordinary meaning under applicable treaty laws,¹⁸⁸ the Court concluded that jurisdiction ordinarily referred to government exercise of authority within its territorial boundaries.¹⁸⁹ Instances of extraterritorial action were thus considered to be exceptional cases,¹⁹⁰ and the Court's *Loizidou* ruling was one such exception as it was based on effective control of Turkey in the disputed area.¹⁹¹ The Court thus recognized the continued legitimacy of its previous rulings in *Loizidou* and *Cyprus*.¹⁹²

The Court then reviewed the applicants' argument that, in the absence of overall effective control, a member-state should not be responsible for all Convention protections, but only those relative to the amount of control possessed. In examining the assertion that NATO's jurisdiction could derive from control vis-à-vis the air strikes, the Court stated that such logic was "tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."¹⁹³ Agreeing with the respondent governments, the Court found no textual evidence in the Convention supporting such

186. *Id.* at 347 (noting the respondents' assertion that Yugoslavia "was not and is not a party to the Convention and its inhabitants had no existing rights under the Convention.")

187. *Id.* at 350 ("[T]he essential question to be examined therefore is whether the applicants and their deceased relatives were . . . capable of falling within the jurisdiction of the respondent States.")

188. *Banković*, 2001-XII Eur. Ct. H.R. at 350-51 (noting the importance of interpreting the ordinary meaning of "within their jurisdiction" as required by the Vienna Convention on the Law of Treaties).

189. *Id.* at 351-52 (concluding that the ordinary meaning of jurisdiction was based on territorial control).

190. *Id.* at 354 (noting that jurisdiction is "essentially territorial" in nature and that actions conducted abroad are instances of exceptional expansion of jurisdiction).

191. *See id.* (outlining and re-affirming the *Loizidou* case).

192. *Banković*, 2001-XII Eur. Ct. H.R. at 355 (summarizing the Court's previous holdings in the *Loizidou* and *Cyprus* cases).

193. *Id.* at 356.

a view that the Convention's protections could be "divided and tailored" relative to the proportionate amount of control at hand.¹⁹⁴

Finally, the Court agreed with the NATO governments that a significant fact in *Loizidou* was that the inhabitants of Cyprus had previously been covered by the Convention prior to the Turkish occupation, distinguishing that situation from the one in Yugoslavia.¹⁹⁵ The Court reiterated the regional nature of the Convention, asserting that it covered a "legal space" that did not include Yugoslavia at that time.¹⁹⁶ Therefore, the Court concluded that the plaintiffs did not fall under NATO's jurisdiction, nor the Court's jurisdiction, since "[t]he Convention was not designed to be applied throughout the world."¹⁹⁷ The Court thus unanimously declared the case inadmissible. By citing *Loizidou* for the principle that extraterritorial jurisdiction can exist when one nation has effective control of another, but also stating that the Convention was meant to apply only within the Council of Europe and not "throughout the world," the Court seemed to state that Council member-nations can only have extraterritorial jurisdiction in other member-nations.

IV-A. THE ÖCALAN CASE

Abdullah Öcalan was a Kurd of Turkish nationality and head of the Worker's Party of Kurdistan (PKK) — a separatist Kurdish organization.¹⁹⁸ The PKK had initiated a wide-scale insurgency characterized by guerrilla and terrorist-style tactics in the 1980s.¹⁹⁹ The ultimate aim of the uprising was the creation of an independent Kurdish state from Turkey — which had historically conducted repressive policies against its Kurdish population.²⁰⁰

194. *Id.* at 357 (stating that "[h]ad the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text identical or similar to" language in the Geneva Conventions).

195. *Id.* at 358 (discussing and distinguishing *Loizidou* and *Cyprus v. Turkey* from the instant case).

196. *Id.* at 358-59 (stating that the Convention is a treaty "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space").

197. *Id.* at 359.

198. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, 252 (2003) (judgment) (describing the applicant's background).

199. AMIKAM NACHMANI, *TURKEY: FACING A NEW MILLENNIUM: COPING WITH INTERTWINED CONFLICTS* 36-37 (2003) (outlining the aims of the PKK and noting that its 1984 rebellion was the seventeenth Kurdish uprising against Turkey). *See also* HENRI J. BARKEY & GRAHAM E. FULLER, *TURKEY'S KURDISH QUESTION* 23-29 (1998) (discussing the goals of the PKK and its ideological foundations).

200. MICHAEL M. GUNTER, *THE KURDS AND THE FUTURE OF TURKEY* 11-14 (1997) (outlining Turkish human rights violations in its conduct of operations against the Kurds); HELSINKI WATCH, *DESTROYING ETHNIC IDENTITY: THE KURDS OF TURKEY* 7-18 (1988) (outlining Turkish

In late 1998 and early 1999, Öcalan traveled through Greece, Russia, and Italy, seeking asylum after being forced to leave Syria.²⁰¹ As leader of the PKK, Turkey had issued a number of warrants for his arrest.²⁰² In February of 1999, Öcalan was allegedly taken to Kenya by Greek secret services after being denied asylum.²⁰³ For several days he stayed at the Greek Ambassador's residence, but was later informed that he could leave Kenya and travel to the Netherlands.²⁰⁴ On February 15, Öcalan left the Greek embassy in a car driven by a Kenyan official, was taken to an international area of Nairobi Airport, and was arrested by Turkish agents after boarding a plane.²⁰⁵ The Government of Kenya stated that they played no knowing role in his arrest at the airport.²⁰⁶

Upon his arrest, Öcalan was alleged to have been photographed, videotaped, and periodically blindfolded or hooded during the flight to Turkey.²⁰⁷ On February 16, he was incarcerated at the Ýmráli Prison Island in Turkey, which had immediately transferred prisoners to other locations and was declared a military zone, and interrogated for several days by Turkish agents.²⁰⁸ Turkish officials prevented several of Öcalan's attorneys from visiting him in prison or entering the country to aid in his defense.²⁰⁹ He was first allowed

ethnic identity policies and conduct of torture by security forces); HUMAN RIGHTS WATCH, TURKEY: FORCED DISPLACEMENT OF ETHNIC KURDS FROM SOUTHEASTERN TURKEY Vol. 6 No. 12, 10-21 (1994) (outlining reports of forced displacement of Kurds by Turkish forces in its conduct of operations against the PKK); HUMAN RIGHTS WATCH, TURKEY: HUMAN RIGHTS AND THE EUROPEAN UNION ACCESSION PARTNERSHIP 4 (vol. 12, no. 10 (D), 2000) ("The persistence of torture in Turkey is an indisputable matter of record.")

201. *Öcalan*, 37 Eur. H.R. Rep. at 252 (describing his travels through various nations seeking asylum).

202. *Id.* at 253 (noting outstanding Turkish arrest warrants for Öcalan alleging "founding an armed gang in order to destroy the territorial integrity of the State and of instigating various terrorist acts that had resulted in loss of life").

203. *Id.* at 255 ("The applicant also told the prosecutor that after leaving Syria on October 9, 1998 he had gone first to Greece and then to Russia and Italy. When the latter two countries refused to grant him the status of political refugee, he had been taken to Kenya by the Greek secret services.")

204. *Id.* at 252-53 (describing events in Nairobi prior to the applicant's arrest).

205. *Öcalan*, 37 Eur. H.R. Rep. at 253 (describing the applicant's arrest by Turkish agents in an international zone of Nairobi Airport).

206. *Id.* at 253.

The Kenyan Minister of Foreign Affairs added that the Kenyan authorities had played no part in the applicant's arrest and had had no say in his final destination. The Minister had not been informed of any operations by Turkish security forces at the time of the applicant's departure and there had been no consultations between the Kenyan and Turkish Governments on the subject.

Id.

207. *Id.* at 253-54 (describing alleged conditions of Öcalan's flight to Turkey).

208. *Id.* at 254-55 (describing conditions of Öcalan's detention following his arrest).

209. *Id.* at 255 (noting that one of his lawyers was prevented from leaving his office by

to visit with attorneys on February 25 in the presence of a Turkish judge and masked security officials.²¹⁰ After a series of trials by a State Security Court, in June of 1999 Öcalan was found guilty of instructing crimes and attacks aimed towards the establishment of an independent Marxist Kurdish state and was sentenced to death.²¹¹

Before the European Court of Human Rights, Öcalan sued Turkey for a variety of Convention violations stemming from his arrest, treatment in custody, trial, and subsequent sentencing to death.²¹² However, the major issue pertaining to extension of jurisdiction for extraterritorial actions revolved around Öcalan's Article 5 § 1 claim — which prohibits a person's deprivation of liberty in the absence of a "procedure prescribed by law."²¹³ The issue facing the Court was whether or not Turkey's act of detaining Öcalan at Nairobi Airport constituted an extension of its jurisdiction, bringing him under the protection of the Convention.²¹⁴

Öcalan asserted that he did fall within Turkey's jurisdiction and that Turkey had violated the Convention's Article 5 § 1 protections because his arrest amounted to an abduction not prescribed by law, thus voiding his subsequent trial and sentence.²¹⁵ Based on statements from Kenyan officials about their lack of involvement in his arrest, he asserted that there was no official collaboration for extradition between the governments of Turkey and Kenya leading to his arrest.²¹⁶ Öcalan relied on *Cyprus v. Turkey* and other cases

Turkish officials and other attorneys were stopped from entering the country at Istanbul Airport).

210. *Öcalan*, 37 Eur. H.R. Rep. at 255.

On February 25, 1999 the applicant was able to talk to two of the sixteen lawyers who had asked to see him, Mr. Z. Okçuoglu and Mr. H. Korkut. The first conversation took place in the presence of a judge and of members of the security forces wearing masks. The latter decided that it should not last longer than [twenty] minutes.

Id.

211. *Id.* at 257-59 (outlining events during Öcalan's trial leading to his indictment and sentencing).

212. *Id.* at 238-40 (outlining determinations by the Court on alleged violations of Convention Articles 2, 3, 5, 6, 7, 8, 9, 10, 13, 14, 18, 34, and 41).

213. Convention for Human Rights, *supra* note 14, art. 5 § 1 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.").

214. *Öcalan*, 37 Eur. H.R. Rep. at 274.

215. *Id.* at 271 (outlining Öcalan's argument that his arrest "did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void").

216. *Id.* at 270 (outlining Öcalan's argument that "[m]ere collusion between Kenyan officials operating without authority and the Turkish Government could not constitute interstate co-operation The applicant further alleged that the Kenyan officials implicated in his arrest had been bribed.").

to assert that Turkey's Article 5 § 1 obligations were implicated by his abduction at Nairobi Airport.²¹⁷

Relying on *Banković*, Turkey asserted, "without further explanation," that it was not responsible for Öcalan's arrest.²¹⁸ On the contrary, Turkey argued that Kenya had arrested Öcalan, that Kenya was a sovereign nation and Turkey had no means of exercising its jurisdiction there, and that Kenya simply released Öcalan into Turkey's custody as a matter of interstate cooperation.²¹⁹

IV-B. THE ÖCALAN RULING

In a brief analysis of the Article 5 § 1 issue, the Court began by recognizing that Article 5 § 1's protection of a person's liberty reflected a purpose "to protect individuals from arbitrariness."²²⁰ Interstate cooperation to extradite an individual could implicate Article 5 § 1 obligations if its protections were violated.²²¹ However, the Convention itself did not contain guidelines beyond the protections stated in Article 5 § 1 which spoke directly to how interstate extraditions should be effected.²²² Thus, the critical question at hand was whether "beyond all reasonable doubt" . . . the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State.²²³ A finding that Turkey, in its pursuit of Öcalan, had violated its arrest procedures or violated Kenya's sovereignty, would have amounted to a violation of the Convention.

To determine if Turkish procedures complied with the Convention's Article 5 § 1 obligations, the Court first had to determine whether or not Öcalan was brought within Turkey's jurisdiction in Nairobi. The Court revisited *Banković* and noted that the exercise of extraterritorial jurisdiction by a member-state to the

217. *Id.* at 270-71 (referring to *Cyprus v. Turkey* to argue that Turkey had violated Öcalan's Article 5 rights).

218. *Id.* at 271 (noting Turkey's argument that "their responsibility was not engaged by the applicant's arrest abroad").

219. *Id.* at 271-72 (outlining Turkey's arguments).

220. *Öcalan*, 37 Eur. H.R. Rep. at 272.

221. *Id.* at 273 (outlining precedent holding that Article 5 protections could be implicated in the case of cooperation between states for extradition of criminals).

222. *Id.* ("The Court further notes that the Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted.")

223. *Id.* at 274.

Convention was only recognized in exceptional situations.²²⁴ The Court then noted that:

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the “jurisdiction” of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.²²⁵

Having found that Turkey was bound by its Convention obligations, the Court subsequently found that it had neither violated its own arrest procedures,²²⁶ nor Kenya’s sovereignty using a “beyond all reasonable doubt” threshold.²²⁷ It therefore did not violate Article 5 § 1 of the Convention.²²⁸

224. *Id.* (citing the Court’s statements in the *Banković* case acknowledging the exceptional nature of a finding that jurisdiction can be exercised beyond the territorial boundaries of a state).

225. *Öcalan*, 37 Eur. H.R. Rep. at 274-75.

226. *Id.* at 275 (“It follows that [Öcalan’s] arrest and detention complied with orders that had been issued by the Turkish courts.”).

227. *Id.* at 276 (“[T]he Court holds that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty.”).

228. *Id.* (“It follows that the applicant’s arrest on February 15, 1999 and his detention must be regarded as having been in accordance with ‘a procedure prescribed by law’ for the purposes of [Article 5 § 1 (c)] of the Convention. Consequently, there has been no violation of [Article 5 § 1] of the Convention.”).

Öcalan did, however, win several of his other claims. The Court found Turkey had violated parts of Article 3, Article 5 § 3 and § 4, and Article 6 § 1, but had not violated Article 2, parts of Article 3, Article 5 § 1, and Article 14. *Id.* at 311-13. The Turkish government also changed its Constitution, rescinding Öcalan’s death sentence. *Id.* at 293. At the time of this writing, Öcalan remains in Turkish custody with a life sentence.

V. EXTRATERRITORIAL APPLICATION OF THE EUROPEAN
CONVENTION IN THE WAKE OF *BANKOVIĆ*, *ÖCALAN*, AND OTHER
CASES

The holdings in *Banković*, *Öcalan*, and other aforementioned cases have left several unanswered questions. *Loizidou*, and its affirmation in *Cyprus*, laid clear the doctrine that effective control engenders responsibility to uphold the Convention's protections:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control²²⁹

This obligation is imputed to a member-state either through its military or vis-à-vis “a subordinate local administration.”²³⁰ Such a subordinate entity includes proxy governments supported by a member-state, such as the “Turkish Republic of Northern Cyprus” which was administering the occupied portions of Cyprus.²³¹ When the effective control amounts to “effective overall control[,] . . . [the member-state's] ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention.”²³²

Banković clearly limited this assertion. The Court's reasoning in *Banković* seems inconsistent with other decisions by the Court. In response to the applicant's *Loizidou/Cyprus* effective control argument, the *Banković* Court asserted that the Convention's protections could not be divided and applied in a level commensurate to the action at issue, and to recognize jurisdiction in such cases would amount to allowing anyone in the world affected by a member-state's actions to be brought under the Convention's jurisdiction.²³³ In one sense, *Banković* reaffirms the

229. *Loizidou I*, 310 Eur. Ct. H.R. (ser. A) at 24.

230. *Id.*

231. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 25 (recognizing Turkish jurisdiction over occupied Cyprus vis-à-vis the “local administration which survives by virtue of Turkish military and other support”).

232. *Id.*

233. *Banković*, 2001-XII Eur. Ct. H.R. at 356-57.

[The applicant's] claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a “cause-and-effect” notion of

effective control doctrine and makes the determination of whether effective control exists a question of fact. In *Loizidou and Cyprus*, Turkish military occupation of parts of Cyprus was enough for the Court to find that such effective overall control obligated Turkey to expand its Convention responsibilities to those areas.

NATO's air campaign in Yugoslavia, and its arguable control over its airspace, was certainly not analogous to the military occupation of Cyprus. However, by requiring such effective overall control vis-à-vis military occupation, the Court neglected the principle that under the Convention, extraterritorial jurisdiction should be broadened to "bring any other person 'within the jurisdiction' of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged."²³⁴ As recognized by the Parliamentary Assembly of the Council of Europe on the topic of extraterritorial jurisdiction, the effective overall control of the type in Cyprus is not a requirement of jurisdiction:

Accordingly the State's "jurisdiction" is not limited to its territory; it extends to all persons "under its actual authority and responsibility". The main difference with the *northern Cyprus* cases is of course that there is no lasting and effective control over an area. The consequence is that the State concerned is not required to secure *the entire range* of substantive rights set out in the Convention, but rather to respect the individual's rights "to the extent that it exercises authority over such persons".²³⁵

jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

. . . [T]he Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of [the] Convention" can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question

. . . .

Id.

234. *Stocké v. Germany*, 199 Eur. Ct. H.R. (ser. A) 1, 24 (1991) (Commission report).

235. Report of the Committee on Legal Affairs and Human Rights, Areas where the European Convention on Human Rights cannot be implemented, EUR. PARL. DOC. 9730, § V, ¶ 41 (Mar. 11, 2003) [hereinafter Committee Report], available at <http://assembly.coe.int>.

Banković deviates from this principle by asserting that the Convention's protections cannot be applied in proportion to the act of the member-state in question.²³⁶ Critics of *Banković* have appropriately pointed out that the effective control in the *Loizidou/Cyprus* cases should not be a prerequisite for a finding of extraterritorial jurisdiction, but only one example of such.²³⁷ By asserting that Convention protections cannot be detached based upon circumstances, the Court created "a gap in the protection afforded by the Convention,"²³⁸ in which jurisdiction exists in circumstances of effective overall control vis-à-vis military occupation, but obligations do not exist in instances where member-states take extraterritorial action short of military occupation.

Another unanswered question left in the wake of *Banković* and other decisions on extraterritoriality is the degree of importance to which the extraterritorial act in question occurred in a Council of Europe member-state or the territory of a non-member. In *Cyprus*, the Court noted the integral nature of the Convention in protecting human rights in Europe, and that by depriving those protections to an area that had formally enjoyed those protections, the purpose of the Convention would be subverted.²³⁹ The *Banković* Court partially premised its decision on the distinction between Turkish-occupied Cyprus and Yugoslavia, the former having been a signatory to the

236. *Banković*, 2001-XII Eur. Ct. H.R. at 356-57 (rejecting a "cause-and-effect" application of the Convention).

237. Rick Lawson, *Life After Banković: On the Extra-Territorial Reach of the ECHR 10* (Apr. 2, 2003) (unpublished manuscript, on file with author) ("The northern Cyprus saga might create the impression that effective overall control is required for a State to be held responsible for its acts abroad . . . [b]ut this would be to ignore the existing case-law of the Commission."). Professor Lawson served as legal advisor to the applicants in the *Banković* case, and his article serves as an excellent overview of the current status of extraterritorial application of the European Convention.

238. Sarah Williams & Sangeeta Shah, *Comment, Banković and Others v. Belgium and 16 Other Contracting States*, 6 EUR. H.R. L. REV. 775, 781 (2002). One proffered explanation for the Court's decision is patently political in nature — that it did not want to extend jurisdiction, and hence liability, to NATO forces acting in a perceived "just" war. See Alexandra Ruth & Mirja Trilsch, *International Decisions*, 97 AM. J. INT'L L. 168, 172 (2003).

What might explain the defensive stance assumed by the Court is that the admissibility of the instant case was difficult and awkward not only with regard to the extraterritoriality of the impugned acts, but also with regard to the question of whether — and if so, which — contracting parties are responsible under the Convention for actions carried out within the framework of NATO. By adopting a restrictive approach in relation to the question concerning extraterritoriality, the Court avoided the need to address the one concerning NATO.

Id. Professor Lawson offers a detailed criticism of the Court's parsing of the issue of defining control in the Yugoslavian situation. See Lawson, *supra* note 237, at 17-21.

239. *Cyprus*, 2001-IV Eur. Ct. H.R. at 25 (discussing the importance of circumventing a "vacuum" in human rights protections).

Convention and the latter having not.²⁴⁰ However, in *Öcalan*, the act in question — the arrest of Mr. Öcalan — occurred in an international area of Nairobi's airport.²⁴¹ Additionally, in *Issa*, which contrary to *Banković* was found admissible, the impugned acts in question occurred in Iraq, which is obviously not a Council of Europe member.²⁴² The importance of locale to the Court's case law on extraterritoriality remains a significant, albeit not fully examined, issue.

The *Öcalan* judgment, however, may offer some explanation to these unanswered questions. In regards to the significance of the location of the impugned act, it must again be noted that Turkey's arrest of Öcalan occurred in an international area of Nairobi's airport.²⁴³ However, neglecting the fact that the arrest took place in an international area, the Court instead focused on the question of whether Turkey's actions had violated the sovereignty of Kenya, and found that it had not — making Öcalan's arrest permissible under the Convention.²⁴⁴ Perhaps more importantly, the Court found that Turkey did maintain an obligation to the Convention because of its clear control over the circumstances.²⁴⁵ The Court's analysis, thus, seems to place an emphasis on the factual question of degree of control, rather than on location. Turkish security forces clearly had control over Öcalan by virtue of his arrest and detention.²⁴⁶ The Court therefore seems to recognize that Turkey's degree of control over Öcalan was greater than the control NATO exercised over Yugoslavia's airspace in *Banković*.²⁴⁷

240. *Banković*, 2001-XII Eur. Ct. H.R. at 358-359 (distinguishing Yugoslavia from Cyprus based on its membership status in the Council of Europe).

241. *Öcalan*, 37 Eur. H.R. Rep. at 253 (outlining events prior to Öcalan's arrest).

242. *Issa*, Eur. Ct. H.R. App. No. 31821/96 at 2-3 (describing alleged events which occurred during a Turkish military incursion in Iraq).

243. *Öcalan*, 37 Eur. H.R. Rep. at 253 (recognizing that the arrest of Öcalan occurred on an airplane in Nairobi Airport).

244. *Id.* at 276 (finding that Kenyan authorities had de facto cooperated with Turkey in Öcalan's arrest, and that no violation of Kenyan sovereignty had occurred).

245. *Id.* at 274.

Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of [Article] 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.

Id.

246. *Id.* at 274-75.

The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković* [and *Others*] case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.

Id.

247. Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights*

In the wider sense, *Banković* and *Öcalan* contradict each other — both involving extraterritorial acts committed by Council of Europe member-states, but the former declared inadmissible for lack of jurisdiction, and the latter declared admissible and decided. The Parliamentary Assembly of the Council of Europe has recognized this conflict: “*Issa and Öcalan* suggest that a [High Contracting Party] must secure the Convention rights and freedoms to the extent that it can when performing an operation in a third country, but *Banković* expressly points in the opposite direction.”²⁴⁸ In a narrower sense, *Öcalan* re-affirms one aspect of *Banković* by requiring that a certain degree of control must be found to exist in order for the Convention’s obligations to extend to extraterritorial acts of Council of Europe states.²⁴⁹

Despite the unanswered questions from *Banković*, *Öcalan*, and related cases about the degree of control required for Convention jurisdiction to exist, what is known is that member-states conducting actions outside of the Council of Europe will be obligated to adhere to the European Convention on Human Rights if such control is found to exist. *Loizidou* and *Cyprus* indicate that such control exists by virtue of a military occupation.²⁵⁰ *Banković* indicates that use of precision-targeted air strikes does not amount to such control.²⁵¹ Finally, *Öcalan* indicates that the threshold of control is met if the security forces of a member-state conduct an arrest and detention of an individual.²⁵² The continuing development of this case law comes at an ample and pressing time, as the United Kingdom — a member-state to the Council of Europe and the Convention on Human Rights — has been conducting military operations in Iraq since March of 2003.²⁵³ In a groundbreaking decision in May of 2004, the High Court of Justice of England and Wales ordered a hearing on England’s European

in the Occupied Territories, 73 ISRAEL L. REV. (forthcoming Spring 2005), available at <http://www2.colman.ac.il/law/concord/publications/livingindenial.pdf> (last visited Mar. 3, 2005) (critiquing the *Banković* and *Öcalan* cases but asserting in relation to the Court’s reasoning in *Öcalan* that “[p]erhaps the Court attributed importance to the intensity of physical control exercised by Turkish officials over *Öcalan*, which clearly surpassed the level of physical control exercised by NATO forces flying over Belgrade”).

248. Committee Report, *supra* note 235, § VI ¶ 48.

249. See Ben-Naftali & Shany, *supra* note 247 (asserting that “[i]t should further be noted in this context that the restrictive approach embraced by the Court in *Banković* was somewhat revised in the *Öcalan* case”).

250. See *supra* Part III.B for a discussion of the northern Cyprus cases.

251. See *supra* Part III.D for a discussion of *Banković*.

252. See *supra* Part IV.B for a discussion of *Öcalan*.

253. See Lawson, *supra* note 237, at 19 (discussing the implications of *Loizidou* and *Banković* in regards to British military operations in Iraq).

Convention on Human Rights obligations in regards to the alleged deaths of Iraqi civilians at the hands of British military forces.²⁵⁴

VI. THE UNITED KINGDOM AND THE HUMAN RIGHTS ACT OF 1998

Not only is the United Kingdom bound by the European Convention of Human Rights as a convention party and member-state to the Council of Europe, it has also incorporated virtually all of the Convention rights and protections into statutory law vis-à-vis the Human Rights Act.²⁵⁵ The Act will theoretically decrease the amount of cases involving the United Kingdom that will go before the European Court of Human Rights in Strasbourg. The United Kingdom is certainly no stranger to the Court as a party to previous cases. From 1959-1989, the United Kingdom was found to have violated the Convention twenty-three times.²⁵⁶ In its own courts, judicial references to the European Convention have appeared over 150 times.²⁵⁷ The Human Rights Act itself was finally passed after considerable debate about its implications for the UK.²⁵⁸

The Act includes the major Convention rights to life,²⁵⁹ liberty and security;²⁶⁰ fair trial;²⁶¹ and freedom of thought, conscience and religion.²⁶² The Act dictates that United Kingdom courts must take into account European Court rulings on human rights.²⁶³ The two significant omissions from the Convention are the absence of articles 1 and 13 regarding obligations to uphold the Act's protections within the jurisdiction of the United Kingdom and to

254. Richard Norton-Taylor, *Families Win Hearing on Deaths*, THE GUARDIAN (London), May 12, 2004 (discussing a High Court ruling to hear a case against Britain for deaths of Iraqis allegedly shot or beaten to death by British forces), available at LEXIS, European News Sources File.

255. Human Rights Act, 1998 (Eng.).

256. DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (1997) (asserting that the United Kingdom violated the Convention twenty-three times in the stated period, and that "measured both by the number of complaints before the Court and by the violations found, it was the most frequent offender").

257. *Id.* at 126-27 (describing Professor Jackson's search results for ECHR references in English court decisions).

258. Lammy Betten, *Introduction*, in THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS 1, 1-6, (Lammy Betten ed., 1999) (discussing debate and implications for the UK's adoption of the Human Rights Act); Clare Dyer, *Human Rights Law: Bringing Home the Basics*, THE GUARDIAN (London), Nov. 12, 1998 (outlining implications of the Human Rights Act for UK law), available at LEXIS, European News Sources File; Frances Gibb, *Rights Act will Allow Judges to Shape our Lives*, THE TIMES (London), Oct. 27, 1998 (discussing debate over the role and adequacy of English judges to interpret the Human Rights Act), available at LEXIS, European News Sources File.

259. Human Rights Act, 1998, sched. 1, art. 2 (Eng.).

260. *Id.* art. 5.

261. *Id.* art. 6.

262. *Id.* art. 9.

263. *Id.* § 2(1)(a) (Introduction).

provide an effective remedy for proven wrongs.²⁶⁴ In parliamentary debate, it was recognized that these Convention articles could be removed due to redundancy, as they were “in effect giving our domestic courts the jurisdiction relating to the rights and freedoms guaranteed under the European Convention on Human Rights.”²⁶⁵ In addition, clause 8 of the Act, which enables domestic courts to provide remedies to unlawful acts,²⁶⁶ was thought to be sufficient enough to exclude the Convention’s wording.²⁶⁷

In another noteworthy departure from the European Convention, the United Kingdom has officially reserved a right to derogate from certain Convention obligations in the Human Rights Act, particularly in regards to alleged terrorist activities. Its principle derogation relates to the Convention’s Article 5 obligations in regards to securing individual liberty.²⁶⁸ The United Kingdom had enacted police powers to arrest and detain individuals without charge for a period of time in its operations against Irish Republican Army (IRA) terrorist activity, and reserved a continuing right to do so in its derogation of Convention obligations in the Human Rights Act.²⁶⁹ Despite the European Court of Human Rights

264. See Human Rights Act, 1998, sched. 2 (Eng.) (including Convention articles 2-12 and 14-18).

265. 585 PARL. DEB., H.L. (5th ser.) (1997-98) 419 available at <http://www.publications.parliament.uk> (last visited Mar. 2, 2005).

266. Human Rights Act, 1998, c. 8 (Eng.) (“In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.”), available at <http://www.hmsso.gov.uk/acts/acts1998/19980042.htm> (last visited Mar. 2, 2005).

267. See 584 PARL. DEB., H.L. (5th ser.) (1997-98) 1266-67.

My Lords, I have not the least idea what the remedies the courts might develop outside Clause 8 could be if Article 13 was included. The noble and learned Lord has really made my point for me. Clause 8(1) is of the widest amplitude. No one is contending that it will not do the job. When we have challenged the proponents of the amendment on a number of occasions in Committee to say how Clause 8 might not do the job, they have been unable to offer a single example. Therefore, the argument is all one way. What we have done is sufficient.

Id.

268. Convention for Human Rights, *supra* note 14, art. 5 (declaring that “[e]veryone has the right to liberty and security of person” unless lawful processes have been enacted to arrest and detain individuals).

269. Human Rights Act, 1998, sched. 3, § 1 (Eng.), available at <http://www.hmsso.gov.uk> (last visited Mar. 2, 2005).

The Government found it necessary in 1974 to introduce and since then, in cases concerning persons reasonably suspected of involvement in terrorism connected with the affairs of Northern Ireland, or of certain offences under the legislation, who have been detained for 48 hours, to exercise powers enabling further detention without charge, for periods of up to five days, on the authority of the Secretary of State.

Id.

1988 judgment in *Brogan and Others v. The United Kingdom*,²⁷⁰ finding that the UK had violated Article 5 protections after detaining alleged terrorist suspects for several days without adhering to Convention obligations,²⁷¹ the UK has continued to reserve this power, and has moved to expand this derogation in regards to arresting foreign nationals in the wake of the 9/11 terrorist attacks.²⁷² It should be recognized, however, that even though derogations of Article 5 protections are permissible in certain circumstances, there are four Convention principles deemed so important that they cannot be derogated from in any circumstances.²⁷³ These include the Convention Article 2 right to life “except in respect of deaths resulting from lawful acts of war,” Article 3 prohibition of torture, Article 4 prohibition of slavery, and Article 7 prohibition of criminal penalties for non-criminal acts.²⁷⁴

270. *Brogan and Others v. The United Kingdom*, 11 Eur. H.R. Rep 117 (1988).

271. *Id.* 131-36.

272. Human Rights Act, 1998, amend. 2, order 2001 (Eng.), available at <http://www.hmso.gov.uk> (last visited Mar. 2, 2005).

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist.

Id.

273. Convention for Human Rights, *supra* note 14, art. 15.

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Id.

274. *Id.*

VII. THE DETENTION AND DEATH OF BAHHA MOUSA

The cases before the High Court of England and Wales originated from alleged human rights violations committed by British military forces in Iraq. The alleged violations were reported in an International Red Cross report that was leaked to the *Wall Street Journal* and reported in early May of 2004.²⁷⁵ The International Committee of the Red Cross (ICRC) asserted its displeasure with the public disclosure of the previously confidential report.²⁷⁶ It also claimed that the report was communicated to the Coalition Provisional Authority (CPA) of Iraq in February of 2004, and was based on information gathered throughout 2003.²⁷⁷ The 24-page report was based on interviews with Iraqi detainees and other witnesses, and concluded that CPA forces had allegedly engaged in widespread abuse of prisoners that violated international human rights law.²⁷⁸ The ICRC reported that the most frequent forms of alleged abuses by CPA forces included prolonged hooding of detainees; beatings with guns and other objects; psychological abuse; sleep, food, and water deprivation; sexual humiliation; and other forms of maltreatment.²⁷⁹

British lawyers have now filed cases against the United Kingdom triggered by the ICRC report and other accounts.²⁸⁰ These cases involve circumstances in which British soldiers allegedly shot and killed Iraqis while in their homes, cars, or other public

275. David S. Cloud, et al., *Red Cross Found Widespread Abuse of Iraqi Prisoners; Confidential Report Says Agency Briefed U.S. Officials on Concerns Repeatedly*, WALL ST. J., May 7, 2004, at A1; David S. Cloud, *Red Cross Cited Detainee Abuse Over a Year Ago; Agency Filed Complaints About Abu Ghraib Prison Months Before U.S. Probe*, WALL ST. J., May 10, 2004, at A1.

276. Press Release, International Committee of the Red Cross, Iraq: ICRC explains position over detention report and treatment of prisoners (May 8, 2004) (asserting that ICRC "reports carry a specific mention that they are strictly confidential and intended only for the authorities to which they are presented. . . . As already indicated this report was, however, released without our consent"), available at <http://www.icrc.org> (last visited Mar. 2, 2005).

277. *Id.* ("[T]his report includes observations and recommendations from visits that took place between March and November 2003. The report itself was handed over to the Coalition Forces (CF) in February of 2004.")

278. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004) [hereinafter ICRC REPORT].

279. *Id.* ¶ 25 (outlining "methods of ill-treatment most frequently alleged during interrogation"). Public disclosure of these allegations of prisoner abuse is most frequently credited to an article published by the *New Yorker* days before the ICRC report was leaked to the *Wall Street Journal*. See Seymour Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, available at <http://www.newyorker.com> (last visited Mar. 2, 2005).

280. Public Interest Lawyers, *Iraq Litigation*, available at <http://www.publicinterestlawyers.co.uk> (last visited Mar. 2, 2005) (describing cases brought by Iraqi families against the United Kingdom).

places.²⁸¹ One case involves the alleged beating to death of an Iraqi man while in detention. As noted in the ICRC report, the man, earlier identified as Baha Mousa, was detained by British soldiers along with others who had raided the Basra hotel he worked at.²⁸² According to the report:

[The detained men] were made to kneel, face and hands against the ground, as if in a prayer position. The soldiers stamped on the back of the neck of those raising their head. . . . The suspects were taken to Al-Hakiyima, a former office previously used by the [Iraqi Intelligence Service] in Basrah and then beaten severely by CF personnel. One of the arrestees died following the ill-treatment Prior to his death, his co-arrestees heard him screaming and asking for assistance.

The issued “International Death Certificate” mentioned “Cardio-respiratory arrest-asphyxia” as the condition directly leading to the death.²⁸³

According to witness accounts reported earlier, witnesses alleged that Mousa and others were arrested by British soldiers, bound with flexi-cuffs, hooded, and severely beaten.²⁸⁴ The detained men were repeatedly kicked in their kidneys and forced to dance.²⁸⁵ Various medical documents reported that Mousa and the other detained men were seriously beaten after arrest.²⁸⁶ The family of Mousa accepted \$3,000.00 in compensation for his death.²⁸⁷

Mousa’s family and others then disputed a government “policy decision” to not conduct an independent inquiry into his death and deaths of others allegedly committed by British soldiers, and they

281. *Id.* (describing the cases of Hazim Jum’aa Gatteh Al-Skeini — shot during a funeral; Hannan Mahaibas Saeed Shmailawi — shot while eating dinner in her home; Muhammad Abdul Ridha Salim — shot while at a family member’s home; Waleed Fayayi Muzban — shot from behind while driving).

282. ICRC REPORT, *supra* note 278, ¶ 16 (describing arrest of Baha Mousa and others on September 13, 2003).

283. *Id.*

284. Rory McCarthy, “They were kicking us, laughing. It was a great pleasure for them,” THE GUARDIAN (London), Feb. 21, 2004, (describing witness accounts of men arrested at a Basra hotel by PCA forces), available at LEXIS, European News Sources File.

285. *Id.* (describing witness accounts in which British soldiers repeatedly kicked detainees and forced them to dance “like Michael Jackson”).

286. *Id.* (describing medical reports alleging kidney failure and severe beatings).

287. *Id.* (“Since then [Mousa’s father] has accepted \$3,000 (about £1,600) as part of a compensation payment for his son’s death.”).

won the right to a full hearing over the matter before the High Court of England and Wales.²⁸⁸ Lawyers for the families have acknowledged that jurisdiction vis-à-vis the Human Rights Act and European Convention is “[t]he crucial issue the High Court must decide.”²⁸⁹ It should be noted again that by incorporating the European Convention’s principles via the Human Rights Act, the United Kingdom’s courts now “must take into account” European Court of Human Rights case law.²⁹⁰ The remainder of this Article will provide an overview of European Court of Human Rights case law supporting the argument that the United Kingdom does maintain extraterritorial jurisdiction over its forces in Iraq, and more importantly, that the death of Mousa and torture of other Iraqis violates the European Convention’s Article 3 prohibition of torture and Article 2 right to life.

VIII. THE EUROPEAN COURT OF HUMAN RIGHTS AND ARTICLE 3:
IRELAND, TOMASI, RIBITSCH, AND SELMOUNI

The landmark court case involving Convention violations of Article 3²⁹¹ was *Ireland v. The United Kingdom*, decided in 1978.²⁹² In response to terrorist activity by both the IRA and loyalist forces,²⁹³ the government of Northern Ireland enacted special powers to arrest and detain individuals in order to prevent terrorism.²⁹⁴ These powers enabled authorities to arrest individuals without warrant and traditional due process rights for detention and interrogation for varied periods of time, including indefinitely.²⁹⁵ The United Kingdom notified the Council of Europe of their intention to derogate from the Convention in order to exercise these powers.²⁹⁶

288. *Iraqi Families Win Right to Challenge Government*, THE GUARDIAN (London), May 11, 2004 (reporting a High Court decision to conduct a full hearing on the alleged killings), available at LEXIS, European News Sources File.

289. Karen McVeigh, *Relatives of Dead Iraqis Win High Court Challenge*, THE SCOTSMAN (Edinburgh), May 12, 2004, available at LEXIS, European News Sources File.

290. Human Rights Act, 1998, c. 2 (Eng.), available at <http://www.hms0.gov.uk> (last visited Mar. 2, 2005).

291. Convention for Human Rights, *supra* note 14, art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

292. *Ireland v. The United Kingdom*, 2 Eur. H.R. Rep. 25 (1978).

293. *Id.* at 35 (“The situation worsened in 1970. The number of explosions recorded by the police jumped dramatically from a total of eight in 1969 to 155 in 1970. Some explosions were caused by Loyalists . . . but there is no dispute that the majority were the work of the IRA.”).

294. *Id.* at 50.

295. *Id.* at 51-57 (describing special powers regulations enacted by the government of Northern Ireland).

296. *Id.* at 51 (noting the UK’s official notification of derogation to the European Convention six times in the 1970s).

In 1971, the United Kingdom's security forces initiated Operation Demetrius — a wide-scale operation in which hundreds of suspected IRA members were detained and interrogated by the Royal Ulster Constabulary.²⁹⁷ Although the majority of detainees were released within several days, a number of detainees were held for “interrogation in depth.”²⁹⁸ Five general categories of interrogation techniques were employed by government forces in interrogation: 1) “wall-standing” (keeping detainees in “stress positions” for prolonged periods of time); 2) hooding; 3) prolonged exposure to loud noise; 4) sleep deprivation; and 5) food and water deprivation.²⁹⁹ In addition to these conditions, detained individuals alleged that a variety of acts of maltreatment were committed against them, including severe beatings.³⁰⁰

The Court noted that Article 3 maltreatment exists upon a finding that a level of severity has been reached as determined by the factual circumstances at hand.³⁰¹ It also reaffirmed the principle that Article 3 could not be derogated from in any form or in any circumstances.³⁰² The Court then recognized that the five interrogation techniques did comprise “inhuman treatment” outlawed by the Convention.³⁰³ Reviewing allegations by detainees at several different holding locations, the Court found that this pattern of inhuman treatment of detainees was practiced in many, although not all, detention centers.³⁰⁴ The Court thus held that the use of the five interrogation techniques did amount to a violation of Article 3 by the United Kingdom.³⁰⁵

Since *Ireland*, a number of cases have spoken specifically towards Article 3 violations committed by government forces against detainees. *Tomasi v. France*³⁰⁶ concerned the detention of a Corsican separatist who had allegedly participated in an attack against a French military garrison.³⁰⁷ Tomasi was arrested and kept in police custody for forty-eight hours, and alleged that he had been

297. *Id.* at 38 (outlining the arrest of some 350 individuals in an operation “directed against the IRA organisation as a whole”).

298. *Ireland*, 2 Eur. H.R. Rep. at 59.

299. *Id.* (outlining interrogation techniques used by government forces of alleged IRA detainees).

300. *Id.* at 61-70 (describing allegations of mistreatment of detainees).

301. *Id.* at 79 (noting that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3”).

302. *Id.* (“The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”).

303. *Id.* at 79-80.

304. *Id.* at 79-85.

305. *Id.* at 107.

306. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) (1993).

307. *Id.* at 9.

beaten and maltreated during his interrogation.³⁰⁸ Doctors appointed by French judicial officials confirmed after medical examination that he had sustained various lesions that may be consistent with his allegations.³⁰⁹ However, the French court removed the case on the grounds that it was impossible to prove with certainty that his alleged beating was conducted while he was in detention, as police had expressly denied any such actions.³¹⁰ Tomasi then applied to the European Court with Article 3 and other claims, which were admitted for review.³¹¹

The Court noted France's argument that although Tomasi did sustain apparent injuries, it was impossible to prove that a causal link existed implicating police for his injuries.³¹² Notwithstanding the absence of proof indicating that Tomasi's injuries were sustained while in detention, the Court found it "sufficient to observe that the medical certificates and reports, drawn up in total independence by medical practitioners, attest to the large number of blows inflicted on Mr[.] Tomasi and their intensity," and subsequently held that his treatment was inhuman and degrading and therefore in violation of Article 3.³¹³ *Tomasi* indicated that even in the absence of evidence proving a direct link between maltreatment and the actions of government agents, a significant body of evidence showing that maltreatment may have occurred in detention is sufficient to find a violation of Article 3.

The case of *Ribitsch v. Austria* further developed how the Court would treat evidence of maltreatment in detention.³¹⁴ Ribitsch was an alleged drug dealer who had been apprehended by police in the investigation of heroin overdose-related deaths.³¹⁵ After his release from detention, a medical examination indicated that he had several bruises and "symptoms characteristic of a cervical syndrome, [and] that he was suffering from vomiting and a violent headache."³¹⁶ Ribitsch claimed that he was repeatedly beaten

308. *Id.* at 19-20 (outlining Tomasi's interrogation and alleged maltreatment).

309. *Id.* at 20-22 (outlining results of medical examinations performed by doctors and finding that the lesions were "consistent with Mr. Tomasi's declarations but could equally have a different traumatic origin").

310. *Id.* at 30 (citing the Court of Cassation's conclusions that furthering Tomasi's case would be "pointless").

311. *Tomasi*, 241 Eur. Ct. H.R. (ser. A) at 32 (finding Tomasi's case admissible for review of Article 3, Article 5, and Article 6 claims).

312. *Id.* at 40 (noting the Government's position that "excluded any presumption of the existence of a causal connection" between Tomasi's injuries and his detention).

313. *Id.* at 42.

314. *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) (1995).

315. *Id.* at 8-9.

316. *Id.* at 9.

during his interrogation, but police claimed his injuries were caused after he slipped while getting out of a police car.³¹⁷

As in *Tomasi*, medical examination showed that Ribitsch had sustained injuries, but because it was impossible to conclude that they were a result of an alleged beating in detention absent other evidence,³¹⁸ he lost his case before an Austrian court.³¹⁹ Before the European Court's review of Ribitsch's Article 3 claim, Austria argued that alleged beating and injuries by government agents must be proved beyond a reasonable doubt.³²⁰ The Court, however, came to another conclusion. Noting that it was "not disputed that Mr[.] Ribitsch's injuries were sustained during his detention in police custody,"³²¹ the Court found that Austria was "accordingly under an obligation to provide a plausible explanation of how the applicant's injuries were caused."³²² The Court also noted the "particular vulnerability" of Ribitsch as an individual detained by government agents.³²³ Because it did not find it plausible that his injuries were caused by slipping out of a police car door, and in the absence of another explanation, the Court found Austria had violated Ribitsch's Article 3 rights.³²⁴ *Ribitsch* indicates that not only will an Article 3 violation be found in the absence of direct proof establishing a link between government conduct and injuries sustained in detention, but places a positive obligation on governments to provide a suitable explanation for injuries in the absence of such evidence.

The case of *Selmouni v. France*³²⁵ is also a notable development of the European Convention's Article 3 case law. After being detained by French police for suspected drug-trafficking, Selmouni alleged that he was repeatedly punched, beaten with a bat, urinated on, sodomized with a baton, and threatened with blow torches and forced injection of a syringe by the police.³²⁶ Medical examination conducted during his period of interrogation indicated that he had sustained lesions throughout his head and body that "corresponds to the period of [Selmouni's] police custody."³²⁷ Unlike in *Tomasi* and *Ribitsch*, a French domestic court found four police officers

317. *Id.* (describing differing accounts of Ribitsch's detention).

318. *Id.* at 18-19 (citing a medical examination by a forensic expert).

319. *Ribitsch*, 336 Eur. Ct. H.R. (ser. A) at 20-22.

320. *Id.* at 24.

321. *Id.* at 25-26.

322. *Id.*

323. *Id.* at 26.

324. *Ribitsch*, 336 Eur. Ct. H.R. (ser. A) at 25-26 (concluding that Austria was in violation of Article 3).

325. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149.

326. *Id.* at 160-63.

327. *Id.* at 159-60 (citing medical reports of Selmouni's condition during his detention).

guilty of assault.³²⁸ Three of the police officers were sentenced to twelve- to fifteen-month suspended imprisonments, and the commanding officer to eighteen months of imprisonment, fifteen of which were suspended.³²⁹

In the European Court's consideration of the case, it noted that "[e]ven in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment."³³⁰ Relying on the medical examinations conducted during Selmouni's detention, the Court found that he had suffered extreme physical injuries.³³¹ Unlike in *Ireland*, where the Court had found that the United Kingdom had violated Article 3 by causing inhuman treatment,³³² it examined whether the police conduct in the instant case amounted to the more egregious level of torture prohibited by the same article.³³³ Citing the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted,"³³⁴ the Court found that the police conduct did amount to torture.³³⁵ France thus became the first Western European nation to be found in violation of the Convention's prohibition against torture.³³⁶

IX. THE EUROPEAN COURT OF HUMAN RIGHTS AND ARTICLE 2: *MCCANN, ÇAKICI, TIMURTAŞ, AND VELIKOVA*

Significant Article 2 case law of the Convention began in claims brought against the United Kingdom. *McCann and Others v. The United Kingdom*³³⁷ was the first European Court case to focus on an intentional killing and alleged violation of Article 2, which

328. *Id.* at 170-72 (noting the decision of the Versailles Court of Appeals).

329. *Id.* (outlining the sentencing of the four police officers).

330. *Selmouni*, 1999-V Eur. Ct. H.R. at 181.

331. *Id.* at 183 (outlining Selmouni's physical abuse and exposure to "heinous and humiliating" acts).

332. *See supra* notes 292-305 and accompanying text for a discussion of *Ireland*.

333. Convention for Human Rights, *supra* note 14, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

334. *Selmouni*, 1999-V Eur. Ct. H.R. at 181 (quoting the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

335. *Id.* at 183-84 (finding a violation of Article 3's prohibition of torture).

336. The government of Turkey had previously been found in violation of Article 3's prohibition against torture. *See, e.g.*, *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251, 295-97 (1998) (violation of Article 3's prohibition of torture for beating, sexual humiliation, rape, and use of a water hose on a Kurdish woman by Turkish security officials).

337. *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995).

enshrines the basic right to life.³³⁸ In *McCann*, members of British military Special Air Services (SAS) were detached to Gibraltar in order to arrest three IRA members.³³⁹ The SAS believed that the IRA members were planning to detonate a car bomb near a military ceremony.³⁴⁰ The SAS and local police tracked the three suspects to an area within the proximity of the military ceremony and identified what they believed to be “a ‘suspect car bomb.’”³⁴¹

The SAS agents followed the three suspects walking away from the car.³⁴² Believing that they were about to detonate the car bomb, the agents shot one suspect after he allegedly reached across his front side in a rapid manner for a presumed detonation device.³⁴³ They then shot the other suspect after she allegedly reached for her handbag for a presumed weapon or detonation device.³⁴⁴ The third suspect was also shot after he was seen reaching for a jacket pocket.³⁴⁵ All three suspects were then searched and no weapons or detonation devices were found.³⁴⁶ The vehicle identified as the suspect car bomb was also searched and no bomb was found.³⁴⁷ However, an explosive device was later found in a car rented by one of the suspects.³⁴⁸ Family members of the deceased IRA members later challenged the United Kingdom in both Gibraltar and

338. Convention for Human Rights, *supra* note 14, art. 2.

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Id.

339. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 11-12 (describing orders of SAS members to arrest an IRA active service unit in Gibraltar).

340. *Id.* at 14 (describing an intelligence briefing by SAS in regards to the possible actions of Daniel McCann, Sean Savage, and Mairead Farrell).

341. *Id.* at 21 (describing a brief examination of a car believed to be holding a bomb).

342. *Id.* at 22-23 (describing observations of the three IRA suspects by SAS agents).

343. *Id.* at 23 (describing the shooting of Daniel McCann).

344. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 23-24 (describing the shooting of Mairead Farrell).

345. *Id.* at 27 (describing the shooting of Sean Savage).

346. *Id.* at 30 (“After the shooting, the bodies of the three suspects and Farrell’s handbag were searched. No weapons or detonating devices were discovered.”).

347. *Id.* (“The bomb-disposal team opened the suspect white Renault car but found no explosive device or bomb.”).

348. *Id.* at 31 (describing the discovery of explosives in a car rented by Mairead Farrell under the pseudonym of Katharine Smith).

Northern Ireland and lost their cases.³⁴⁹ They then sued the UK, alleging a violation of Article 2, on the grounds that the use of lethal force and their subsequent deaths “were not absolutely necessary.”³⁵⁰

In determining whether or not the United Kingdom had violated Article 2, the Court first noted that the prohibition against the taking of life by government forces was not absolute, but could be permitted under very strict conditions.³⁵¹ A determination of whether or not a violation had occurred must take into account whether or not it was “absolutely necessary” to intentionally take life, given the factual circumstances of the situation.³⁵² An examination of such circumstances includes not only a review of the government force’s actions, but a wider scrutiny of “the planning and control of the actions under examination.”³⁵³

Focusing on the actions of the SAS agents, the Court found no evidence that the killings of the three IRA members were premeditated acts.³⁵⁴ Furthermore, although it was later found that none of the suspects had weapons or explosive detonators on them, the Court recognized that SAS agents were acting under a reasonable belief that they did have such items with them and were imminently prepared to use them.³⁵⁵ Given such considerations, the Court found that the shootings were justifiable since the agents were acting under the belief that they were about to prevent the taking of innocent lives, and that their actions themselves did not amount to a violation of Article 2.³⁵⁶

349. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 31-38 (describing proceedings of the applicants failed challenges against the United Kingdom in both Gibraltar and Northern Ireland).

350. *Id.* at 45 (outlining the applicant’s Convention challenges alleging a violation of Article 2).

351. *Id.* at 45-46 (“It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention.”).

352. *Id.* at 46 (“[T]he use of the term ‘absolutely necessary’ in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society.’”).

353. *Id.*

354. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 51-52 (finding no evidence that the shootings were planned in advance as a form of intentional assassination).

355. *Id.* at 57-58 (reviewing the actions of the SAS soldiers prior to the shootings).

356. *Id.* at 58-59.

The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an

However, in regards to the Article 2 obligations in the planning and control of the SAS mission, the Court reached a different conclusion. It noted that the situation in which the shootings occurred could have been entirely preempted had the IRA members been arrested prior to that day, upon their arrival in Gibraltar, which was monitored by the government.³⁵⁷ It also concluded that the security forces — with the knowledge that the SAS agents would in all likelihood kill the IRA members if they believed they were about to detonate a bomb — had an obligation to ensure that their intelligence information was either entirely correct or contained sufficient notice that there may not be enough of an absolute need to resort to lethal force.³⁵⁸ Given these considerations, the Court was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence,”³⁵⁹ and consequently found the United Kingdom in violation of Article 2.³⁶⁰ The *McCann* holding thus indicated how closely the Court would scrutinize government use of lethal force, looking not only to the actions of the government agents themselves, but also to the planning and operationalization context to determine if lethal force was absolutely necessary or could have been preempted.

Since *McCann*, cases have developed combining Article 2 claims with the factual circumstances of arrest and detention which characterize the Article 3 cases discussed above.³⁶¹ Several illustrative cases originate from Turkish military operations against the PKK. In *Çakici v. Turkey*,³⁶² plaintiffs alleged that

honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. . . .

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision.

Id.

357. *Id.* at 59-60 (noting the failure to arrest the suspects prior to their shootings).

358. *Id.* at 61-62 (discussing considerations as to whether or not the use of lethal force was absolutely necessary).

359. *McCann*, 324 Eur. Ct. H.R. (ser. A) at 62.

360. *Id.* (“Accordingly, the court finds that there has been a breach of Article 2 of the Convention.”).

361. *See supra* Part VIII.

362. *Çakici v. Turkey*, 1999-IV Eur. Ct. H.R. 583; *see also* Gobind Singh Sethi, *The European Court of Human Rights’ Jurisprudence on Issues of Forced Disappearances*, 8 HUMAN RIGHTS BRIEF 29 (2001); Irum Taqi, Note, *Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights’ Approach*, 24 FORDHAM INT’L L.J. 940 (2001) (providing analyses of European Court of Human Rights examination of “disappearance” cases involving Turkish operations against Kurdish separatist forces). Both Sethi and Taqi provide a thorough overview of *Çakici* and other European Court of Human Rights case law focusing on evidential issues related to alleged disappearances and deaths of Kurds in Turkish custody.

Çakici was taken into custody by Turkish forces from his village and detained for an unknown period of time at several holding facilities — where witnesses claimed to have seen him after he was tortured.³⁶³ Turkey argued that they had never detained him and that he had eluded security forces as a wanted PKK member until he was allegedly found dead with dozens of other PKK fighters after a clash with government forces.³⁶⁴

The Council of Europe's then fact-finding entity — the Commission on Human Rights — concluded after an investigation, involving interviews with several witnesses, that Çakici had been detained by the security forces and was beaten on at least one occasion.³⁶⁵ Noting Article 2 § 1's requirement "that the right to life be protected by law," and that there was "sufficient circumstantial evidence" showing that he had been detained by the government, the Court found that Turkey had a positive obligation to protect his life while in its custody.³⁶⁶ The Court subsequently found that Turkey had violated Article 2's obligation to protect the right to life.³⁶⁷ It also found Turkey in violation of Article 3's prohibition of torture as well, deducing from witness testimony that Çakici was tortured prior to his death.³⁶⁸

In *Timurtaş v. Turkey*,³⁶⁹ Timurtaş was allegedly apprehended and detained by Turkish security forces from his village along with several other men.³⁷⁰ Although the government denied that he had ever been detained,³⁷¹ evidence was provided that Timurtaş had been detained and interrogated by Turkish forces.³⁷² Citing to *Selmouni*, the Court recognized that "where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible

363. *Çakici*, 1999-IV Eur. Ct. H.R. at 593 (describing the plaintiffs' allegations in regards to Çakici's disappearance).

364. *Id.* (describing the government's arguments in regards to Çakici's disappearance).

365. *Id.* at 599-601 (outlining the Commission's findings).

366. *Id.* at 610 (holding that Turkey had a positive obligation to protect Çakici's right to life after detaining him).

367. *Çakici*, 1999-IV Eur. Ct. H.R. at 610-11 ("As Ahmet Çakici must be presumed dead following an unacknowledged detention by the security forces, the Court finds that the responsibility of the respondent State for his death is engaged.").

368. *Id.* at 611-12 (finding witness testimony credible enough to indicate that Turkey had also violated Article 3 by torturing Çakici while he was detained).

369. *Timurtaş v. Turkey*, 2000-VI Eur. Ct. H.R. 303.

370. *Id.* at 311-12 (describing the plaintiffs' allegations in regards to Timurtaş' disappearance).

371. *Id.* at 313 (describing the government's arguments in regards to Timurtaş' disappearance).

372. *Id.* at 314 (describing a hearing of the Commission on Human Rights in which a military report indicated that Timurtaş had been arrested and detained by the security forces).

explanation of how those injuries were caused.”³⁷³ Citing *Çakici*, it then noted that even if the detained individual’s body is not found, circumstantial evidence can lead to a presumption of death in custody.³⁷⁴ Because Timurtaş^o had been missing for over six years, the length of his disappearance itself was a significant factor indicating the likelihood that he had died in custody.³⁷⁵ As in *Çakici*, the Court concluded that Timurtaş had died in “an unacknowledged detention,” and that Turkey had thus violated Article 2 for failing to protect his life while in custody.³⁷⁶

In a 2000 case involving an alleged Article 2 violation while in custody not involving a disappearance, the Court reviewed the death of a Gypsy while in police custody in *Velikova v. Bulgaria*.³⁷⁷ In *Velikova*, Slavtcho Tsonchev was arrested by Bulgarian police for allegedly being involved in the theft of cattle.³⁷⁸ At the time of his arrest, Tsonchev had been drinking substantial amounts of alcohol with friends.³⁷⁹ According to police reports, he was too drunk to be questioned and was left in an arrest cell where he began vomiting and allegedly fell on the ground due to being intoxicated.³⁸⁰ Later in the night, Tsonchev was found dead at the police station.³⁸¹ An autopsy conducted the next day found numerous bruises on his face, arms, and legs, and that “[t]he cause of Mr[.] Tsonchev’s death was the acute loss of blood resulting from the large and deep haematomas on the upper limbs and the left buttock The injuries are the result of a blunt trauma.”³⁸²

The Court, again citing to *Selmouni*, restated the Convention obligation to protect a detained individual’s health and safety while in government custody under Article 2.³⁸³ It dismissed the government’s claim that Tsonchev died from injuries caused by falling while drunk, as the medical report indicated that his death

373. *Id.* at 330.

374. *Timurtaş*, App. 2000-VI Eur. Ct. H.R. at 330 (holding that sufficient circumstantial evidence can allow a conclusion that an individual has died in custody).

375. *Id.* at 330-31 (discussing the length of Timurtaş’ disappearance and noting “that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died”).

376. *Id.* at 331-32 (finding a violation of Article 2 because Timurtaş was presumed to have died during government custody).

377. *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1.

378. *Id.* at 9-10 (describing circumstances of Tsonchev’s arrest).

379. *Id.* at 10 (describing witness testimony that Tsonchev had been drunk at the time of his arrest, but did not seem to be experiencing any medical problems).

380. *Id.* at 10-12 (describing police accounts of Tsonchev’s detention).

381. *Id.* at 12 (noting police testimonies as to the discovery of Tsonchev’s dead body).

382. *Velikova*, 2000-VI Eur. Ct. H.R. at 13-14.

383. *Id.* at 23 (noting that “the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation” in regards to injuries or deaths that occur in government custody).

was due to blood loss caused by blunt trauma.³⁸⁴ It thus concluded that Tsonchev died as a result of intentional injuries sustained while he was in police custody, amounting to a violation of Article 2.³⁸⁵

X. CONCLUSION: ANOTHER LOOK AT THE CASE OF BAHA MOUSA

Revisiting the case of Baha Mousa,³⁸⁶ the European Court of Human Rights' Article 2 and Article 3 case law make it abundantly clear that his torture and death violated both articles. Mousa and others were arrested and taken into British custody.³⁸⁷ In detention, the Iraqis were subjected to the identical treatment deemed illegal in *Ireland* — hooding, forced stress positions, and beatings³⁸⁸ — as violations of Article 3's prohibition of inhuman treatment.³⁸⁹ *Tomasi* and *Ribitsch* demonstrate the Court's willingness to find Article 3 violations even in the absence of a causal link between injuries and the state actors' alleged conduct.³⁹⁰ *Ribitsch* also imposed an Article 3 obligation on the alleged state perpetrator to either safeguard an individual while in custody or provide a plausible explanation for injuries sustained in custody.³⁹¹ As Mousa allegedly died as a result of this treatment, it is arguable that the beatings he received rose to the degree of severity recognized in *Selmouni* as torture.³⁹² The conduct of British forces would therefore amount to at least a violation of Article 3's prohibition of inhuman treatment and likely a violation of its prohibition of torture.

The Turkish disappearance cases of *Çakici* and *Timurtaş* indicate that even in the absence of direct evidence or even a body, the Court will find an Article 2 violation of a state's obligation to protect life.³⁹³ Such a violation can be concluded on the basis of a

384. *Id.* at 23-24 (reviewing evidence regarding Tsonchev's death).

385. *Id.* at 24 ("[T]here is sufficient evidence on which it may be concluded beyond reasonable doubt that Mr. Tsonchev died as a result of injuries inflicted while he was in the hands of the police. . . . The Court concludes, therefore, that there has been a violation of Article 2.").

386. *See supra* Part VII for a discussion of Baha Mousa's death.

387. ICRC REPORT, *supra* note 278, ¶ 16 (describing arrest of Baha Mousa and others on September 13, 2003).

388. *Id.* (describing conditions of detainment while in British custody); McCarthy, *supra* note 284 (describing witness accounts of men arrested at a Basra hotel by PCA forces).

389. *Ireland*, 2 Eur. H.R. Rep. at 79 (finding the interrogation techniques used by security forces against IRA suspects to be violations of Article 3).

390. *See supra* notes 306-24 and accompanying text for a discussion of *Tomasi* and *Ribitsch*.

391. *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) (1995) 25-26 (recognizing Austria's obligation to provide a plausible explanation for injuries sustained while in police custody).

392. *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 183-84 (finding that the conduct of French police amounted to an Article 3 violation of the prohibition against torture).

393. *See supra* notes 362-76 and accompanying text for a discussion of *Çakici* and *Timurtaş*.

sufficient amount of circumstantial evidence alone.³⁹⁴ In Mousa's case, it is not a situation in which circumstantial evidence alone exists — on the contrary, his dead body was produced after having been taken into custody.³⁹⁵ His case would therefore be analogous to that in *Velikova*, where an Article 2 violation will be found upon the death of an individual in state custody.³⁹⁶ Such a conclusion would follow from the Court's previously cited recognition "that where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused."³⁹⁷ Undoubtedly, there is no "plausible explanation" that can be provided in regards to Mousa's death in custody other than that it was caused by the conduct of British military personnel detaining him. In reference to the Court's high degree of scrutiny employed in *McCann*, it should also be clear that his death by torture was by no means "absolutely necessary" to the furthering of any legally acceptable ends.³⁹⁸ An Article 2 violation of the right to life should thus be found in regards to Mousa's death.

The critical question, of course, is whether the European Convention will apply extraterritorially to the United Kingdom in Iraq. The Court's rulings in *Loizidou* and *Cyprus* indicate that military occupation and effective control of another state imposes an obligation on the occupying state to extend the protections of the Convention on the occupied populace.³⁹⁹ Such effective control was not found to exist in *Banković* vis-à-vis NATO air strikes.⁴⁰⁰ Instead, the *Öcalan* judgment is factually analogous to Mousa's case, in which the Court found that Turkey had jurisdiction over Öcalan through his arrest conducted by Turkish forces at Nairobi Airport.⁴⁰¹ Mousa's arrest and detention should be recognized as a deprivation of his individual liberty and establishment of effective control over him by British military personnel. Therefore, the European Convention should apply to the United Kingdom in Iraq in Mousa's case.

394. *Timurtaş v. Turkey*, 2000-VI Eur. Ct. H.R. 303, 330 (holding that sufficient circumstantial evidence can allow a conclusion that an individual has died in custody).

395. ICRC REPORT, *supra* note 278, ¶ 16 (describing witness accounts of Mousa's maltreatment and death).

396. *Velikova v. Bulgaria*, 2000-VI Eur. Ct. H.R. 1, 24 (finding Bulgaria in violation of Article 2 for the death of Tsonchev while in police custody).

397. *Timurtaş*, 2000-VI Eur. Ct. H.R. at 330.

398. See *supra* notes 337-61 and accompanying text for a discussion of *McCann*.

399. See *supra* notes 136-57 and accompanying text for a discussion of the *Cyprus* cases.

400. *Banković and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 333, 356-57 (ruling against the plaintiffs' argument that NATO exerted control over Yugoslavia).

401. *Öcalan v. Turkey*, 37 Eur. H.R. Rep. 238, 274-75 (holding that Turkey had jurisdiction over Öcalan through his arrest).

A Convention remedy should especially exist because, upon the occupation of Iraq, multinational military personnel of the Coalition Provisional Authority of Iraq were deemed “immune from Iraqi legal process.”⁴⁰² Instead, coalition forces are “subject to the exclusive jurisdiction of their Sending States.”⁴⁰³ Having adopted the European Convention on Human Rights through the Human Rights Act 1998 — which requires domestic courts to consider European Court case law⁴⁰⁴ — the U.K. judiciary should review the Mousa case, and related cases involving alleged human rights violations by British forces, in reference to the European Court’s case law. This article focuses on the Mousa case and the Convention’s Article 2 and Article 3 case law as effective control was established over Mousa through his arrest. However, it should be noted that other Convention case law exists concerning Article 2 claims that may be applicable to other civilian deaths that have occurred in military firefights.⁴⁰⁵ In the event of an unsatisfactory judicial outcome in the United Kingdom, Mousa’s family and others should also have recourse to pursue claims against the United Kingdom before the European Court of Human Rights because it is a signatory to the European Convention.

As a policy matter, the extraterritorial application of the European Convention raises a fundamental question as to the continued viability of international human rights law: If a state can be liable for the commission of a human rights violation within its own territory, should it not also be responsible for the same act conducted abroad? It seems anathema to principles of universal human rights law that a state may be able to commit egregious acts with impunity abroad and not be required to answer to principles of international law. In this era of intervention, the European Convention on Human Rights should extend to those lawless areas of Europe to provide redress for such violations where obligations to protect human rights have been ignored, including such areas in Iraq.

402. Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, Coalition Provisional Authority, Order No. 17, § 2 ¶ 1, *available at* <http://www.iraqcoalition.org> (last visited Mar. 4, 2005).

403. *See id.* § 2 ¶ 3; *see also* PUBLIC INTEREST LAWYERS, IRAQ LITIGATION, *available at* <http://www.publicinterestlawyers.co.uk> (last visited Mar. 4, 2005) (“In the case of Iraq, the argument for domestic accountability is made even stronger in light of the immunity afforded to Coalition personnel (under Coalition Provisional Authority Order 17) from prosecution in Iraqi courts. Such personnel enjoy complete immunity from criminal and civil liability under Iraqi jurisdiction.”).

404. Human Rights Act, 1998, c. 2 (Eng.).

405. *See generally* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751 (finding an Article 2 violation because of insufficient precautions to protect civilian life during a military operation).

COMPARATIVE HUMAN RIGHTS JURISPRUDENCE IN AZERBAIJAN: THEORY, PRACTICE AND PROSPECTS

CHARLES H. MARTIN*

I. INTRODUCTION. THE AZERBAIJAN REPUBLIC AND CONSTITUTION

The Republic of Azerbaijan (Azerbaijan) is a nation of approximately eight million people located on the western shore of the Caspian Sea and at the southeastern end of the Caucasus Mountains region.¹ The population is composed primarily of Azerbaijani Turks, with strong cultural influences from neighboring Russia, Georgia and Iran.² Azerbaijan has been independent of the former Union of Soviet Socialist Republics (USSR) since 1991.³ Nearly 75% of Azerbaijan's gross domestic product is generated by petroleum revenues.⁴ Azerbaijan became part of the Russian Empire in the 1820s.⁵ By 1900, the Baku/Apsheron region produced more oil than all U.S. wells combined, and approximately half of the world's total output.⁶ During and after the First World War, a secular, modernist local elite established the Azerbaijan Democratic Republic from 1918-1920, the first democracy in a Muslim nation.⁷

After a period of increasing output under the rule of the USSR beginning in 1920, Azerbaijan oil output peaked in 1940, then began a slow decline.⁸ In 1994, however, Azerbaijan signed the "Contract-of-the-Century" with international oil companies and

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1. Gregory Twyman, *Geography and Climate*, in GATEWAY TO AZERBAIJAN: UNITED STATES-AZERBAIJAN CHAMBER OF COMMERCE (USACC), 2004 VIRTUAL INVESTMENT GUIDE 8 (Lydia Borland ed., 5th ed. 2004), available at <http://www.usacc.org/investmentguide.pdf>.

2. See Audrey Alstadt, *Azerbaijan: Historical Overview*, in GATEWAY TO AZERBAIJAN, *supra* note 1, at 6. See also Gregory Twyman, *Geography and Climate*, in GATEWAY TO AZERBAIJAN, *supra* note 1, at 8.

3. Alstadt, *supra* note 2, at 6.

4. Frank Verrastro, *Political Environment: Risk Analysis*, in GATEWAY TO AZERBAIJAN, *supra* note 1, at 12.

5. Twyman, *supra* note 1, at 8.

6. Alstadt, *supra* note 2, at 6.

7. *Id.*; see also THOMAS DE WAAL, BLACK GARDEN: ARMENIA AND AZERBAIJAN THROUGH PEACE AND WAR 99 (2003) (short-lived republic granted the vote to women before the United Kingdom did).

8. CHARLES VANDER LEEUW, STORM OVER THE CAUCASUS 49 (1998) (annual oil production declined from 22.2 million tons in 1940 to 10 million tons in 1990); see also Elman Rustamov, *Overview of the Banking Sector*, in GATEWAY TO AZERBAIJAN, *supra* note 1, at 34 (annual oil production in 2006-2012 is projected to increase to about 65 million tons per year).

financial institutions for investment in oil and gas resources.⁹ This investment currently exceeds \$8 billion in oil and gas development projects, including over \$4 billion in oil and gas pipelines from the Baku region through Azerbaijan, Georgia and Turkey, which will transport Azerbaijan oil and natural gas to Western markets beginning in 2005.¹⁰ Other Caspian Region nations with oil and gas resources might use this pipeline infrastructure in future years.

Azerbaijan has an elected president and a uni-cameral national assembly, called the "Milli Majlis."¹¹ The Nakhichevan Autonomous Republic exclave of Azerbaijan, which is separated from the main territory of Azerbaijan by the nation of Armenia, has its own legislature and courts.¹² Azerbaijan lost the region of Nagorny-Karabakh, approximately 14% of its territory, to Armenian separatists, and suffered an influx of refugees as a result of a 1991-1994 war between Azerbaijan and the newly independent nation of Armenia.¹³

Azerbaijan's Constitution was adopted on November 12, 1995.¹⁴ Presidential elections have been held twice under the Constitution.¹⁵ In 1998, Heydar Aliev, a former member of the USSR Politburo,¹⁶ was elected to a full five-year term under the new 1995 Constitution, after first being elected president in 1993.¹⁷ In 2003, Heydar Aliev's son, Ilham Aliev, was elected president for a five-year term.¹⁸ The elections for president and for the Milli Majlis were criticized by foreign observers for, among other things, lack of access by the multiple opposition parties to electronic media controlled by the president's ruling party and its allies.¹⁹

The judicial system of Azerbaijan operates on the model of Russian civil code systems.²⁰ The Azerbaijan Constitution provides

9. Verrastro, *supra* note 4, at 12.

10. David Woodward, The "Contract of the Century" . . . 10 Years On, Presentation at 11th International Caspian Oil and Gas Conference (June 2, 2004) (on file with author). See also Rustamov, *supra* note 8, at 34.

11. AZERBAIJAN RESPUBLIKASI KONSTITUSIYA [Constitution], art. 7, available at <http://www.constitutional-court-az.org/const-contents.htm> (last visited Mar. 1, 2005).

12. *Id.* arts. 134-41.

13. See generally DE WAAL, *supra* note 7.

14. HUGH POULTON, ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION, AZERBAIJAN: PRESS FREEDOM OR PERSONAL FIEFDOM? para. 4.1 (Jan. 2001), at <http://www.article19.org>.

15. See *id.* paras. 2.3, 2.5.

16. Svante E. Cornell, *Democracy Falters in Azerbaijan*, 12.2 J. OF DEMOCRACY 118, 119 (Apr. 2001).

17. POULTON, *supra* note 14, para. 2.3.

18. International Foundation for Election Systems and CNN World/Election Watch, at <http://www.cnn.com> (Oct. 15, 2003).

19. *Resolution 1358 (2004): Functioning of Democratic Institutions in Azerbaijan*, paras. 6(i), 8(i), EUR. PARL. ASS. DEB. 2nd Sitting (Jan. 27, 2004), available at <http://assembly.coe.int> (last visited Feb. 16, 2005).

20. FAKHRI AKPEROV GUDRAT, A GUIDE TO THE REPUBLIC OF AZERBAIJAN LAW RESEARCH,

for a Constitutional Court of nine judges.²¹ The Court began operations in 1998.²² It is authorized, among other things, to review the conformity to the Constitution of executive and legislative branch laws, decrees and orders, Supreme Court decisions, municipal acts, and interstate agreements that “have not yet become valid.”²³ The Constitution (before the 2002 amendments) authorized the Court to interpret its terms only in response to inquiries of the president, the Milli Majlis, presidential Cabinet Ministers, the Supreme Court, and the Procurator’s (Prosecutor General’s) Office.²⁴ The Constitution provides that any laws or treaties cease to be valid and do not come into force, if so specified in a decision of the Court.²⁵

II. THEORIES OF INTERNATIONAL LAW INCORPORATION AND COMPARATIVE CONSTITUTIONAL JURISPRUDENCE

A. *Theories of Incorporation of International Law into Domestic Law*

One of the central issues of constitutional development in previously “closed” societies has been identified as their “opening up to international law . . . reflected in a new approach to the relationship between domestic legal systems of these states and international law.”²⁶ It has been stated that “[c]rucial to the success of *international* standards and institutions. . . is the degree to which national courts respect decisions of the international human rights tribunals and incorporate their jurisprudence into national decisions.”²⁷ The goal of this analysis is to identify where, in the spectrum of relationships between the European Court of Human Rights (ECHR) and national courts, the human rights jurisprudence of the Azerbaijan Constitutional Court exists.

at <http://www.llrx.com> (January 15, 2002). See also PETER B. MAGGS, THE CIVIL CODES OF CENTRAL EURASIA-A COMPARISON (2003), at <http://home.law.uiuc.edu> (last visited Feb. 16, 2005) (similarity between Azerbaijan and Russian Civil Codes allows Azerbaijan legal scholars to draw on extensive Russian judicial and academic interpretation for guidance).

21. AZERBAIJAN RESPUBLIKASI KONSTITUSIYA art. 130(I).

22. Dr. Svante Cornell, *Government and Institutions*, in GATEWAY TO AZERBAIJAN, *supra* note 1, at 16.

23. AZERBAIJAN RESPUBLIKASI KONSTITUSIYA art. 130(III).

24. *Id.*; see also *infra* note 87 (regarding the 2002 amendments expanding the right of access to the Constitutional Court to lower courts, the Ombudsman Office, and individual citizens).

25. AZERBAIJAN RESPUBLIKASI KONSTITUSIYA art. 130(X) (amended 2002).

26. Rein Müllerson, *Introduction*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE xii (Rein Müllerson et al eds., 1998).

27. Holly Dawn Jarmul, *Effects of Decisions of Regional Human Rights Tribunals on National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 247 (Thomas M. Franck & Gregory H. Fox eds., 1996).

Judge Herczegh of the International Court of Justice has stated that “a State that is well integrated into the community of nations assumes a great number of international obligations, does not consider it necessary to transform them one by one into domestic law and is ready to admit the primacy of international treaties over domestic Acts.”²⁸ It has been further argued that “[i]t is also important that not only treaties as such but also the jurisprudence of different international monitoring bodies (e.g. U.N. Committee on Human Rights, the European Commission and Court of Human Rights) is applied domestically.”²⁹

National courts can be categorized according to the opposing paradigms of 1) being legally obligated to follow only treaties and international court decisions that are specifically legislated into domestic law (“dualist”), or 2) operating in a system in which such treaties and decisions automatically prevail over one or more levels of domestic legislation or constitutional provisions (“monist”).³⁰ Some factors leading to greater application of international law norms in domestic constitutional law jurisprudence have been identified as 1) the growing interdependence of states in furtherance of national development, 2) the growing importance of human rights in international relations, and 3) the increasing democratization of political and social life.³¹

The growing importance of constitutional court judicial review has been compared with the decline of “parliamentary sovereignty.”³² It has been attributed to post-Second World War reactions to the “tyranny of the majority” in fascist electoral democracies of the 1930s, and to post-Soviet reactions to Marxist legal theory that placed few limits on governmental power.³³ Thus, “[j]udicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema.”³⁴ These post-fascist and post-

28. Judge G. Herczegh, *Three Years at the Constitutional Court of Hungary (1990-1993) — A personal account*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE, *supra* note 26, at 90.

29. Müllerson, *supra* note 26, at xiv.

30. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1875 (2003).

31. Judge V.S. Vereshchetin, *Some Reflections on the Relationship between International Law and National Law in the Light of New Constitutions*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE, *supra* note 26, at 7.

32. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 2 (2003).

33. *Id.* at 2-3.

34. *Id.* at 3. See also KHANLAR HAJIYEV, THE INTERPRETATION OF THE PROVISIONS OF CONSTITUTION AND LAW BY CONSTITUTIONAL COURTS 73 (Rauf Guliyev ed., 2002).

As opposed to [the] USA[,] in European countries as soon as there arises the solidity of [a] bloc of parliamentary majority and Government[,] the

Marxist democracies usually employ specialized constitutional courts to establish limits on executive and legislative power.³⁵ Unlike the U.S. Supreme Court, these courts exercise exclusive and centralized jurisdiction over constitutional review and interpretation. They also exercise the power to review the constitutionality of government acts in the abstract, upon the request of government agencies, such as before enactment of proposed legislation, in addition to their power of “concrete” review of government interference with the activity of specific citizens.

Internationally-recognized human rights and constitutional rights have been described by Gerald Neuman as “fundamental rights,” with “consensual,” “suprapositive,” and “institutional” qualities.³⁶ The consensual quality is rooted in political approval processes, the “suprapositive” quality is rooted in “natural law,” and the “institutional” quality is rooted in the practical constraints on the effectiveness of supra-national courts.³⁷ These competing qualities might cause conflicting jurisprudence among international and national courts. Neuman suggests, however, that possible conflicts in freedom of expression jurisprudence might be resolved through the under-enforcement of one among several fundamental rights.³⁸ Following Neuman’s logic, if the right to personal dignity can be subordinated to the competing right to freedom of expression, then (as argued in Section V) international “suprapositive” interpretations of freedom of expression rights could require the reform of domestic defamation laws and practices, despite countervailing consensual and institutional obstacles.

Political decisions by states to elevate international conventions and treaties over ordinary domestic legislation might be made in order to avoid legislative gridlock and to facilitate compliance with international obligations.³⁹ National courts might also be authorized “to follow precedents established by international tribunals even where such rulings were in conflict with national laws, either prior

separation of powers in fact fades away. Consequently, in order to restore the balance it is necessary that the constitutional judge would intervene to ensure effective control regarding the Government.

Id.

Judge Hajiyev is now the Azerbaijan judge at the European Court of Human Rights. EUROPEAN COURT OF HUMAN RIGHTS, COMPOSITION OF THE COURT: GENERAL INFORMATION, at <http://www.echr.coe.int> (Jan. 27, 2005).

35. See GINSBURG, *supra* note 32, at 3.

36. Neuman, *supra* note 30, at 1866.

37. *Id.* at 1874-79

38. See *id.* at 1879.

39. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 214 (1997).

or later in time” in reaction to legislative and executive deprivations of human rights under previous non-democratic regimes.⁴⁰

There have been two major trends in post-Second World War democratic constitutions. First, the authority of international treaty provisions has been elevated over ordinary domestic legislation.⁴¹ Second, beginning with the Spanish Constitution of 1978, a distinction has been made between human rights conventions and other treaties, with the former given “a normative rank higher than that of other treaties and ordinary domestic law.”⁴² Although the language of the articles is more ambiguous than the language of incorporation in other nations’ constitutions, two articles of the Azerbaijan Constitution can be interpreted to grant to the terms of the European Convention on Human Rights and Fundamental Freedoms (the Convention) and to European Court of Human Rights (ECHR) decisions authority that is at least equal to other constitutional requirements. For example, Article 71(III) states:

Rights and liberties of a human being and citizen may be partially and temporarily restricted [only] on announcement of war, martial law and state of emergency, and also mobilization, *taking into consideration international obligations of the Azerbaijan Republic*. Population of the Republic shall be notified in advance about restrictions as regards their rights and liberties.⁴³

Further, Article 12(II) provides, “Rights and liberties of a person and citizen listed in the present Constitution are implemented *in accordance with international treaties wherein the Azerbaijan Republic is one of the parties*.”⁴⁴

International agreements are compared with constitutional provisions and ordinary legislation in two other Articles of the Azerbaijan Constitution. Article 148(II) states: “International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of [the] legislative system of the Azerbaijan Republic.”⁴⁵

40. *Id.*

41. *Id.* at 218-19.

42. *Id.* at 216-17.

43. AZERBAIJAN RESPUBLIKASI KONSTITUSIYA art. 71(III) (emphasis added).

44. *Id.* art. 12(II) (emphasis added).

45. *Id.* art 148(II).

Article 148(II) by itself suggests that international agreements unrelated to individual rights are only equal in status to ordinary Azerbaijan legislation, but this issue is resolved by Article 151, Legal Value of International Acts, which states:

Whenever there is disagreement between normative-legal acts in [the] legislative system of the Azerbaijan Republic (except [the] Constitution of the Azerbaijan Republic and acts accepted by way of referendum) and international agreements wherein the Azerbaijan Republic is one of the parties, provisions of international agreements shall dominate.⁴⁶

Azerbaijan can, therefore, be described as one of the growing class of nations which accords quasi-constitutional status to international human rights obligations, while giving other international treaty obligations superiority over ordinary domestic legislation.⁴⁷ Like Article 39(1)(b) of the South Africa Constitution, which requires consideration of international law in interpretation of constitutional rights,⁴⁸ these Azerbaijan constitutional incorporations of international jurisprudence could be examples of “strong consent to the influence of international human rights norms,”⁴⁹ which nevertheless permits different national interpretations of those norms as constitutional rights.

Rapporteurs for the European Commission for Democracy through Law of the Council of Europe (Venice Commission) opined in 2001 that, once ratified by the Republic of Azerbaijan, the Convention would be incorporated automatically into the Azerbaijan legal system, and its provisions would become “directly applicable,” or “self-executing:”

Furthermore, in the light of Article 151 read in conjunction with Article 12, it can also be argued that even in case of an apparent disagreement between the ECHR and the Constitution, the latter’s provisions shall be interpreted and implemented in the light of the ECHR provisions. Consequently, the

46. *Id.* art. 151. But note the criticism of the non-governmental organization in POULTON, *supra* note 14, para. 4.1 (Article 151’s exception “[u]ndermines the legal principle *pacta sunt servanda* (treaties create legally binding obligations that States should observe) which states that: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’”) (citing Vienna Convention on the Law of Treaties, Article 26, 1969).

47. See Buergenthal, *supra* note 39, at 215.

48. S. AFR. CONST. ch. 2, § 39(1)(b) (1997), available at <http://www.oefre.unibe.ch>.

49. Neuman, *supra* note 30, at 1897.

essence of the ECHR guarantees will be safeguarded. *Indeed, Article 12 can be regarded as a specific rule that establishes the equal status of the ECHR and the Constitution of Azerbaijan.*⁵⁰

The ultimate authority of the Convention over the Azerbaijan Constitution on human rights matters was further assumed by the Venice Commission in that, “[b]ecause of the direct effect of the ECHR, it must be assumed that behaviour that amounts to a violation of the ECHR will be prohibited in Azerbaijan even though there is no specific constitutional prohibition of this behaviour.”⁵¹

The relationships between treaty obligations under the Convention and the domestic law of Convention parties can be placed into several categories, including: 1) elevation of Convention provisions and ECHR decisions to the same level as constitutional provisions; 2) elevation of Convention provisions and ECHR decisions above ordinary legislation, but below the level of constitutional provisions; 3) superiority of Convention provisions, but not ECHR decisions, over ordinary legislation; 4) equality of Convention provisions and ECHR decisions with ordinary legislation; and 5) incorporation of Convention norms into domestic law only through specific legislation.⁵²

The profile of the Azerbaijan legal system’s relationship with the Convention and the ECHR, at least according to textual analysis, places it at the highest level of complete incorporation into domestic constitutional law of Convention requirements and ECHR interpretations of those requirements.⁵³ This is the level of incorporation and authority required by the Austrian Constitution⁵⁴ and the Spanish Constitution,⁵⁵ and is a level above most other Convention parties’ legal systems in terms of the authority of Convention provisions and ECHR decisions over national constitutional norms.⁵⁶ In part III, I will examine whether or not this institutional profile, and the external factors described in Part II, contribute to a “strong consent to the influence of international

50. *Draft Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms*, Eur. Comm’n for Democracy through Law (Venice Comm’n), CDL (2001) 132, para. 18, at <http://venice.coe.int> (Dec. 10, 2001) (emphasis added).

51. *Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan*, Eur. Comm’n for Democracy through Law (Venice Comm’n), CDL-INF (2001) 27, para. 14 [hereinafter *Opinion on the Draft Constitution*], at <http://venice.coe.int> (Dec. 21, 2001).

52. Jarmul, *supra* note 27, at 263-81.

53. *See generally id.*; Buergenthal, *supra* note 39.

54. Jarmul, *supra* note 27, at 263.

55. Buergenthal, *supra* note 39, at 217.

56. Jarmul, *supra* note 27, at 263-81.

human rights norms⁵⁷ in Azerbaijan Constitutional Court decisions.

The ECHR's effectiveness in obtaining contracting states' consent, first to accept its jurisdiction, and second to assist in enforcing compliance with its judgments, has been described as derived in part from Convention provisions giving individuals the right to petition the ECHR against their own governments.⁵⁸ Helfer and Slaughter describe the compliance procedures for ECHR decisions as follows:

Approximately half of the signatories to the Convention have incorporated the treaty into domestic law, thereby allowing individuals to invoke the treaty and the ECHR's judgments in national judicial proceedings. The remaining states fulfill their Convention obligations by giving effect to specific judgments of the ECHR, in nearly all cases agreeing to introduce legislative amendments, reopen judicial proceedings, grant administrative remedies, and pay monetary damages to individuals whose treaty rights have been violated.⁵⁹

Judge Khanlar Hajiyeu, the former Chairman of the Constitutional Court of the Azerbaijan Republic, has concluded that:

The interpretation of conventional norms on citizens and human rights and freedoms by [the] European Court of Human Rights is binding for all who ratified the European Convention on Human Rights and Fundamental Freedoms. For the time being, a lot of domestic statutes contradict . . . the principles enshrined in the European Convention and are interpreted by European Court of Human Rights. In this situation the Constitutional Courts of CIS countries should play the role of mechanism that ensures the harmonization of European and domestic constitutional law within the process of interpretation of constitutional provisions.⁶⁰

57. Neuman, *supra* note 30, at 1897.

58. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997).

59. *Id.* at 295 (citations omitted).

60. HAJIYEV, *supra* note 34, at 171-2. *See also* GUDRAT, *supra* note 20:

B. Theoretical Reasons for Comparative Constitutional Jurisprudence

Comparative jurisprudence also occurs in the absence of treaty obligations. In this less formal relationship, it has nevertheless been described as having a central place in modern constitutional adjudication, balanced against the unique expressions of national identity inherent in particular constitutions.⁶¹ Three alternative interpretative methods used by constitutional courts have been categorized by Sujit Choudhry according to their use of foreign constitutional sources to support the political acceptance of their decisions.⁶² These three methods, using universal values, historical antecedents, and contrasting approaches to similar cases, create different results in scope, legitimization and effect on “constitutional culture.”⁶³

Judge Hajiyeu also identifies these three interpretative methods, called by Choudhry the “universalist,” “genealogical,” and “dialogical,”⁶⁴ as the theoretical grounds for the Azerbaijan Constitutional Court’s comparison of its domestic jurisprudence with that of the Russian constitutional court and European courts.⁶⁵

While expressly stipulating that an international treaty may not contravene the Constitution and laws adopted by referendum (Art. 151), see also Art. 130(III(6)), [t]he Constitution . . . implicitly, as a *lex specialis* rule, provides for the primacy of international human rights over the appropriate constitutional provisions (Art. 12). Thus Art. 12(II) of the Constitutions [sic] empowers domestic courts to apply International Human Rights treaties to which Azerbaijan is party. This is a very progressive statement which needs to be corroborated and developed by the judicial practice, particularly by the jurisprudence of the Constitutional Court.

61. See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 822-23 (1999).

62. *Id.* at 885-92.

63. *Id.*

64. *Id.* at 825-26.

65. See HAJIYEV, *supra* note 34, at 3-4.

[A]s to the comparative jurisprudence the representatives of the science of constitutional law of Azerbaijan Republic should first of all pay more attention to the study of those countries’ legislation that is similar to it: those are the countries formerly constituting the single State and first of all the legislation of Russian Federation. This is stipulated by the fact that from one hand some institutions of Russian constitutional law have [a] higher degree of experience and thus can serve as an example for the constitutional law of Azerbaijan Republic; from another, the conduct of comparative analysis of a number of institutions including the institution of [the] interpretation of norms of Constitution and statute by Constitutional Courts of Azerbaijan Republic and Russian Federation contribute to revelation and elimination of gaps of the legislation in force and, accordingly, its perfection.

Finally . . . the present-day tendency of European constitutionalism . . . is especially important for development of domestic constitutionalism.

In Judge Hajiyeu's view, the "concrete," or law application-oriented, and the "abstract," "sense-of-the-law"-oriented theories of judicial review both proceed from an assumption of the applicability of universal values to domestic jurisprudence.⁶⁶

The logical/objective and the experiential/subjective elements of the process of legal interpretation identified by Judge Hajiyeu could also be viewed as alternatives within the "dialogical" mode.⁶⁷ This internal judicial dialogue is amplified by the collective character of appeals court decisionmaking.⁶⁸

Judge Hajiyeu characterizes the Azerbaijan Constitutional Court's role as participating "[s]trictly within its competencies . . . in law-making by means of filling the interpreted norm by new content . . ."⁶⁹ This judicial law-making is based on principles that can be external to the constitutional text, including the clarification and development of such principles in accordance with the jurisprudence of the ECHR.

III. PRACTICAL AND POLITICAL REASONS FOR COMPARATIVE HUMAN RIGHTS JURISPRUDENCE

A. *Practical*

Practical reasons can be identified for the use of foreign judicial reasoning in constitutional adjudication of human rights protection. The European Court of Justice (ECJ) and the ECHR operate as supranational courts in furtherance of the goals of the European Union (EU) treaties and the Convention, respectively.⁷⁰ Neither court has a direct enforcement apparatus for its decisions, although individuals can invoke "directly effective" EU legislation.⁷¹ Current and prospective members of the EU, however, seek international approval of their constitutional and human rights policies. Successful membership in the Council of Europe (COE) (which obligates all members to comply with the judgments of the ECHR) has been a prerequisite to EU membership. Therefore, prospective EU members are encouraged to harmonize their domestic constitutional human rights jurisprudence with ECHR jurisprudence.⁷²

Id.

66. *See id.* at 6.

67. *See id.* at 14-15.

68. *Id.* at 15.

69. *Id.* at 150.

70. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104-11 (2000).

71. *Id.* at 1105.

72. Vince Burskey, *Times of Change — Can Turkey Make the Necessary Changes in its Human Rights Policies to be Admitted to the European Union?*, 29 N.C. J. INT'L L. & COM.

Incorporation of ECHR jurisprudence into national constitutional jurisprudence is also driven by the influence and institutional prestige of the ECHR. The ECHR has been described as a “world court of human rights,”⁷³ whose decisions and analyses have been relied upon by the highest courts of states and entities that are not legally bound by the Convention, such as South Africa, Zimbabwe, Jamaica, the Inter-American Court of Human Rights, and the U.N. Human Rights Committee.⁷⁴

Another practical reason for comparative jurisprudence has been described as the growth of “judicial comity” and deference to the jurisdictional interests of foreign courts in international disputes.⁷⁵ New constitutional courts proliferated in Western Europe after the Second World War, and in Eastern Europe and elsewhere after the fall of the Soviet Union.⁷⁶ It is natural that similarly situated constitutional court judges would take advantage of modern communication and transportation facilities to share information and methodologies on common legal issues.⁷⁷ Margaret Burnham described the practical advantages of comparative jurisprudence for the South African Constitutional Court as “locating authority for its actions in the legal expression of the international community . . . [and] establishing the legitimacy of its own actions while strengthening the international norms upon which it relies.”⁷⁸

Finally, general principles of statutory interpretation require analysis of common legal terms in light of their common meaning at the ordinary legislative level. Similarly, prevalent constitutional norms such as “freedom of expression” should be analyzed with the benefit of the perspective of international and foreign experience in application of such norms. The more universally-recognized such norms are, the more easily international and foreign decisions may be applied to their domestic constitutional adjudication.⁷⁹

REG. 713, 728-29 (2004).

73. John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 27, at 383.

74. Slaughter, *supra* note 70, at 1109-12.

75. *Id.* at 1112-13.

76. *Id.* at 1117.

77. *Id.* at 1120-23.

78. Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29, 44 (1997).

79. “Indeed, it may be that the legitimacy of these principles exists in proportion to the extent to which they are found abroad.” Choudhry, *supra* note 61, at 844.

B. PACE and Venice Commission Political Leverage

Azerbaijan became a member of the Council of Europe on January 25, 2001.⁸⁰ Opinion 222 (2000) of the Parliamentary Assembly of the Council of Europe (PACE) established certain conditions subsequent to Azerbaijan's admission, including a commitment to human rights protections and continued monitoring by PACE of those protections.⁸¹ In 2002 and 2004, PACE enacted resolutions requiring improved functioning of democratic institutions in Azerbaijan.⁸² Lack of electronic media access for opposition candidates and administrative harassment of non-government media and journalists were criticized by PACE.⁸³

The Venice Commission was established in 1990 to advise new democratic governments in Eastern Europe on "constitutional engineering" during and after revolutionary change.⁸⁴ The Venice Commission summarized its view on the degree of incorporation of ECHR case law under Articles 12(2), 71(3), 148(2), and 151 of the Azerbaijan Constitution as follows:

It follows from the above provisions that, once ratified by Azerbaijan, the ECHR will be incorporated automatically in the domestic legal system and its self-executing provisions will be directly applicable.

It is also clear from the above provisions that where the provisions in the ECHR conflict with domestic law other than the Constitution, the former will prevail.

Because of the direct effect of the ECHR, it must be assumed that behaviour that amounts to a violation of the ECHR will be prohibited in Azerbaijan even though there is no specific constitutional prohibition of this behaviour. Furthermore, in the light of

80. *Resolution 1305 (2002): Honouring of Obligations and Commitments by Azerbaijan*, EUR. PARL. ASS. DEB. 31st Sitting (Sept. 26, 2002) [hereinafter *Resolution 1305*], available at <http://assembly.coe.int> (last visited Feb. 16, 2005).

81. *Opinion No. 222 (2000): Azerbaijan's Application for Membership of the Council of Europe*, paras. 14, 17, EUR. PARL. ASS. DEB. 21st Sitting (June 28, 2000) [hereinafter *Opinion 222*], available at <http://assembly.coe.int> (last visited Feb. 16, 2005).

82. *Resolution 1305*, *supra* note 80, para. 1; see also *Resolution 1358*, *supra* note 19.

83. *Resolution 1358*, *supra* note 19, paras. 8-9.

84. *Brief Presentation*, CDL (2002) 64, Eur. Comm'n for Democracy through Law (Venice Comm'n), para. 1 [hereinafter *Brief Presentation*], available at <http://venice.coe.int> (June 26, 2002).

Article 151 read together with Article 12, it can be assumed that even in the case of an apparent “disagreement” between the ECHR and the Constitution, the latter’s provisions will be interpreted and implemented in the light of the ECHR provisions. Consequently, the essence of the ECHR guarantees will be safeguarded.⁸⁵

One way that the Venice Commission attempts to “engineer” the development of democratic constitutionalism in new Convention states is by proposing and commenting on draft national legislation that impacts human rights.⁸⁶ The Venice Commission’s comments on four specific types of legislation (constitutional court-related, ombudsman-related, election-related and Convention implementation-related) illustrate these techniques of collaborative law-making.⁸⁷ The standards applied by the Commission to Azerbaijan draft legislation are “whether the provisions of the draft law are in conformity with the Constitution of Azerbaijan, and whether their adoption is advisable in the light of common European standards and practices.”⁸⁸

In 1996 the Commission began analyzing draft legislation for the Azerbaijan Constitutional Court.⁸⁹ The Commission’s comments included recommendations for individual citizen access to the Constitutional Court through complaint procedures.⁹⁰ The Council of Europe made establishment of the right of individual citizen complaint to the Constitutional Court a condition subsequent to Azerbaijan’s admission.⁹¹

The Commission’s analysis of expanded access to the Azerbaijan Constitutional Court included comment on the issue of complaint-screening procedures, on the best methods to allow ordinary courts to refer questions to the Constitutional Court, and on the collateral

85. *Opinion on the Draft Constitution*, *supra* note 51, paras. 12-14.

86. *Brief Presentation*, *supra* note 84, paras. 1-8.

87. *Id.* para. 17.

88. *Draft Law on the Constitutional Court of the Republic of Azerbaijan Interim Opinion*, Eur. Comm’n for Democracy through Law (Venice Comm’n), CDL-INF (2001) 28, para. I, available at <http://venice.coe.int> (Dec. 21, 2001).

89. *See Opinion on the Draft Law on the Constitutional Law of the Republic of Azerbaijan*, Eur. Comm’n for Democracy through Law (Venice Comm’n), CDL (1996) 086e-restr, available at <http://venice.coe.int> (Oct. 28, 1996).

90. *Opinion on the Draft Constitution*, *supra* note 51, para. 31.

91. *Opinion 222*, *supra* note 81, para. 15ii. *Cf. Helfer & Slaughter*, *supra* note 58, at 294. (“Commentators have stressed the importance of this individual access right [to the ECHR] as crucial to the success of the Convention in altering the domestic legal landscape.”).

effects on interested parties of judgments that existing laws violate constitutional requirements.⁹²

The Commission's comments on draft legislation encouraged expansion of access to the Constitutional Court, not only through individual complaints and lower court referrals, but also through the new office of the Ombudsman.⁹³ Noting the obligation under Article 13 of the Convention for each contracting state to provide an effective remedy before a national authority for everyone whose rights and freedoms set forth in the Convention are violated, the Commission stated, "[t]he Ombudsman may play an important subsidiary role in providing an effective remedy."⁹⁴ Reference to human rights under the Convention was recommended to be included in the legislative description of the function and duties of the Ombudsman, because in the Commission's words it "is of great importance for the future implementation by Azerbaijan of its obligations under the European Convention on Human Rights."⁹⁵

The importance of developing administrative interpretations of electoral legislation that recognize the limits on speech restriction of the Convention and the Azerbaijan Constitution was emphasized by the Commission in 2000.⁹⁶ For example, "restrictions to these freedoms must be prescribed by law, be motivated by the public interest and respect the principle of proportionality."⁹⁷ Also, "[e]lectoral propaganda by its very essence lacks objectivity. That is why only the courts should be able to prohibit such material, and only when a criminal offence or a tort is about to be committed. In general, the limits placed on political speech should be less strict than for ordinary speech."⁹⁸ Finally, regarding advocacy of new government, "[t]he incitement to change the constitutional basis of government may be forbidden, according to international standards, only when it is proposed to introduce such a change by force."⁹⁹

92. *Opinion on the Draft Constitution, supra* note 51, paras. 36-37.

93. *Draft Law on the Ombudsman of the Republic of Azerbaijan Comments*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2001) 41, para. 2, available at <http://venice.coe.int> (May 9, 2001).

94. *Id.*

95. *Id.*

96. *Law on Parliamentary Elections of the Republic of Azerbaijan Comments*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL INF (2000) 17, para. 1, available at <http://venice.coe.int> (Nov. 15, 2000).

97. *Id.*

98. *Id.*

99. *Id.*

C. *Legislative and Other Responses to Political Leverage*

Legislation establishing the office of the Ombudsman was enacted by the Milli Majlis in 2001.¹⁰⁰ Legislation on the Constitutional Court, including access by individual citizen complaints and lower court referrals of constitutional issues was enacted in 2003.¹⁰¹ Constitutional amendments establishing these three new avenues of access to the Constitutional Court were approved by referendum on August 24, 2002.¹⁰²

The Venice Commission and PACE continue to monitor democratic institutional development in Azerbaijan. The fairness of the presidential elections of 2003 was criticized by PACE.¹⁰³ The Venice Commission commented in 2004 on election laws and procedures.¹⁰⁴ Council of Europe experts have provided advice in furtherance of the requirement of PACE Opinion 222 that Azerbaijan reform its legal profession licensing and discipline laws.¹⁰⁵

IV. AZERBAIJAN CONSTITUTIONAL COURT OPINIONS
INCORPORATING EUROPEAN COURT OF HUMAN RIGHTS DECISIONS

A. *Constitutional Court Typologies and Comparative Jurisprudence*

In granting effective remedies under Article 13 of the Convention, contracting states have “considerable latitude” in achieving compliance with ECHR judgments.¹⁰⁶ This latitude has been described as “a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law.”¹⁰⁷ As noted in Part

100. See *Draft Law of the Republic of Azerbaijan on the Ombudsman*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2001) 77, available at <http://venice.coe.int> (July 3, 2001).

101. See *Law on the Constitutional Court of Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2004) 005, available at <http://venice.coe.int> (Feb. 9, 2004).

102. See *Constitution of the Republic of Azerbaijan with modifications*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2003) 48, available at <http://www.venice.coe.int> (July 10, 2003).

103. *Op. 222*, *supra* note 81, para. 3.

104. *Joint Recommendations on the Electoral Law and the Electoral Administration in Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL-AD (2004) 016rev, available at <http://venice.coe.int> (June 1, 2001).

105. See Council of Europe, Transcript of Expert Meeting Concerning the Drafting of the Examination Questionnaires for the Bar Exam and Preparation of Bank of Examination Questions, Mar. 22, 2002 (on file with author).

106. *James v. United Kingdom*, 98 Eur. Ct. H.R. 9 (ser. A) at 44 (1986).

107. *Id.*

II.A, a broad split has been identified between approximately half of the contracting states, which formally incorporate the Convention into domestic law, and the other states that require legislative amendments, judicial proceedings, administrative remedies, or monetary awards in order to provide an effective remedy to persons whose Convention rights are violated.¹⁰⁸

As noted above, national incorporation practices can be further subdivided into at least five categories.¹⁰⁹ Within each of these categories, national constitutional courts have used ECHR decisions to bolster their reasoning or supplement their decisions without explicitly acknowledging their binding authority.¹¹⁰ The text of relevant constitutional articles and the prevailing Azerbaijan theories of jurisprudence place the Convention text and ECHR decisions at the level of constitutional equivalence with the provisions of the Azerbaijan Constitution and Constitutional Court decisions.¹¹¹ The record of actual incorporation of ECHR jurisprudence into Azerbaijan constitutional jurisprudence should confirm or refute whether or not this harmonization of norms exceeds formal resemblances.¹¹²

The Azerbaijan Constitutional Court issued seventy-one decisions between August 1998 and May 2004.¹¹³ Ten of those decisions cited provisions of the Convention in support of their reasoning, with specific ECHR decisions cited in five cases. No other foreign or international court opinions are cited.¹¹⁴ In twenty-two decisions, the Constitutional Court refers to provisions of the United Nations (U.N.) Universal Declaration of Human Rights of 1948.¹¹⁵ Articles of the U.N. International Covenant on Civil and Political Rights are referred to in eleven decisions.¹¹⁶ In five decisions, provisions of the U.N. International Covenant on

108. See generally Helfer & Slaughter, *supra* note 58.

109. Jarmul, *supra* note 27, at 263-81. Those categories are: 1) complete incorporation of the Convention and all ECHR jurisprudence into domestic constitutional law; 2) elevation of "directly effective" or "self-executing" Convention provisions and ECHR decisions above all ordinary legislation, but below the level of Constitutional provisions; 3) elevation of other Convention provisions, but not ECHR decisions above prior ordinary legislation only; 4) equality of Convention provisions and ECHR decisions with ordinary domestic legislation; and 5) Convention provisions taking effect only upon enactment of specific domestic legislation incorporating them into national law. *Id.*

110. *Id.* at 283.

111. See, e.g., Jarmul, *supra* note 27, at 263-81; Buergenthal, *supra* note 39.

112. See, e.g., Jarmul, *supra* note 27, at 263-81; Buergenthal, *supra* note 39.

113. See THE CONSTITUTIONAL COURT OF AZERBAIJAN REPUBLIC, DECISIONS, available at <http://www.constitutional-court-az.org/decisions/htm> (last visited Feb. 28, 2005).

114. See *id.*

115. See *id.*

116. See *id.*

Economic, Social, and Cultural Rights are cited.¹¹⁷ Articles of various conventions of the International Labour Organization are cited in four decisions.¹¹⁸

B. Freedom of Expression in the Convention and the Azerbaijan Constitution

Article 10 of the European Convention on Human Rights and Fundamental Freedoms states:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹¹⁹

At the time of its invitation to membership in the Council of Europe (COE), the COE Committee of Ministers invited the Venice Commission to give its assistance to reforming the Azerbaijan Constitution, electoral law and “media law in conformity with Council of Europe standards.”¹²⁰ In 2000, the Parliamentary

117. *See id.*

118. *Id.*

119. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, paras. 1 & 2, 312 U.N.T.S. 221 [hereinafter European Human Rights Convention].

120. Council of Europe, Committee of Ministers, Armenia and Azerbaijan: invitation to become members of the Council of Europe, CM (2000) 170, available at <https://wcm.coe.int> (Nov. 9, 2000).

Assembly of the Council of Europe issued Opinion 222 recommending specific areas of necessary media reform.¹²¹

Freedom of expression is protected in the Azerbaijan Constitution. Article 47, "Freedom of thought and speech," provides that:

(I) Everyone may enjoy freedom of thought and speech.

(II) Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions.

(III) Propaganda provoking racial, national, religious and social discord and animosity is prohibited.¹²²

Article 50, "Freedom of information," provides that:

(I) Everyone is free to look for, acquire, transfer, prepare and distribute information.

(II) Freedom of mass media is guaranteed. State censorship in mass media, including press[,] is prohibited.¹²³

The limitation of free speech stated in Article 47(III) is expanded upon in other Articles. Article 46, "Right to Defend Honor and Dignity," provides that:

(I) Everyone has the right to defend his/her honor and dignity.

(II) Dignity of a person is protected by [the] state. Nothing must lead to [the] humiliation of dignity of human beings.

(III) Nobody must be subject to tortures and torment, treatment or punishment humiliating the dignity of

121. See *Opinion 222*, *supra* note 81.

122. AZERBAIJAN REPUBLIKASI KONSTITUSIYA art. 47.

123. *Id.* art. 50.

human beings. Medical, scientific[,] and other experiments must not be carried out on any person without his/her consent.¹²⁴

Article 57, "Right to Appeal," paragraph (II) provides that:

(II) Citizens of the Azerbaijan Republic have the right to criticize activity or work of state bodies, their officials, political parties, trade unions, other public organizations[,] and also activity or work of individuals. Prosecution for criticism is prohibited. Insult or libel shall not be regarded as criticism.¹²⁵

The limitations on free speech in Article 47(III) might be viewed as tolerable exceptions designed to eliminate "hate speech" that provokes physical, rather than intellectual, reactions. The provisions of Article 46 might also be viewed in isolation, especially in the context of paragraph (III)'s reference to torture and medical experimentation without consent, as only prohibitions of universally-condemned physical and mental human rights abuses. The last sentence of Article 57(II), however, creates a potential conflict between the freedom of expression jurisprudence of the ECHR and Azerbaijan constitutional and statutory defamation law.¹²⁶

The application of the Azerbaijan Criminal Code defamation penalties against journalist criticism of government officials, as described hereafter, requires a resolution of this potential conflict between Azerbaijan judicial practices on one side, and constitutional provisions, ECHR jurisprudence, and Convention requirements on the other side. This resolution should reasonably determine the hierarchy between the competing norms of protection of individual dignity and honor and protection of freedom of expression.

124. *Id.* art. 46.

125. *Id.* art. 57.

126. POULTON, *supra* note 14, para. 3. This tension between Article 57's last sentence and ECHR jurisprudence remains despite the statement in Article 5 of the 1999 Law on Mass Media that, in case of conflict, international law obligations supercede national law. Article 5 could be interpreted as merely a restatement of Constitution Article 151's placement of international agreements above ordinary domestic legislation in the hierarchy of norms.

C. The Criminal Defamation Prosecutions

Although criminal defamation statutes remain in the official codes of many nations and American states, their use in most European countries and in the United States is infrequent and often disfavored.¹²⁷ The 2000 Criminal Code of Azerbaijan provides criminal penalties for defamation in the following three Articles:

Article 147 Defamation

147.1 Defamation, namely the distribution of knowingly false information, that defames the honour and dignity of another person or undermines his reputation in public, in publicly displayable work or in the mass media — is punishable by a fine from one hundred to 500 minimum wages, or community service for a period of up to 240 hours, or correctional labour for up to one year, or imprisonment for up to six months.

147.2 Defamation, linked with an accusation against a person of committing a serious or especially grave crime — is punishable by correctional labour for a period of up to two years, or restrictions of freedom for up to two years, or imprisonment for up to three years.

127. See Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861 (2003). See also ARTICLE 19 STATEMENT ON CERTAIN LAWS OF THE REPUBLIC OF AZERBAIJAN RELATING TO FREEDOM OF EXPRESSION, para. II. [hereinafter STATEMENT ON LAWS OF AZERBAIJAN] (citing Council of Europe, Declaration on Freedom of Political Debate in the Media (2004)), at <http://www.article19.org> (June 10 2004). See also *Report of the Rapporteur for Freedom of Expression 1999*, General Secretariat, Organization of American States, available at <http://www.summit-americas.org> (criticizing criminalization of speech targeted at public officials as incompatible with the guarantee of freedom of expression in Article 13 of the American Convention on Human Rights). See generally Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433 (2004) (application of English criminal libel laws to aggrieved American colonists inspired armed revolution, and ideals of liberty and equality discouraged later use of criminal libel laws, such as the federal Sedition Act of 1798 that expired without renewal in 1801).

Article 148 Insult

148.1 Insult, namely degrading the honour and dignity of another person, expressed in an indecent form in public, in publicly displayable work or in the mass media — is punishable by a fine from 300 to 1,000 minimum wages, or up to 240 hours of community service, or correctional labour for up to one year, or imprisonment for up to six months.

Article 323 Discrediting or Degrading the Honour and Dignity of the Head of State: the President of the Republic of Azerbaijan.

323.1 Discrediting or degrading the honour and dignity of the head of state, the president of the Republic of Azerbaijan, in public or in publicly displayable work or in the mass media — is punishable by a fine from 500 to 1,000 minimum wages, or correctional labour for up to two years, or imprisonment for the same period.

323.2 The same deeds linked with an accusation of committing a serious or especially grave crime — are punishable by imprisonment from two to five years.¹²⁸

In addition, the 2001 Law on Mass Media imposes a maximum fine of three months' income for cases of criminal defamation by a broadcast licensee,¹²⁹ and allows the banning of publications that have been found guilty of defamation three times.¹³⁰

Besides being criticized as unnecessary and excessive for the legitimate protection of unfairly damaged reputations, the application of these statutes has been criticized for their failure to require complainants to prove the false nature of the allegedly defamatory statements.¹³¹ Criminal Code Article 148's crime of "Insult" has been criticized for not requiring the insulting statement to be false and for allowing prosecution of mere opinion.¹³² Article

128. See POULTON, *supra* note 14, para. 4.2 (unofficial translation from official language text).

129. *Id.* para. 4.5.1.

130. *Id.*

131. *Id.* para. 4.2.

132. *Id.*

323 is subject to the same criticism regarding truthful allegations.¹³³ As described below in Section E, Article 323's special provisions protecting the reputation of the president also contravene ECHR jurisprudence that public officials should tolerate more, rather than less, criticism than ordinary individuals.¹³⁴

It has been reported that criminal defamation lawsuits have been used by government officials to intimidate critical and investigative journalists and news outlets.¹³⁵ Most of these critical

133. POULTON, *supra* note 14, para. 4.2. See also *Columbani et al. v. France*, 2002-V Eur. Ct. H.R. 25, 43 (holding that *Le Monde* newspaper and journalists' publication of article on Moroccan drug trafficking that relied on official government reports and allegedly insulted the King of Morocco and resulted in criminal libel convictions did not allow the truth defense, and therefore violated Article 10 of Convention, and stating that "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research"); Lisby, *supra* note 127, at 448 (explaining that the English Court of Star Chamber source of common law criminal libel, based on complaints by powerful English nobles, made truth not merely immaterial as a defense, but an aggravating factor in the crime, giving rise to the maxim "the greater the truth the greater the libel"); *Id.* at 461-62 (criticizing the other major rationale for criminal libel, the prevention of violence by the objects of insult and criticism). Yanchukova, *supra* note 127, at 870 (arguing that truth defense to criminal libel actions is made irrelevant by the "defense of fragile democracy" rationale in some post-communist countries); *But see* *Garrison v. Louisiana*, 379 U.S. 64 (1964) (holding that truthful statements about the conduct by public officials of public business may not be punished by criminal or civil libel laws, even if published with ill-will).

134. POULTON, *supra* note 14, para. 4.2. See also *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) 4, 23 (1992).

135. POULTON, *supra* note 14, para. 4.1:

The provisions in Article 46 and that concerning insult and defamation in Article 57 [of the Constitution] are reflected in key articles of the Criminal and Civil Codes, which have . . . been misused repeatedly by high state officials and others to try and silence critical voices in the media. Since the introduction of the Law on Mass Media (LMM) in February 2000, the provisions of the criminal code have been commonly used in combination with Article 19 of the LMM to ban publications . . . Although [Article 47(3) of the Constitution] appears little used, the values it represents are reflected in Article 281 of the Criminal Code which . . . is used on occasions to stifle reporting of which the authorities disapprove.

See also STATEMENT ON LAWS OF AZERBAIJAN, *supra* note 127, para I, n.1:

According to the Azerbaijan Committee to Protect Journalists, 40 lawsuits were brought against 18 journalists or media outlets during 2003, resulting in fines of approximately \$325,000 (1.6 billion manat). Similarly, in 2002, journalists and media outlets were fined about \$149,000 (750 million manat). Given the country's weak economy, such high fines frequently lead to the bankruptcy of media outlets.

Even if few of these fines are ever paid, any large contingent liability can threaten the financial survival of small businesses. See THE COMMITTEE TO PROTECT JOURNALISTS, *ATTACKS ON THE PRESS 2003: DOCUMENTED CASES FROM EUROPE AND CENTRAL ASIA* (describing defamation lawsuits against Azerbaijan journalists who criticize public officials), at <http://www.cpj.org> (2003); THE COMMITTEE TO PROTECT JOURNALISTS, *2005 NEWS ALERT - AZERBAIJAN: ASSETS OF OPPOSITION NEWSPAPER FROZEN* (concerning the shutdown on 12/31/04 of the major opposition newspaper *Yeni Musavat* following a court order freezing the newspaper's assets in order to satisfy libel awards totaling \$160,000 in favor of

outlets have been low circulation newspapers sponsored by opposition political parties. The highest quality and lowest cost printing press is the government-owned printer, which has sometimes refused to print opposition newspapers.¹³⁶ The government has a monopoly on the purchase of newsprint paper and has the only national print media distributor.¹³⁷ Few television or radio outlets critical of government have been licensed.¹³⁸ It has been reported that most Azerbaijan cases of alleged defamation or insult have been brought by government ministers, relatives of the president, and parliamentary deputies.¹³⁹

D. *The Moral Damages Civil Defamation Case*

In response to a petition of the Azerbaijan Supreme Court, on May 31, 2002, the Constitutional Court published its decision *On Interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic*.¹⁴⁰ The Supreme Court sought a determination of whether compensation for “moral damage” was available to a plaintiff suing under Article 23.4 of the Civil Code, which provides: “Where information harming the honor, dignity or business reputation of a natural person is disseminated, such person has the right to recover damages caused by such dissemination and obtain a declaration that the information is untrue.”¹⁴¹

government officials), at <http://www.cpj.org> (Jan. 7, 2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, Feb. 25, 2004 (describing criminal libel suits and convictions of newspapers and journalists for insulting high government officials — 40 lawsuits in 2003, resulting in fines of approximately \$325,000, and an additional \$149,000 in fines in 2003 resulting from suits brought in 2002), at <http://www.state.gov>. But see Peter Krug, *Civil Defamation Law and the Press in Russia*, 13 CARDOZO ARTS & ENT. L.J. 847, 849-50 (1995) for an analysis of the increase in civil defamation lawsuits in Russia:

[E]xpansion [in Russian law] of personality rights protection has been accompanied by a significant increase in the number of civil lawsuits, many of them against press defendants and the predominance of civil defamation over criminal defamation lawsuits because of the availability of moral damages compensation and a lower standard of proof of fault.

136. INTERNATIONAL FEDERATION OF JOURNALISTS, *QUELLING DISSENT IN AZERBAIJAN, A POST-ELECTION ANALYSIS OF MEDIA UNDER PRESSURE 7* (2003), at <http://www.ifj.org>.

137. *Id.*

138. See POULTON, *supra* note 14, para. 4.5.1 (case study of small newspaper, Uch Nogde, sued three times for criminal defamation for publishing criticisms of government media control, a local government official and a local fish company).

139. *Id.* para. 6.1.3. See also TRANSPARENCY INTERNATIONAL, *GLOBAL CORRUPTION REPORT 2004*, available at www.globalcorruptionreport.org (last visited Feb. 5, 2005). Azerbaijan is ranked 124th out of 133 countries in the Corruption Perceptions Index for 2003. *Id.*

140. *On Interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic* (Constitutional Court of Azerbaijan Republic), available at <http://www.constitutional-court-az.org> (May 31, 2002).

141. *Id.*

A parallel statute provides damages for untrue information harming business reputation.¹⁴² “Moral damage” is defined by the Constitutional Court as non-physical, subjective harm to “dignity, honor, business reputation, family privacy, right to move and choose the domicile, copyright [or] other private non-material rights and material goods” without direct economic significance. Such “moral damage” “shocks a physical person and imposes anguish.”¹⁴³

After analyzing provisions for “moral damage” compensation in other domestic legislation (but not the Criminal Code defamation statutes), the Court cited Azerbaijan Constitution Article 46’s protection of individual honor and dignity.¹⁴⁴ It noted, however, that “[a]t the same time . . . one of the basic principles of development of society is the guarantee of the freedom of thought and expression . . . enshrined in Article 47 of the Constitution . . .”¹⁴⁵ The Court then noted Convention Article 10’s protection of freedom of expression, and the ECHR 1986 decision of *Lingens v. Austria*,¹⁴⁶ in which “the right to freedom of expression is recognized to be one of the important foundations of society and is the necessary precondition for its development.”¹⁴⁷

Therefore, implementation of the right to protect honor and dignity “cannot be accompanied by restriction or complete rejection of other rights.”¹⁴⁸ Further, “when defending the dignity and honor one should respect the constitutional provisions concerning the right to freedom of thought and expression and observe the proportionality between these two rights.”¹⁴⁹

The Constitutional Court concluded that compensation for “moral damage” was a remedy provided by Article 21 of the Civil Code. However, “[t]he compensation of moral damage as well as the application of other restrictions specified in the legislation should be proportional to other rights and freedoms ensured by the

142. *Id.*

143. *Id.* (The Court also cited provisions for mental and emotional injury in Article 1 of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Nov. 29, 1985.).

144. *Id.*

145. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* <http://www.constitutional-court-az.org> (May 31, 2002).

146. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 11 (1986).

147. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* <http://www.constitutional-court-az.org> (May 31, 2002).

148. *Id.*

149. *Id.*

Constitution of [the] Azerbaijan Republic and depend in each concrete case on the court's discretion."¹⁵⁰

The Court, as is usual in its decisions, did not describe any specific fact situation that prompted the Supreme Court's request for its opinion. No specific dispute is required for the court to exercise its power of "abstract review."¹⁵¹ The Court did not describe to what extent the *Lingens v. Austria* reasoning was authoritative in resolving the conflicts presented by "moral damages" cases.¹⁵²

The argument can be made, as stated in Part III above, that Article 12 of the Azerbaijan Constitution requires consideration of *Lingens v. Austria* and its ECHR case law progeny as equal in authority to the articles of the Azerbaijan Constitution.¹⁵³ *Lingens v. Austria* should, therefore, be examined further to analyze the implications of its reasoning on the conflict between criminal defamation lawsuits by public officials against media defendants in Azerbaijan and the internationally recognized right of freedom of expression.

E. Lingens v. Austria

The case of *Lingens v. Austria* came to the ECHR upon a complaint by an Austrian magazine editor.¹⁵⁴ Peter M. Lingens had written and published a series of articles in 1975 that criticized Austrian Chancellor Bruno Kreisky's public support of political party leader, Friedrich Peter.¹⁵⁵ Peter had been criticized by the president of the Jewish Documentation Centre, Simon Wiesenthal, for volunteering to join the Nazi SS first infantry brigade during the Second World War.¹⁵⁶ Besides defending Mr. Peter, Chancellor Kreisky described Mr. Wiesenthal's organization as a "political mafia" using "mafia methods."¹⁵⁷ Mr. Lingens's first article stated that if the Chancellor's remarks had been made by someone else, "this probably would have been described as the basest opportunism," but at least Mr. Kreisky believed what he was saying.¹⁵⁸ The second article stated that "[i]n truth Mr. Kreisky's

150. *Id.*

151. *See* AZERBAIJAN RESPUBLIKASI KONSTITUSIYA art. 130.

152. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* <http://www.constitutional-court-az.org> (May 31, 2002).

153. *See supra* Part III.

154. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 11-13.

155. *Id.* at 11.

156. *Id.* at 11-13.

157. *Id.* at 17.

158. *Id.*

behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified.”¹⁵⁹

Chancellor Kreisky initiated two private prosecutions against Mr. Lingens based on the defamation statutes of Articles 111 and 112 of the Austrian Criminal Code.¹⁶⁰ Mr. Lingens was convicted of criminal defamation by the trial court for using the expressions “basest opportunism,” “immoral,” and “undignified.”¹⁶¹ The trial court fined Mr. Lingens, but noted that because his articles constituted political criticism, the politicians criticized must “show greater tolerance of defamation than other individuals” and awarded the Chancellor no damages.¹⁶² The trial court did, however, order confiscation of the offending articles.¹⁶³

The regional appeals court twice affirmed the judgment against Lingens.¹⁶⁴ Despite Lingens’s defense that his criticisms were value judgments or opinions that could not be considered defamatory, the court found that his comments had gone beyond permissible limits because they were directed at the Chancellor personally, rather than against his policies or administration.¹⁶⁵

The Vienna Court of Appeal found that Lingens had criticized Mr. Kreisky in his capacities both as a politician and as a private individual, but that Mr. Kriesky could not be accused of having acted immorally or in an undignified manner because he was personally convinced that Mr. Wiesenthal used “mafia methods.”¹⁶⁶ Mr. Lingens thereafter applied to the European Commission on

159. *Id.* at 15.

160. *Id.* at 19. The relevant statutes cited by the court read:

1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honor or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.

2. Anyone who commits this offense in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.

3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true.

Id. Article 112 puts the burden of proof of truth and good faith on the defamation defendant, stating in part that “evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith.” *Id.* at 19.

161. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 20.

162. *Id.*

163. *Id.* at 21.

164. *Id.*

165. *Id.* at 20.

166. *Id.* at 23.

Human Rights and the ECHR to determine whether his conviction for criminal defamation had violated Article 10 of the Convention.¹⁶⁷

After finding that Mr. Lingens's freedom of expression had been interfered with by a public authority, and that the interference had met the requirements of Article 10, paragraph 2, that it be "prescribed by law" and with legitimate aims, the ECHR analyzed whether such interference was "necessary in a democratic society" under Article 10, paragraph 2.¹⁶⁸ The Austrian government's assertion that a conflict existed between Article 10's protection of freedom of expression and Convention Article 8's right to respect for private and family life was rejected by the ECHR because of the public nature of the Chancellor's criticized comments.¹⁶⁹

The ECHR examined first, whether the interference was "proportionate to the legitimate aim pursued," and second, whether the reasons given by the Austrian courts to justify this interference with free expression were "relevant and sufficient."¹⁷⁰ The ECHR noted that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment [sic]."¹⁷¹ The right applies "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."¹⁷² Because "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention," the "limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."¹⁷³

The ECHR agreed with Mr. Lingens that his criticisms of Mr. Kreisky were value judgments that could not be proved true or false.¹⁷⁴ Therefore, the criminal defamation statute's requirement that a defendant prove the truth of his opinions by itself infringed freedom of opinion that is protected by Convention Article 10.¹⁷⁵ The ECHR unanimously concluded that the Austrian government's interference with Mr. Lingens' freedom of expression was not "necessary in a democratic society . . . for the protection of

167. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 23.

168. *Id.* at 24.

169. *Id.* at 25.

170. *Id.* at 26.

171. *Id.*

172. *Id.*

173. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26.

174. *Id.*

175. *Id.*

reputation . . . of others,” and was “disproportionate to the legitimate aims pursued.”¹⁷⁶

F. Other Constitutional Court Cases Relying on ECHR Jurisprudence

In response to a petition of the Supreme Court, on June 11, 2002, the Constitutional Court published its decision *On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic*.¹⁷⁷ The Supreme Court sought a determination of whether civil procedure statutes that required the participation of licensed lawyers in the presentation of complaints to the highest appeals court complied with constitutional requirements.¹⁷⁸

After reviewing relevant constitutional protections of the right to challenge judicial actions through appeals and examples of legislative provision for public payment of lawyers' fees for low income persons in civil cases, the Court reviewed relevant international law. Article 6 of the Convention guarantees the right to a fair trial.¹⁷⁹ The Court cited the 1979 ECHR case of *Airey v. Ireland*¹⁸⁰ for the rule that “Article 6 para. 1 . . . may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court . . . because legal representation is rendered compulsory.” The Court opined that “[w]here it is required by interests of a fair trial . . . the State should ensure not only the Constitutional right to get the qualified legal assistance but it should also ensure such right to low-income persons in [a] real situation.”¹⁸¹ The Court concluded its decision by finding that the civil procedure statutes were in conformity with the Constitution.¹⁸² It recommended that the Cabinet of Ministers fix “the amount and procedure of the payment

176. *Id.* at 28.

177. On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (June 11, 2002).

178. *Id.*

179. European Human Rights Convention, art. 6, *supra* note 119.

180. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 4 (1979). *Airey v. Ireland* was brought to the ECHR by application of an Irish citizen whose efforts to obtain a judicial decree of separation were thwarted by her inability to pay for the services of a lawyer before the High Court of Ireland. *Id.* at 4-8. The ECHR, in a divided opinion, concluded that the Irish government, by not providing free legal assistance, had violated Ms. Airey's rights under Articles 6 and 8 of the Convention. *Id.* at 12-20.

181. On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (June 11, 2002).

182. *Id.*

at the governmental expenses for legal assistance in civil court proceedings.”¹⁸³

In response to a petition of the Supreme Court, on December 27, 2002, the Constitutional Court published its decision *On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic “On Execution of Court Decisions.”*¹⁸⁴ The Supreme Court sought a determination of whether the provisions of civil statutes providing for payment of judgment creditors only after payment of execution expenses from proceeds of execution against debtor property, and payment of “expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings,” conformed to the Constitution.¹⁸⁵

After citing domestic, constitutional, and other international treaty provisions, the Constitutional Court cited the 1997 ECHR case of *Hornsby v. Greece*¹⁸⁶ for the rule that Convention Article 6’s “right to a court would be illusory if a [contracting state’s] domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.”¹⁸⁷ The Court concluded that the relevant statutes were “null and void” because of their non-conformity to various articles of the Azerbaijan Constitution.¹⁸⁸

In response to a petition of the Prosecutor General’s Office, on August 1, 2003, the Constitutional Court published its decision *On Interpretation of the Provision “having no obligations before other states” of Article 100 of the Constitution of Azerbaijan Republic.*¹⁸⁹ The Prosecutor General’s Office sought an interpretation of the meaning of the limitation on eligibility of candidates for the position

183. *Id.*

184. On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic “On Execution of Court Decisions” (Constitutional Court of Azerbaijan Republic), available at <http://www.constitutional-court-az.org> (Dec. 27, 2002).

185. *Id.*

186. *Hornsby v. Greece*, 33 Eur. Ct. H.R. 495 (1997).

187. *Id.* at 510. *Hornsby v. Greece* was brought to the ECHR by application of two British citizens whose application to open an English language school in Rhodes had been frustrated by administrative non-compliance with judgments of the European Court of Justice and the Supreme Administrative Court of Greece. *Id.* at 498-504. The applicants claimed denial of effective judicial protection of their civil rights under Article 6, paragraph 1, of the Convention. *Id.* at 504-10. The ECHR concluded that the Greek administrative authorities who refused to license the school had violated the Convention. *Id.* at 509-13.

188. On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic “On Execution of Court Decisions” (Constitutional Court of Azerbaijan Republic), available at <http://www.constitutional-court-az.org> (Dec. 27, 2002).

189. On Interpretation of the Provision “having no obligations before other states” of Article 100 of the Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (Aug. 1, 2003).

of president such that the candidates have “no liabilities in other states.”¹⁹⁰

The Court cited the 2001 ECHR case of *Ferrazzini v. Italy*¹⁹¹ as authority for the position that tax obligations are civil law obligations owed to a state by the taxpayer.¹⁹² The Court concluded that taxes and other obligations owed by the taxpayer to a foreign state are obligations causing the dependency of the taxpayer on the foreign state, and, therefore, are disqualifications to eligibility for the office of president of the Republic of Azerbaijan under the Constitution.¹⁹³

In response to a complaint lodged by three individuals on behalf of an advocacy organization for the homeless and indigent of the city of Baku, on May 11, 2004, the Constitutional Court published its decision *On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic*.¹⁹⁴ This appears to be the first published decision arising from individual complaints under this new method of access to the Constitutional Court.¹⁹⁵ Three individuals sought a determination of the conformity of certain judicial decisions to the laws and Constitution. These lower court decisions had denied complaints by the individuals that the government had improperly denied their application for registration of their organization.¹⁹⁶

The Constitutional Court cited protections of the rights to freedom of association and of peaceful assembly in the Azerbaijan Constitution, the U.N. Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights and Fundamental

190. *Id.*

191. *Ferrazzini v. Italy*, 2001-VII Eur. Ct. H. R. 351.

192. *Id. Ferrazzini v. Italy* was brought to the ECHR by application of an Italian citizen who alleged denial of a hearing within a reasonable time by a tribunal regarding his civil rights and obligations under Article 6, paragraph 1 of the Convention, because of the lengthy duration of three sets of tax proceedings to which he was a party. *Id.* at 351-55. In a split opinion, however, the court concluded that tax disputes fall outside the scope of civil rights and obligations as described in Article 6, paragraph 1. *Id.* at 355-61.

193. On Interpretation of the Provision “having no obligations before other states” of Article 100 of the Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (Aug. 1, 2003).

194. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (May 11, 2004).

195. See *supra* notes 91-92.

196. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), available at <http://www.constitutional-court-az.org> (May 11, 2004).

Freedoms.¹⁹⁷ The Court cited Article 11.2 of the latter Convention for the rule that “no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety.”¹⁹⁸

The Court cited the 1998 ECHR case of *Sidiropoulos v. Greece*¹⁹⁹ for the rule that:

[Contracting] States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, *but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions [T]he provisions of Constitution, including the constitutional guarantees for human rights and freedoms which have highest and direct legal effect within the territory of Azerbaijan Republic, should be in the center of attention.*²⁰⁰

The Court concluded that the judgments of the lower courts that the government had not violated the complainants’ right of assembly by denying and delaying their attempts to register their organization, were not in conformity with the judiciary’s constitutional obligations to protect individual rights.²⁰¹

The May 11, 2004, Constitutional Court decision on the homeless advocacy group complaint establishes three important principles upon which future comparative jurisprudence should proceed: 1) the effectiveness of individual citizen complaints as an avenue of access to Constitutional Court protection of individual rights; 2) the equality of the provisions of international human rights conventions with constitutional provisions in the hierarchy

197. *Id.*

198. *Id.*

199. *Sidiropoulos and Others v. Greece*, 79 Eur. Ct. H.R. 1594, 1614 (1998). The *Sidiropoulos v. Greece* case was brought to the ECHR upon the application of Greek citizens whose request to form a regional culture society was denied by the government because the applicants were suspected of supporting secessionists. *Id.* The court unanimously concluded that the reasons given by the government and the national courts for preventing the registration of the organization did not satisfy the test of “necessary in a democratic society.” *Id.*

200. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* <http://www.constitutional-court-az.org> (May 11, 2004) (emphasis added).

201. *Id.*

of national law; and 3) “review by the Convention institutions” of government interference with individual rights includes review by the Constitutional Court of conformity of government actions with the standards set in relevant ECHR decisions.²⁰² The specific Convention test applied in *Sidiropoulos* of “prescribed by law and are necessary in a democratic society”²⁰³ should also apply to the evaluation of government interference with freedom of speech under the Azerbaijan Constitution and Article 10 of the Convention.²⁰⁴

V. PROSPECTS FOR FUTURE COMPARATIVE JURISPRUDENCE

In *Lingens v. Austria*, the ECHR stated its view of the appropriate comparative human rights jurisprudence among contracting states.²⁰⁵ In connection with its interpretation of the restrictions on freedom of expression permitted by Convention Article 10 that are “prescribed by law and are necessary in a democratic society,”²⁰⁶ the ECHR stated that “[t]he Contracting States have a certain margin of appreciation in assessing whether such a need exists . . . but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.”²⁰⁷

The comparative human rights jurisprudence stated in *Lingens v. Austria* is consistent with the positioning of the international human rights agreements of Azerbaijan at the level of constitutional equivalence.²⁰⁸ The interpretations by the ECHR of Convention rights that are also constitutional rights are, according to both constitutional and judicial sources, at least as authoritative as, and possibly superior to, competing constitutional mandates. These interpretations should supercede all ordinary domestic legislation. Where decisions of the ECHR appear to conflict with restrictions on constitutional rights in domestic legislation, therefore, these ECHR decisions must be weighed against the interests motivating such restrictions. For example, regarding freedom of expression restrictions by criminal and civil defamation laws, the ECHR has stated that “the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’ in

202. *Id.*

203. *Sidiropoulos and Others*, 79 Eur. Ct. H.R. at 1626.

204. European Human Rights Convention, *supra* note 119.

205. *Id.*

206. *Id.*

207. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25 (emphasis added).

208. See generally Buergethal, *supra* note 39.

imparting information of serious public concern.”²⁰⁹ Where serious public issues are debated in the press, the ECHR has taken a strong pro-expression position that exempts opinion from suppression or punishment, even when delivered as personal insult,²¹⁰ and that protects even false factual statements if made in good faith²¹¹ and in reliance on government documents.²¹²

The ECHR has accepted the existence of criminal libel laws as measures adopted by State authorities “in their capacity as guarantors of public order . . . intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”²¹³ The Azerbaijan Constitutional Court should recognize, however, that criminal defamation laws, especially when applied to public groups and figures, should not be used “to punish discussions of matters of public concern.”²¹⁴

Whether the standard for liability for publishing false statements of fact about a public official is ordinary negligence²¹⁵ or malice/recklessness,²¹⁶ the ECHR has held that:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.²¹⁷

Four elements of unfairness in criminal libel prosecutions by politicians who have a civil libel remedy available have been identified as: 1) elimination of the risk of financial loss or payment

209. *Bladet Tromso and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 322.

210. *Prager and Oberschlick v. Austria*, 313 Eur. Ct. H. R. (ser. A) 4, 17-19 (1995).

211. *Schwabe v. Austria*, 242 Eur. Ct. H.R. (ser.A) 23 (1993).

212. *Bladet Tromso and Stensaas*, 1999-III Eur. Ct. H.R. at 325-27; *Columbani et al. v. France*, 2002-V Eur. Ct. H.R. 25, 43.

213. *Castells v. Spain*, 236 Eur. Ct. H. R (ser. A) 4, 24 (1992) (applicant to the ECHR had been convicted of criminal defamation and imprisoned for writing a magazine article claiming government responsibility for attacks on and murder of Basque separatists). *Cf. Zana v. Turkey*, 57 Eur. Ct. H. R. 2533 (1997) (finding that a criminal prosecution of a former mayor for statements to journalists defending a separatist party accused of terrorism did not violate the Convention's freedom of expression rights).

214. *Beauharnais v. Illinois*, 343 U.S. 250, 272 (Black, J., dissenting).

215. *Reynolds v. Times Newspapers Limited*, 4 All E.R. 609 (U.K. 1999).

216. *Lange v. Atkinson*, 3 NZLR 424 (Ct. App. New Zealand 1998); *NY Times v. Sullivan*, 376 U.S. 254 (1964).

217. *Castells*, 236 Eur. Ct. H. R. (ser. A) at 23-24.

of defendant costs by losing complainants; 2) elimination of attorney fees and costs for the complainants; 3) creation of a public presumption of guilt of the accused because of public faith in prosecutorial fairness; and 4) penalization of accused parties through imprisonment and appearance bond requirements prior to trial or conviction.²¹⁸ These unfair advantages combine to create punishment without trial, a warning to others against similar speech, and prior restraint of potential speakers.²¹⁹

Principles have been proposed by Article 19: The Global Campaign for Free Expression (Article 19), a human rights monitoring group, for the harmonization of Azerbaijan defamation legislation with international standards of freedom of expression protection.²²⁰ Among these international standards are: 1) the ECHR *Lingens v. Austria* jurisprudence protecting expression of opinion and exposing public officials to wider criticism than private individuals; 2) the ECHR *Bladet Tromsø and Stensaas v. Norway* jurisprudence on good faith reliance on official reports as a defense to defamation; 3) the placement of the burden of proof of falsity on criminal defamation complainants;²²¹ and 4) the ECHR *Castells v. Spain* jurisprudence disfavoring the use of criminal defamation statutes by government agencies and officials and public figures, and encouraging the reform of criminal defamation statutes for use only in cases of alleged knowledge of falsity or reckless disregard for the truth.²²²

Azerbaijan journalists, executive branch representatives, and legislators have begun to work on a draft set of principles closely resembling Article 19's principles. In their comment on this Azerbaijan draft, Article 19 recommended that a principle of interpretation be considered that would require Azerbaijan courts to apply the provisions of defamation law in accordance with the guarantees of the Convention and the jurisprudence of the ECHR.²²³

Full incorporation by the Azerbaijan Constitutional Court of ECHR jurisprudence on the use of criminal defamation prosecutions against journalist criticism of the performance of government officials is required by the theoretical and political foundations of

218. Lisby, *supra* note 127, at 470-471.

219. *Id.*

220. ARTICLE 19: THE GLOBAL CAMPAIGN FOR FREE EXPRESSION, DEFINING DEFAMATION: PRINCIPLES ON FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION [hereinafter DEFINING DEFAMATION], at <http://www.article19.org> (July 2000).

221. See *Schwabe*, 242 Eur. Ct. H.R. (ser.A) 23; *Castells*, 236 Eur. Ct. H. R. (ser. A) 4.

222. DEFINING DEFAMATION, *supra* note 220.

223. ARTICLE 19: THE GLOBAL CAMPAIGN FOR FREE EXPRESSION, NOTE ON THE PRINCIPLES OF THE LAW OF THE AZERBAIJAN REPUBLIC ON DEFAMATION, at <http://www.article19.org> (Mar. 2004).

judicial review in Azerbaijan. The Constitutional Court has begun this process of incorporation through its reliance on five ECHR decisions, including the important *Lingens v. Austria* decision on freedom of expression and defamation.

The establishment of the constitutional rights of individuals, lower ordinary courts, and the office of the Ombudsman to seek review of the constitutionality of government statutes and actions, will increase the number of complaints requiring decisions of the Constitutional Court. The Court's decision on the Baku homeless and indigent advocacy group confirms its nascent process of comparative jurisprudence. It confirms the application of relevant ECHR decisions on human rights to similar constitutional rights requiring the Constitutional Court's interpretation. The Constitutional Court should extend the application of Convention-protected rights and ECHR jurisprudence to situations in which the constitutional protections of the Azerbaijan Republic have not yet reached.

The current use of criminal defamation prosecutions against media defendants for their criticism of public officials provides an opportunity for comparative human rights jurisprudence to contribute to the growth of democratic institutions in Azerbaijan. A positive correlation has been identified between the length of time a new democracy has been subject to the Convention's requirements and its freedom of the press ranking by the Freedom House organization.²²⁴ The Constitutional Court has established the principle that it has the power to reach issues that arise in its interpretations of constitutional requirements, whether or not they are argued by the parties requesting an interpretation.²²⁵ A future citizen complaint might be presented to the Constitutional Court for interpretation of the conformity of a criminal defamation lawsuit by a government official or public figure against a journalist defendant for criticism of official performance regarding public issues. In such a case, the Court should apply the ECHR tests stated in *Lingens v. Austria* and its progeny. This jurisprudence protects statements of opinion, permits reasonable journalist reliance on government reports, requires proof by criminal defamation complainants of intentional falsehood or recklessness by defendants, and discourages use of criminal defamation prosecutions by government

224. Yanchukova, *supra* note 127, at 890. See also FREEDOM HOUSE, FREEDOM OF THE PRESS 2004 (Karin Deutsch Karlekar ed., 2004), available at <http://www.freedomhouse.org/pfs2004/pfs2004.pdf>.

225. See HAJIYEV, *supra* note 34, at 104, 142 (Constitutional Court must interpret challenged legislation as well as determine its constitutionality; by eliminating defects in legislation, Constitutional Court participates in law-making.).

entities and officials. These are the developing contours of the ECHR's tests for government interference with freedom of expression that is "necessary in a democratic society . . . for the protection of reputation . . . of others," and "proportionate to the legitimate aim pursued."²²⁶

226. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 130.

THE PROLIFERATION SECURITY INITIATIVE: NAVIGATING THE LEGAL CHALLENGES

SAMUEL E. LOGAN*

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I. INTRODUCTION

A. Background

On December 10, 2002, Spanish authorities stopped and boarded the *So San*, a Cambodian-registered cargo ship, 600 miles off the coast of Yemen.¹ The ship, purporting to deliver cement from North Korea to Yemen, flew no flag and took evasive measures to avoid inspection.² When Spanish and U.S. authorities searched the vessel, they discovered fifteen Scud missiles underneath 40,000 sacks of cement.³ Though the vessel was seized, it was later released because, according to the United States, “There is no provision under international law prohibiting Yemen from accepting delivery of the missiles from North Korea.”⁴ In this case, the vessel’s failure to fly a flag formed a reasonable basis for

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1. James Harding et al., *US Releases Missiles Ship for Yemen*, FINANCIAL TIMES (London), Dec. 12, 2002, at 10; Frederic L. Kirgis, *Boarding of North Korean Vessel on the High Seas*, ASIL INSIGHTS (Dec. 12, 2002), at <http://www.asil.org/insights/insigh94.htm>; Andrew C. Winner, *The PSI As Strategy*, 10 THE MONITOR 9, 11 (2004), available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

2. Kirgis, *supra* note 1.

3. *Id.*

4. Harding et al., *supra* note 1.

stopping and searching the vessel;⁵ however, because Yemen was not party to a treaty requiring it to refuse the shipment, and was not at war with Spain or the United States, the vessel could not be detained or the cargo seized.⁶

This embarrassing incident highlighted the need for a further international non-proliferation regime. With the end of the Cold War and the subsequent breakdown of the Soviet Union, WMD⁷ have become more accessible to terrorists. Moreover, the terror attacks of September 11, 2001, have caused many countries to become increasingly concerned that WMD may fall into the hands of states or non-state actors who have the will to use them to destabilize entire regions and undermine global security.⁸ In the case of the *So San*, for example, the United States and its allies were particularly concerned that Yemen intended to sell the Scuds to Libya, Syria, or Iran.⁹

Until recently, diplomatic efforts to stem the flow of these WMD had taken the form of formal international agreements such as the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),¹⁰ the Chemical Weapons Convention (CWC),¹¹ and the Biological Weapons Convention.¹² However, recent years and months have

5. Kirgis, *supra* note 1.

6. *Id.*

7. The term "WMD," shorthand for "weapons of mass destruction," is admittedly imprecise, but will be used throughout this paper to refer to nuclear, chemical, and biological weapons and, where appropriate, their delivery systems and related material.

8. U.S. DEP'T OF STATE, OFFICE OF THE PRESS SECRETARY, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES [hereinafter INTERDICTION PRINCIPLES], available at <http://www.state.gov> (Sept. 4, 2003).

9. This suspicion was due in part to the fact that the missiles did not appear on the ship's cargo manifest, even though the shipment was not illegal per se. See Harding et al., *supra* note 1.

10. Treaty for the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. On January 11, 2003, North Korea announced its intention to withdraw from the Treaty, thereby relieving itself of its formal obligation not to traffic in WMD. INTERNATIONAL ATOMIC ENERGY AGENCY, IN FOCUS: IAEA AND DPRK: FACT SHEET ON DPRK NUCLEAR SAFEGUARDS, available at <http://www.iaea.org> (May 2003); see also Andrew Ward, *N. Korea Quits Nuclear Non-proliferation Treaty*, FINANCIAL TIMES (London), Apr. 11, 2003, at 11. The PSI, introduced about six weeks after the withdrawal became effective, is likely intended to help fill the resultant gap in the anti-proliferation framework. *E.g.*, Mark T. Esper & Charles A. Allen, *The PSI: Taking Action Against WMD Proliferation*, 10 THE MONITOR 4 (2004), available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

11. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317, available at http://www.opcw.org/docs/cwc_eng.pdf.

12. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163. North Korea is a party to the Biological Weapons Convention, but it is not a party to the Chemical Weapons Convention. ANDREW PROSSER, CENTER FOR DEFENSE INFORMATION, THE PROLIFERATION SECURITY INITIATIVE IN PERSPECTIVE n.30 (June 16, 2004),

seen significant changes in the approach to non-proliferation. The International Maritime Organization's (IMO) International Ship and Port Facility Security Code (ISPS Code), for example, is an intricate and exhaustive attempt to prevent acts of terrorism at sea.¹³ The Proliferation Security Initiative (PSI) aims to complement existing international arms control arrangements by creating a loose partnership of countries whose aim is to stop the illicit transport of WMD on the oceans.¹⁴

B. What is the PSI?

The PSI is a loose alliance of countries committed to non-proliferation of WMD via shipping routes on land, air, and sea — though, to this point, the PSI has focused primarily on ocean transport.¹⁵ The PSI was proposed by U.S. President George W. Bush on May 31, 2003, in Krakow, Poland, and was initially joined by eleven countries — Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.¹⁶ In December 2003, Canada, Denmark, Norway, and Singapore joined the PSI; the Czech Republic joined in April 2004, and Russia joined in May 2004.¹⁷ Currently, “[m]ore than [sixty] countries have expressed their support for the initiative.”¹⁸ In July 2003, the PSI partner countries, meeting in Brisbane, Australia, agreed upon a Statement of Interdiction Principles that provides a framework for action against proliferation.¹⁹

Who are the real targets of the PSI? According to the Statement of Interdiction Principles, the PSI aims to prevent proliferation among “states and non-state actors of proliferation concern,” defined as:

[T]hose countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in

at <http://www.cdi.org/pdfs/psi.pdf>.

13. *E.g.*, S. REP. NO. 108-10, at 110 (2004) (statement of Rear Admiral John E. Crowley, Jr., Chief Counsel and Judge Advocate General, U.S. Coast Guard, Dep't of Homeland Security).

14. PROSSER, *supra* note 12.

15. *See* Esper & Allen, *supra* note 10, at 5.

16. Winner, *supra* note 1, at 10.

17. *Russia Joins Proliferation Security Initiative*, BBC WORLDWIDE MONITORING, May 31, 2004, at 1.

18. AUSTRALIAN DEP'T OF FOREIGN AFFAIRS AND TRADE, PROLIFERATION SECURITY INITIATIVE [hereinafter PSI], at <http://www.dfat.gov.au> (last visited July 6, 2004).

19. The Statement of Interdiction Principles was “formally adopted at the third plenary meeting in Paris in September 2003.” *Id.*

proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.²⁰

In practice, the “states” at issue boil down to North Korea, Iran, Syria, and, until recently, Libya.²¹ “Non-state actors” is clearly meant to refer to various terrorist organizations around the world that cannot be unequivocally identified with a particular state.²² PSI countries are concerned that these states and non-state actors will use WMD and WMD material for the purposes of intimidation, coercion, and blackmail, and, even worse, may resort to actually using the weapons in a catastrophic attack.²³ Under the PSI, participating countries hope to prevent, or at least delay, such contingencies as these by increasing the cost of proliferation and lengthening the time required for state or non-state actors to develop WMD capacity.²⁴ The PSI is, in large part, designed as a deterrence measure to proliferating countries.²⁵

II. LEGAL PROBLEMS WITH THE PSI

This article addresses the relationship of the PSI to the United Nations Convention on the Law of the Sea (Convention). Critics of the PSI point to the Convention as a potential legal obstacle to its implementation.²⁶ Indeed, Russia and China, among others, have expressed serious doubts about whether the PSI conforms with international law,²⁷ though Russia joined the initiative at the end of May 2004²⁸ and China seems to be softening its criticism amid growing international support for the initiative.²⁹

20. INTERDICTION PRINCIPLES, *supra* note 8.

21. PROSSER, *supra* note 12.

22. *Id.*

23. *See, e.g.*, John S. Wolf, U.S. State Dept., Remarks at Sandia National Laboratories 12th Annual International Arms Control Conference, Albuquerque, New Mexico (Apr. 19, 2002), available at <http://usinfo.org> (“It is no longer simply the threat that states pose, but also the threat that terrorists will acquire, and use, weapons of mass destruction.”).

24. *See* ANDREAS PERSBO & IAN DAVIS, SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA 55 (2004), available at <http://www.basicint.org>.

25. Winner, *supra* note 1, at 10.

26. *See, e.g.*, BENJAMIN FRIEDMAN, BIPARTISAN SECURITY GROUP, THE PROLIFERATION SECURITY INITIATIVE: THE LEGAL CHALLENGE 1 (2003), at http://www.gsainstitute.org/gsi/pubs/09_03_psi_brief.pdf; PROSSER, *supra* note 12.

27. PROSSER, *supra* note 12.

28. *Russia Joins Proliferation Security Initiative*, *supra* note 17.

29. *See* Li Jing, *Nations to Team Up on Arms Control*, CHINA DAILY, July 21, 2004, available at <http://www.chinadaily.com.cn>.

The Statement of Interdiction Principles, the working document for the PSI, claims that PSI activities will not violate international law.³⁰ According to the Statement, PSI countries are to pursue the goals of the initiative “to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks.”³¹ But when challenged on the legality of the initiative, PSI advocates consistently fail to provide a satisfactory explanation. For instance, a representative answer is that: “There already exists a large body of authority for undertaking interdictions, such as those involving actions by coastal states in their territorial waters, or by flag states of vessels operating on the high seas under their flags.”³² The usually sparse legal explanations offered by PSI countries in defense of the initiative suggest that its legal rationale deserves further consideration.

The Statement of Interdiction Principles lays out “specific actions” to be undertaken by PSI participants. Subparagraphs 4(b) and (c) call on flag states to board and search their own vessels regardless of their location in the world and to consider providing consent to other states for such boardings.³³ Article 92 of the Convention subjects ships flying the flag of one state to the exclusive jurisdiction of that state on the high seas,³⁴ but the flag state can waive its exclusive jurisdiction by consent.³⁵ Thus, these subparagraphs pose no problem under the Convention.

30. PROSSER, *supra* note 12.

31. INTERDICTION PRINCIPLES, *supra* note 8.

32. U.S. DEPT OF STATE, BUREAU OF NONPROLIFERATION, PROLIFERATION SECURITY INITIATIVE FACT SHEET, at <http://www.state.gov> (May 24, 2004). In a July 2003 press conference, Australian Deputy Secretary for the Department of Foreign Affairs and Trade Paul O'Sullivan stated, “[PSI participants will] abide by international law. The question that's in debate if you like is precisely what is permitted under some interpretations of some aspects of international law. But . . . on the whole the participants in this process don't feel that the existing structure of laws prevents them from doing the things that we're talking about.” Paul O'Sullivan, Press Conference, Brisbane, Australia (July 10, 2003), at <http://www.dfat.gov.au>.

33. INTERDICTION PRINCIPLES, *supra* note 8, at 4(b)-(c).

34. U. N. Convention on the Law of the Sea, Dec. 10, 1982, art. 92, para. 1, 1833 U.N.T.S. 3, 433 [hereinafter UNCLOS]. Article 94 grants flag state jurisdiction and control over “administrative, technical and social matters”; even though the Article does not specifically reference the flag state's ability to regulate the cargo of its vessels, a state could indirectly regulate the cargo by imposing certain regulations on the transport of such cargo, e.g., by requiring extensive documentation for the transport of nuclear warheads. *See id.* art. 94, para. 1, at 434.

35. For example, the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, imposes enforcement duties on the flag state, but allows the flag state to authorize another state to enforce the Agreement. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 307-08 (3d ed. 1999).

More problematic is subparagraph 4(d) of the Statement of Interdiction Principles, which calls on PSI participants:

To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.³⁶

This subparagraph raises serious concerns under the Convention because of the apparent conflict with the right of innocent passage and the freedom of navigation.

A. *Right of Innocent Passage*

The right of innocent passage has long formed an integral part of the law of the sea. One author describes innocent passage as “the main universally recognized manifestation of limitations imposed by international law on sovereignty in coastal waters.”³⁷ The Law of the Sea Convention preserves the right of innocent passage both in the territorial sea and in straits used for international navigation.³⁸

i. *Territorial Sea*

Article 17 of the Convention limits coastal state control over foreign vessels in the territorial sea by granting these vessels the right of innocent passage.³⁹ Innocent passage is defined in Article 19, which requires the coastal state to permit passage through its territorial waters unless the passage is “prejudicial to the peace, good order or security of the coastal State.”⁴⁰ Article 19 goes on to

36. INTERDICTION PRINCIPLES, *supra* note 8, at (4)(d).

37. FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA: THE CURRENT REGIME OF ‘FREE’ NAVIGATION IN COASTAL WATERS OF THIRD STATES 38 (1990).

38. UNCLOS, *supra* note 34, art. 45, at 414.

39. *Id.* art. 17, at 404.

40. *Id.* art. 19, para. 1, at 404.

list what might qualify as an activity that prejudices “the peace, good order, or security of the coastal State.”⁴¹

For PSI interdictions in the territorial sea to be legal, the interdicted ship must be exercising passage that is non-innocent.⁴² However, the transport of WMD does not fit neatly within any of the exceptions listed in Article 19. The only exception which might apply is “any threat or use of force . . .” against the coastal state.⁴³ It might be argued that the shipment of WMD between states or non-state actors who desire to use them against the coastal state should count as a “threat” against the state’s sovereignty, or perhaps that it even violates the prohibition in the U.N. Charter against the use of armed force “against the territorial integrity or political independence of any State . . .”⁴⁴ Thus, the passage would be non-innocent.

To make this argument cogently, the coastal state would have to demonstrate several things. First, it must prove that the transport of WMD constitutes a “threat . . . of force” against it.⁴⁵ The analysis is complicated by the possibility of “dual use” WMD material.⁴⁶ According to Dr. Michael Beck, Executive Director of the Center for International Trade and Security, PSI efforts “face a major problem because 95 percent of the ingredients for WMD are dual-use in nature, having both civilian and WMD applications.”⁴⁷ Under the PSI, the effort to interdict the rare illicit shipment may require the coastal state to stop and search numerous ships which turn out to pose no threat at all. And further, even if questionable materials are found, the coastal state must then prove that the materials will be used for threatening rather than non-threatening purposes.⁴⁸

Second, the coastal state will have to show that the transport of WMD threatens its “sovereignty, territorial integrity or political independence” or violates some other principle of international law embodied in the U.N. Charter.⁴⁹ This, too, will be difficult to prove, because it is not the mere *transport* of WMD that threatens a state’s sovereignty, but the *use* of these weapons against it. If

41. *Id.* para. 2, at 404.

42. *See id.* art. 25, para. 1, at 407.

43. *Id.* art. 19, para. 2(a), at 404.

44. U.N. CHARTER, art. 2, para. 4; *see also* U.N. CHARTER, Preamble (stating as a purpose of the United Nations “to ensure . . . that armed forces shall not be used, save in the common interest”).

45. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

46. Michael E. Beck, *The Promise and Limits of the PSI*, 10 THE MONITOR 16, Spring 2004, available at http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

47. *Id.*

48. *See* Beck, *supra* note 46, at 16-17.

49. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

arguing that the transport of WMD threatens its security, it may not be enough for the coastal state to show merely that the WMD will be used. Rather, on the literal wording of Article 19, the coastal state must prove that the WMD being interdicted will be used against *that particular state*.⁵⁰ This correlation will not be easily made.⁵¹

Third, if the coastal state argues that the transport violates the U.N. Charter, it cannot rely on the possibility that the WMD will be used at some time in the future. Article 19(2) requires that the threat or use of force be made “in the territorial sea.”⁵² A future use of WMD will probably not occur in the territorial sea. Thus, the coastal state again must argue that the transport itself, not the future use, violates the principles of the U.N. Charter, an argument which may have difficulty winning support in the United Nations.⁵³

1. Article 25

There are a couple of possible responses to these problems. The first response might be for the coastal state to invoke Article 25 of the Convention. Paragraph 1 of Article 25 provides: “The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”⁵⁴ Paragraph 1 is intended to be a general introduction to the rest of the Article, which provides two specific situations in which the coastal state may take such steps.⁵⁵ First, according to paragraph 2:

[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to

50. UNCLOS, *supra* note 34, art. 19, para. 2(a), at 404.

51. The search for WMD in Iraq, which to date has been fruitless, is just one example of the difficulty of acquiring and implementing solid intelligence on this issue.

52. UNCLOS, *supra* note 34, art. 19, para. 2, at 404.

53. If the coastal state fails to show that the passage is non-innocent, UNCLOS, Article 23 would apply. Article 23 requires vessels transporting “nuclear or other inherently dangerous or noxious substances . . . through the territorial sea” to carry certain documentation when exercising the right of innocent passage. Thus, it appears that the only regulation a coastal state may impose on ships carrying WMD, so long as they are exercising innocent passage, is to require them to confine their passage to certain designated sea lanes, as provided by Article 22. But so long as the vessels stick to the designated routes, the hands of the coastal state seem to be tied by the Convention when it comes to implementing the PSI in the territorial sea. *Id.* arts. 22-23, at 406.

54. *Id.* art. 25, para. 1, at 407.

55. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 229 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter CONVENTION COMMENTARY 2].

which admission of those ships to internal waters or such a call is subject.⁵⁶

This implies that the coastal state could stop inbound ships to check for documentation or, perhaps, even to perform a cursory search. Second, paragraph 3 permits the temporary suspension of the right of innocent passage in specified areas of the territorial sea “if such suspension is essential for the protection of its security, including weapons exercises,” provided that the suspension is duly published and does not discriminate among foreign ships.⁵⁷

The suspension of the right of innocent passage is therefore contingent on several conditions: (1) the suspension must be non-discriminatory, and, therefore, ban *all* vessels if it bans any; (2) it must be temporary and not permanent; (3) it “may only cover specified areas of the territorial sea;” (4) it must “be essential for [the] protection of coastal State security, including weapons exercises,” not just one option among many; and (5) it must be published before becoming effective.⁵⁸

It could be argued that a PSI-driven interdiction is a form of suspension of the right of innocent passage. But paragraph 3 of Article 25 does little to justify typical PSI activities.⁵⁹ Under condition (1), the suspension must be non-discriminatory,⁶⁰ while PSI activities are aimed at specific actors of concern. Under condition (2), any suspension must be temporary, whereas PSI partners might suspend innocent passage for certain vessels, or for vessels flying particular flags, on a permanent basis, or at least until the countries of concern give up their proliferation activities.⁶¹ Condition (3) is also a problem, because to be effective, PSI activities will probably occur throughout the territorial sea rather than in a designated area. And under condition (4), the coastal state will have to argue that the PSI interdiction is *essential*, and that other options — such as diplomatic channels — are ineffective.⁶²

Does Article 25, paragraph 1, establish the basis for other PSI-related action besides those listed in paragraphs 2 and 3?⁶³ The answer is unclear. On the one hand, a coastal state seeking to prevent non-innocent passage through its territorial sea does not

56. UNCLOS, *supra* note 34, art. 25, para. 2, at 407.

57. *Id.* para. 3, at 407.

58. NGANTCHA, *supra* note 37, at 165-66.

59. UNCLOS, *supra* note 34, art. 25, para. 3, at 407.

60. NGANTCHA, *supra* note 37, at 166.

61. *Id.*

62. *Id.* This last point may not be as difficult to overcome as it first appears, especially with respect to non-state actors, with whom negotiation is impossible.

63. *See* UNCLOS, *supra* note 34, art. 25, at 407.

have many choices besides interdiction.⁶⁴ For instance, it might enact documentation requirements like those listed in Article 23,⁶⁵ but the only way to enforce such measures is by interdiction.⁶⁶ Thus, random interdictions in the territorial sea seem to be the only way to prevent non-innocent passage. On the other hand, Article 24 precludes the coastal state from “hamper[ing] the innocent passage of foreign ships” or from “impos[ing] requirements . . . which have the practical effect of denying or impairing the right of innocent passage.”⁶⁷ In order to prevent non-innocent passage by using random interdictions, the coastal state will have to hamper the truly innocent passage of a large number of foreign vessels. The question, therefore, is how much “collateral damage” should be allowed in the coastal state’s pursuit of its national security objectives?

The solution is probably found in solid intelligence. With good intelligence, the interdicting country can attempt to reconcile Articles 24 and 25 by interdicting non-innocent vessels in pursuit of its national security objectives while minimizing the hassle to innocent ships.⁶⁸ The PSI Statement of Interdiction Principles, which encourages states to “[a]dopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity,”⁶⁹ encourages such a solution.⁷⁰

2. Protective Principle & Article 27

Another response to these problems might be found in the protective principle of international law and Article 27 of the Convention.⁷¹ The protective principle holds that a state has the right to protect itself against threatening acts performed outside its territory.⁷² The case of *United States v. Gonzalez*⁷³ provides a helpful context for this principle. In *Gonzalez*, the U.S. Coast Guard stopped, boarded, and seized a Honduran vessel 125 miles off the coast of Florida after gaining the consent of Honduran authorities,

64. Winner, *supra* note 1.

65. See UNCLOS, *supra* note 34, art. 23, at 406.

66. See Winner, *supra* note 1.

67. UNCLOS, *supra* note 34, art. 24, paras. 1, 1(a), at 406. Article 24 also prohibits the coastal state from “discriminat[ing] in form or in fact against the ships of any state or against ships carrying cargoes to, from or on behalf of any State.” *Id.* para. 1(b), at 406. Countries of concern could probably raise a persuasive argument under this provision that PSI participants discriminate against their vessels or cargo.

68. PROSSER, *supra* note 12.

69. INTERDICTION PRINCIPLES, *supra* note 8, at para. 2.

70. See *supra* note 53.

71. UNCLOS, *supra* note 34, art. 27, at 407.

72. See CHURCHILL & LOWE, *supra* note 35, at 215-16.

73. *U.S. v. Gonzalez*, 776 F.2d 931, 934 (11th Cir. 1985).

finding a large stash of marijuana on board.⁷⁴ The Coast Guard was acting pursuant to the Marijuana on the High Seas Act of 1980, which authorized searches and seizures of foreign vessels outside established “customs waters” when appropriate agreements had been reached with the flag state of the vessels.⁷⁵ In this case, Honduras’ consent allowed the U.S. Court of Appeals to uphold the interdiction.⁷⁶ But the court noted:

Even absent consent, however, the United States could prosecute foreign nationals on foreign vessels under the ‘protective principle’ of international law, . . . which permits a nation to assert jurisdiction over a person whose conduct outside the nation’s territory threatens the nation’s security or could potentially interfere with the operation of its governmental functions.⁷⁷

The Law of the Sea Convention codifies a form of the protective principle for the territorial sea in Article 27.⁷⁸ Subparagraphs 1(a) and (b) of Article 27 declare that a coastal state may exercise criminal jurisdiction on board a foreign ship in the territorial sea “if the consequences of the crime extend to the coastal State” or “if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.”⁷⁹ Of course, the coastal state must first criminalize the conduct under its domestic law before it can exercise protective jurisdiction.⁸⁰

To analogize from drugs to the transfer of weapons, the protective principle and Article 27 may help to justify the PSI in territorial waters. A coastal state might persuasively argue that the transport of WMD and related material could greatly harm its security or governmental functions, or that the consequences of the transport extend to the coastal state.⁸¹

74. *Id.* at 934.

75. 46 U.S.C. §§ 1903(a)-(d) (2000).

76. *Gonzalez*, 776 F.2d at 934.

77. *Id.* at 938.

78. To be precise, the Article actually allows the coastal state to exercise a sort of “effects jurisdiction.” UNCLOS, *supra* note 34, art. 27, at 407-08.

79. *Id.* paras. 1(a), 1(b), at 407.

80. PERSBO & DAVIS, *supra* note 24, at 49. The *Gonzalez* court noted that the protective principle is limited to acts which are generally considered illegal under the laws of states with reasonably developed legal systems. *Gonzalez*, 776 F.2d at 939. This might tend to preclude the legitimate invocation of the protective principle if few States consider the transport of WMD to be a crime. But the objection loses its force in light of the broadening coalition of PSI countries who, even if not yet criminalizing such activity under their domestic laws, certainly have expressed a desire to prohibit proliferation.

81. In theory, the protective principle could be applied to acts performed anywhere in the

ii. Straits Used for International Navigation

Under Article 38 of the Convention, vessels enjoy the right of transit passage through straits used for international navigation.⁸² Transit passage can be seen as a “species” of the right of innocent passage, embodying a compromise between seafaring and coastal states.⁸³ Article 38 defines transit passage as “the exercise . . . of the freedom of navigation . . . solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”⁸⁴ Article 39, entitled “Duties of ships and aircraft during transit passage,” requires vessels to “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.”⁸⁵ In case transit passage is not available under Article 38, the right of innocent passage applies.⁸⁶

Because of the similarities between Article 39, paragraph 1(b), and Article 19, paragraph 2(a), so-called “straits states” will encounter the same difficulties in enforcing the PSI as other coastal states, such as defining the transport as a “threat . . . of force” and linking the transport to a future threat or use in light of dual-use weapons technology.⁸⁷ Furthermore, transit passage is even more firmly entrenched than innocent passage, as straits states may not “hamper” or suspend transit passage through the strait.⁸⁸ Shipping “choke points” like the Strait of Malacca, therefore, may be inaccessible to PSI activities, even if straits states support the initiative.⁸⁹

world, and thus might be used to justify interdictions on the high seas. However, such application is unlikely because the consequences of the transport are not as immediate – it is arguably more likely that weapons will explode or that a cargo ship will sink in the territorial sea of a coastal State, thereby causing it harm, than that weapons transported on the high seas will be used in an eventual attack on the coastal state at some unspecified point in the future.

82. UNCLOS, *supra* note 34, art. 38, para. 1, at 411.

83. NGANTCHA, *supra* note 37, at 57-58.

84. UNCLOS, *supra* note 34, art. 38, para. 2, at 411.

85. *Id.* art. 39, para. 1(b), at 411.

86. *Id.* art. 45, para. 1(a), at 411.

87. *Id.* art. 39, para. 1(b), at 411; *Id.* art. 19, para. 2(a), at 404.

88. *Id.* art. 44, at 413.

89. Malaysia and Indonesia have opposed PSI activities in the Strait of Malacca. *E.g.*, PROSSER, *supra* note 12.

iii. Internal Waters and Ports

In its internal waters, a state has virtually absolute power to enforce its laws.⁹⁰ A coastal state's ports are usually considered part of its internal waters, and the right of innocent passage does not apply in this zone.⁹¹ Because the coastal state enjoys such unrestrained jurisdiction in its internal waters, it is free to inspect foreign vessels which dock at its ports and to arrest vessels and seize illicit cargo when the vessels violate its domestic laws.⁹² This recognized jurisdiction provides solid legal footing for Subparagraph 4(f) of the Statement of Interdiction Principles, which requires port states to inspect vessels suspected of proliferation and seize identified cargo.⁹³

B. Freedom of Navigation

"Beyond the territorial sea all vessels enjoy . . . [the] freedom of navigation . . . [and are subject to] the exclusive jurisdiction of their flag State."⁹⁴ This includes the contiguous zone (when declared), the exclusive economic zone, and the high seas.⁹⁵

Subparagraph 4(d) of the PSI Statement of Interdiction Principles specifically calls upon participant states to interdict vessels in their contiguous zones.⁹⁶ The Statement makes no explicit mention of interdictions of foreign vessels in a coastal state's exclusive economic zone (EEZ) or on the high seas.⁹⁷ However, interdictions outside the contiguous zone will be required for the PSI to be successful. The PSI seeks to achieve ambitious goals: John Bolton, former U.S. Under Secretary for Arms Control and International Security and the chief architect and proponent of the PSI, expressed his hope that, by May 2005, the PSI "will have shut down the ability of persons, companies, or other entities to engage in [WMD proliferation]."⁹⁸ In order to "shut down" proliferation, the scope of the PSI must be expanded beyond the territorial sea and

90. CHURCHILL & LOWE, *supra* note 35, at 65.

91. *Id.* at 60-61.

92. *Id.* at 64.

93. The principle of port state jurisdiction also underpins such maritime security measures as the IMO's ISPS Code and the U.S.-led Container Security Initiative. INTERDICTION PRINCIPLES, *supra* note 8, para. 4(f).

94. CHURCHILL & LOWE, *supra* note 35, at 264.

95. *Id.*

96. INTERDICTION PRINCIPLES, *supra* note 8, para. 4(d).

97. *Id.*

98. John R. Bolton, The Proliferation Security Initiative: A Vision Becomes Reality, Remarks to the First Anniversary Meeting of the Proliferation Security Initiative, Krakow, Poland (May 31, 2004), at <http://www.state.gov> [hereinafter Remarks to the First Anniversary Meeting].

the contiguous zone. Moreover, many principal flag states do not have the military capacity to successfully monitor their own vessels on the high seas, leaving a huge enforcement gap that will likely be filled by major PSI countries like the United States and Australia.⁹⁹

1. Contiguous Zone

Any interdiction of foreign vessels in the contiguous zone without the consent of the flag state is probably illegal.¹⁰⁰ Because the contiguous zone is not part of the territorial sea, the freedom of navigation applies to it.¹⁰¹ The only limit on this freedom is found in Article 33, under which the coastal state may exercise the control in the contiguous zone that is necessary to “prevent [and punish] infringement[s] of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.”¹⁰² A foreign-flagged vessel sailing through the contiguous zone of a coastal state could not be stopped, as the transport of WMD does not readily fall within any of the four categories listed in Article 33.¹⁰³

2. Exclusive Economic Zone

In the exclusive economic zone, the coastal state enjoys sovereign rights over living and non-living natural resources and may exercise jurisdiction with regard to (1) “artificial islands, installations, and structures,” (2) “marine scientific research,” and (3) “the protection and preservation of the marine environment.”¹⁰⁴ The coastal state, however, must exercise these rights with “due regard to the rights and duties of other States,”¹⁰⁵ — one of which is the freedom of navigation protected by Article 87.¹⁰⁶

Any proposed justification for a WMD-based interdiction of a foreign-flagged vessel by the coastal state in the EEZ would be extremely shaky. The coastal state might try to excuse the

99. See Winner, *supra* note 1, at 12.

100. FRIEDMAN, *supra* note 26, at 3.

101. CONVENTION COMMENTARY 2, *supra* note 55, at 267.

102. UNCLOS, *supra* note 34, art. 33, para. 1, at 409.

103. Of course, if the vessel were inbound to a port of the coastal state, interdiction would be justified as a customs measure. Interdiction of ships carrying illegal drugs is a good example. According to a senior member of the U.S. Coast Guard testifying before the U.S. Senate Foreign Relations Committee, “[a]doption by the U.S. of an expanded contiguous zone has doubled the area where we can exercise these increased authorities. The benefits of the contiguous zone against [drug] traffickers surreptitiously shipping their illicit products to U.S. shores are clear.” S. REP. NO. 108-10, at 109 (2004) (statement of Rear Admiral John E. Crowley, Jr., Chief Counsel and Judge Advocate General, U.S. Coast Guard, Dep’t of Homeland Security).

104. UNCLOS, *supra* note 34, art. 56, paras. 1(b)(i)-(iii), at 418.

105. *Id.* para. 2, at 418.

106. *Id.* art. 58, para. 1, at 419.

interdiction as part of its duty to protect and preserve the marine environment, but this would probably fail unless the vessel is polluting the ocean while in transit. The legal regime for pollution control is found in Part XII of the Convention; among other things, Part XII authorizes measures adopted by the coastal state to minimize “pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, *preventing intentional and unintentional discharges*, and regulating the design, construction, equipment, operation and manning of vessels.”¹⁰⁷ Article 211 authorizes the coastal state to “adopt laws and regulations for the prevention, reduction and control of *pollution from vessels* conforming to and giving effect to generally accepted international rules and standards” in the EEZ.¹⁰⁸ Boarding and inspection is only justified under Part XII when a violation of these laws or regulations results “in a substantial discharge causing or threatening significant pollution of the marine environment.”¹⁰⁹ Thus, interdiction would not be justified in the absence of a “substantial discharge,” resulting in a serious threat to the marine environment — a condition that will probably not obtain in most PSI-related interdictions.

The mere fact that the cargo is potentially dangerous would not justify an interdiction, as the Convention seems to envision the unhampered transport of “nuclear or other inherently dangerous or noxious substances,” provided certain conditions are fulfilled.¹¹⁰ In short, PSI interdictions of foreign vessels in the EEZ appear legally unsupportable.

3. *High Seas*

The exclusive enforcement relationship between a flag state and its vessels on the high seas has long been recognized by international law. As early as 1927, the Permanent Court of International Justice (PCIJ) held in the *Lotus*¹¹¹ case that “vessels on the high seas are subject to no authority except that of the State whose flag they fly.”¹¹² The Convention codifies this principle in Article 92, which reserves to the flag state jurisdiction over ships

107. *Id.* art. 194, para. 3(b), at 478 (emphasis added).

108. *Id.* art. 211, para. 5, at 484 (emphasis added).

109. *Id.* art. 220, para. 5, at 489.

110. UNCLOS, *supra* note 34, art. 23, at 406.

111. S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 at 25, *quoted in* ANDREAS PERSBO & IAN DAVIS, *SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA* 43 (2004), *available at* <http://www.basicint.org>.

112. *Id.*

flying its flags on the high seas.¹¹³ Flag states could waive their exclusive jurisdiction to expedite PSI interdictions, but to this point only three states — Panama, Liberia and the Marshall Islands — have done so.¹¹⁴

In the absence of such a waiver, Article 110 of the Convention prohibits a warship from boarding a foreign ship on the high seas.¹¹⁵ There are several exceptions to this rule: a ship can be boarded if it is engaged in piracy, slave trade, or unauthorized broadcasting; if it is without nationality;¹¹⁶ or if it is “of the same nationality as the warship.”¹¹⁷ Unless a ship carrying WMD cargo otherwise falls within one of these exceptions (e.g., it flies under two or more flags of convenience), it cannot be intercepted by a foreign warship.

But might the spirit of the Convention override — or at least supplement — the letter? Perhaps PSI activities are justified in light of the purposes for which the high seas are reserved. Article 88 states, “The high seas shall be reserved for peaceful purposes.”¹¹⁸ This must be taken together with Article 301, which reads:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.¹¹⁹

These two Articles establish that the freedom of navigation on the high seas, one of the rights under the Convention, is limited to peaceful uses.¹²⁰ PSI countries, then, might claim that the transport of WMD and their delivery systems is not a “peaceful purpose” in light of the probable consequences of proliferation. States which participate in such activities could be viewed to have waived their

113. UNCLOS, *supra* note 34, art. 92, para. 1, at 433.

114. *See, e.g.*, Remarks to the First Anniversary Meeting, *supra* note 98.

115. UNCLOS, *supra* note 34, art. 110, para. 1, at 438.

116. Article 92 extends the definition of a ship without nationality to “[a] ship which sails under the flags of two or more States, using them according to convenience.” *Id.* art. 92, para. 2, at 433.

117. *Id.* art. 110, para. 1(e), at 438.

118. *Id.* art. 88, at 433.

119. *Id.* art. 301, at 516. At the ninth session of the Conference (198), the text of Article 301 was originally proposed by ten states as an addition to Article 88, but was not adopted; instead, the text was included as Article 301. 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 90 (Satya N. Nandan & Shabtai Rosenne eds., 1995) [hereinafter CONVENTION COMMENTARY 3].

120. UNCLOS, *supra* note 34, art. 88, at 433; art. 301, at 516.

freedom of navigation under the Convention.¹²¹ Article 300, for example, declares, “States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”¹²² If trafficking in WMD material is seen as an abuse of the freedom of navigation and a failure to act in good faith, a state which does so might be prevented from invoking Article 87 in its defense.¹²³

III. ROUTES AROUND THE LEGAL OBSTACLES

There are several routes around the legal problems posed by the PSI. I will try to deal with these briefly, without going too far afield of the central issue.

A. *Self-defense*

First, PSI countries might claim the right of “collective self-defence” enshrined by Article 51 of the U.N. Charter.¹²⁴ According to a 1985 report of the U.N. Secretary-General, the Law of the Sea Convention does not prohibit “military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51”¹²⁵ More to the point, “[i]n the exercise of the right of collective self-defence it is clear that parties to [collective] security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels[,] or aircraft.”¹²⁶ Seen in this light, the PSI is a collective response to the threat of international terrorism.

However, Article 51 of the U.N. Charter sets the prerequisite that “an armed attack” against a member state occur before action can be taken in self-defense.¹²⁷ PSI countries would have to argue that the attacks such as those of September 11, 2001, and the Madrid train bombings should trigger the right to collective self-

121. See PERSBO & DAVIS, *supra* note 24, at 61-62

122. UNCLOS, *supra* note 34, art. 300, at 516.

123. See PERSBO & DAVIS, *supra* note 24, at 61-62; FRIEDMAN, *supra* note 26, at 9.

124. Article 51 of the U.N. Charter reads in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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.” U.N. CHARTER art. 51.

125. *United Nations Disarmament Study Series — The Naval Arms Race, Report of the Secretary-General*, U.N. GAOR, 40th Sess., Annexes, Agenda Item 68(b), para. 188, U.N. Doc. A/40/535 (1985), *quoted in* CONVENTION COMMENTARY 3, *supra* note 119, at 91.

126. *Id.* para. 178.

127. U.N. CHARTER art. 51.

defense. The situation is complicated because these attacks came not at the behest of a particular state, but under the direction of a loose chameleonic association of non-state actors. The uncertain nature and location of the terrorist network create an incentive for PSI countries to cast too wide a net in the hopes of achieving a “successful” interdiction, which might raise both efficiency and equity concerns. Additionally, the PSI is forward- rather than backward-looking, envisioning pre-emptive action to prevent further attacks.¹²⁸ Because pre-emptive military action is not currently accepted as a legitimate exercise of self-defense, the right of self-defense probably fails to justify the PSI.¹²⁹ Naturally, though, the stronger the evidence that the recipient state itself plans to use WMD against the coastal state, or plans to sell the WMD to non-state actors who desire to attack the coastal state, the stronger this justification becomes.

B. U.N. Security Council Resolution

Under Chapter VII of the U.N. Charter, PSI countries could push for a U.N. Security Council resolution specifically authorizing the boarding of ships and the seizing of WMD-related cargo.¹³⁰ Indeed, in May 2004 the Security Council adopted Resolution 1540, which calls on all states “to take cooperative action” to prevent proliferation of WMD, “their means of delivery, and related materials.”¹³¹ According to PSI countries, the PSI is just one example of such “cooperative action.”¹³²

But Resolution 1540 is insufficient in itself. The Resolution recognizes proliferation to be “a threat to international peace and security,”¹³³ but does not explicitly authorize the types of interdictions to take place under the PSI. Therefore, a further resolution is needed. However, it is unlikely that such a resolution could be passed because, even if the majority of the members could be persuaded to override the traditional rights of innocent passage and freedom of navigation on the high seas, the resolution would almost certainly be vetoed by China, which has expressed

128. INTERDICTION PRINCIPLES, *supra* note 8.

129. It might be argued that the traditional interpretation of Article 51 of the U.N. Charter, precluding pre-emptive action, is ill-suited to deal with a world where (1) modern technology has enabled entire states to be virtually demolished with the push of a button; and (2) states are no longer the only actors in the proliferation game.

130. PERSBO & DAVIS, *supra* note 24, at 73.

131. S.C. Res. 1540, U.N. SCOR, 4956th mtg. para. 10, U.N. Doc. S/Res/1540 (2004).

132. *Id.* It is interesting that Resolution 1540 was adopted in late April 2004, nearly a year after the PSI was first proposed, rendering less forceful the claim that the PSI was initiated pursuant to the Resolution.

133. *Id.* at 1.

resistance to the PSI and frustration with the position taken by the United States on North Korea's nuclear program.¹³⁴

C. Customary International Law

It might be argued that there is an emerging norm of customary international law against proliferation, or even bolder, in favor of taking certain actions to prevent it. Indeed, the popularity of the PSI testifies that such a norm might be emerging. However, because customary international law is based on consent, countries of concern such as North Korea and Iran could ensure that this rule does not apply to them by dissenting openly and consistently as the norm develops.

D. Amending the Convention

States Parties might consider amending the Law of the Sea Convention to better deal with the threat of proliferation.¹³⁵ There are at least two reasons supporting amendment. First, although it purports to be a comprehensive constitution for the oceans, the Convention seems primarily addressed to marine conservation and resource allocation.¹³⁶ Military operations on the seas were deliberately not discussed during the United Nations conferences on the Law of the Sea.¹³⁷ On the contrary, the Convention was "intended to regulate the uses of the seas in time of peace."¹³⁸ It might be argued, therefore, that the Convention does not grant sufficient flexibility for military efforts like the PSI. Second, when the Convention was adopted in 1982, the world was a far different place than it is today. Military power was split between the United States and the Soviet Union, both of whom were too busy playing the zero-sum game to pay much attention to a potential WMD threat from non-state actors. Indeed, the fearful but relatively stable political framework of the Cold War probably helped keep WMD out of the hands of terrorist groups. But in light of the stateless, ever-changing face of terrorism, perhaps the international legal regime must be updated to ensure the efficiency and

134. See James Kynge & Andrew Ward, *Beijing Frustrated with US Policy on North Korea*, FINANCIAL TIMES (London) Sept. 5, 2003, at 10.

135. The Convention opened for amendment on November 16, 2004, ten years after the date of its entry into force (Nov. 16, 1994). UNCLOS, *supra* note 34, art. 312, para. 1, at 520.

136. The Convention states that its purpose is to "promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." UNCLOS, *supra* note 34, Preamble, at 397.

137. CHURCHILL & LOWE, *supra* note 35, at 421.

138. *Id.*

expediency of counter-proliferation efforts while protecting peaceful uses of the sea.

For instance, Article 19, which defines innocent passage,¹³⁹ might be amended to include a provision stating that passage is not innocent if a ship is carrying unauthorized nuclear, chemical, or biological weapons, their delivery systems, or related material. Such an amendment would provide a sound legal basis for coastal state interdiction in the territorial sea.¹⁴⁰ Likewise, an amendment to Article 110 could extend the legal grounds for boarding a foreign ship on the high seas. This could be done quite simply by adding another exception to paragraph 1 to cover illicit trade in WMD.

Realistically, the United States, though spearheading the PSI and having the most at stake in its international acceptance, is not yet a party to the Convention and is prevented from proposing an amendment.¹⁴¹ Therefore, concerns about the PSI may not be taken into serious consideration if the Convention is amended. But perhaps the United States will see the amendment process as, *inter alia*, an effective way to further its counter-proliferation efforts, remove existing doubts about the legality of the PSI, and retake its long-lost seat at the negotiating table among other leading countries in the law of the sea.¹⁴²

IV. WHAT HAPPENS NEXT?

So where does this complicated web of international law and politics leave the PSI? Despite doubts about the legality of the PSI, participants in the initiative can always bring their interdiction actions into accord with the Law of the Sea Convention by simply signing mutual shipboarding agreements with one another and, more importantly, with countries whose ships flying its flag traditionally have been used for proliferation.¹⁴³ For instance, the

139. UNCLOS, *supra* note 34, art. 19, at 404.

140. It should be noted here that a ship carrying unauthorized WMD will not declare its illicit cargo. Unlike the other non-innocent activities listed in Article 19 (e.g., exercise or practice with weapons, fishing activities, etc.), the coastal state may not be able to detect an unauthorized shipment immediately. To prevent coastal state abuse of boarding rights and to protect truly innocent passage, the coastal state should still be required to have a "reasonable ground for suspecting" that a ship is carrying unauthorized cargo. *Cf.* UNCLOS, *supra* note 34, art. 110, para. 1, at 438. Thus, the sharing of intelligence among PSI countries will continue to play a major role in interdiction efforts.

141. *See* UNCLOS, *supra* note 34, art. 312, para. 1, at 520.

142. On February 25, 2004, the U.S. Senate Foreign Relations Committee unanimously voted to send the resolution of ratification of the Convention to the full Senate for advice and consent. UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, SENATE CONTINUES EXAMINATION OF LAW OF THE SEA TREATY; ARMED SERVICES, ENVIRONMENT AND PUBLIC WORKS COMMITTEES HOLD HEARINGS (Apr. 30, 2004), at <http://www.unausa.org>.

143. *See, e.g.,* PERSBO & DAVIS, *supra* note 24, at 62-63.

United States recently signed shipboarding agreements with the governments of Panama and Liberia, which have the two largest ship registries in the world.¹⁴⁴ By virtue of these two agreements alone, the United States can freely board over 30% of the world's cargo vessels.¹⁴⁵ Assuming that all PSI countries allow ships flying their flag to be boarded as well, this figure increases to almost 50%.¹⁴⁶ These agreements are only bilateral, but Panama and Liberia will probably sign similar agreements with other PSI countries as well.¹⁴⁷

Unfortunately, the PSI is likely to be emasculated by the refusal of North Korea, Iran, and other states to sign such shipboarding agreements with PSI countries. North Korea has expressed grave concern over the initiative, stating that it has a sovereign right to develop, deploy, and export weapons, and that it would view any interdiction of its ships as a declaration of war.¹⁴⁸ North Korea has further invoked the right of innocent passage protected by the Convention to condemn Japanese blockades of North Korean ships.¹⁴⁹ Given this hostility to the PSI, it is unlikely that PSI participants will be able to sign shipboarding agreements with North Korea. The same problem will almost certainly arise with Iran and Syria.

Another problem is China's reluctance to join the PSI. China's participation is essential to the success of the initiative, not only because of its political leadership in Asia and in the world, but also because it controls important sea lanes around the Korean peninsula. China is concerned about WMD proliferation and desires international cooperation on the issue, but remains opposed to "pre-emptive strikes and maritime interception operations."¹⁵⁰ Ideally,

144. See John R. Bolton, U.S. Under Secretary for Arms Control and International Security, Remarks with H. E. Arnulfo Escalona, Minister of Government and Justice of Panama, Treaty Room, Washington, D.C. (May 12, 2004), at <http://www.state.gov/t/us/rm/32413.htm>.

145. See INSTITUTE OF SHIPPING ECONOMICS AND LOGISTICS, SHIPPING STATISTICS YEARBOOK 2001 26-27, Table 1.1.7 (2001).

146. See, e.g., Remarks to the First Anniversary Meeting, *supra* note 98.

147. There is, of course, a potential diplomatic nightmare here in that, if the PSI continues to expand its membership, PSI countries will have to create a complex web of mutual shipboarding agreements. Multilateral shipboarding agreements would avoid the problem of multiple bilateral treaties, but many countries will probably be hesitant to sign on to such agreements. For example, a trilateral shipboarding agreement among Germany, Panama, and Liberia would not only grant Germany the expedited right to board Panamanian and Liberian vessels, but would also allow Panama and Liberia to board each other's (and Germany's) vessels under the principle of reciprocity — a scenario that each country might resist.

148. *North Korean TV says Missile Exports "Sovereign Right,"* BBC MONITORING ASIA PACIFIC, Sept. 16, 2003, at 1.

149. *North Korea Warns Japan Against Ship Restrictions, Sanctions,* BBC MONITORING ASIA PACIFIC, Jan. 10, 2004, at 1.

150. Jing, *supra* note 29.

China's concerns will spark a full-scale international discussion about the PSI's legality under the Law of the Sea Convention.

Whether the PSI has been successful is highly debatable. While advocates claim the PSI has great potential,¹⁵¹ its success is difficult to measure because PSI participants have not disclosed the number of interdictions that have occurred or the methods employed.¹⁵²

But there have been highlights. The most prominent PSI success story took place in October 2003, when PSI forces interdicted the German-flagged ship *BBC China* on its way to Libya.¹⁵³ After gaining permission of the German shipping company, PSI forces diverted the ship to an Italian port, where thousands of parts of uranium-enrichment equipment were discovered on board.¹⁵⁴ Libya's subsequent decision to abandon its nuclear program might be partially attributed to this interdiction.¹⁵⁵

The case of the *BBC China* gives room for hope that the PSI can be an effective tool in the counter-proliferation effort and still remain well within the bounds of international law. But to maximize its potential, the PSI must expand its scope to include interdictions of questionable legality under existing treaties — most notably, the 1982 United Nations Convention on the Law of the Sea. Frank discussion of these issues is necessary. The PSI must be reconciled to the Convention in order to lawfully confront the chief threat of our time.

151. See, e.g., Beck, *supra* note 46, at 16.

152. PROSSER, *supra* note 12.

153. *U.S. Seized Shipload of Nuclear Equipment for Libya in October*, N.Y. TIMES, Jan. 1, 2004, at A7.

154. *Id.*

155. Esper & Allen, *supra* note 10, at 5-6.

E-COMMERCE AND THE TAXATION DOCTRINE OF PERMANENT ESTABLISHMENT IN THE UNITED STATES AND CHINA

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I. INTRODUCTION

The People's Republic of China entered into an Income Tax Agreement with the United States in 1984. The signing of that tax treaty began official cooperation between the United States and China regarding taxation of income for their residents. Ratified two decades ago, that document did not address taxation of Internet income. While we await codification of taxation of Internet income by either country, international businesses are left without specific authority to determine what will constitute an e-commerce permanent establishment for purposes of taxation in China or the United States. Other countries are in the same situation as China and the United States, having no taxation laws defining and determining the meaning of permanent establishment in e-commerce. This article will discuss the definition of permanent establishment and its importance in determining what a country's e-commerce tax implications will be. As China emerges as an international business power, and the United States continues to be a world leader, evaluating how they deal with international taxation issues can provide insight to other countries as to the future of permanent establishments in e-commerce.

II. BUSINESS RELATIONS BETWEEN THE UNITED STATES AND CHINA

The Chinese government wishes to maintain an annual growth rate for its economy of 7.2%.¹ Until 2003, the growth rate of China's economy had been predictable, growing between 7% and 8% annually in the five years prior.² However, 2003 saw a change in China's economic growth that has continued in 2004. In 2003, China's economy grew by 9.1%, and the growth surged to 9.7% in the first quarter of 2004.³ The Chinese government is expected to

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1. Siva Yam & Paul Nash, *Cooling China's "Overheated" Economy to Bring it In-Line with a Targeted Annual Growth Rate of 7.2%*, CHINA ALERT, May 1, 2004, at 1, at <http://www.usccc.org/publication/May%201,%202004.pdf> (last visited Feb. 16, 2005).

2. *Id.*

3. *Id.*

take measures to slow the growth of its economy, which could impact businesses operating in or with China.⁴ Slowed growth is expected to negatively impact property developers and cause increased competition between Chinese and U.S. manufacturers.⁵

China is “the world’s largest construction site.”⁶ For this reason, opportunities exist for foreign businesses, including U.S. businesses, in the production of raw materials — such as steel — as China’s own resources are scarce.⁷ An increasing number of U.S. companies are operating in China due to its massive consumer market and low production costs.⁸

China is only beginning to emerge as a powerful player in global commerce. Domestic businesses in China have a long history of government control.⁹ Private Chinese businesses, still in their early stages, have difficulty directly challenging U.S. businesses.¹⁰ However, Chinese businesses are becoming more modernized and willing to invest in new technological developments.¹¹ Increasingly, Chinese businesses are operating outside of China and are willing to make direct investments in the United States to avoid operating through a traditional foreign company intermediary.¹²

The increasing market available for U.S. businesses in China and the increasing willingness of Chinese businesses to operate in the United States means that the two countries will have significantly more taxation issues with foreign companies. As the economic interplay between China and the United States heightens, and the expansion of the Internet and e-business continues, the two countries and their business enterprises must deal with the issues of permanent establishment, taxation, and e-commerce. However, business commentators are concerned that friction in the bilateral relationship between the United States and China, caused mainly by the United States’ astounding \$120 billion trade deficit with China, may cause problems for U.S. businesses seeking an association with China.¹³

4. *Id.*

5. *Id.* at 1-2.

6. SIVA YAM & PAUL NASH, REFLECTIONS ON 2003 AND SOME THOUGHTS ON THE OPPORTUNITIES AND CHALLENGES OF THE COMING FIVE TO TEN YEARS 1, at <http://www.usccc.org/publication/Executive%20Summary%20Year%202004.pdf> (last visited Feb. 16, 2005).

7. *Id.* at 1-2.

8. *Id.* at 3-4.

9. *See id.* at 2-3.

10. *Id.* at 3.

11. *Id.*

12. *Id.*

13. *Turbulence Seen for Sino-U.S. Relations*, PAC. BUS. NEWS, Feb. 16, 2004, at 1, available at <http://www.johnsonchoi.com/pbn021704.pdf> (last visited Feb. 16, 2005).

III. THE INCOME TAX TREATY

An income tax treaty — the Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income (Agreement) — between the United States and the People's Republic of China was signed on April 30, 1984.¹⁴ The U.S. Departments of State and Treasury were primarily responsible for negotiating the Agreement on behalf of the U.S.¹⁵ The Agreement is the first and only income tax treaty between the two countries.¹⁶ The Agreement entered into force on November 21, 1986, after it was amended by a subsequent protocol signed on May 10, 1986.¹⁷ The 1986 protocol provided for rules against “treaty shopping.”¹⁸ Generally, U.S. citizens, unless they are also U.S. residents, are not covered by the Agreement.¹⁹

The Agreement was created based on model income tax treaties produced by the Organization for Economic Cooperation and Development and the U.S. Department of the Treasury.²⁰ The provisions of the Agreement are reciprocal, meaning that the same rules apply to both countries.²¹ In the Agreement's formation, the importance of determining permanent establishment rules was recognized. In his letter submitting the treaty to President Ronald Reagan, George P. Schultz, then Director of the Department of State, stated: “[I]nvestors will know before undertaking a transaction in China what the income tax consequences will be. Business profits will not be taxable by China unless attributable to a ‘permanent establishment,’ as defined in the agreement.”²²

Article 5 of the Agreement defines the concept of permanent establishment for taxation of U.S. businesses operating in China and Chinese firms conducting business in the United States.²³ A

14. Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, Apr. 30, 1984, U.S.-P.R.C., T.I.A.S. No. 12065 [hereinafter Agreement for the Avoidance of Double Taxation].

15. *1984 U.S.-China Income Tax Agreement*, 86 TAX NOTES INT'L 8-34 (Apr. 21, 1990), available at LEXIS 86 TNI 8-34.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Agreement for the Avoidance of Double Taxation, *supra* note 14. See Appendix A for the full text of Article 5.

permanent establishment is defined as a “fixed place of business through which the business of an enterprise is wholly or partly carried on.”²⁴ A permanent establishment, under the terms of the treaty, includes:

- a) a place of management;
- b) a branch;
- c) an office;
- d) a factory;
- e) a workshop; and
- f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.²⁵

The Agreement provides that the term “permanent establishment” shall also include:

- a) a building site, a construction, assembly or installation project, or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months;
- b) an installation, drilling rig or ship used for the exploration or exploitation of natural resources, but only if so used for a period of more than three months; and
- c) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where such activities continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve month period.²⁶

More importantly, the term “permanent establishment” does not include:

24. *Id.* art. 5(1).

25. *Id.* art. 5(2).

26. *Id.* art. 5(3).

- a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character; [or]
- f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs (a) through (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.²⁷

The treaty's definition of permanent establishment can therefore be reduced to requiring a fixed place of business, or the ongoing conduction of business for a period of time within the foreign country, with few exceptions. While the treaty does not define the meaning of permanent establishment within the e-commerce context, the treaty does provide for a broad definition of permanent establishment. The State Administration of Taxation in China "has not ruled on the issue of whether a Web site or computer server, through which e-commerce transactions are conducted between a nonresident vendor and Chinese customers, constitutes an 'establishment' within the meaning of Chinese domestic tax law or a 'permanent establishment' under a tax treaty."²⁸

27. *Id.* art. 5(4).

28. Jinyan Li, *E-Commerce Taxation in China*, WORLDWIDE TAX DAILY, Dec. 4, 2000, at 36.

IV. MODERN APPROACHES

The definition contained in the U.S./China taxation treaty of permanent establishment is substantially similar to that contained in the Organisation for Economic Co-operation and Development (OECD) model convention.²⁹ The OECD model was one source used in the drafting of the treaty.³⁰ Therefore, the commentary on Article 5 of the OECD model convention (dealing with permanent establishment) is relevant to interpretation of the U.S./China tax treaty.³¹ While neither country has codified e-commerce taxation and the definition of permanent establishment in that context, they are likely to turn to this model — frequently referred to in international tax situations — in future formation of their definitions and current applications of the existing treaty provisions. According to the OECD commentary, “an Internet web site . . . does not in itself constitute” a permanent establishment.³² The OECD reasons that an Internet site is composed of software and data, not tangible property, and therefore cannot be considered “a place of business” to lead to inclusion as a permanent establishment.³³ However, a server may rise to the level of a permanent establishment because it is tangible property requiring a physical location, and its location can be “a ‘fixed place of business,’” regardless of whether the server is owned or leased by the business operating the server.³⁴ The presence of business personnel at the location of the server is not necessary to create a permanent establishment.³⁵ If the server is not at the disposal of the business, but rather is operated by a web provider, it should not constitute a permanent establishment because the business has no control over the server and it is not a place of business of the enterprise.³⁶

The OECD states that “[c]omputer equipment . . . may only constitute a permanent establishment if it meets the requirement of being fixed.”³⁷ It does not matter whether the server may be

29. ARTICLES OF THE MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2000), *available at* <http://www.oecd.org/dataoecd/52/34/1914467.pdf> (last visited Feb. 25, 2005).

30. *See supra* note 20 and accompanying text.

31. OECD COMMITTEE ON FISCAL AFFAIRS, CLARIFICATION ON THE APPLICATION OF THE PERMANENT ESTABLISHMENT DEFINITION IN E-COMMERCE: CHANGES TO THE COMMENTARY ON THE MODEL TAX CONVENTION ARTICLE 5 (Dec. 22, 2000) [hereinafter OECD CLARIFICATION], *at* <http://www.oecd.org/dataoecd/46/32/1923380.pdf> (last visited Feb. 25, 2005).

32. *Id.* at 5.

33. *Id.*

34. *Id.*

35. *Id.* at 6.

36. *Id.* at 5.

37. OECD CLARIFICATION, *supra* note 31, at 5.

moved, but rather if it is actually moved.³⁸ A server must remain in the same location “for a sufficient period of time” (at least twelve months) to constitute a permanent establishment.³⁹

The existence of computer equipment, even if in a fixed place, will not create a permanent establishment where the business conducted through the equipment is limited to preparatory or auxiliary services.⁴⁰ Whether particular functions can be considered preparatory or auxiliary services must be decided on a case-by-case basis, with regard for all the functions performed by the business through the computer equipment.⁴¹ Examples of activities considered preparatory or auxiliary by the OECD include:

- providing a communications link . . . between suppliers and customers;
- advertising of goods or services;
- relaying information through a mirror server for security and efficiency purposes;
- gathering market data for the enterprise; [and]
- supplying information.⁴²

Where activities performed through the computer equipment are essential and significant to the business as a whole, they go beyond the meaning of auxiliary or preparatory services and create a permanent establishment.⁴³ Businesses should note that any core activities carried on through a server will cause that server to be classified as a permanent establishment under the OECD model, and thus expose them to taxation in the jurisdiction where the server rests.⁴⁴ As an example, the OECD commentary refers to the “e-tailer,” an enterprise that sells products through the Internet.⁴⁵ The mere fact that an e-tailer uses a server to perform some part of its business is insufficient to show that the uses of that server are more than preparatory or auxiliary.⁴⁶ Rather, consideration must be given to “the nature of the activities performed at that location in light of the business carried on by the enterprise.”⁴⁷ For example, if a server is used to operate a web site used only for advertising,

38. *Id.*

39. *Id.*

40. *Id.* at 6.

41. *Id.*

42. *Id.*

43. OECD CLARIFICATION, *supra* note 31, at 6.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

providing information, or displaying a catalogue, it will not constitute a permanent establishment.”⁴⁸ However, if the web site is able to perform the functions of a typical sale (such as the processing of payment by the buyer and the processing of delivery of the products automatically through the server), it will be sufficient to cause the server to create a permanent establishment for taxation purposes.⁴⁹

Generally, the OECD does not consider independent service providers (ISPs) to constitute permanent establishments.⁵⁰ Because ISPs are typically not authorized to contract on behalf of businesses operating through their networks, they therefore constitute independent agents, which is often demonstrated by ISPs hosting the web sites of multiple businesses.⁵¹ As such, they are not considered permanent establishments.⁵² Furthermore, since an ISP or a web site is not a “person” according to Article 3 of the OECD, they would not qualify as permanent establishments under the agency principles outlined in paragraph 5.⁵³

The United States will more than likely follow all of the recommendations of the OECD when it decides to amend or supplement its international tax treaties, including its treaty with China. The United States has already indicated that it believes the OECD should be the leader in determining such international taxation issues, and that the United States should support the OECD’s findings and principles.⁵⁴ In its report to Congress in 2000, the Advisory Commission on Electronic Commerce recommended “affirm[ing] support for the principles of the OECD’s framework conditions for taxation of e-commerce, and support[ing] the OECD’s continued role as the appropriate forum for: (1) fostering effective international dialogues concerning these issues; and (2) building international consensus.”⁵⁵

However, in 1999, prior to the release of the report, the U.S. Department of the Treasury released a report conflicting with the OECD model in regards to servers as permanent establishments.⁵⁶

48. *Id.* at 6-7.

49. OECD CLARIFICATION, *supra* note 31, at 7.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONGRESS, at 42 (Apr. 2000) [hereinafter ADVISORY COMMISSION REPORT TO CONGRESS], available at http://www.ecommercecommission.org/acec_report.pdf (last visited Feb. 17, 2005).

55. *Id.*

56. U.S. DEP’T. OF THE TREASURY, OFFICE OF TAX POLICY, SELECTED TAX POLICY IMPLICATIONS OF GLOBAL ELECTRONIC COMMERCE (Nov. 1996), available at <http://www.ustreas.gov/offices/tax-policy/library/internet.pdf> (last visited Feb. 17, 2005).

The Treasury does not believe servers should be classified as permanent establishments for taxation purposes.⁵⁷ The Treasury reasoned that computer servers can easily be located anywhere in the world, and that its users are indifferent to its location.⁵⁸ Further, a server is often not significantly involved in the creation of income so as to be considered in “determining whether a U.S. trade or business exists.”⁵⁹ The Treasury also feared that foreign persons would simply locate their servers outside of the United States, since their location is unimportant from a business standpoint.⁶⁰ However, since the U.S. Advisory Commission on Electronic Commerce later released a report indicating its loyalty to OECD principles, the Department of the Treasury may withdraw its prior stance against servers as permanent establishments in order to defer to the ideal of international cooperation. Deference to the OECD model may also lead to increased taxation revenues for the United States as clear rules for the right to tax, the method of collection, and agreements to submit to such taxation are reached.

The Treasury report suggested that no new taxes should be applied to e-commerce and that current traditional rules of international taxation should be modified as necessary to adapt to the global Internet business world.⁶¹ Economically similar transactions should receive the same tax treatment, whether made digitally or conducted through non-electronic means.⁶² E-commerce should not shoulder more tax burdens or administrative burdens related to international taxation than its traditional “brick and mortar” competitors. All nations should defer development of their own tax codes related to international e-commerce taxation until such time as an international consensus may be reached on these issues.

V. CONCLUSION

The Advisory Commission on Electronic Commerce Report directed that no U.S. legislation be enacted that is contrary to the Commission’s recommendations on international e-commerce taxation.⁶³ If the report’s recommendations are followed, the United States is unlikely to take any specific action on codification of international e-commerce permanent establishment taxation issues

57. *See id.* at 26.

58. *Id.* at 25.

59. *Id.*

60. *Id.*

61. *Id.* at 19.

62. *Id.*

63. ADVISORY COMMISSION REPORT TO CONGRESS, *supra* note 54, at 43.

any time in the near future. The report clearly indicates that the United States should not advance its own laws on these issues unless and until, in working with the OECD, an international consensus is reached on such taxation matters.⁶⁴ While many countries are actively cooperating in this process, including the United States and China, divergent ideas from a multitude of nations with different laws and concepts of taxation will likely impede progress towards international consensus. Also, developing countries are likely to have different agendas and needs than large economic powers such as the United States and, more recently, China. Developing countries may be adversely affected by the proposed permanent establishment rules, which only allow a country to tax an entity with a physical location within its boundaries. The buyer's resident country receives no tax revenues while the country of the seller's place of business (typically the more developed country) does. These types of disputes and competing interests make it unlikely that a consensus on international e-commerce taxation can be reached.

Without any codes, statutes, or legislation from either China or the United States telling international businesses how their permanent establishments, and thus their country of taxation, will be determined, businesses must turn to the OECD model for the most accurate indication of how they may be taxed. As stated earlier, the taxation treaty between the United States and China was largely based upon this model. The United States and China, both explicitly and implicitly, have consented to the OECD taking the lead in international taxation issues as both countries freely participate in the OECD's activities and determinations.

If the OECD model is followed, this would mean that the presence of a web site is unlikely to give rise to the existence of a permanent establishment for taxation purposes, but the presence of a computer server in China or in the United States could be considered a permanent establishment and thus expose its owner to taxation by that country. Currently, international companies in both countries should expect any meaningful Internet activities that include some fixed place of business (from a computer server to a full-fledged business operation) within China or U.S. borders to grant taxation rights to that country. As U.S. companies continue their expansion into the large Chinese market, and as Chinese businesses begin to tap U.S. sources, these organizations will increasingly pressure their governments for clear, favorable rules regarding permanent establishments in e-commerce. These

64. *Id.* at 42-43.

pressures may lead the countries to amend their treaty to include e-commerce taxation definitions sooner than expected as the wait for global consensus becomes infinite.

APPENDIX A

Article 5 of the Agreement Between the Government of the United States of America and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Tax Evasion with Respect to Taxes on Income, April 30, 1984, US-P.R.C., T.I.A.S. No. 12065:

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term "permanent establishment" includes especially:
 - a) a place of management;
 - b) a branch;
 - c) an office;
 - d) a factory;
 - e) a workshop; and
 - f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.
3. The term "permanent establishment" also includes:
 - a) a building site, a construction, assembly or installation project, or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months;
 - b) an installation, drilling rig or ship used for the exploration or exploitation of natural resources, but only if so used for a period of more than three months; and
 - c) the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where such activities continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve month period.
4. Notwithstanding the provisions of paragraphs 1 through 3, the term "permanent establishment" shall be deemed not to include:
 - a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;
- e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs a) through e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person, other than an agent of an independent status to whom paragraph 6 applies, is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that Contracting State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph if it is shown that the transactions between the agent and the enterprise were not made under arm's-length conditions.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of

the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

FEELING FOR ROCKS WHILE CROSSING THE RIVER: THE GRADUAL EVOLUTION OF CHINESE LAW

BRADLEY L. MILKWICK*

I. INTRODUCTION

In 1927, archaeologists unearthed the remains of “Peking Man” near Beijing, China, who lived sometime between 250,000 and 400,000 years ago.¹ Archaeologists also indicate that modern *Homo sapiens* known as the “Upper Cave People” first appeared in that area approximately 18,000 years ago.² By the second millennium B.C., a mature language had developed in that region³ and, shortly thereafter, law. China’s legal culture is among the world’s most ancient.

Early Chinese law was somewhat akin to England’s early common law — a loose body of unwritten rules that may have been applied arbitrarily.⁴ But by 536 B.C., China had developed its first body of statutory law, the Xingding Code.⁵ Throughout the dynasty period of China, law flowed from an emperor, who enjoyed immutable executive, legislative, and judicial power.⁶ The emperor was above the law: he used law to execute his will, and he reserved the right to alter the law by decree at any time. The emperor could unilaterally circumvent the courts by determining the guilt of an accused and by altering or vacating judgments given by lower judicial authorities. Emperors and dynasties came and went, but the legal system remained largely unchanged during China’s 2,000-year-long imperial era.⁷ Throughout that time, the emperor’s word was the be-all- and-end-all of the law.

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1. PEKING MAN, WIKIPEDIA, at http://en.wikipedia.org/wiki/Peking_Man (last visited Mar. 4, 2005).

2. PEKING MAN SITE AT ZHOUKOUDIAN, TRAVEL CHINAGUIDE.COM, at <http://www.travelchinaguide.com/attraction/beijing/pekingman.htm> (last visited Mar. 4, 2005).

3. Simon Ager, *Origins of Writing in China*, in OMNIGLOT: A GUIDE TO WRITTEN LANGUAGE, at <http://www.omniglot.com/writing/chinese.htm> (last visited Mar. 4, 2005).

4. This body of law’s name was “yuxing”, or the “law of Yu,” named after the founder of the Xia dynasty. At that time it was commonly said that “the government of Xia is corrupt, so the law of Yu is applied”.

5. See generally <http://www.hsn.com.cn> (a brief history of early Chinese law) (last visited Apr. 18, 2005).

6. See generally Zhu Jingwen, Introduction to Chinese Law: An Historical and Philosophical Approach (2004) (unpublished lecture notes, on file with author).

7. See *id.*

One might argue that “Red China” has not deviated far from its imperial past, at least until recently. Ruled by a handful of men (rather than just *one* man), the Chinese Communist Party (CCP) dominates government action. Although the National People’s Congress (NPC) is the head of the government under the constitution, the CCP sets policy and has the ability to remove NPC legislators. Moreover, the NPC is not much of a legislative body at all, at least in comparison to the United States Congress. In fact, the CCP frequently submits legislation directly to the NPC for approval (rather than the NPC doing its own legislating), which is why some scholars criticize the NPC as a “rubber-stamp legislature.”⁸ Thus, to some degree, the 3,000-member NPC merely amplifies the voice of the CCP Politburo Standing Committee nine-member delegation.⁹

But the CCP’s absolute authority is crumbling. Internal and external forces dating back to the 1970s have pressed the communist leadership to “rule the country by law.”¹⁰ Moreover, as China becomes an increasingly important player in the global community, its leaders face constant peer pressure to change with the times and adopt more democratic reforms. China’s economy is growing at an historic pace; however, the capitalist revolution has only borne limited democratic fruits — economic reforms are greatly outpacing political and legal reforms,¹¹ especially where laws have little or no bearing on the economy. The old communist regime seems intent on its resistance to change, clinging to the vestiges of a dying animal called “democratic dictatorship.”

Speaking of the government’s resistance to change, one highly regarded scholar compared Chinese law reform to a “bird in a cage” — alive and making noise, but carefully restrained by a screen of bars.¹² Similarly, the late Deng Xiaoping characterized the resistance to change by saying that “one must feel for rocks while

8. A “[r]ubber stamp legislature is a derogatory name for a legislature that has no real power but simply approves . . . bills put before it by other institutions.” The legislatures of Communist states are often discredited as rubber stamps for decisions of the ruling party. RUBBER STAMP LEGISLATURE, WIKIPEDIA, at http://en.wikipedia.org/wiki/Rubber_stamp_legislature (last visited Feb. 12, 2005).

9. Furthermore, although Communist Party membership is not a prerequisite to NPC “election,” every NPC delegate must first be approved by the CCP. Thus, the CCP maintains the ability to reject “extreme” candidates. See generally LEON POON, THE PEOPLE’S REPUBLIC OF CHINA, at <http://www-chaos.umd.edu/history/prc.html> (last visited Mar. 5, 2005); NATIONAL PEOPLE’S CONGRESS, WIKIPEDIA, at http://en.wikipedia.org/wiki/National_People%27s_Congress (last visited Mar. 5, 2005).

10. Gordon G. Chang, *What Does the Rule of Law Mean in China?*, 13 CHINA L. & PRAC. 6, 34 (1999).

11. *Id.* at 33-34.

12. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 297 (1999).

crossing a river,” one — *very slow* — step at a time.¹³ Drawing on these and other portrayals, this paper will (1) trace China’s legal development from the Mao Zedong era to the present day, and (2) present the communist leadership’s dilemma in concurrently trying to change while remaining the same.

II. CHINA’S LEGAL EVOLUTION

Since the People’s Republic of China (PRC) was founded in 1949, China has seen four major regime changes.¹⁴ Each regime is commonly referred to as a generation, or “*dai*.”¹⁵ This section outlines the four generations in chronological order, governed by Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao. This section also identifies and highlights a general direction of legal evolution by focusing on each era’s major developments.¹⁶

A. *First Generation — The Mao Zedong Era: China Moves Backward in Time*

Throughout the world, Mao Zedong is associated with history’s most notorious tyrants, but in China he is associated with greatness. To his credit, Mao helped end a centuries-long tradition of feudalism, China’s addiction to opium, and diplomatic humiliation at the hand of “western imperialists.” These problems had ruined China’s economy and pride during the weaker years of the Qing Dynasty. But generally speaking, Mao turned China’s clock back to the Stone Age, and he governed the country like the emperors who had lived centuries before him.¹⁷

The state of the law during the Mao era calls his sanity into question. One author identified six major periods of development from the time the PRC was founded in 1949:

[F]irst, a period during which Peking laid the statutory and organizational framework for a legal system patterned essentially after that of the Soviet

13. This is the author’s translation. Alternative, but similar, translations are available. See, e.g., Steve Barth, *Reengineering Socialism*, WORLD TRADE MAG. (Sept. 1997), at <http://www.global-insight.com/wt9709a.htm> (last visited Apr. 6, 2005) (“[T]o cross the river by feeling the stones.”).

14. THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 9.

15. As in “*diyī dai*”, The First Generation.

16. This paper will not cover all developments that occurred in each generation. Rather, it will discuss those that stood out to me as the most significant.

17. See generally C. Clark Kissinger, *How Maoist Revolution Wiped Out Drug Addiction in China*, REVOLUTIONARY WORKER ONLINE, at <http://rwor.org/a/china/opium.htm> (last visited Apr. 6, 2005); *The Time 100 Leaders and Revolutionaries: Mao Zedong*, TIME (Apr. 13, 1998), available at <http://www.time.com/time/time100/leaders/profile/mao.html> (last visited Apr. 5, 2005).

Union; (2) a period . . . during which there was a greater degree of conformity than before or after to the standards defined by statute for the functioning of the legal system; (3) . . . a period of general, though not uninterrupted, deterioration of the promise [that] the legal system had shown in its first two periods; (4) the period of the Cultural Revolution, when the legal system was at its nadir; (5) a period of military control during the ebbing of the Cultural Revolution; and (6) the present, when the legal organs appear to be functioning once again, but . . . with apparent uncertainty among the leadership about the future role of law¹⁸

That author went on to characterize China's then-current legal system as "a distinctive amalgam of traditional Chinese notions of law, Marxist ideology, borrowings from the Soviet Union, the thought of Mao Tse-tung, and various practical circumstances."¹⁹ Despite all of the influences, however, *no* statutes governed the basic crimes of rape, theft, murder, and arson.²⁰ Criminal law was tried under the general Statute on Punishment for Counterrevolutionary Activity, promulgated in 1951 and unchanged for decades.²¹ When no statutory authority could be found (which happened frequently), Communist Party policy would control.²² But Party policy was indefinite and inconsistent, as evidenced by CCP initiatives such as the Great Leap Forward and the Cultural Revolution. Thus, the definition of lawful conduct literally changed daily. The official explanation for the lack of certainty in the law was that "rigid laws should not be enacted prematurely because of the continued economic and political developments in mainland China."²³ This explanation was probably more of a vehicle for justification of the CCP's retention of absolute power.

Constitutional law in China also experienced major woes during the Mao years: the constitution was not followed. Judicial

18. Tao-tai Hsia, *National Report: People's Republic of China, the Legal System and Literature of the People's Republic of China*, 2 INT'L. J.L. LIBR. 74, 75-76 (1974).

19. *Id.* at 76.

20. *Id.* at 78.

21. *Id.* Hsia identified this body of law as being "vaguely worded, loosely constructed, and brief to the point of sketchiness." *Id.* One possible reason for the dearth of statutes on the "basic crimes" listed is that the crime rate in China at that time (and today) was very low. In the rare case major crimes were committed, local authorities would handle many, if not all, of those crimes quickly and quietly.

22. *Id.* at 79.

23. Chin Kim, *The 1975 Constitution of the People's Republic of China*, 1 HASTINGS INT'L & COMP. L. REV. 1, 19 (1977).

independence was a part of China's constitution,²⁴ but judges were "officially expected to subordinate themselves" to Party policies "and to the directives of Party officials in particular cases."²⁵ When "legal figures"²⁶ called on the government to honor the constitution's judicial independence provision, they were countered with another article of the constitution which provided: "all organs of the state must rely on the masses of the people . . . heed their opinions, and accept their supervision."²⁷ This provision would seem democratic by nature were it not for the Party's definition of "people" — the CCP.²⁸ In other words, China's constitution governed unless "the people" (or CCP) determined otherwise. Perhaps to eliminate these contradictions, Mao changed the constitution several times: by 1975, most law had been taken from the constitution; in its place was substituted pro-Mao rhetoric.

B. Second Generation — Deng Xiaoping Era: A Better Direction

"Under Mao, policy alone as articulated and applied by the [CCP] had directed and guided the entire Chinese Party-state, and legislation had been used only formalistically to declare policy. It was imprecise, exhortational, tentative, and subject to unlegislated revision."²⁹ Mao's leadership had effects on Chinese law for which he received an international chiding. Even fellow Communists in the Soviet Union criticized the regime when Mao declared that judicial independence, an accused right to a defense, and the presumption of innocence were tainted with bourgeoisie origins and had no place in the Chinese legal system.³⁰ By the end of his rule, Maoism had morphed into something beyond unconventional. Deng Xiaoping's leadership could not have come at a better time because he set China's legal front on a new and better path.

Around the time Mao passed away, many Chinese nationals were hungry for "legalization." Quoting Chairman Mao, one scholar

24. Article 78 of China's Constitution reads, in pertinent part: "[I]n administering justice the People's Courts are independent, subject only to the law." Alice Erh-Soon Tay, *Law In Communist China — Part 2*, 6 SYDNEY L. REV. 335, 356 (1971).

25. Hsia, *supra* note 18, at 79.

26. *Id.* Not many legal figures were around at that time. During the Cultural Revolution, all schools were closed and scholars were sent to camps to receive a "labor education". According to Hsia, as of 1973, law schools had still not reopened and the legal profession had "virtually disappeared." *Id.* at 80.

27. Hsia, *supra* note 18, at 79 (quoting China's Constitution).

28. *See id.*

29. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 384 (2000).

30. *See* I.D. Perlov, *The Departure From Democratic Principles of Justice in the Chinese People's Republic*, 1 CHINESE L. & GOV'T 23 (1968), in *Articles Noted*, 2 CASE W. RES. J. INT'L L. 59, 68 (1969).

urged “legislative work on a large scale . . . necessary legal organs and legal institutions must be revived and established.”³¹ To get there, it was apparent that criminal law, civil law, civil procedure, and legal education in general would have to be reinstated.³² Indeed, when the new constitution was ratified, China lacked any legal system at all. The 1978 document, to a large degree, changed that.

One author stated, “The 1978 Constitution of the People’s Republic of China appears to mark the end of a rather turbulent era in that nation’s history and should demarcate the beginning of a new, more orderly one”³³ A large portion of the 1978 document was drastically different from the prior constitution,³⁴ implemented just three years earlier. Embodied in this document were the so-called “Four Modernizations,” a radical economic plan which focused on the development of agriculture, industry, defense, and science and technology.³⁵ These reforms drastically departed from pre-1978 economic policy (which was non-existent), but under the new document, the government stayed the same: China remained a socialist dictatorship, the CCP was the core of leadership, and “Marxism-Leninism-Mao Tse-tung Thought’ [w]as the state’s guiding ideology.”³⁶ Moreover, the economic reforms would be greatly restricted as the Communist state retained a stranglehold on the economy: all four of the modernizations would be owned, controlled, or operated by the central government.³⁷

The 1978 Constitution also purported to place greater emphasis and provide greater detail on the functions and powers of the state’s legal organs.³⁸ For example, the NPC was granted the power to elect the President of the Supreme People’s Court³⁹ (though that power was subject to CCP leadership veto, and NPC membership was administered by the CCP). Also, the Supreme Court’s functions and powers were fleshed out in the new constitution⁴⁰ (though court action was subject to CCP review). A careful reading of the constitution showed that the increased power

31. Stanley B. Lubman, *New Developments in Law in the People’s Republic of China*, 1 NW. J. INT’L L. & BUS. 122, 125 (1979) (quoting Han Yu-t’ung, *Smash Spiritual Shackles — Do Legal Work Well*, PEOPLE’S DAILY, Mar. 16, 1978, at 3).

32. *See id.*

33. Chin Kim & Timothy G. Kearley, *The 1978 Constitution of the People’s Republic of China*, 2 HASTINGS INT’L & COMP. L. REV. 251, 278 (1979).

34. *Id.* at 253.

35. Erin E. Douglas, *The Struggle for Human Rights Versus Stability: The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT’L L. & POL’Y 151, 163-64 (2001).

36. Kim & Kearley, *supra* note 33, at 257.

37. *Id.* at 259-60.

38. *Id.* at 263.

39. *Id.* at 264.

40. *Id.* at 273-75.

vested in state organs only mattered as long as CCP leadership did not disagree with the exercise of that power. Thus, these new provisions were somewhat empty, given the CCP's final, binding veto power. With all of its flaws, however, the new document moved China's government one step toward concrete legalization. No longer was China's legal system based on the whims of an old man and his henchmen.

The 1982 Constitution went even further. With Deng fully in control and China's economy on the mend, the document took important strides away from Maoist ideology, the guiding ideology of the 1978 document. The 1982 Constitution "recognized promulgated laws enacted by the legislative organs of the state as the appropriate vehicles both for defining and implementing policy rather than CCP policy directives" ⁴¹ Though the CCP still enjoyed absolute oversight, a trend appeared to be developing: the CCP was relinquishing power to the state's other legislative organs in more meaningful ways, and more authority was being entrusted to them.

Overall, the Deng era of the 1980s was an exciting time for China. Legal education was beginning to thrive, ⁴² the economy was booming at an unprecedented pace, and Beijing was becoming recognized as the legitimate capital of China (as opposed to Taipei) by most, if not all, countries. Beijing was becoming an important member of the global community. These circumstances created legal disputes at home and abroad and created a need for private international law and international legal scholars. In particular, there was a need for a body of law that could reconcile a socialist market economy with the market economies of foreign democracies such as the United States. In and of itself, this need was a colossal departure from anything ever fathomed in the Mao era just over a decade earlier, when the idea of trade with the West was abhorrent and unthinkable. ⁴³ International legal disputes led to the creation of a corpus of civil law, which contained a fledgling chapter pertaining to the "application of laws to civil matters involving foreign elements." ⁴⁴ This corpus did not purport to be a comprehensive code, but it symbolized China's legal progress and reflected a desire to address disputes in a legal forum. ⁴⁵ China

41. Lubman, *supra* note 29, at 384.

42. See generally Tung-Pi Chen, *Private International Law of the People's Republic of China: An Overview*, 35 AM. J. COMP. L. 445 (1987).

43. See *id.*

44. *Id.* at 450-51.

45. See *id.* at 446-47.

would continue to develop this and other areas of the law through the end of the Second Generation.

Although the 1980s were an exciting time for China, the decade ended in tragedy. On June 4, 1989, the world watched in horror as tanks rolled into Tiananmen Square to quash students' demands for democracy.⁴⁶ Although no official death toll has been released, it is estimated that some 4,000 people were killed on or around June 4. On that day, Deng Xiaoping showed the world that despite China's "opening and reforming," the government would continue to repress its people. But on that day, Deng — unintentionally — killed communism. Deng proved to the world how ugly repression could be, and pressures from the international community only increased after the incident, as democratic nations began to hesitate to deal with a country that massacred students because it wanted more political sway. The Tiananmen Square incident slowed legal reform and hurt economic progress, and for a few years "law journals were once again full of articles discussing the class nature of law and the need to use the law to strike hard at the enemies of the state."⁴⁷ Of course, once the fervor surrounding the Tiananmen incident calmed down, economic development resumed, as did legal reform. But Deng never again commanded the international respect he enjoyed prior to the incident.

C. Third Generation — Jiang Zemin Era: Picking Up Where Deng Left Off

Deng Xiaoping got China moving again. He introduced economic plans which ended a decade-long famine. He ended a thirty-year hiatus on international trade. He took power away from the CCP and gave it to other state organs, amended the constitution, and saw new bodies of law — criminal, civil, and administrative — enacted. But Deng left a "mixed legacy:" he will be forever known as the leader who "encourag[ed] capitalist economic development [and legal reform in China], while ferociously suppressing political opposition."⁴⁸

History might remember Jiang Zemin as a much stronger advocate for legal reform. Jiang came into power in 1993 when Deng stepped down. As early as 1989, in the wake of the Tiananmen

46. See generally TIANANMEN SQUARE PROTESTS OF 1989, WIKIPEDIA, at http://en.wikipedia.org/wiki/Tiananmen_Square_protests_of_1989 (last visited Mar. 7, 2005).

47. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 58 (2002).

48. EDITORIAL Bd., DENG XIAOPING AND THE FATE OF THE CHINESE REVOLUTION, INTERNATIONAL COMMITTEE OF THE FOURTH INTERNATIONAL (Mar. 12, 1997), at <http://www.wsws.org/history/1997/mar1997/dengx.shtml>.

Square Incident, Jiang was advocating for a “rule of law” regime.⁴⁹ He said, “[T]he Party should never replace the government and override law . . . China must stick to the principle of governing in accordance with law.”⁵⁰ Subjecting CCP leaders to the law was a new concept at that time. Prior to the 1990s, leaders were not subject to law, but breakdowns in *guanxi*.⁵¹ Shortly after Jiang came into power, the CCP launched a rule of law campaign.⁵² Rule of law refers to a situation in which all members of a state are subject to the law regardless of status. There are varying degrees of rule of law, as noted by Randall Peerenboom⁵³ and other scholars. By contrast, rule *by* law⁵⁴ defines a situation in which the state uses law as a tool to justify its actions. An important aspect of rule by law is that the highest echelon of state leadership is not subject to the law.⁵⁵

Though Deng and other leaders in his administration discussed the importance of rule of law, Jiang’s administration was the first that seemed to really campaign for a rule of law system. Jiang used the rule of law as a way to keep Party cadres in line, especially when corruption was involved.⁵⁶ In a January 1999 speech, Jiang expressed concerns that the people were upset with

49. PEERENBOOM, *supra* note 47, at 111 n.21. For additional background information on rule of law, see Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43 (2001).

50. PEERENBOOM, *supra* note 47, at 111 n.21.

51. An entire book could be written about the implications of this word alone. Basically, it means relationships, social connections, networks, and everything in between. *Guanxi* is especially important in politics — he who has the best and the most *guanxi* wins. See JAMES M. ZIMMERMAN, *Legislating, the Judiciary, and Lawyers in China*, in CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 74-75 (1999).

52. *Yifa zhiguo, jianshe shehuizhuyi fazhiguo*. This probably best translates to “Rule of Law, and the Building up of Socialism to Rule the Country.” Rule of law discussions have been around since the 1970s, but they became especially popular in the mid-90s. See PEERENBOOM, *supra* note 47, at 58, for a different translation of this phrase (“rule the country in accordance with law, establish a socialist rule-of-law state”).

53. Peerenboom classifies these as “thick” and “thin” rule of law. Laws in a “thin” regime are “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.” PEERENBOOM, *supra* note 47, at 3. “Thick” regimes incorporate all of the “thin” characteristics and add “political morality . . . forms of government . . . [and] conceptions of human rights.” *Id.*

54. *Yifa zhiguo*. The only difference between this phrase and the rule of law phrase is the first character of the four. The first character, pronounced *yi*, means “in accordance with,” while the second character, also pronounced *yi*, means “utilizing.” Thus, a literal translation of the latter rule of law phrase would be “in accordance with law, rule the country,” while a literal translation of the former rule by law phrase would be “utilizing the law, rule the country.” *Id.* at 64.

55. Also worthy of note is “rule by man,” a system which exists when there is no codified law and decisions are made by a handful of leaders who take action based on their whims. China was under a rule by man regime during the Cultural Revolution, when all law was abolished. This is noteworthy because prior to the Cultural Revolution, China had not seen a rule by man regime since before 536 B.C., some 2,500 years earlier.

56. Chang, *supra* note 10, at 33.

rampant corruption among Party officials.⁵⁷ According to Jiang, it was important that “the powers of government organs are regulated and limited in accordance with law, so as to ensure state power is practiced strictly in line with the constitution.”⁵⁸ Indeed, Jiang was committed to “govern[ing] the country according to law,” stating it would “strengthen and improve [the] political system.”⁵⁹

In addition to administrative regulation coming from the top down, the Administrative Litigation Law (ALL) provided an avenue for regulation to come from the bottom up. Though it was passed in the wake of the Tiananmen incident, the ALL saw increased use during the Third Generation. “The ALL allows parties to bring suit when their ‘legitimate rights and interests’ are infringed by a specific administrative act of an administrative organ or its personnel.”⁶⁰ This is important because government leaders were previously immune from private causes of action. At the time the ALL was passed, some scholars noted it was the government’s way of rectifying the Tiananmen incident, but ironically, political rights such as free speech and the right to demonstrate were not included in the law.⁶¹ Nevertheless, the ALL assumed greater importance during the Jiang era as personal and property rights gained increased protection.⁶²

As strong an advocate for rule of law as Jiang was, he hoped it would only take limited hold in China, at least according to some scholars. Stanley Lubman notes that commentators fail to look at the big picture when it comes to Jiang’s rule of law friendly rhetoric. Lubman points out that Jiang often refers to protecting the nation’s “long-term peace and stability,”⁶³ which is:

shorthand for continued Party control, and despite the Party’s continued endorsement of government by law it has continued to use law as an instrument to maintain and carry out Party policies

. . . .

57. *See id.*

58. *Id.*

59. *Jiang Zemin on Political Restructuring*, XINHUA ENG. NEWSWIRE, Mar. 26, 2001, available at 2001 WL 19011544.

60. PEERENBOOM, *supra* note 47, at 420.

61. *Id.*

62. *Id.* Peerenboom notes that “the number of ALL cases in Beijing increased from 142 in 1991 to 430 in 1996,” and that “plaintiffs prevail in approximately 40% of the cases.” *Id.* at 445 nn.111-12.

63. LUBMAN, *supra* note 12, at 129.

. . . Use of law in this manner marked Maoist administration, which enlisted the courts in efforts to support a succession of mass campaigns used to promote particular policies.⁶⁴

Commenting on the CCP leadership's point of view, Lubman adds that "there is no doubt that law must be subservient to policy" and that "the echo of revolutionary style is far from stilled."⁶⁵ According to Lubman, virtually every aspect of the legal system is subject to Party policy, and the CCP is still above, and not subject to, the law.⁶⁶ In order to truly implement a rule of law regime, he notes, "Chinese officials and intellectuals must try to define the relative roles of policy and law and, if possible, to reconcile them."⁶⁷

Nevertheless, Lubman concedes that "public administration has become more regular and rational," and that at least more Chinese have been apprised of what the law is.⁶⁸ For example, in the early 1990s, a five-year legal education campaign was initiated to disseminate legal knowledge.⁶⁹ Also, the Jiang era saw a significant softening of CCP leadership. This was evinced by Jiang's waning influence,⁷⁰ increased litigation under the ALL (in which plaintiffs in forty percent of the cases brought are granted relief),⁷¹ and the emergence of freer speech,⁷² at least in some ways. The repression of the Falungong is one exception.⁷³ Like the Tiananmen massacre,

64. *Id.* at 129-31.

65. *Id.* at 130-31.

66. *See id.* at 130-37.

67. *Id.* at 130.

68. *Id.* at 131.

69. *Id.* at 132-33.

70. Though Jiang was the core of the Third Generation, his power was not equal to that of Mao or even Deng: "Jiang Zemin was relatively weak when compared with Mao and Deng. Both of these men named their successors . . . Jiang was not able to dictate unilaterally who would get a single seat on the Politburo." Andrew J. Nathan & Bruce Gilley, *China's New Rulers: The Path to Power*, N.Y. REV. OF BOOKS, Sept. 26, 2002, available at <http://www.nybooks.com/articles/15673> (last visited Apr. 1, 2005).

71. PEERENBOOM, *supra* note 47, at 445 n.112.

72. Many visitors to China have commented on how Chinese society is rapidly "opening up." One visitor noted that the first two times she visited China in the mid-1970s, social conduct was heavily restricted. In particular, she was astonished by the de facto dress code and noted that speech was heavily restricted. When she returned in 2000, "It was another world." For example, her tour guides in the 1970s would not speak of the Cultural Revolution or other government policies of the time. But her guides in 2000 were very candid about the horrors suffered by family members during the Cultural Revolution. Telephone Interview with Barbara K. McClure, Director of Regional Services, Retired, Georgia Department of Education (Nov. 18, 2004) (notes on file with author).

73. The Falungong is a religious movement that exploded in the late 1990s, gathering millions of members in China and abroad. The Falungong's beliefs are a combination of several Asian religions, meditation, and tai chi. When the government criticized the organization, several thousand members of the group surrounded a government compound

the Falungong incident showed the world that China was going to maintain the status quo — its economy would approach capitalism, but politically, it would remain communist.

While Jiang was in power, the constitution was amended twice, once in 1993 and once in 1999.⁷⁴ Constitutional change in China occurs frequently. It “concerns itself more with . . . state organizational structure,” the “future direction of . . . society,” and ambiguous principles than with Western notions of checks and balances and fundamental rights.⁷⁵ The 1993 and 1999 revisions were important economic developments (the 1999 revisions recognized private capitalist economic practices),⁷⁶ but to the chagrin of many constitutional scholars, “[t]here was little discussion of democratisation [sic], political reform and the protection of human rights.”⁷⁷ One scholar even suggests that China’s constitution is really not a constitution at all: “[I]f the Constitution is to be worthy of its name, it must address the issues relating to judicial independence, separation of powers, checks and balances, a democratic election system and the protection of human rights.”⁷⁸ Thus, the amendment “was a small step because the party controls the law-making process.”⁷⁹

D. Fourth Generation — Hu Jintao: The Present and Future

Hu Jintao, age 62, came to power on March 15, 2003. He is the Party General Secretary, State President, Chairman of the Central Military Commission,⁸⁰ and future of China’s legal development as the core of the Fourth Generation.⁸¹ The current state of Chinese politics makes it difficult for one person acting alone to have an overwhelming impact on politics and law, at least to the degree enjoyed by Mao and Deng. Thus far, Hu has been more

(Zhongnanhai) to protest. In response, the government arrested and reportedly tortured many of the Falungong’s leaders, seized their possessions, destroyed Falungong literature, and outlawed the group. The government then campaigned against the group, told wild stories of animal and human sacrifices, and convinced most Chinese to shun the group and persecute its members. PEERENBOOM, *supra* note 47, at 91-93.

74. See Chen Jianfu, *The Revision of the Constitution in the PRC: Conceptual Evolution of “Socialism with Chinese Characteristics”*, 24 CHINA PERSP. 66, 66 (1999).

75. *Id.*

76. The individual and private economies are no longer defined as a complement to the socialist public economy; they are now treated as ‘an important component of the country’s socialist market economy.’ *Id.* at 72 (quoting 1999 amendment to Article 11).

77. *Id.* at 71.

78. *Id.* at 73.

79. Chang, *supra* note 10, at 35.

80. He did not take over this post from Jiang Zemin until September 2004.

81. *CPC and State Leaders: Hu Jintao*, PEOPLE’S DAILY ONLINE, at <http://english.people.com.cn/data/people/hujintao.shtml> (last visited Apr. 5, 2005).

of a behind-the-scenes leader. Hu and the Fourth Generation are facing a number of important issues.

China's accession to the World Trade Organization (WTO) has had a profound impact on the state's legal reform, including the rule of law. The fact that China was able to join the WTO *at all* evinces tremendous legal reform, given the WTO-required transparency obligations⁸² and WTO-member-imposed obligations, such as constitutionalism and human rights.⁸³ Recently, one author noted that WTO entry has "provided a catalyst for China's evolution away from a legal system driven by power relationships and towards a rule-based legal system."⁸⁴ Her outlook was positive:

The regime understands the need for a stable legal infrastructure, including neutral application and enforcement of the law, to support a market system. In addition, fostering neutral and predictable application of law is a means of promoting stability, which is of paramount concern to China's leaders. WTO accession is providing China's leaders additional leverage to push for the implementation of such commitments⁸⁵

This statement may assume too much. A neutral application of the law would subject the CCP and its policies to the law, which would be an unfamiliar position. Moreover, the author couches "stability" in terms of neutral and predictable application of the law; but according to other scholars, China's leaders use "stability" to mean something else — Party control.⁸⁶ Since CCP leadership has resisted relinquishing Party control, one might argue that by Halverson's

82. See WORLD TRADE ORGANIZATION, TRADE POLICY REVIEWS, at http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm (last visited Apr. 1, 2005). Article X of the GATT requires trade-related laws to be promptly published and administered uniformly and impartially. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. X, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The TRIPS and GATS Agreements impose similar requirements. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 42, 63, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125 (1994); General Agreement on Trade in Services, Apr. 15, 1994, art. III.4, World Trade Organization Agreement, Annex 1B, 33 I.L.M. 1125 (1994).

83. Prior to China's accession, many WTO Members criticized not only its trade practices, but also its human rights violations and failure to establish a rule of law regime, something that has not largely changed since. See SUPPORT DEMOCRACY IN CHINA, CHINA HUMAN RIGHTS FACT SHEET (Mar. 1995), at http://www.christusrex.org/www1/sdc/hr_facts.html (last visited Apr. 5, 2005).

84. Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 347 (2004).

85. *Id.* at 353.

86. LUBMAN, *supra* note 12, at 129-30.

definition, the Party seeks instability over stability. A truly stable, neutral application of the law would mean curtains for the Party's unbounded power.

The rule of law issue is also important to the Fourth Generation "because it is an essential condition of improving foreign investment and trade."⁸⁷ Now more than ever, foreign and domestic voices are calling for rule of law in China, which includes reform of and adherence to the constitution. A leading Chinese constitutional law professor stated:

[A Constitution] is a legal weapon for the citizens to protect their lawful rights against the abuse of powers by the government. Without such protection, power will be abused without checks and balances and citizens' rights will be infringed . . . Historically, modern constitutions have all aimed at protecting the basic human rights of the citizens. The Constitution in a socialist country should play the same function. Its authority should be utilized in checking and restraining government powers.⁸⁸

Not only should this type of constitution be established in the PRC, but the CCP should not be above the "supreme legal authority."⁸⁹ But none of the other generations were willing to take such a bold step (and subject themselves to the constitution). It remains to be seen whether the Fourth Generation will.

The quality of the judicial system is another important issue facing the Fourth Generation. Currently, the judiciary suffers from a lack of legal training. Many judges have no legal training at all —

87. Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. OF BOOKS, Sept. 26, 2002, available at http://www.oycf.org/Perspectives/19_123102/takingRights.htm (last visited Apr. 1, 2005). To maintain its blistering economic growth, China and the Fourth Generation must do more to promote rule of law. See Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 152 (1999/2000).

88. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 262 (2003) (quoting Mo Jihong, *Jianli Xianfa Quanwei, Baozhang Gongmin Quanli* [Establishing the Authority of the Constitution to Protect Citizens' Rights], BEIJING RIBAO [BEIJING DAILY], Dec. 2, 2002, at 14). Implicit in citizens' rights are human rights. For decades, the nations of the world have called on China to stop human rights abuses. Though great improvements have been made, China leaves much to be desired. Human rights are outside the scope of this paper, but are also an important issue facing the Fourth Generation.

89. P.R.C. CONST. pmbl. (1982). "[The Constitution] is the fundamental law of the state and has supreme legal authority . . . [A]ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct . . ." *Id.*

they are retired police officers and Party officials.⁹⁰ But WTO accession has also pushed the government to enhance the quality of the judiciary.⁹¹ In 2002, a National Judicial Exam was created to test judges and the procuratorate.⁹² Passing the exam is still not a prerequisite for becoming a judge, but is “required for judicial promotion.”⁹³ If the Supreme People’s Court has its way, judicial applicants will be required to pass the exam some time in the near future.⁹⁴

Open and rampant judicial corruption is another problem.⁹⁵ Moreover, courts often decide cases on political grounds. Many courts receive their staffing and funding directly from local governments.⁹⁶ Those who pay the courts control the courts,⁹⁷ and since most judicial opinions are not published in any meaningful way (i.e., no reasoning is given for the decision),⁹⁸ judicial accountability is a non-issue — lower courts do not have to concern themselves with appearing incompetent by writing a judicial opinion that the law contradicts.

Closely tied to the corruption problem is the lack of an independent judiciary:⁹⁹ “[T]he rampant corruption in the Chinese judiciary results from its lack of independence. . . . [T]he judiciary is heavily influenced by local Party and government officials who often abuse their power by interfering with the courts’ business.”¹⁰⁰ “In recent years, advocates for judicial independence have become increasingly vocal.”¹⁰¹ This is a remarkable change from what many of those same voices were saying just over a decade ago. In 1991, an authoritative work on constitutional law said that separation of powers would “never become a reality.”¹⁰² But powered by China’s WTO entry and the desire to give the courts more legitimacy, scholars are calling the move toward judicial independence an “irreversible trend.”¹⁰³

90. Halverson, *supra* note 84, at 348.

91. *See id.* at 349.

92. *Id.*

93. *Id.*

94. *See id.*

95. *See generally* Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 FLA. ST. J. TRANSNAT’L L. & POL’Y 393 (2004).

96. Lin, *supra* note 88, at 295.

97. *See id.*

98. *Id.* at 309.

99. For rule of law to exist, “judges must be independent of the executive and legislative powers of government.” Dworkin, *supra* note 87.

100. Lin, *supra* note 88, at 298.

101. *Id.* at 293.

102. *Id.* (quoting ZHONGGUO SIFA ZHIDU [JUDICIAL SYSTEM IN CHINA] 43 (Wu Lei ed., 1991)).

103. *Id.* Professor Lin points out that in March 2003, the City of Shenzhen “officially declared that it would adopt the theory of separation of powers in restructuring its

Hu and the Fourth Generation have their work cut out for them. Not only are they under pressure to ensure that China's rapid economic development continues, they must also do so while maintaining "long-term peace and stability." Some say that China's economy has outgrown its legal system and that drastic reforms must happen soon if the economy is to keep growing.¹⁰⁴ If Hu wants to be remembered as a successful leader, he might have a hard time "feeling for rocks while crossing the river." His pace will have to quicken.

III. CHINA'S DILEMMA: OFFICIAL CONTRADICTION

Politics and law in the People's Republic of China is a game of give and take. From the time Deng came into power, Chinese leaders have regularly provided pro-reform rhetoric followed by greatly restrictive, if not contradictory, language. As early as 1978, Deng seemed to advocate democracy: "[D]emocracy has to be institutionalized and written into law."¹⁰⁵ He clarified that statement over the following years with statements like this one made eight years later: "In developing our democracy, we cannot simply copy bourgeois democracy, or introduce the system of separation of powers. . . . We cannot do without dictatorship."¹⁰⁶ These two statements sum up what "Chinese Democracy" is all about — contradiction. A dictator cannot determine the will of the people and call it democracy. But this is the system that officials have maintained all along.

Deng also advocated the rule of law, at least where it was limited by Party Policy. In the early 1980s he said that "the law must be observed; law enforcement must be strict; law-breakers must be dealt with accordingly; and all persons are equal before the law."¹⁰⁷ But Deng failed to mention that Party officials were exempt from those requirements and that the Party would use the law as a tool to promote Party policies.¹⁰⁸ When law is used to advance the interests of a single person or handful of individuals at the expense of others, law is not obeyed and people are not equal before the law.

government." *Id.* at 294 n.131.

104. See, e.g., Chang, *supra* note 10, at 34.

105. LUBMAN, *supra* note 12, at 124 (quoting DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING*, 18).

106. Lin, *supra* note 88, at 314 n.214 (quoting DENG XIAOPING, *Take a Clear-Cut Stand Against Bourgeois Liberalization, Remarks Made to Some Leading Members of the Central Committee of the Communist Party of China*, in *SELECTED WORKS OF DENG XIAOPING* (1975-1982)).

107. DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING* (1975-1982), available at <http://english.peopledaily.com.cn/dengxp/> (last visited Apr. 1, 2005).

108. LUBMAN, *supra* note 12, at 129.

Party Policy (i.e., politics) determined the outcome of many court decisions over the First and subsequent Generations — to the benefit of some (primarily those with *guanxi*) and at the expense of others.¹⁰⁹ In making contradictory statements, Jiang Zemin picked up where Deng left off. He often said, “[govern] the country according to law,”¹¹⁰ but also frequently emphasized “long-term peace and stability,” shorthand for Party control.¹¹¹ Prior to the 1999 constitutional amendments, Jiang characterized governing the country by law by describing the essence of a socialist dictatorship.¹¹² Under Jiang’s definition, “the broad masses of the people [would work] under the leadership of the Party and in accordance with the Constitution”¹¹³ — clearly indicating that the Party is still above the constitution in China’s legal hierarchy.

Many authorities on rule of law struggle with the notion that socialist ideology can coexist with rule of law because communist governments use law as a tool, a feature of rule *by* law or rule of man.¹¹⁴ Though most scholars take this viewpoint, Randall Peerenboom suggests that rule of law is compatible with socialist ideology so long as rule of law limits socialist ideology.¹¹⁵ Peerenboom takes a practical approach: China has in fact achieved remarkable legal reform. Despite all of China’s problems, rule of law is becoming a reality there. Since the government is still considered Communist, one may argue that rule of law — to a limited extent — *is* compatible with socialism.¹¹⁶

The interplay between the Constitution and Party policy is worthy of further attention. Chen Jianfu wrote, “Among the Four Principles, the most important ones are to uphold Party leadership and to adhere to the socialist road, with the central emphasis on the Party leadership.”¹¹⁷ He also sees a conflict between “constitutional supremacy and Party leadership.”¹¹⁸ This conflict has baffled most commentators on China and begs the question: If the Party wants absolute power, then why doesn’t it say so in the text of the constitution, rather than using extra-constitutional means? Chen

109. Lubman refers to an article written by a Chinese scholar on rule of law where he observed that “instructions” (i.e., Party Policy) from Party officials were often substituted for the law in court cases and that there was widespread “official disregard of the law.” LUBMAN, *supra* note 12, at 129.

110. Yifa zhiguo. PEERENBOOM, *supra* note 47, at 64; Chang, *supra* note 109, at 33.

111. See LUBMAN, *supra* note 12, at 129. See also *supra* Part I.C on Jiang Zemin.

112. See Jianfu, *supra* note 74, at 71.

113. *Id.*

114. See, e.g., *id.* at 71-72.

115. See PEERENBOOM, *supra* note 47, at 188-226.

116. See *id.* at 188-90.

117. Jianfu, *supra* note 74, at 70.

118. *Id.*

Jianfu offers some suggestions: First, this is the practice found in other socialist countries.¹¹⁹ Constitutions are made under the assumption that they are not binding on the controlling Party. Second, since Party membership is “composed of only a tiny part of the Chinese population,” it would seem more democratic to transfer the will of the Party into law through a rubber-stamp legislature.¹²⁰ So, the CCP goes on tricking the masses of the people as it has since the 1970s.

IV. CONCLUSION

“Feeling for rocks while crossing a river” connotes a gradual progress: When a step forward does not feel right, a step in another direction might be necessary. China’s constitutional reform and open-door policy have moved the country toward progress, but when the CCP is daunted by too much “progress” too soon, it takes a step back. One might wonder why the Party resists what contributes most to China’s progress — reform and opening up. So far, the CCP has toiled endlessly to prove to the world that a capitalist economy can coexist with a communist government. This is puzzling to most people: Why not create a legal system that is most compatible with a successful economic policy, especially where the current legal system is, on many levels, dysfunctional? Perhaps the CCP’s reluctance to change is based on a fear of losing power — i.e., that legalization, constitutionalism, and rule of law would mean sacrificing control.¹²¹ Or maybe China’s core central government remains strong because the Communist Party came to power through a mass movement and will likely lose it in the same way.¹²² Until that happens, “China will continue to face an inherent contradiction: gradual but steady economic liberalisation [sic] in a rigid but essentially undemocratic one-party system.”¹²³

119. *Id.*

120. *Id.*

121. Tahirih V. Lee, Class Lecture in Comparative Law at The Florida State University College of Law (Nov. 2004) (notes on file with author).

122. Dworkin, *supra* note 87.

123. Jianfu, *supra* note 74, at 73.

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The Lillich Lecture series honors Professor Richard B. Lillich. Professor Lillich was the first holder of the Ball Eminent Scholar Chair at The Florida State University College of Law. He is known worldwide for his work in human rights law and international claims and investment.

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THE UNITED NATIONS COMPENSATION COMMISSION FOR CLAIMS ARISING OUT OF THE 1991 GULF WAR: THE “ARISING PRIOR TO” DECISION

DAVID D. CARON*

INTRODUCTION

It is my distinct pleasure to inaugurate the Richard B. Lillich Memorial Lecture at the Florida State University College of Law (FSU). Richard was a great lawyer and scholar in the field of international dispute resolution, an individual committed to the progressive realization of human rights, and a good friend. He had a deep love for FSU; he always spoke glowingly of its faculty and its students.

The questions I address are ones with which I not only have been involved, but ones that also deeply interested Professor Lillich. From the fall of 1996 to the summer of 2003, I served as a Commissioner with the United Nations Compensation Commission (UNCC or the Commission) for claims arising out of the 1990 Gulf War.¹ There are few books addressing the work of that institution.² The first and probably most significant volume was edited by Richard Lillich.³

This article concerns in particular what became known as the “arising prior to” clause of United Nations Security Council Resolution 687⁴ and the decision taken by the “E2 Panel” (the Panel) as to what that clause meant. In terms of effect on the docket of the Commission, probably no other decision had equal significance. It also is particularly noteworthy for its articulation of the proper method for interpretation of a Security Council resolution. Before I

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1. I served as a Commissioner on the UNCC “Precedent Panel” which later became denominated as the “E2 Panel.” The E2 Panel was chaired by Professor Bernard Audit of France. José-María Abascal of Mexico and I served as the other two members. The Panel was deliberative and collegial in its process with all members forming the decisions reached.

2. See Veijo Heiskanen, *The United Nations Compensation Commission*, 296 RECUEIL DES COURS 393, 393-97 (2003), for a general bibliography.

3. See THE UNITED NATIONS COMPENSATION COMMISSION (Richard B. Lillich ed., 1995) [hereinafter UNCC].

4. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. para. 16, U.N. Doc. S/RES/687 (1991) [hereinafter S.C.Res. 687].

examine the Panel's decision and its application by the Commission, I first describe the establishment and working method of the Commission so that the reader may appreciate the all-important context in which this decision was taken. I conclude with observations on the "arising prior to" clause decisions and the workings of the Commission in general.

I. THE ESTABLISHMENT OF THE UNCC

A. *The Immediate Response to the Invasion*

On August 2, 1990, Iraq invaded Kuwait.⁵ On that same day, the United Nations Security Council adopted Resolution 660, which provided that the Council "[c]ondemn[ed] the Iraqi invasion of Kuwait" and "[d]emand[ed] that Iraq withdraw immediately and unconditionally."⁶ It is important to recognize the role that law played in this situation. The resolution was so quickly agreed to because international law established the boundaries of plausible argument. Even if Iraq had had a plausible argument about historic title, that title could not have justified aggression. Since there was no possible justification for the action taken, the discussion was over very quickly.⁷

During the fall of 1990, the Security Council issued a series of resolutions, each pointing to new areas of concern for the international community or issuing new demands on Iraq.⁸ The

5. S.C. Res. 660, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 19, U.N. Doc. S/RES/660 (1990) [hereinafter S.C. Res. 660].

6. *Id.* paras. 1-2 (emphasis omitted).

7. As the United States proposes more complicated fact-contingent tests as to when force in international relations may be used (through the preemptive use of force doctrine and the like), the speed of discussions, such as those that occurred with Iraq's invasion of Kuwait, are likely to change. *Id.* at 585. If Iraq had instead argued that Kuwait posed an immediate threat, for example, the demand to withdraw may have taken much longer to issue. This is not an argument that the resolution would not have been made ultimately in any event, but that the speed and time required for that discussion would change.

8. See S.C. Res. 660, *supra* note 5; S.C. Res. 661, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 19-20, U.N. Doc. S/RES/661 (1990); S.C. Res. 662, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 20, U.N. Doc. S/RES/662 (1990); S.C. Res. 664, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 21, U.N. Doc. S/RES/664 (1990); S.C. Res. 665, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 21-22, U.N. Doc. S/RES/665 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 22, U.N. Doc. S/RES/666 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 23-24, U.N. Doc. S/RES/667 (1990); S.C. Res. 669, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 24, U.N. Doc. S/RES/669 (1990); S.C. Res. 670, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 24-25, U.N. Doc. S/RES/670 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 25-27, U.N. Doc. S/RES/674 (1990) [hereinafter S.C. Res. 674]; S.C. Res. 677, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 27, U.N. Doc. S/RES/677 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., Supp. for July-Sept. 1990, at 27-28, U.N. Doc. S/RES/678 (1990) [hereinafter S.C. Res. 678].

United Kingdom chaired the Security Council in October.⁹ As Chair, it sponsored Resolution 674, which emphasized the liability of Iraq that grew day by day with Iraq's occupation of Kuwait.¹⁰ Resolution 674 reminded Iraq "that under international law it is liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."¹¹ This resolution created some expectation in the claimant community that liability claims would be satisfied.

For November of 1990, the United States assumed the Chair of the Security Council.¹² It was during this crucial month that the Council adopted Resolution 678 authorizing: "Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the above-mentioned resolutions, to use all necessary means to uphold and implement [R]esolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security . . ."¹³ Resolution 678 is quite subtle. Its authorization "to use all necessary means" extends to Member States "co-operating with the Government of Kuwait."¹⁴ A practical issue with authorizing members to use force is how they are to be coordinated under one command. One can imagine how the United States military planners would have wished neither that other nations independently try to oust Iraq out of Kuwait nor that the United States enter into long negotiations as to the appropriate command structure. In Resolution 678, the authorization was to those members cooperating with Kuwait where it was thought likely that Kuwait would make the United States, the major power involved, head of the coalition. The Resolution thereby created a presumption that nations would participate in the coalition under U.S. command.¹⁵

9. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Forty-Fifth Meeting*, U.N. SCOR, 45th Sess., 2945th mtg. at 1, U.N. Doc. S/PV.2945 (1990).

10. S.C. Res. 674, *supra* note 8.

11. *Id.* para. 8, at 26.

12. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Fifty-Second Meeting*, U.N. SCOR, 45th Sess., 2952d mtg. at 1, U.N. Doc. S/PV.2952 (1990).

13. S.C. Res. 678, *supra* note 8, para. 2, at 27.

14. *Id.*

15. As an aside, the official argument of the United States for going into Iraq in 2003 was not based on the pre-emptive use of force doctrine. Rather, in the view of the U.S. State Department, the international legal authority for the U.S. use of force in Iraq was a continuing one flowing from Resolution 678. In the spring of 1991, there was a cease-fire resolution. The U.S. view was that the cease-fire resolution did not withdraw the authorization to use force contained in Resolution 678, but rather merely suspended it. Through its later actions, argued the State Department, Iraq materially breached the terms of the cease-fire, voiding the cease-fire and reactivating the authorization to use force under Resolution 678. But, even at its best, this argument could only resurrect Resolution 678, and

B. What the Security Council Knew at the End of the War and the Shadow of the Iran-United States Claims Tribunal

After an effective bombing campaign beginning in January of 1991,¹⁶ the land campaign was launched, and the objective of ousting Iraq from Kuwait was obtained.¹⁷ On March 2nd, the war was essentially over.¹⁸ The formal cease-fire emerged from the Security Council in Resolution 687 on April 3rd.¹⁹ Many issues were addressed through the cease-fire resolution. As to the provisions dealing with claims and compensation for damage suffered, the language of those paragraphs was greatly influenced by the

not some no-holds-barred authorization. For example, the United States was not cooperating with Kuwait at this point as presumed by Resolution 678. Indeed, Kuwait was not involved in any way. Thus, the assertion that Resolution 678 authorized the 2003 action in Iraq is more problematic than may first appear to be the case. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 173-76 (2004), for a valuable analysis of this basis for authority.

16. LAWRENCE FREEDMAN & EFRAIM KARSH, *THE GULF CONFLICT, 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER* 312 (1993).

17. *Id.* at 386-406. On a related note, I include this story because it is about Richard Lillich:

In early January 1991, I was in Cairo. Saddam Hussein had been given a deadline of January 15 to withdraw from Kuwait, and the launching of an air war by the coalition seemed imminent. I was there to speak at a conference on Iraq's invasion and to consider with others possible avenues for the resolution of the Iraq-Kuwait border issues. Richard was also at this meeting, although he was there primarily to talk about claims since, as noted already, the momentum for holding Iraq liable for damage done was building.

Richard was warm, but seemed quite taciturn to many. In fact, Richard could smile quite broadly. Both Richard and I had been involved earlier in the claims process that grew out of the 1979 Iranian revolution. When one reads the facts of those claims, one lesson that comes through over and over again is that in many parts of the world it is better to be paid in advance (or at least through an irrevocable letter of credit). Of course, no one had expected the war in Kuwait, and both Richard and I were asked to go to Cairo on very short notice. We would be reimbursed. Despite the lesson mentioned, both Richard and I packed our bags and went to Cairo on that basis. A second lesson from the earlier claims work was that it would be wise to be reimbursed prior to leaving Cairo.

By the last night in Cairo, neither Richard nor I had been reimbursed. The facts of those earlier cases were being repeated. "No one with the authority to make such reimbursements can be found." "One person has been found, but of course two signatures are needed." But at the last moment on the last evening, a young aide from the office of the ambassador-in-exile approached us in the lobby of the Semiramis Hotel and announced that "finally, we were able to get into petty cash, and here is your reimbursement." The young man then pulled out wads of tens and twenties. What stood out at that moment was the beaming smile of relief on Richard's face. And that smile remained as the aide requested it be counted right then, which Richard prudently did; not in the open lobby, but rather in the restroom adjoining the lobby.

18. *Id.* at 407.

19. S.C. Res. 687, *supra* note 4.

estimations circulating as to the extensive scope of the damage and the astonishing number of claims likely to be raised.

First, there were an incredible number of likely claims. Indeed, over 2.6 million claims from some eighty countries were eventually submitted, and this number included over 200,000 claims of businesses (corporate or other), governments, and international organizations.²⁰ Second, the amount sought by these claims was anticipated to be very large. And, indeed, the claims filed seek over \$353 billion in the aggregate.²¹ Iraq had a significant oil industry, with a revenue stream that prior to the war had amounted to approximately eleven billion U.S. dollars per year.²² It was therefore thought that funds used to satisfy the claims would be limited, and that many claims quite possibly would not be paid off fully.

In approaching the challenge of conceiving a system to handle such an extensive number of claims with such a large aggregate amount of damages sought, the then recent experience of many with the Iran–U.S. Claims Tribunal (Tribunal) loomed large. The Tribunal was established in 1981 to handle unresolved claims following the 1979 Iranian revolution.²³ The hostage release was agreed to under President Jimmy Carter,²⁴ and, on the day President Ronald Reagan was inaugurated,²⁵ the hostages were flown out of Iran.²⁶ The Tribunal was established as a part of that resolution of a political crisis, and its operation had, over the decade leading up to the Gulf War, provided a forum in which a significant number of people, either as representatives of claimants or as staff of the Tribunal, gained a great deal of experience with international claims. I was fortunate to serve as a staff member from 1983 to 1985. Richard Lillich, already an authority in the field, was also called upon to serve as an expert for the United States on numerous occasions.

A central lesson from the Tribunal was that it takes time to arbitrate claims. That institution had a docket of roughly 4,000 claims.²⁷ By 1991, its work wasn't over, and, indeed, its work is still

20. See generally UNCC, *supra* note 3.

21. *Id.* at 37.

22. Robert S. Mason, *The Economy*, in *IRAQ: A COUNTRY STUDY* 143 (Helen C. Metz ed., 4th ed. 1990).

23. See generally David D. Caron et al., *Guide to Sources*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* 477, 477-99 (David D. Caron & John R. Crook eds., 2000) [hereinafter *THE TRIBUNAL*].

24. Iran-United States: Settlement of the Hostage Crisis, Jan. 1981, U.S.-Iran, 20 I.L.M. 223, 223 [hereinafter *Hostage Settlement Agreement*].

25. President Ronald Reagan was inaugurated on January 20, 1981. The White House, *President Ronald Reagan*, at www.whitehouse.gov/history/presidents/rr40.html.

26. See *Hostage Settlement Agreement*, *supra* note 24.

27. David D. Caron, *The Gulf War, The U.N. Compensation Commission and the Search for*

not over today. Of the original 4,000 claims, 2,780 were small claims brought by individuals. These were settled in one lump sum. Approximately 420 of the claims were a particular type of bank claim and found to be outside the jurisdiction of the Tribunal. These claims were terminated by order. Therefore, only approximately 800 of the remaining claims on the docket were decided by arbitral award over the Tribunal's first decade of work.²⁸ Of those, almost two-thirds actually were settlements for which "Awards on Agreed Terms" were issued.²⁹ It therefore had taken ten years to arbitrate approximately 250 claims to conclusion.³⁰ Many individuals remembering that fact looked to the likely two million claims of the Gulf War and knew the scope of the challenge presented.

All this led the post-Gulf War claims situation to be viewed as presenting two main institutional design challenges. First, the claims system would have to be fast but fair, since that was the only way to ever get through two million claims. But international claims processes were not accustomed to proceeding quickly. Second, there needed to be a plan as how to divide what was likely going to be an inadequate pie among the claimants. This suggested that some claims might receive a priority in payment, and that perhaps some should be excluded from the jurisdiction of the Commission generally.

C. Creation of the Commission

As mentioned, Resolution 687, the "cease-fire" resolution, addressed many issues: it established the weapons inspectors regime, a boundary commission to demarcate the boundary, a group to investigate the search for lost Kuwaiti gold, a group to investigate the circumstances surrounding missing Kuwaitis, and, finally, the UNCC to resolve claims against Iraq.³¹ Paragraph sixteen of the Resolution provided:

Reaffirms that Iraq, without prejudice to its debts and obligations [of Iraq] arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage — including environmental damage and the depletion of natural resources — or

Practical Justice, 24 BOALT HALL TRANSCRIPT 26, 27 (Fall 1991).

28. Caron, *supra* note 37, at 27.

29. David D. Caron & John R. Crook, *The Tribunal at Work*, in *THE TRIBUNAL*, *supra* note 27, at 143-44.

30. Caron, *supra* note 37, at 28.

31. S.C. Res. 687, *supra* note 4.

injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.³²

This clause of Resolution 687 simply affirmed Iraq's liability without saying anything about the process whereby claims based on that liability would be resolved. Two other parts of the Resolution addressed the claims process. First, paragraph eighteen created a fund to pay for the amounts determined to be owed by a claims process and a commission to administer the fund.³³ In other words, there was not only the ascertainment of liability; there was also a mechanism for payment. Second, paragraph nineteen directed the Secretary General of the U.N. to present a plan within thirty days for a process to resolve and pay claims.³⁴

The request that the Secretary General prepare a plan reflected the practical limits on the law-making capabilities of the Security Council. The deliberation process of the Security Council is time consuming and resolutions often are not detailed as a result. At some point, it is easier to turn the question of details over to someone else for the preparation of recommendations. Within the Security Council, one naturally entrusts this task to the head of the U.N. Secretariat. Accordingly, the Secretary General developed the plan with input from Member States as to what this commission might look like.³⁵ The Member States gave him a month to prepare the plan, and he came back in timely fashion with his proposal for a Commission that would be a subsidiary body of the Security Council and have three organs.³⁶

The first organ would be a Governing Council that would serve both a roughly legislative and executive function.³⁷ The Governing Council would be the policy-making body of the Commission and would be composed of the representatives of the Member States of the Security Council who resided in Geneva, where the Commission was headquartered.³⁸ Hence, even as the membership of the Security Council in New York changed, the mirror image of that

32. *Id.* para. 16, at 14.

33. Paragraph eighteen implements paragraph sixteen in part: "*Decides also to create a fund to pay compensation for claims that fall within paragraph 16 and to establish a commission that will administer the fund.*" *Id.*

34. S.C. Res. 687, *supra* note 4, para. 19, at 14.

35. *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, U.N. Security Council, 46th Sess., U.N. Doc. S/22559 (1991) [hereinafter Paragraph 19 Report].

36. *Id.* at 3.

37. *Id.*

38. *Id.* at 3-4.

membership in Geneva would serve as the Governing Council.³⁹ It would make decisions through consensus, elucidating on the scope of Iraq's liability, and eventually approve the resolution of claims recommended by panels of commissioners.⁴⁰

The second organ would be the Panels of Commissioners who would serve a "quasi-judicial" function.⁴¹ The Panels of Commissioners would evaluate claims and submit recommendations as to their resolution to the Governing Council.⁴² The Secretary General's Report was careful to use the term "quasi-judicial" as a partial recognition that a process to resolve over two million claims could not involve individualized adjudication of claims or the expectations of due process that ordinarily accompany such adjudication.⁴³ Yet, although perhaps a necessary term, the Commission, particularly at the outset, struggled with what it would mean to be "quasi-judicial." It knew that delivering individualized due process on two million claims would not be possible. It also knew that a deliberative process was required. Its challenge thus was to find neither rough justice nor perfect justice, but rather practical justice.

In terms of the Secretary General's Report, the last, and seemingly least significant, organ would be the Secretariat.⁴⁴ Its role would be to support the work of the other two bodies and administer the Fund.⁴⁵

39. *Id.*

40. *Id.* at 4.

41. Paragraph 19 Report, *supra* note 35, at 9.

42. *Id.*

43. *Id.* See also Caron, *supra* note 27, at 30 (quoting Paragraph 19 Report, *supra* note 35) (explaining that "[t]he Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payment and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.") (emphasis omitted).

44. See Paragraph 19 Report, *supra* note 35, at 2.

45. *Id.* Lastly, the Secretary General made recommendations as to the Fund. *Id.* The Fund was an important and innovative mechanism. Its funding started at 30% of the oil revenues of Iraq. See Caron, *supra* note 27, at 28. Following the 2003 Iraq war, the percentage was dropped to 5%. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. para. 21, U.N. Doc. S/RES/1483 (2003). A good description of the unique interaction of the United Nations and commercial transactions with Iraq, particularly as done under the "Oil for Food" program, may be found in Saleh Majid, *Trading with Iraq*, 17 ARAB L.Q. 398, 398-402 (2002).

II. THE UNCC IN PRACTICE: PHASE ONE

A. *The Influence of Lessons from the Iran-United States Claims Tribunal*

The Secretary General's plan for the UNCC was adopted by the Security Council.⁴⁶ The structure described above, however, was different in practice. Much of the initial leadership of the UNCC came with experience from the Iran-U.S. Claims Tribunal. The U.S. legal representative in Geneva at the time present on the Governing Council had formerly represented the United States as its Agent to the Tribunal. Likewise, at least three high-ranking members of the Secretariat, after the Executive Director, also came in one way or another from that Tribunal. And as generals are said to focus on fighting the last war, so too did these and other alumni of the Tribunal arrive at the UNCC seeking to improve on the issues that had confronted them at the Tribunal.⁴⁷

One issue was how a claims institution is best managed. Virtually all major decisions regarding the Tribunal were taken by the nine arbitrators, and one perception held by at least some of the Tribunal alumni, none of whom had been arbitrators, was that entrusting the management of the institution to the arbitrators was not the best solution. First, it wasn't clear that the set of skills required of a judge were the same as those needed of a manager or leader. Second, although the arbitrators at the Tribunal were asked to reside in The Hague, and serve essentially full-time, the reality was that they, to varying degrees, but increasingly over time, did not in all cases so commit themselves.⁴⁸

In the case of the UNCC, the Governing Council and Secretariat came into being and began operating long before the first Commissioners were appointed. The Council and Secretariat during this period set out to devise policies and processes for the new institution, and, given that no claims would be ready for Commissioners to resolve for some time, this initiative was quite appropriate.⁴⁹ In time, the Governing Council, working closely with the experts within the Secretariat, began adopting "Decisions" that elaborated on the meaning of Resolution 687 and thus on the scope of Iraq's liability.⁵⁰ As time went by, Panels of Commissioners were

46. *Provisional Verbatim Record of the Two Thousand Nine Hundred and Eighty-Seventh Meeting*, U.N. SCOR, 46th Sess., 2987th mtg. at 3, U.N. Doc. S/PV.2987 (1991). See also UNCC, *supra* note 3, at 5.

47. UNCC, *supra* note 3, at 375-76.

48. See generally UNCC, *supra* note 3, at 18-19.

49. *Id.* at 4-9.

50. *Id.*

appointed as part-time bodies entrusted with resolving particular “installments” rather than as full-time Panels of Commissioners with a more general sense of responsibility for the docket.⁵¹ The interesting point is that although the Secretary General’s Report viewed the UNCC Secretariat as a support unit, in fact, the Secretariat became in some respects the most influential unit.⁵² It was the only organ of the UNCC working full-time. The Panels of Commissioners became part-time groupings, convening in Geneva every month or every other month, to resolve a limited set of claims with the assistance of the Secretariat. Similarly, the Governing Council formally would meet on a quarterly basis with working groups, occasionally meeting at other times.

The second lesson involved the fact that the Tribunal had largely resolved the claims of corporations before those of individuals. The Tribunal’s alumni understood the reasons for why this ordering had occurred, but they nonetheless tended to wish it had been done in reverse. In particular, at the beginning of the Tribunal’s work, attention focused first on the large corporate claims in part because it was hoped that the 2,800 claims of individuals would be resolved as a group.⁵³ Indeed, they eventually were settled *en masse*, but it took a decade for that lump sum to come.⁵⁴ This docket ordering failed to reflect the fact that individual claimants arguably need their claims resolved much more promptly than the corporations. The individuals — small businessmen who were injured or lost their goods — often desperately needed relief. But for corporations, the claim resided in their books as a potential credit, and thus lacked the equivalent urgency. Those with Tribunal experience were determined to move the individuals with small claims to the front of the docket.⁵⁵

B. *The Overall Approach of the UNCC*

The structure of the docket became the vehicle to implement the conviction that docket priorities must be identified for different types of claims.⁵⁶ The docket for the UNCC was divided into six categories. These divisions became the basic blueprint for determining the order in which claims would be addressed. The first group to be addressed would be what became known informally as

51. See David D. Caron & Brian Morris, *The United Nations Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT’L L. 183, 187 (2002).

52. See generally UNCC, *supra* note 3, at 3-14.

53. UNCC, *supra* note 3, at 21.

54. See *supra* notes 27-30 and accompanying text.

55. See UNCC, *supra* note 3, at 21.

56. Caron & Morris, *supra* note 51, at 187.

the "humanitarian claims": Claim Categories A, B, and C. These were claims of individuals for departure ("A"), for serious injury or death ("B"), or for claims under \$100,000 ("C"). The second group was claims identified not by the type of claim, but rather the type of claimant. These also fit into three categories: claims of individuals over \$100,000 ("D"), claims of corporations ("E"), and claims of governments or international organizations ("F").

The work of the UNCC can thus be seen as having two broad stages. Categories A, B, and C — the urgent claims — were addressed in phase one. The UNCC used mass claims proceedings and moved vast numbers of claims very quickly.⁵⁷ About 2.5 million claims were involved; all of them resolved by 1996, and all of them paid by 2000.⁵⁸ Of the 923,158 claims for departure, approximately \$3.2 billion was awarded to 856,124 claimants.⁵⁹ For the 5,734 claims of serious injury or death, 3,941 claimants received approximately \$13.5 million.⁶⁰ For the approximate 1.6 million claims under \$100,000, the UNCC awarded over \$5 billion to 636,044 claimants.⁶¹

The UNCC was able to resolve these claims relatively quickly by getting away from an individual assessment of each claimant's precise entitlement. The UNCC had to resolve millions of claims. And although it ended up throwing out hundreds of thousands of claims, it cannot be said that an exaggerated claim could not have snuck through the process. But removing any possibility of an exaggerated claim came to be seen as not worth the inordinate amount of effort and injustice, in terms of delay, that would have been placed on all the other claimants.

The UNCC gained its speed through two decisions. First, it stipulated the amount of damages for similar claims.⁶² For the departure claims, for example, the damages were \$2,500.⁶³ That was it.⁶⁴ It did not matter if the damage was perhaps worth \$10,000

57. *Id.* at 188.

58. *Id.* at 187.

59. U.N. Comp. Comm'n, *Status of Claims Processing*, at www2.unog.ch/uncc/status.htm (last modified Jan. 13, 2005) [hereinafter *Status of Claims Processing*].

60. *Id.*

61. *Id.*

62. *Criteria for Expedited Processing of Urgent Claims*, Governing Council of the U.N. Comp. Comm'n, 1st Sess., 10th mtg., U.N. Doc. S/AC.26/1991/1 (1991) [hereinafter *Expedited Processing of Urgent Claims*].

63. *Id.* at 2-3.

64. It should be noted, however, that additional funds were provided for serious injury and death with proper documentation. These amounts were cumulatively payable with respect to one person, but "no more than \$10,000 w[ould] be paid for death, and no more than \$5,000 for departure, with respect to any one family (consisting of any person and his or her spouse, children and parents)." *Id.*

to a Greek and \$4,000 to a Sri Lankan; both would receive \$2,500.

Secondly, the UNCC specified the evidence required to establish the claim. Rather than consideration of various types of evidence of injury during the review stage, the UNCC specified in advance the documents, such as an airline ticket or a passport with appropriate governmental stamps, that would be regarded as proof of departure during the relevant period.⁶⁵ To aid in uncovering possibly fraudulent claims, there was a massive use of computing power to cross-check claims against airlines registers, for example, to see if the person was actually on the plane.⁶⁶ Law schools and courts accustom the lawyer to focus on the individual case. The UNCC docket presented its staff with system-level problems. The effort here was trying not to think only like a lawyer.

The UNCC's resolution of the humanitarian claims in Phase One was a major accomplishment. Just about every person seriously hurt by the conflict in the region received some assistance in getting back on their feet. It was a huge success for the U.N. and is what the organization is all about. In my view, the U.N. missed an important opportunity to heighten global appreciation for it by not making this success more widely known.

There was also one major failing in Phase One: Environmental claims were left out from the urgent and humanitarian side of the docket. In 1992, the Governing Council ruled that "direct environmental damage and depletion of natural resources" included losses or expenses resulting from:

1. Abatement and prevention of environmental damage . . . ;
2. Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
3. Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
4. Reasonable monitoring of public health and performing medical screenings . . . ; and

65. *See generally id.*

66. *See UNCC, supra note 3, at 141-42.*

5. Depletion of or damage to natural resources.⁶⁷

The environmental claims were placed in Phase Two as part of Category F.⁶⁸ Humanitarian claims were addressed first because they were the most urgent, the most immediate. But much of the environmental damage was ongoing, and, indeed, much of the damage remains unknown.⁶⁹ Had the environmental claims been addressed first in the humanitarian group, the eventual damage may well have been less than it became. Despite the clear early priority placed on the environmental claims, the UNCC's work along these lines did not seriously commence until 1998 when a distinguished panel of commissioners was appointed and a team in the Secretariat was formed to handle these claims. Though those claims arguably started too late, what the Environmental Claims Panel and Team have done since then has been a remarkable achievement.⁷⁰

C. State as Agent, Not as Principal

In international law, states are normally seen as principals.⁷¹ If you travel overseas and are assaulted by a government official, such as a police officer, you might try to attain redress in that country. If you are unsuccessful, you might petition your home state to espouse your claim vis-à-vis the other country. Theoretically, in that situation, the claim belongs to the espousing state.⁷² It is the espousing state that was injured under international law; one of its nationals was hurt without redress.⁷³ And indeed, the espousing state does not have a duty under international law to give any money it receives to its injured national.⁷⁴ This is the sense in which states are principals.

67. *Criteria for additional Categories of Claims*, U.N. Compensation Commission, Governing Council, 5th Sess., para. 35, at 8, U.N. Doc. S/AC.26/1991/7/Rev.1 (1992).

68. *Letter Dated 23 March 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., at 9-10, U.N. Doc. S/23765 (1992) [hereinafter *Letter Dated 23 March 1992*].

69. Olufemi Elias, *The UN Compensation Commission and Liability for the Costs of Monitoring and Assessment of Environmental Damage*, in *ISSUES OF SOCIAL RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 219, 227-28 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004); David D. Caron, *Finding Out What the Oceans Claim: The 1991 Gulf War, the Marine Environment, and the United Nations Claims Commission*, in *BRINGING NEW LAW TO OCEAN WATERS* 393, 415 (David D. Caron & Harry N. Scheiber eds., 2004).

70. See generally Elias, *supra* note 69; Caron, *supra* note 69.

71. See RESTATEMENT (SECOND) OF THE LAW: FOREIGN RELATIONS LAW OF THE U.S. § 174 (1965).

72. *Id.*

73. *Id.*

74. *Id.*

In the UNCC, the state, outside of its own claims in Category F, was treated as the agent of the claimant.⁷⁵ For example, the claims of nationals and residents of Egypt were for the most part submitted through the Egyptian government.⁷⁶ But this avenue for filing did not mean that they were the claims of Egypt.⁷⁷ Rather, Egypt presented them on behalf of its citizens.⁷⁸ If Egypt refused to present claims for a segment of its population — a major concern for the UNCC being that Palestinians in various countries would not be represented by a government — the UNCC reserved the power to specify an agent to go into the country to get the claims.⁷⁹

Second, once the money was awarded to such claimants, there were very specific regulations. The state receiving the money had to deliver the money, could only skim off a small percentage for the administrative costs of running the claims program, had to spell out such possible costs in a statute, had to show the awarded monies had been delivered to the claimant in fact, and was obligated to return to the UNCC any money that the state could not deliver.⁸⁰

Treating the State as agent rather than principal is a radical and very important transformation. States were charged with doing tasks, and it was the UNCC's mandate to ensure that states followed through with these obligations.

III. THE UNCC IN PRACTICE: PHASE TWO

Phase Two began in 1996 with the second category of claims in Categories D, E, and F. There were far fewer claims, but for much larger amounts.⁸¹ Individual claims over \$100,000 — Category D — contained 13,584 claims totaling over \$16.5 billion.⁸² Category E, the claims of corporations, included over 6,500 claims seeking over \$78.5 billion.⁸³ Category F was the group seeking the largest amount: 497 government and international organization claims seeking a total amount of over \$243 billion.⁸⁴ This last group included environmental claims and the claims of Kuwait.⁸⁵

75. See *Expedited Processing of Urgent Claims*, *supra* note 62, at 4.

76. See *generally id.*

77. *Id.*

78. *Id.*

79. *Letter Dated 21 September 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, U.N. SCOR, 47th Sess., at 17-18, U.N. Doc. S/24589 (1992).

80. *Distribution of Payments and Transparency*, Governing Council of the U.N. Comp. Comm'n, 12th Sess., 41st mtg., U.N. Doc. S/AC.26/Dec.18 (1994).

81. Caron & Morris, *supra* note 51, at 187.*Id.*

82. *Status of Claims Processing*, *supra* note 59.

83. *Id.*

84. *Id.*

85. *Letter Dated 23 March 1992*, *supra* note 68, at 9-10.

Two basic problems were seen at the outset of this phase. The first was how to interpret the "arising prior to" clause. The second problem was whether the mass claims procedures employed in Phase One would work with the larger claims. In this essay I address the first.

A. *The "Arising Prior To" Clause: Historical Background*

In January of 1979, I lived in San Francisco, and one bright January day I went to the Iranian consulate to observe this bit of history: Every week there were demonstrations against the Shah of Iran. As I was watching, a woman in a chador approached me and handed me a leaflet that I now wish I had kept. She was an Iraqi, and the leaflet talked about the life of Saddam Hussein. It detailed all of his achievements, explaining how he had just become President of Iraq, and that he was only forty-one. It ended with the sentence: "What more can we expect?"

Mark Bowden paints a much different vision of Saddam Hussein as a person.⁸⁶ He tells, among other things, the story of Hussein's meeting in Havana in 1979 with Iranian representatives.⁸⁷ The Iranians, concerned after their revolution that they had been isolated, reportedly decided that they wanted to settle the Shatt-al-Arab dispute.⁸⁸ Iraq's Ambassador to the U.N. came over to Saddam Hussein following the talks and relayed his happiness that the Iranians appeared ready to settle.⁸⁹ Saddam Hussein turned to his ambassador and indicated that he was ready to take advantage of their weakness.⁹⁰

The Iran-Iraq War, begun by Saddam Hussein shortly thereafter, raged for much of a decade and is the great overlooked war of the last century. Iran, in 1979, took U.S. nationals hostage, ignored the judgment of the International Court of Justice that they be released, and, in general, seemed a threat to regional stability, and, therefore, U.S. interests. When war broke out between Iraq and Iran in 1980, Iran's attempts to invoke the U.N. Charter in response to Iraq's aggression fell on deaf ears. Even though the loss of life was horrific, Iran's own actions made it an outlaw in the eyes of the world community, and its effort to invoke the very machinery it had flaunted was not successful. If there is a lesson of international law, it is that if you shun the international community, you may be shunned in return. Iran was the victim of

86. See Mark Bowden, *Tales of the Tyrant*, THE ATLANTIC MONTHLY, May 2002, at 35.

87. *Id.* at 47.

88. *Id.*

89. *Id.*

90. *Id.*

this war, but it could not get the international community to pay attention to it.

The significance of the Iran-Iraq War for the Iraqi economy and for Iraq's debt situation today cannot be overstated. Most importantly, that conflict increased the external public debt of Iraq astronomically. As we approach the economic effect of that war, it is important to recognize that Iraq had virtually no foreign debt before its war with Iran in 1980.

Iraq's external public debt increased as Iraq borrowed from other nations to finance the war. And, indeed, almost all of the present estimates of Iraq's external public debt find their origin in the period of the Iran-Iraq War. As to the amount of this debt, the Secretary General of the United Nations wrote in 1991 that:

Iraq's total external debt and obligations have been reported by the Government of Iraq at \$42,097 million as of 31 December 1990. However, the exact figure of Iraq's external indebtedness can only be ascertained following discussions between Iraq and its creditors. To estimate debt servicing requirements it is assumed that Iraq reschedules its debts at standard Paris Club terms.⁹¹

Other accounts of the debt are greater. Lawrence Freedman and Efraim Karsh wrote: "[I]t increasingly became evident that Iraq had emerged from the war a crippled nation. From a prosperous country with some \$35 billion in foreign exchange reserve in 1980, Iraq had been reduced to dire economic straits, with \$80 billion in foreign debt and shattered economic infrastructure."⁹²

91. *Letter Dated 30 May 1991 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., para. 6, at 3, U.N. Doc. S/22661 (1991) [hereinafter *Letter Dated 30 May 1991*]. In accordance with paragraph 19 of Security Council Resolution 687, the Secretary General presented a report to the Council on 2 May 1991, see Paragraph 19 Report, *supra* note 35, which contained, at paragraph 13, an undertaking by the Secretary General to suggest to the Security Council a percentage figure of the value of Iraq's petroleum exports that would represent Iraq's contribution to the Fund to serve as the source of monies for satisfaction of decisions of the UNCC. *Letter Dated 30 May 1991, supra*, note 91 at 5. On 30 May 1991, the Secretary-General presented his analysis in the form of a note, annexed to the above cited letter. *Id.* at 2-3. In its letter to the Security Council dated 16 August 1991, the Government of Iraq confirmed the "external debt and financial commitments" figure of more than US\$42,097 million. *Letter Dated 16 August 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/22661 (1991).

92. FREEDMAN & KARSH, *supra* note 16, at 39. See also ABBAS ALNASRAWI, *THE ECONOMY OF IRAQ: OIL, WARS, DESTRUCTION OF DEVELOPMENT AND PROSPECTS 1950-2010* 109 (1994).

Iraq has always been one of the few developing countries that managed to stay away from contracting foreign loans. The only significant

In addition, as Iraq's external public debt increased, Iraq found it could not sustain its normal purchases, and its international commercial transactions started to change dramatically.⁹³ Kuwait and other Gulf region countries, for instance, at that time normally paid off a commercial transaction within thirty days.⁹⁴ As Iraq's

exception was a number of loans extended by the Soviet Union and other centrally planned economies, most of which were to be paid in oil.

As the war with Iran continued, the government found itself forced to borrow to finance the war. Three sources of loans were identified. First, loans extended by the Arab Gulf states, mainly Saudi Arabia and Kuwait, soon after the outbreak of the war. The government of Iraq has always maintained that such funds, which amounted to \$40 billion, were supplied as assistance rather than loans to help it in its war with Iran. Another \$35 billion was owed to Western governments and banks. Third, another \$11 billion was owed to the Soviet Union and other Eastern European governments. It should be pointed out that Iraq's debt-service obligations were projected to be \$8 billion, 55 per cent of its oil revenue in 1989.

Id. Cf. Iraq Country Profile 1989-90, THE ECONOMIST INTELLIGENCE UNIT 33 (1990) ("Iraq's balance of payments situation before the war with Iran was such that the government was able to avoid raising loans abroad as a matter of principle for many years. Since 1981, however, in the face of growing current account deficits, the country has taken on enormous overseas borrowing.").

93. Caron & Crook, *supra* note 29, at 131-32.

94. *Report and Recommendations made by the Panel of Commissioners Concerning the First Installment of "E2" Claims*, U.N. Compensation Commission Governing Council, 21st Sess., at 28-29, U.N. Doc. S/AC.26/1998/7 (1998) [hereinafter *Report and Recommendations*].

83. Iraq's substantial foreign debt is a relatively recent phenomenon. Indeed, Iraq's practice with respect to foreign suppliers of goods and services until the late 1970s, or even the early 1980s, appears to have been to pay its debts on a current basis

. . . .

85. Iraq's foreign debt became significant only during the 1980s. The main factors which contributed to its emergence and rapid growth are generally identified as the decline in oil prices at the end of the 1970s (with the resulting corresponding decrease in Iraq's oil revenues), the adverse effect of the war with the Islamic Republic of Iran on Iraq's economy (in terms of both increased military expenditures and decreased income due to the destruction of assets, including oil exporting facilities), and the maintenance — and in some cases the increase — of public sector spending by Iraq notwithstanding the constraints created by the first two factors.

86. With the rapid growth of its foreign debt, Iraq changed its foreign trade practices and began to request credit from its suppliers, even for ordinary consumer goods and medical supplies, where it had previously incurred foreign credits "only with the greatest of care[.]" The country became increasingly dependent on the willingness of foreign suppliers to finance operations in Iraq through, among other things, extended payment terms. The distortion of normal conditions in Iraq's international trade during the mid- to late 1980s resulting from Iraq's foreign debt was also manifest in the fact that it no longer paid its then existing debts on originally-contracted terms, but required deferments in order to allow it the time needed to gather the funds necessary to make payments that became due and to clear debts that were overdue. As time went on, Iraq continuously renegotiated and rescheduled its debts with

ability to purchase foreign goods and services diminished, Iraq began to default on contractual payments due and commenced renegotiating the terms of contracts to provide for payment after as much as forty-eight months.⁹⁵ In essence, the sellers had begun to provide financing for Iraq's purchases.

The Security Council was quite aware of Iraq's pre-Gulf War debt and its rough magnitude as it moved to establish the UNCC as a part of the cease-fire resolution in 1991.

B. The "Arising Prior To" Clause Decision

In Security Council Resolution 687, Iraq was declared to be liable for damages arising from its illegal invasion and occupation of Kuwait.⁹⁶ Paragraph sixteen of the Resolution provides:

Reaffirms that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage[,] — including environmental damage and the depletion of natural resources — or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.⁹⁷

The precise object of the critical initial decision of the UNCC's Second Phase was the clause "without prejudice to its debts and obligations arising prior to 2 August 1990," a clause that became known as the "arising prior to" clause. Most importantly, by what test would Panels decide if a debt or obligation arose prior to the start of the war?

Although, as noted above, the Governing Council could have issued a decision as to the meaning of the clause, they could not agree on a meaning. They had difficulty deciding on a single meaning because at stake was in essence the repayment of the Iran-Iraq War debt. Moreover, because of the high stakes present, extremely focused legal thinking was applied by the potential claimants and much of the Iran-Iraq War debt described above was argued to have arisen after the war. For example, although a loan

its contracting partners.

Id.

95. *See id.*; Mason, *supra* note 22, at 126 ("in a process of constant negotiation with its creditors, Iraq had deferred payment by rescheduling loans").

96. S.C. Res. 687, *supra* note 4.

97. *Id.*

debt may have had its origin long before the war, it was argued that because a material breach in payments on that debt was occasioned by various actions during the war, that breach had accelerated payments under the loan and a new debt had arisen at that point in time, a point after the start of the war. Therefore, although the original loan may have arisen prior to August 2, 1990, it was argued that a new claim had arisen after the exclusion date and was within the jurisdiction of the UNCC.

There was as much as \$80-90 billion that turned on the meaning given to the "arising prior to" clause. But the Governing Council was divided.⁹⁸ The members of the Council had extensive briefs from their own governments, and at least a dozen countries had submitted extensive legal opinions on the meaning of the clause.⁹⁹ The Council eventually gave the question — reluctantly — to a Panel of Commissioners referred to informally as the Precedent Panel. The question for the Panel was: What is the meaning of the clause? Since the decision of the Panel required the approval of the Governing Council, one unstated question was: Why would one think such a decision would survive the review of the divided Governing Council?¹⁰⁰

The key to the Panel's decision was its recognition that the task before it was to interpret a Security Council Resolution under international law, and that the phrase had an autonomous meaning and was not intended to include a reference to the national law that might govern the debt. Although this might seem readily apparent, it was not the approach employed by the various governments up to that point. The legal briefs of the various governments instead had analyzed the phrase "arising prior to," without exception, by looking at their national laws. The briefs had not focused on the intent of the Security Council in adopting the language and, without discussion, generally assumed the relevance of national law.

The Panel started by ascertaining the applicable rules of legal interpretation stating:

In interpreting Security Council resolution 687 (1991), the Panel takes guidance from the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which provides, in part, that "[a] treaty shall be interpreted in good faith in accordance with

98. See *Report and Recommendations*, *supra* note 94, at 19.

99. *Id.*

100. The Governing Council approves the decisions of Panels. The Panels write recommendations, but unlike a judge's final decision, the Panel's views must be passed onto the Governing Council where they, by vote, approve it.

the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[.]” Although a resolution of the Security Council is not a treaty within the meaning of the Vienna Convention, the Panel finds that the Convention when referred to with care is relevant to its task of interpretation. The Panel notes in this regard that other international bodies have looked to the Vienna Convention for guidance in interpreting resolutions of the United Nations Security Council.¹⁰¹

The Panel then turned to what it saw as the two fundamental issues raised by the “arising prior to” clause.

The first, and easier, question for the Panel concerned the meaning of the phrase “without prejudice to” and whether the “arising prior to” clause should be read to have any exclusionary effect.¹⁰² Indeed, a number of governments argued “the position that the ‘arising prior to’ clause was not intended to have any exclusionary effect on the Commission’s jurisdiction.”¹⁰³ The Panel considered the language carefully, looking to official languages of the Resolution other than English as “instructive in ascertaining the Security Council’s intentions,”¹⁰⁴ and concluded:

101. *Report and Recommendations*, *supra* note 94, para. 54, at 19. As to the practice of other bodies, the Panel in particular noted that:

In *Prosecutor v. Dusko Tadic*, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 made use of the Vienna Convention in interpreting its constitutive Statute. The Tribunal in that instance wrote: “Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters’ conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation of the Vienna Convention on the Law of Treaties appear relevant.” *Prosecutor v. Dusko Tadic a/k/a “Dule”* case No. IT-94-1-T (Trial Chamber Decision of 10 August 1995), para. 18.

Id. at n.12.

The law to be applied by the Panel is set out in article 31 of the [Commission’s] Rules, which provides as follows:

“In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.”

Id. para. 43, at 17.

102. *Id.* at 19-21.

103. *Id.* para. 52, at 19.

104. *Id.* para 61, at 21. The Panel closely considered the proper interpretative method for a resolution in several official languages writing:

The Panel finds that the "arising prior to" clause does have an exclusionary effect on the jurisdiction of the Commission, and that the phrase "without prejudice" is at the same time intended to emphasize that the jurisdictional exclusion in no way affects the ability of persons or entities to seek recourse for such debts and obligations "through the normal mechanisms[.]"¹⁰⁵

The second and crucial issue was the meaning of "arising prior to" itself.¹⁰⁶ Finding that the ordinary meaning of the terms did not

As stated in paragraph 54 . . . the Panel takes guidance from the Vienna Convention even though the Convention is not directly applicable in this instance.

The Panel concludes that it should take particular care with article 33 of the Vienna Convention which addresses the interpretation of treaties authenticated in two or more languages. Article 33, paragraph 4, of the Vienna Convention provides that where there are differences between "authenticated" texts, "the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted[.]" The Panel notes that although the phrase "authenticated text" does not appear within the Security Council's Rules, Arabic, Chinese, English, French, Russian and Spanish are "both the official and the working languages of the Security Council" (rule 41 of the Provisional Rules of Procedure of the Security Council).

Putting aside the question of whether an official text should be regarded as the equivalent of an authenticated text, the Panel believes that the principles of interpretation it employs on critical precedential issues such as those presented by the Claims should reflect the realities of the drafting process. In short, the analogy between treaties and United Nations resolutions "must be treated with considerable caution, bearing in mind that in the law of treaties the status of 'authenticated text' derives from the agreement of the parties, and is not [as with United Nations Security Council resolutions] imposed by mere procedure" The Panel notes also that, prior to conclusion of the Vienna Convention, the International Court of Justice in the South-West Africa voting procedure advisory proceeding, when faced with interpreting a General Assembly resolution, gave a preference to the French version having found that it seemed to "express more precisely the intention of the General Assembly" Thus the Panel finds that article 33, paragraph 4, of the Vienna Convention does not *necessarily* provide an appropriate rule of interpretation given the differences in circumstances between the negotiation of a treaty and the drafting, discussion and passage of Security Council resolution 687 (1991). Rather, the Panel takes notice of the fact that English was the working language used in the drafting and discussion of resolution 687 (1991), and as such, the English language version should be the starting point of any inquiry into the meaning and application of the resolution. The Panel looks to the other official language versions so as to confirm, or where necessary, resolve ambiguities in the meaning suggested by the English text.

Id. at n.14 (citations omitted).

105. *Id.* para. 56, at 20.

106. *Id.* at 21-35.

provide a clear resolution, the Tribunal considered whether there existed a special legal meaning uniform to all legal systems.¹⁰⁷ The Panel noted that the phrase “arising prior to,” in the legal sense, does not have a universal specialized meaning.¹⁰⁸ Rather, the Panel stressed that national laws vary not only among each other on the meaning of “arising prior to,” but, even more significantly, the phrase can have several meanings even within one system depending upon the context in which it is employed.¹⁰⁹ Therefore, the meaning of the phrase was found to depend heavily on the context of its use.¹¹⁰ The Panel wrote:

The Panel finds that the divergence in views expressed in the article 16 responses [the views of Governments] results not only from the fact that differences exist between legal systems, but also because the Governments often tried to give a single and abstract answer without reference to the particular purpose to be served by the phrase. The responses thereby failed to reflect that significant differences exist even within a given legal system as to when a debt or obligation arises, depending upon the context in which the concept is used. In the light of these various and often conflicting views across and within different jurisdictions, the Panel finds that there is no definite and universal legal concept of when a debt or obligation may be considered to have arisen.¹¹¹

This conclusion led the Panel to seek the intent of the Security Council in adopting the language, and this, in turn, led back to the history leading up to the conflict which has been described above.¹¹² In this context, the intent of the Council was clear to the Panel. It wrote:

[T]he object and purpose of the Security Council’s insertion of the “arising prior to” clause was to exclude from the jurisdiction of the Commission Iraq’s old debt. The exclusion of this pre-existing

107. *Id.* at 23.

108. *Id.*

109. *Id.*

110. *Id.* para. 70, at 23.

111. *Id.*

112. *Id.* at 23-27.

foreign debt from payment through the Fund is understandable when one considers its sheer size The debt was substantial and known to the public — including the Security Council — before resolution 687 (1991) was adopted. Paying off this debt out of the Fund would have resulted in a significant diversion of the resources available to compensate the victims most directly affected by the invasion of Kuwait. Such a diversion of resources would have greatly undermined the very purpose of the Commission and Fund, and would have created an unanticipated mechanism for the compensation of creditors long unpaid. It was this old debt that the Security Council sought to exclude by the insertion of the "arising prior to" clause.¹¹³

The Security Council intended to exclude the old debt. They knew of the debt generated by the Iran-Iraq War, and they meant to exclude it with the "arising prior to" clause.¹¹⁴ The issue then became for the Panel to devise a mechanism to determine what constituted old rather than new debt. This would be difficult because the issue could not simply involve a reference to the national law which might be said to govern that debt because as already described, such a reference would lead in some instances to old debt being re-characterized as new for purposes of UNCC jurisdiction.

The Panel saw its task as one "to devise an administrable rule for the identification of those debts as opposed to the debts that could be termed truly 'new' as of 2 August 1990; only the latter are within the Commission's jurisdiction." The Panel approached the question keeping the Council's intent in mind. The easily-identified old debt included "the debts that already existed as of the end of the conflict with the Islamic Republic of Iran, i.e., in August 1988." However, as recounted above, the growing Iraqi external debt at that time led to great distortions in commercial practice and to the rescheduling of many of these clearly old debts.¹¹⁵ The Panel observed:

The rescheduling of such old debts perhaps renewed them under applicable law, but did not make them

113. *Id.* para. 72, at 24.

114. S.C. Res. 687, *supra* note 4.

115. *See supra* notes 93-95 and accompanying text.

new debts in the sense of Resolution 687 (1991). In other instances, unusually long payment terms were granted to Iraq, and such terms in this context mask the true age of the debt. These unusually long payment terms as described were a consequence of the magnitude of the old debt; but for those unusually long payment terms, the debts and obligations involved would be a part of the old debt.¹¹⁶

Therefore, the Panel concluded that in order “to distinguish what was ‘old and overdue’ from what was actually new debt as of 2 August 1990,” the Panel must “discount the effects of the foreign debt on Iraq’s ability to make contractual payments owed — i.e., the rescheduling and unusually long payment terms obtained by Iraq from foreign parties in the 1980s.” Moreover, it is not the existence of unusual payment terms and conditions in a contract, in and of themselves, that render a debt “new” or “old” for purposes of Resolution 687.¹¹⁷

The Panel adopted the view that “Iraq’s practice before the rise of its foreign debt is the best indicator of what normal practice would have been in 1990 but for that debt.” In this sense, the significant fact was that “Iraq, before the influence of its foreign debt on its economy and balance of payments, paid its contractual debts on a current basis.” The Tribunal, examining customary practice, concluded that a “foreign party contracting with Iraq therefore reasonably could have expected to have been paid within three months of the . . . relevant document that, according to the underlying contract, evidenced the completion of a particular performance.” The Panel therefore found that “a rule which best implements the Security Council’s intention in [R]esolution 687 (1991) is the following:”

In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990.¹¹⁸

116. *Report and Recommendations*, *supra* note 94, para. 87, at 29.

117. *Id.*

118. *Id.*

The Council discussion concerning this conclusion went much easier than might be expected. The arguments concerning the report were cut short not because the stakes were somehow less, but instead because the Panel, through its finding of an autonomous meaning in the Security Council Resolution, did not actually choose among, or indeed contradict any of, the legal briefs submitted by the various governments.

IV. CLOSING OBSERVATIONS

The "arising prior to" clause decision was, in terms of its effect on the docket, the most significant decision taken by the UNCC. Jurisprudentially, it is particularly significant for its articulation of the proper method for interpretation of a Security Council resolution.

In examining the decisions of the UNCC, two decisional dynamics are important for readers, not a part of the process, to recognize. First, the fact that the Governing Council reviewed the reports and recommendations of the various Panels gave rise to a curious and subtle influence of the style of the Panel's decisions. In other words, the review affected the way some Panels wrote their awards, and readers of these awards need to be aware of this effect. Generally, it will be noted, Panels did not cite to general international law. Instead, they cited to Governing Council policies contained in Council decisions. This practice reflected a judicial tendency to rest a decision on the narrowest ground available. But it also reflected a tendency to indicate to the Governing Council that there was nothing in the Panel's reasoning that went outside of what the Governing Council had already considered. If an issue was particularly difficult, and the Panel spent considerable time deciding it, that difficulty generally can not be easily seen in the Report. Again, the Panels avoided highlighting their early — but later resolved — uncertainty because doing so might only have fostered unnecessary debate in the Governing Council. Second, even though the docket of the UNCC involved a very large number of claims, it still was a closed universe of claims. A consequence of this limited docket was when a Panel was presented with deciding the first of a category of cases or the first impression of a legal issue, the Panel recognized that it needed to do so in anticipation of future like claims. This looking forward was required because a closed docket accentuates the tendency of any judicial body toward a path-dependent jurisprudence. In other words, the fixed nature of the docket led Panels to value consistency within the entire docket over improving its decision but thereby treating parts of the docket differently.

The “arising prior to” decision was a remarkable achievement in that it not only preserved the Security Council’s intended mandate for the UNCC, but that it also, first, gained the prompt unanimous approval of the UNCC’s Governing Council which up to that point had been deeply divided and, second, anticipated extremely well the range of situations that would arise over the course of the Commission’s work and thereby provided lasting guidance to the various Panels.